Nos. 16-596, 16-610

In The Supreme Court of the United States

STATE OF ALASKA, *et al.*,

Petitioners,

v.

SALLY JEWELL,
SECRETARY OF THE INTERIOR, *et al.*,

Respondents.

ALASKA OIL AND GAS ASSOCIATION, *et al.*,

Petitioners,

v.

SALLY JEWELL,
SECRETARY OF THE INTERIOR, *et al.*,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF CONSERVATION RESPONDENTS

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January 6, 2017

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the U.S. Fish and Wildlife Service's highly technical and fact-specific designation of "critical habitat" for polar bears.

PARTIES TO THE PROCEEDING

The petitions correctly identify the parties to the proceedings below. This brief is submitted on behalf of conservation respondents Center for Biological Diversity, Greenpeace, and Defenders of Wildlife who intervened as defendants in the district court and were appellants in the court of appeals.

RULE 29.6 STATEMENT

Conservation respondents Center for Biological Diversity, Greenpeace, and Defenders of Wildlife are nonprofit organizations that have no parent corporations, and no publicly-held company has any ownership interest in them.

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INTRODUCTION

The State of Alaska and the Alaska Oil and Gas Association seek review of the Ninth Circuit's decision upholding the U.S. Fish and Wildlife Service's highly technical, statutorily required rule designating critical habitat for polar bears under the Endangered Species Act ("ESA"). But Petitioners offer no valid reason why this Court should delve into the administrative record to examine such a fact-specific issue dependent on the agency's exercise of its scientific expertise. The Ninth Circuit's unanimous decision does not conflict with a decision from any other Circuit or this Court. And its record-based, narrow decision reflects the correct application of the relevant statutory standards and deferential standard of review.

In their attempt to convince the Court to hear this case, Petitioners misconstrue the facts and the Ninth Circuit's opinion in three primary ways. First, Petitioners pull statements from the Ninth Circuit's decision out of context to suggest it ignored statutory standards. But read in context, these statements reflect the Ninth Circuit's correct application of the ESA's mandate that critical habitat designations be based on the best available science – a standard that consistently has been interpreted to mean the Service must act on existing information, even where there remains some uncertainty.

Second, Petitioners and their associated Amici make much of the overall size of the designation and their belief that the Service "over-designated" polar

bear critical habitat. However, Petitioners and Amici fail to acknowledge that their arguments are limited to a small portion of the overall designation. The Service's critical habitat designation includes three different areas, identified as Unit 1 (the sea ice habitat), Unit 2 (the terrestrial denning habitat), and Unit 3 (the barrier island habitat). Petitioners did not specifically challenge the Service's designation of Unit 1 – which represents roughly *95 percent* of the total designation – in the court of appeals, and do not challenge it now. Rather, Petitioners' and Amici's legal arguments involve Units 2 and 3 only, which constitute about five percent of the designation and consist of a narrow strip of coastline east of Barrow, Alaska, and barrier islands along the coast of Alaska.

Regardless, the Service properly designated critical habitat for polar bears. The size of a critical habitat designation is a fact-bound question based on the particular biological needs of the species at issue. Here, the Service examined the best available science, identified the physical and biological features essential to the conservation of polar bears, and designated specific geographic areas containing those features, which is precisely what the ESA requires.

The polar bear critical habitat designation is large because polar bears have a vast range; thus the areas essential to the survival and recovery of the species are also large. In fact, the polar bear is one of the farthest-ranging species on earth – a single bear can have an activity area larger than 135,600 square miles. And the designation includes only a portion of the species'

occupied habitat in the United States, a small fraction of its total distribution across the Arctic in the territory of five nations.

Third, Petitioners and Amici repeatedly claim that it was arbitrary for the Service to designate such a large amount of critical habitat because the Service believes that critical habitat has no conservation benefit. Such contentions ignore both the ESA's statutory scheme and the Service's explicit findings. In the final rule, the Service found the designation would provide several benefits to polar bears, including focusing conservation efforts on the bears' specific habitat needs, ensuring federal actions do not adversely modify the habitat deemed essential to the species' survival and recovery, and educating the public about the plight of the polar bear. Petitioners and Amici ignore these findings.

At bottom, Petitioners' and Amici's requests reflect little more than their philosophical disagreement with the ESA and its mandate that the Service designate critical habitat for listed species. Such disagreement, of course, does not raise a significant issue requiring the Court's review. The Court should therefore deny the Petitions for Writs of Certiorari.

STATEMENT OF THE CASE

I. The ESA Mandates Timely Critical Habitat Designations Based on the Best Available Science

As this Court has recognized, the ESA represents "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). The primary purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b).

To that end, Section 4 requires the Service to list threatened and endangered species based solely on the best scientific and commercial data available and to timely designate critical habitat for listed species "on the basis of the best scientific data available." *Id.* § 1533(a)(1), (a)(3)(A)(i), (b)(1), (2). The best available science standard has been consistently interpreted by both the D.C. Circuit and the Ninth Circuit to require that the Service consider only *existing* data, even where there remains some uncertainty. *See Bldg. Indus. Ass'n v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir. 2001); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014), *cert. denied sub nom., State Water Contractors v. Jewell*, 135 S. Ct. 950 (2015).

The ESA defines critical habitat, in pertinent part, as "specific areas within the geographic area occupied by the species . . . on which are found those

physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections." 16 U.S.C. § 1532(5)(A)(i). At the time of the designation, the Service considered "physical or biological features essential to the conservation of the species" to include "[s]pace" for normal behaviors; "[f]ood, water, . . . or other nutritional or physiological requirements;" breeding, reproduction, and rearing sites; and "[h]abitats that are protected from disturbance." 50 C.F.R. § 424.12(b) (2010). The Service identified essential features by focusing on their "primary constituent elements" or "PCEs." *Id.*

Legislative history shows Congress saw critical habitat as perhaps the most important element of the ESA: "[C]lassifying a species as endangered or threatened is only the first step in insuring its survival. *Of equal or more importance is the determination of the habitat necessary for the species' continued existence*." H.R. Rep. No. 94-887, at 3 (1976) (emphasis added). Accordingly, the ESA compels the Service to promptly designate critical habitat. Specifically, the ESA requires critical habitat generally be designated concurrently with the listing of species. 16 U.S.C. § 1533(a)(3)(A)(i), 1533(b)(6)(C). If such habitat is "not then determinable," the ESA allows a delay in designation of "not more than one additional year." *Id.* § 1533(b)(6)(C)(ii). Further delays are not allowed. By the end of the additional year, the ESA requires the Service publish a

final critical habitat designation "based on such data as may be available at that time." *Id.*[1]

Time has proven the wisdom of Congress' approach. Studies show that species with critical habitat are more than twice as likely to be recovering, and less than half as likely to be declining, than species without critical habitat.[2]

II. The Polar Bear ESA-Listing and the Required Critical Habitat Designation

A. The Listing of the Polar Bear

In May 2008, the Service listed the global population of polar bears as a threatened species because of the current and projected loss of its sea ice habitat. 73 Fed. Reg. 28,212 (May 15, 2008). At the time, the worldwide population of polar bears was estimated at 20,000 to 25,000 bears spanning across the circumpolar Arctic. *Id.* at 28,215. Nineteen subpopulations are found in the territory of five nations: the United States, Canada, Norway, Denmark (Greenland), and Russia. *Id.* at 28,215, 28,212-13. Two of these populations have ranges that include the United States – the Chukchi-Bering

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[1] The only limited situation in which the Service does not have to designate critical habitat is in the rare case when it determines the designation is "not prudent" because it would cause harm to the species, or otherwise not be beneficial. 50 C.F.R. § 424.12(a)(1).

[2] *See* Taylor, M.F.J., K.S. Suckling and J.J. Rachlinski JJ. 2005. The effectiveness of the Endangered Species Act: A quantitative analysis. BioScience 55:360-67, *available at* http://www.biologicaldiversity.org/publications/papers/bioscience2005.pdf.

Seas population, which extends into Russia, and the Southern Beaufort Sea population, which extends into Canada. *Id.* at 28,216. At the time of listing, the two populations totaled less than 4,000 bears. *Id.* 28,217.

In listing the polar bear, the Service explained that federal scientists predict that loss of habitat will lead to the extinction of approximately two-thirds of the world's polar bears by midcentury. 73 Fed. Reg. at 28,274. Some populations of bears were already declining at the time of listing. For example, the Southern Beaufort Sea population was estimated at 1,800 bears in 1986 but dropped to 1,526 bears between 2001 and 2006. *Id*. at 28,212, 28,268.

Several parties challenged the listing, and the D.C. Circuit subsequently upheld the listing in its entirety. *In re Polar Bear ESA Listing & Section 4(d) Rule Litigation – MDL No. 1993*, 709 F.3d 1 (D.C. Cir. 2013), *cert. denied sub nom*., *Safari Club Int'l. v. Jewell*, 134 S. Ct. 310 (2013). The D.C. Circuit found that the Service's decision was based on a reasonable evaluation of the best available science demonstrating polar bears are dependent upon sea ice for survival; that sea ice is declining; and that climatic changes will continue to dramatically reduce the extent and quality of Arctic sea ice and to such a degree that polar bears are likely to become in danger of extinction within the foreseeable future. *Id.* at 3, 8.

B. The Statutorily Mandated Polar Bear Critical Habitat Designation

The ESA-listing of the polar bear triggered the Service's mandatory duty to designate critical habitat based on the best available science. 16 U.S.C. § 1533(a)(3)(i), (b)(2). Following multiple public comment periods and an exhaustive review of the best available science on polar bear life history and biology (much of which was the same science the Service relied on in listing the polar bear), the Service issued the final critical habitat rule in December 2010. 75 Fed. Reg. 76,086 (Dec. 7, 2010). The Service designated critical habitat for some of the areas occupied by the Chukchi-Bering Seas and Southern Beaufort Sea populations in Alaska and adjacent territorial waters. *Id.*; *id.* at 76,088.

In the final rule, the Service explained that polar bears rely on sea ice for essential life functions, including as a platform for hunting, feeding, breeding, denning, and seasonal and long-distance movements. *Id.* at 76,089, 76,111. The Service found that reductions in sea ice negatively affect polar bears by increasing energetic demands and decreasing feeding opportunities, leading to drowning and other negative outcomes. *Id.* at 76,111.

Unlike many terrestrial habitats that may remain relatively static, sea ice is extremely dynamic. *Id.* When on the ice, polar bears remain in near-constant motion to find or stay on ice that has the characteristics essential to their survival. *Id.* As such, polar bears

need "vast areas of sea ice to pursue the prey upon which they depend." 75 Fed. Reg. at 76,095. A single bear can have a range larger than 135,600 square miles. *Id*. at 76,089.

In addition to sea ice, polar bears also rely on terrestrial habitat for denning and raising cubs. *Id.* at 76,090. A number of circumstances must converge to create ideal denning conditions for polar bears. One is the presence of certain topographic features, such as coastal bluffs and river banks, which allow winds to create leeward snow drifts appropriate for denning. *Id.* The drifts must be deep enough for den construction and maintenance, and for insulation. *Id.* Denning bears also require relative freedom from disturbance. 75 Fed. Reg. at 76,113. Cubs are born blind, lightly furred, and helpless. *Id.* at 76,090. If a female abandons the den due to human disturbance, cubs will perish. *Id.*

Polar bears also use barrier islands and their associated mainland spits for a number of important life functions including resting, denning, and movements. *Id*. at 76,114-15. As with denning habitat, the barrier islands are most useful to polar bears when relatively free from human disturbance. *Id.* at 76,115.

Accordingly, the Service determined the physical or biological features essential to the conservation of polar bears, known as "primary constituent elements" or "PCEs," include: (1) sea ice habitat used for feeding, breeding, denning, and movements, which is sea ice over waters 300 meters or less in depth; (2) terrestrial

denning habitat with certain macrohabitat characteristics, including steep, stable slopes and unobstructed, undisturbed access between den sites and the coast; and (3) barrier island habitat used for denning, refuge from human disturbance, and movements along the coast to access maternal den and optimal feeding habitat. 75 Fed. Reg. at 76,115. After identifying the PCEs, the Service then identified the specific areas in which "sufficient PCEs are present to support at least one of the species' essential life-history functions," using the best available information. *Id*.

Based on this evaluation, the Service designated three separate units as critical habitat: Unit 1 – the sea ice habitat; Unit 2 – the terrestrial denning habitat; and Unit 3 – the barrier island habitat. The Service identified each of these areas by maps with the critical habitat boundaries clearly delineated and a comprehensive textual definition. *Id*. at 76,121-22, 76,133-76,137.

The designated habitat does not include several occupied areas within the United States, including U.S. waters north of the 300-meter depth boundary in the Beaufort Sea that are seasonally occupied by polar bears, and terrestrial areas beyond the designated denning habitat that polar bears occasionally use for denning. *Id*. at 76,096. The Service also excluded Department of Defense lands for "Active and Inactive Radar Sites in Alaska" pursuant to Section 4(a)(3). *Id.* at 76,127.

The Service specifically rejected conservation respondents' request that the Service include more occupied habitat in the United States, as well as high-seas habitat outside of the United States in which the ESA also applies. 75 Fed. Reg. at 76,096. And, after weighing the costs and benefits of inclusion versus exclusion under Section 4(b)(2), including the economic and national security impacts of the designation, the Service excluded from the designation any existing manmade structures and the towns of Barrow and Kaktovik. *Id.* at 76,097, 76,124-25.

The Service also noted that, as climate change causes sea ice to diminish, polar bears are increasingly staying onshore in Alaska when the sea ice extent is at a seasonal low. *Id*. at 76,090. Thus, the importance of terrestrial habitat for denning, resting, and movements is likely to increase with the continuing decline of sea ice. *Id.* at 76,111, 76,115.

In the final rule, the Service expressly found that the critical habitat designation would provide a range of benefits to polar bears, including focusing attention on the species' habitat needs and ensuring federal actions do not destroy or adversely modify designated areas. *Id.* at 76,093, 76,125.

III. The Litigation Below

Petitioners challenged the final critical habitat designation in the U.S. District Court for the District of Alaska, raising an array of objections. Conservation

respondents intervened to defend the rule. The district court rejected nearly all of Petitioners' arguments.

Specifically, the district court found that the designation was not overbroad; the Service reasonably determined polar bears occupied all the designated areas; the Service demonstrated that special management measures may be required for each designated unit; the Service considered all the potential economic impacts of the designation; the Service lawfully acted within its discretion in deciding not to exclude additional areas from the designation; the Service reasonably included the no-disturbance zone as part of Unit 3; and the Service reasonably included Unit 1, the sea ice habitat, in the designation. Alaska Pet. App. 60a-79a. However, the district court found that the record did not contain sufficient evidence showing where each component of each PCE is located within Units 2 and 3, and vacated the designation in its entirety. *Id.* 86a-96a.

The Service and conservation respondents appealed, challenging the district court's findings regarding the designation of Units 2 and 3 and its decision to vacate the designation. *Id.* at 13a, 21a. Petitioners cross-appealed, challenging its findings that the Service reasonably designated the no-disturbance zone as part of Unit 3; that the Service reasonably determined the designated areas may require special management measures; and that the Service adequately considered the economic impacts of the designation. *Id.* at 21a.

The Ninth Circuit unanimously overturned the district court's decision regarding Units 2 and 3, finding that the Service's designation of these areas was a reasonable exercise of the agency's expertise based on the available information and that the district court demanded a level of scientific proof beyond the requirements of the statute. Alaska Pet. App. 21a-38a. The Ninth Circuit also rejected Petitioners' arguments raised in their cross-appeal for the same reasons the district court did. *Id.* at 42a-45a, 46a. The Ninth Circuit subsequently denied Petitioners' request for rehearing en banc, and no judge requested a vote on whether to rehear the case. *Id.* at 108-09a.

REASONS FOR DENYING THE WRIT

I. The Critical Habitat Designation Complies with the ESA and the Ninth Circuit Applied the Proper Standards in Upholding It

As this Court has stated, "[w]hen it enacted the ESA, Congress delegated broad administrative and interpretive power to the [Service]." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995). The designation of critical habitat, including the determination of what geographic areas contain the physical or biological features essential to the conservation of the species, fits squarely within the agency's scientific expertise, and is therefore entitled to deference. *See id.*; *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989).

The Ninth Circuit applied these well-established principles when it upheld the Service's polar bear critical habitat designation. The agency's factual determinations are reasonable, well-supported by the record, and not worthy of review by this Court.

A. The Polar Bear Critical Habitat Designation Must Be Based on the Best Available Science

The ESA requires that the Service designate critical habitat "on the basis of the best scientific data available." 16 U.S.C. § 1533(b)(2). Consistent with this clear statutory directive, courts have repeatedly emphasized that the ESA requires the agency consider only *existing* data. "[W]here the information is not readily available, [a court] cannot insist on perfection: '[T]he best scientific . . . data available,' does not mean 'the best scientific data possible.'" *San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 602 (quoting *Bldg. Indus. Ass'n*, 247 F.3d at 1246). Similarly, the "standard does not require that the [Service] act only when it can justify its decision with absolute confidence." *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1164 (9th Cir. 2010), *cert denied*, 131 S. Ct. 1471 (2011). "Even if the available scientific and commercial data were quite inconclusive, [the agency] may – indeed must – still rely on it." *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000).

The reason the ESA does not permit the Service to delay critical habitat designations until it has more

specific scientific information is that some species may not be able to wait. In enacting the ESA, "Congress clearly intended that [agencies] give 'the highest of priorities' and the 'benefit of the doubt' to preserving endangered species." *Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987) (quoting *Tenn. Valley Auth.*, 437 U.S. at 174). Thus, requiring reliance upon the best *available* scientific data, as opposed to requiring scientific certainty, "is in keeping with congressional intent" that "preventive action to protect species be taken sooner rather than later." *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 679-80 (D.D.C. 1997). There is no disagreement among the Circuit Courts on this fundamental issue.

The Service listed the polar bear as threatened in 2008, and was therefore required to designate critical habitat based on the scientific information available at that time. The Service's polar bear critical habitat designation and the Ninth Circuit's decision upholding it reflect the proper application of this bedrock ESA principle and the deferential standard of review.

B. The Service Reasonably Determined at Least One PCE Is Found Within Units 2 and 3 and the Ninth Circuit Correctly Upheld that Determination

In upholding the polar bear critical habitat designation, the Ninth Circuit thoroughly examined the administrative record and correctly applied relevant statutory standards. In arguing otherwise, Petitioners

repeatedly pull statements from the decision out of context to suggest the Ninth Circuit ignored statutory requirements. The Ninth Circuit's decision, when taken in full, belies such contention.

The ESA defines critical habitat, in pertinent part, as the "specific areas within the geographic area occupied by the species . . . on which are found those physical or biological features . . . essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i). The Service's regulations implementing the ESA at the time of the designation explained that it identifies those features by focusing on their component "primary constituent elements" or "PCEs." 50 C.F.R. § 424.12(b) (2010). According to the regulations, "specific areas" should be delineated by "specific limits using reference points and lines as found on standard topographic maps of the area." *Id.* § 424.12(c).

The ESA thus requires the Service to designate critical habitat using the best existing scientific information to establish PCEs for the species and determine what specific areas contain those PCEs. 16 U.S.C. §§ 1532(5)(A)(i), 1533(b)(2). The Service must then identify the areas designated via reference points and lines. *Id.* § 1532(5)(A)(i); 50 C.F.R. § 424.12(b) (2010). That is precisely what the Service did in designating critical habitat for polar bears.

The Service first identified three separate PCEs for polar bears. The first PCE is the sea ice habitat used for hunting, resting, short- and long-distance movements, and denning. 75 Fed. Reg. at 76,115. The

second PCE is terrestrial denning habitat with four components: (a) steep and stable slopes (range 15.5-50.0º), with heights of 1.3-34 meters; (b) unobstructed, undisturbed access between den sites and the coast; (c) sea ice in proximity of terrestrial denning habitat prior to the onset of denning during the fall to provide access to terrestrial den sites; and (d) the absence of disturbance from humans and human activities that might attract other polar bears. *Id.* The third PCE is barrier island habitat used for denning, refuge from human disturbance, and movements along the coast to access denning and optimal feeding grounds; and includes all barrier islands along the Alaska coast and their associated spits, and the water, ice, and terrestrial habitat within one mile of the islands. *Id.*; Alaska Pet. App. 17a-18a.

The Service then designated as polar bear critical habitat the "specific areas" in which it determined PCEs "are found" in sufficient quantity and arrangement to support at least one of the species essential life functions. 75 Fed. Reg. at 76,121-22, 76,133-76,137. In particular, as the Ninth Circuit recognized, the Service defined Unit 2, the designated terrestrial denning habitat, as: (1) an area that extends from the mainland coast of Alaska 20 miles inland (primarily south) from the United States-Canada border to the Kavik River to the west; and (2) an area that extends from the Kavik River to Barrow and extends inland five miles south from the mainland coast, and developed a map outlining these boundaries. *Id.* at 76,134; Alaska Pet. App. 27a. The Service defined Unit 3, the designated barrier

island habitat, as all islands offset from the coast of Alaska starting at the United States-Canada border and ending at Hooper Bay, Alaska, and the water, ice, and terrestrial habitat within one mile of these islands, and developed a map outlining these areas. *Id.* at 76,136-37; Alaska Pet. App. 35a. And, as the Ninth Circuit recognized, the record supports the Service's determination that the PCEs of terrestrial denning habitat and barrier island habitat "are found" within Unit 2 and Unit 3, respectively. Alaska Pet. App. 17a, 18a, 29a-30a, 35a-37a.

Nevertheless, Petitioners argue the Service's designation of Unit 2 and Unit 3, and the Ninth Circuit's decision upholding it, were erroneous because Units 2 and 3 include areas other than habitat suitable for building dens and because the Service did not have sufficient evidence of the presence of PCEs within most of the designated areas. Such complaints ignore the fundamental facts and go beyond the statutory requirements in two related ways.

First, Petitioners' arguments disregard the PCEs themselves. Specifically, Petitioners contend the designation of Unit 2 was improper because it includes territory that is not suitable for denning. Alaska Pet. at 14, 16; AOGA Pet. at 14. In support of this argument, Petitioners claim the record demonstrates that only about one percent of Unit 2 contains habitat with the physical characteristics necessary for building dens. Alaska Pet. at 16, 26; AOGA Pet. at 4, 16, 31.

However, as the Ninth Circuit correctly explained, the one percent figure cited by Petitioners is based on studies mapping the first component of the terrestrial denning habitat PCE – the steep, stable slopes necessary to build the actual dens. Alaska Pet. App. 36a. But the Service defined denning habitat more broadly. Specifically, the Service determined that to den successfully, polar bears "need the ability to access potential den sites and areas to acclimate the cubs after den emergence in the spring." 75 Fed. Reg. at 76,099. Further, "[i]f a female polar bear abandons her den due to disturbance prior to the cubs being old enough to survive outside the den, her cubs will die." *Id.* And choosing den sites close to the coast allows polar bears to access feeding areas before and after denning, and reduces the chances of predation of polar bear cubs. *Id.*

Thus, as the Ninth Circuit recognized, the Service defined the terrestrial denning habitat PCE to include not only the physical characteristics that allow for construction of a den, but the ability to *access* those dens, including unobstructed, undisturbed access between den sites and the coast so bears can travel, feed, and acclimate their cubs. *Id.*; Alaska Pet. App. 36a-37a. Similarly, the Service defined the barrier islands as a PCE because they include the physical characteristics necessary for denning, and also refuge from human disturbance and movements along the coast to access denning and feeding habitat. 75 Fed. Reg. at 76,099;

Alaska Pet. App. 37a. Petitioners' argument ignores these essential features.[3]

Second, as the Ninth Circuit correctly recognized, Petitioners' arguments demand a standard of scientific proof beyond the clear requirement of the ESA that critical habitat designations be based on the best *available* science. Specifically, Petitioners claim there is insufficient evidence of the presence of PCEs within most of Units 2 and 3, and point to the Service's failure to designate specific migratory corridors as an example. *E.g.*, Alaska Pet. at 17, 20-21; AOGA Pet. at 14-15. However, the Service explained that the best available science demonstrates that PCEs supporting at least one of the polar bear's essential life functions are found within the areas designated as Units 2 and 3, and that more specific information was not available. Petitioners have not pointed to any existing information the Service failed to consider. Alaska Pet. App. 37a.

As the Ninth Circuit recognized, the Service analyzed available radio-telemetry data and designated areas determined to be the distance from the coast, measured in five-mile increments, in which 95 percent

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[3] Petitioners did not challenge the three PCEs in the litigation below. Nevertheless, Petitioner AOGA chastises the Ninth Circuit for stating that "bears need room to roam" when there was no evidence in the record bears need room to roam. AOGA Pet. at 18. Petitioners ignore the multitude of evidence in the record establishing precisely that. For example, the Service found that because suitable den sites are widely dispersed across the North Slope, polar bears need to travel through the area unobstructed to find suitable den sites. *See, e.g.*, 75 Fed. Reg. at 76,090, 76,099. Indeed, every PCE includes the ability to migrate. *Id*. at 76,115.

of all historical confirmed and probable den sites have occurred east of Barrow, Alaska. 75 Fed. Reg. at 76,120; Alaska Pet. App. 27a, 29a-30a. The Service concluded this approach represented the best available method for identifying the specific areas containing the PCEs for terrestrial denning because it was designed to capture a robust estimate of the inland extent of den use; accurately represents polar bear denning concentrations along the northern coast of Alaska; and identifies a zone wide enough to account for potential changes due to climate change, including coastal erosion. 75 Fed. Reg. at 76,099. The Service also explained that this method properly accounted for limitations in the available data, including the fact the Service only had radio-telemetry data available for roughly eight to sixteen percent of the total number of bears believed to den in a given year. *Id*.

Moreover, as the Ninth Circuit recognized, while the potential den site locations are a relatively small portion of the coastal plain, they are widely scattered across broad reaches of terrain, and available studies tracking polar bear movements in different years demonstrate bears traverse the portions of Unit 2 between the potential den sites to get from the coast to the potential den sites and back again. *See, e.g.*, *id.* at 76,090, 76,099, 76,113; Alaska Pet. App. 32a. The studies demonstrate polar bears can have an active annual range as large as 94,387 square miles on average. 75 Fed. Reg. at 76,089.

As for Unit 3, it is comprised of one PCE – the barrier islands – which the Service determined polar

bears use for their essential life functions of denning, migration along the coast to access denning and feeding grounds, and avoiding human disturbance. *Id.* at 76,097, 76,114, 76,115. The Service reached this determination based on an analysis of scientific surveys from 2000 to 2007 demonstrating polar bears regularly use barrier islands for these purposes. *Id.* at 76,097, 76,114, 76,115.

In concluding these methods were best calculated to identify the specific areas where sufficient PCEs are found to support at least one polar bear essential life function, the Service expressly acknowledged that more precise information regarding the presence of PCEs was not available. Specifically, as the Ninth Circuit acknowledged, the Service explained the dynamic, shifting nature of the land, ice, and barrier islands; the wide dispersal of suitable den sites throughout the North Slope; and the fact that pregnant females continually build new dens and will often excavate several partial dens before choosing the one they will actually use, make it difficult (if not impossible) to know precisely where polar bears will move within their habitat to access den sites or where they will build their dens. *Id.*; 75 Fed. Reg. at 76,090, 76,099, 76,111, 76,113-14, 76,119.

Thus, in arguing the designation of Units 2 and 3 were erroneous because the Service did not have sufficient information regarding the presence of PCEs within most of the designated areas, including where polar bears will travel to access den sites, Petitioners demand scientific information that does not exist. The

Ninth Circuit properly rejected such demands as antithetical to the clear requirements of the statute that the agency base critical habitat designations on the best available science. 16 U.S.C. § 1533(b)(2); Alaska Pet. App. 24a-25a; *Sw. Ctr. for Biological Diversity*, 215 F.3d at 60; *see also In re Polar Bear*, 709 F.3d at 9 (noting plaintiffs "point to no scientific findings or studies that [the Service] failed to consider" in listing the polar bear and that their arguments "amount to nothing more than competing views about policy and science, on which [the court must] defer to the agency.").

C. There Is No Circuit Split on the Relevant Issue and the Ninth Circuit Properly Upheld the Designation of Units 2 and 3

The Ninth Circuit upheld the designation of Units 2 and 3 after a thorough review of the record and application of the required deferential standard of review. *See Sweet Home*, 515 U.S. at 708.

In an attempt to sow doubt in the validity of the Ninth Circuit's decision, Petitioners cite decisions from the D.C. Circuit and the Tenth Circuit to suggest a conflict with the Ninth Circuit's approach. Alaska Pet. at 29-30; AOGA Pet. at 29-30, 31, 33. But these decisions are inapposite.

For example, Petitioners erroneously suggest that the Ninth Circuit's decision is inconsistent with the D.C. Circuit's decision in *Otay Mesa Property, L.P. v. Dep't of Interior*, 646 F.3d 914, 916-17 (D.C. Cir. 2011). In *Otay Mesa*, the D.C. Circuit determined it was

arbitrary for the Service to deem private land "occupied" by a listed species based on a single survey that found four individual animals in the area, when six subsequent surveys conducted the same year did not find any evidence of the species in the area. *Id*.

Here, in contrast, there is ample evidence in the record to support the Service's determination that polar bears occupy each of the areas designated as critical habitat. 75 Fed. Reg. at 76,099. The Service determined polar bears occupy Unit 2 by using radio-telemetry data from radio-collars on adult female polar bears from 1982 to 2009 and available field verifications. *Id.*; *id.* at 76,120. The Service determined polar bears occupy Unit 3 based on scientific surveys conducted from 2000 to 2007. *Id.* at 76,114. In light of this evidence and the deferential standard of review, the district court upheld the Service's determination that all three critical habitat units were occupied. Alaska Pet. App. 61a-64a. Petitioners did not challenge this finding in its appeal, and do not challenge it now.

Similarly, Petitioners suggest the Tenth Circuit's decision in *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001) conflicts with the Ninth Circuit's decision in *Arizona Cattle Growers*, 606 F.3d at 1172-74. These cases concern the proper approach to measuring the economic impact of critical habitat designations. But Petitioners do not raise the legal issue of how to measure costs, and the cases do not represent an actual conflict. Petitioner AOGA's suggestion that the Court should hear this case because the Ninth Circuit reached the wrong

decision in *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977, 989-90 (9th Cir. 2015), *cert denied* 136 S. Ct. 799 (2016), fails for the same reason. The portions of *Bear Valley* cited by Petitioner AOGA dealt with whether the Service's decision to exclude areas from designated habitat is judicially reviewable, an issue that is not relevant to Petitioners' arguments, and is not the subject of a circuit split. The Ninth Circuit's decisions in these other cases have no bearing on whether review should be granted in *this* case.

Petitioners also contend that the Ninth Circuit was too deferential when it upheld the designation of Unit 2 because it includes areas surrounding Deadhorse and other areas adjacent to human activity. Alaska Pet. at 16, 32; AOGA Pet. at 18. But the Ninth Circuit's findings reflect the Service's well-supported determination not to exclude these areas.

As the Ninth Circuit recognized, the record reflects that polar bears regularly move freely through the Deadhorse area without being disturbed even though there is widely dispersed infrastructure in the area. *See, e.g.*, 75 Fed. Reg. at 76,098; Alaska Pet. App. 33a. Further, as the Service explained, Deadhorse is a staging ground for oil and gas activities with no permanent residents and no formal boundaries; the movements of personnel and equipment in the area is highly restricted; and there is very little polar bear critical habitat in the vicinity of Deadhorse. 75 Fed. Reg. at 76,098. The Service also explained that excluding existing manmade structures from the designation will effectively remove most of the core human activity

area of Deadhorse from the designation. *Id.* Based on this evidence, the appellate court correctly determined that it was reasonable for the Service to conclude that despite some human activity, polar bears could still move through Deadhorse to locate and access den sites free from human disturbance – a physical and biological feature necessary to the conservation of polar bears. 75 Fed. Reg. at 76,098, 76,115; Alaska Pet. App. 33a.

Similarly, it was reasonable for the Service to decide not to exclude areas surrounding Alaska villages in addition to Barrow and Kaktovik. The Service reached this decision after determining that there was *no overlap* between the critical habitat designation and any communities except for Barrow and Kaktovik, which were already excluded. 75 Fed. Reg. at 76,097. Thus, no further exclusions were necessary. *Id*.

In short, the Ninth Circuit correctly applied the relevant statutory standards and deferential standard of review. Its decision was the right one under the law, and Petitioners present no reason for the Court to disturb the court of appeal's well-reasoned decision.

II. Petitioners' and Amici's Numerous Policy Arguments Misconstrue or Wholly Ignore the Pertinent Facts and Do Not Justify Granting the Writ

Petitioners' and Amici's policy arguments do not justify granting their requests that the Court hear this case. Petitioners and Amici spend much time attacking

the overall size of the designation. But their legal arguments do not implicate 95 percent of the designation. And in myopically focusing on the amount of land and ice within the designation, Petitioners and Amici conveniently ignore the unassailable facts that the best available science shows the polar bear is one of the farthest-ranging species on earth and that the areas essential to the conservation of the species are also large.

Additionally, Petitioners repeatedly allege that the Service believes there is no point to critical habitat designations. Yet again, Petitioners ignore clear evidence in the record proving just the opposite. In the final rule, the Service expressly stated that the designation would have several conservation benefits for polar bears. And while the Service found several benefits from the designation, it found the designation would have few additional costs given the regulations already in place at the time of the designation. Petitioners' and Amici's arguments alleging otherwise are vastly overblown.

A. The Polar Bear Critical Habitat Designation Is Large Because the Areas Essential to Polar Bear Conservation Are Large

The polar bear critical habitat designation is large because the best available science shows that polar bears are one of the farthest ranging species on earth and the specific areas containing the physical and biological features necessary to the conservation of the

species are also large. Nevertheless, Petitioners and Amici attack the size of the critical habitat designation, continually repeating the total number of square miles in the designation and their belief that the Service "over-designated" critical habitat for the polar bear. But such arguments misapprehend the relevant facts and present no credible argument why the Court should review this case.

First, Petitioners' and Amici's constant reference to the fact the designation encompasses roughly 187,000 square miles is misleading. *See, e.g.*, Alaska Pet. at 12, 19; AOGA Pet. at 1, 24, 26; AFN Br. at 4; Alabama Br. at 6, 7. Petitioners and Amici fail to acknowledge that their legal arguments as to why the designation was improper only involve Unit 2 and Unit 3, which consist of a thin strip of coast east of Barrow, Alaska, and offshore barrier islands that, collectively, make up only about 9,700 square miles. 75 Fed. Reg. at 76,121.

In any event, the Service appropriately designated polar bear critical habitat. The Service's decision is based on its probing examination of the best available science to identify the physical and biological features essential to the conservation of polar bears and the specific geographic areas containing those features, exactly what the ESA requires. As the Service explained in detail in the final ESA-listing rule and the final critical habitat rule, the polar bear is one of the farthest-ranging species on earth.

There are many reasons for the polar bear's wide-ranging habitat needs. One is that the sea-ice environment in which polar bears spend most of their time is extremely dynamic. Polar bears must move across vast expanses throughout the year to adjust to the constantly changing distribution of sea ice and their prey. 75 Fed. Reg. at 76,089. Polar bears in the Chukchi-Bering Seas population range from the southernmost tip of the sea ice in the Bering Sea north to the Chukchi Sea, traveling more than 600 miles in a year to stay with moving sea ice. *Id.* Polar bears in the Southern Beaufort Sea population move from nearshore areas along the northern coast of Alaska and Canada in winter and spring to the deeper waters of the polar basin in summer. *Id.* at 76,088, 76,111.

As a result of such long-distance movements, the ranges of individual bears are vast – ranging as high as 135,600 square miles for a *single bear*. *Id.* at 76,089. The designation is large because the range of the polar bear, and thus the areas essential to the conservation of the species, are large. *See, e.g.*, *id.* at 76,095 (polar bears need "vast areas of sea ice to pursue the prey on which they depend").

Moreover, the Service only designated areas it deemed "occupied" by polar bears, even though the ESA gives it the discretion to designate *unoccupied* areas essential for the conservation of the species. 75 Fed. Reg. at 76,095; 16 U.S.C. § 1532(5)(A)(ii) (defining critical habitat to include "specific areas outside the geographical area occupied by the species" upon the Service's determination such areas are "essential for

the conservation of the species"). The Service did not even designate all areas occupied by the species. The designation does not include occupied areas north of the 300-meter depth boundary in the Beaufort Sea, or terrestrial areas beyond the designated denning areas. 75 Fed. Reg. at 76,096.

In support of their argument that the designation is too big, Petitioners quote a snippet of legislative history that disparagingly refers to the Service designating critical habitat "as far as the eyes can see and the mind can conceive." Alaska Pet. at 25; AOGA Pet. at 10 (quoting 124 Cong. Rec. 38,131 (1978)). The concept, which is not part of the statute, has no application to the case at hand. While the designated habitat may be close in size to the State of California as Petitioners point out, Alaska Pet. at 1; AOGA Pet. at 19, that is where similarities end. California is well-populated and dense with land uses, whereas polar bears' sea ice habitat is some of the most remote habitat on the planet. The eyes could look a very long way in the Arctic and see nothing but sea ice.

However, the vast expanses of sea ice inhospitable to humans are essential to polar bears' survival. Polar bears were listed as threatened under the ESA because of the loss of this sea ice habitat. 73 Fed. Reg. at 28,212. There is no question that if the sea ice disappears, so too will the bears. *Id*. Thus, the designated habitat clearly meets the standard articulated in the statute that designated areas be "essential to the conservation of the species," Alaska Pet. at 26, AOGA Pet. at 10, and the legislative history that areas "be

designated critical habitat only if their loss would significantly decrease the likelihood of conserving the species in question." H.R. Rep. No. 95-1625, at 749 (1978). Indeed, the loss of sea ice would not merely "significantly decrease the likelihood of conserving" polar bears in the wild; it would foreclose the possibility altogether.

Petitioners cherry-pick from other designations to suggest the Service has developed a new practice of "over-designating" critical habitat, pointing to other designations also containing a large amount of land or water. To maintain this argument, Petitioners ignore the fundamental notion that critical habitat designations are highly fact-specific, case-by-case scientific inquiries based on the biological and habitat needs of the species at issue. *See, e.g.*, *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1164 (determining whether an area is occupied "is a highly contextual and fact-dependent inquiry . . . within the purview of the [Service's] unique expertise"); *Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 29 (D.D.C. 2013) ("PCE findings are also fact-specific").

Petitioners also myopically focus on designations for other highly-migratory species with large ranges or large distribution, such as loggerhead sea turtles and lynx. Alaska Pet. at 12.[4] But, like the polar bear, these

[4] Northwest Atlantic loggerhead sea turtles range from Newfoundland in Canada to Argentina. National Marine Fisheries Service, *Loggerhead Turtle (Caretta caretta)*, http://www.nmfs.noaa.gov/pr/species/turtles/loggerhead.html, updated Dec. 15, 2014. The Canada lynx is known or believed to occur in 13 different

species occupy a large amount of land or water; thus the areas essential to their conservation are also large. Petitioners ignore myriad designations for non-migratory species, or species with much smaller ranges, some of which encompass only a couple dozen miles. *See, e.g.*, 77 Fed. Reg. 63,604 (Oct. 16, 2012) (designating approximately 54 river miles for the Cumberland darter, 27 river miles and 29 acres for the rush darter, 20 river miles for the Chucky madtom, and 26 river miles for the laurel dace as critical habitat); 81 Fed. Reg. 36,762 (June 7, 2016) (designating roughly 34.6 river miles as critical habitat for the Zuni bluehead sucker).

The polar bear's habitat needs, and consequently designated critical habitat, may indeed be vast, but this is by no means grounds for depriving the species of legally-mandated protections, nor does it make this case suitable for review. The habitat designation is wholly lawful and proper, as is the Ninth Circuit's decision upholding it.

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states in the United States. U.S. Fish and Wildlife Service, *Environmental Conservation Online System: Species Profile for Canada Lynx (Lynx canadensis)*, https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=A073 (last accessed Jan. 4, 2017).

B. The Service Found the Polar Bear Critical Habitat Designation Would Have Several Conservation Benefits, and Petitioners' and Amici's Claims Regarding the Costs of the Designation Are Overblown

Petitioners and Amici also argue that it was inappropriate for the Service to designate a large amount of critical habitat because the Service allegedly believed the designation would be "pointless," but it would enact substantial costs on Petitioners and Amici. *See, e.g.*, Alaska Pet. at 18; Alabama Br. at 7-8. In so arguing, Petitioners and Amici simply ignore the Service's explicit statements in the final rule regarding the benefits of the designation and make claims regarding the impact of the designation that have no basis in reality.

In designating polar bear critical habitat, the Service explicitly recognized the importance of critical habitat in providing for the survival and recovery of polar bears. Specifically, the Service found that the designation would provide numerous opportunities for public education and involvement, and make landowners, state agencies, and local governments "more aware of the plight of listed species and conservation actions needed to aid in species recovery." 75 Fed. Reg. at 76,125. This awareness would, in turn, help "focus and promote conservation efforts by other parties by clearly delineating areas of high value for polar bears in Alaska" and may assist land owners and managers in developing conservation management plans for identified areas. *Id.* In addition, the polar bear critical

habitat "would inform State agencies and local governments about areas that could be conserved under State laws or local ordinances." *Id*.[5]

The Service further explained that critical habitat also benefits the species by requiring federal agencies to consult to ensure federal projects do not destroy or adversely modify the habitat deemed most essential to the species' survival and recovery. *Id*. As the Service explained, the adverse modification standard is designed to ensure the conservation role and function of such habitat is not appreciably reduced. *Id.* at 76,100. The Service recently reiterated many of these benefits in amending its regulations governing the designation of critical habitat. 81 Fed. Reg. 7,414, 7,414-15 (Feb. 11, 2016); *see also Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280, 1286-88. (D. Haw. 1998) (explaining the benefits of critical habitat); Dave Owen, *Critical Habitat & the Challenge of Regulating Small Harms*, 64 Fla. L. Rev. 141, 173, 180-81 (2012) (discussing the benefits of critical habitat designation and concluding, contrary to Petitioner's misleading citation to the article, that "critical habitat does matter."); *c.f.* Alaska Pet. at 11.

Petitioners do not acknowledge the Service's findings. Instead, Petitioners pull statements from the

[5] The National Marine Fisheries Service – the agency charged with managing most marine species under the ESA – has found similar benefits to critical habitat designations. *See, e.g.*, 76 Fed. Reg. 20,180, 20,191 (April 11, 2011) (designating critical habitat for Cook Inlet beluga whales).

administrative record out of context to paint an inaccurate picture of the Service's decision. Specifically, Petitioners argue that the Service's statement that it is "unable to foresee a scenario in which the designation of critical habitat results in changes to polar bear conservation requirements" proves that the Service believes there is no benefit to the designation. AOGA Pet. at 3, Alaska Pet. at 15. But, as the Ninth Circuit recognized, this statement is from the economic analysis of the designation, and the statement "means only that in light of existing regulatory measures, [the Service] could not foresee any additional expense for affected parties." Alaska Pet. App. 43a. That is not the same thing as finding there would be no conservation benefit to the designation. As explained above, the Service clearly found the designation would provide key conservation benefits for the species.

Petitioners also recite statements made in old rules and by past directors of the Department of the Interior and the Service. Alaska Pet. at 10-11. But decades-old rules and testimony certainly have no bearing on the Service's findings in *this* case. And, to the extent these statements express a general view that critical habitat designations do not serve a conservation purpose, the statements ignore clear scientific evidence demonstrating that species with critical habitat designations are more than twice as likely to be recovering as those without.

Such statements also directly collide with the undisputed fact that Congress made critical habitat designations mandatory. 16 U.S.C. § 1533(a)(3)(A)(i). As

courts have explained, the ESA "compels the designation" even if there are "other methods of protecting the species the [Service] might consider more beneficial." *Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F. Supp. 2d 1156, 1169 (D.N.M. 2000).

Petitioners' and Amici's contentions about the economic and societal impact of the designation are similarly disingenuous. Petitioners and Amici make it seem as though the polar bear critical habitat designation will foreclose the development of oil and gas and other projects on the North Slope altogether. AOGA Pet. at 25, Alaska Pet. at 13, AFN Br. at 17, 21; Alabama Br. at 9-10. This is simply not true.

As an initial matter, the designation means that the federal government must ensure that actions it funds, carries out, or permits that affect polar bear critical habitat will not destroy or adversely modify that habitat, which federal agencies will do through Section 7 consultation with the Service. 16 U.S.C. § 1536(a)(2). Consultation does not necessarily stop federal projects. Rather, consultation may conclude informally when the federal agency taking the action determines the action is not likely to adversely affect critical habitat, and the Service concurs in writing *See, e.g.*, 75 Fed. Reg. at 76,125.

Or, if adverse impacts to critical habitat might occur, formal consultation is initiated, which culminates in a biological opinion in which the Service determines whether the federal action is likely to result in adverse modification to critical habitat. *Id*. at 76,125-26. If

consultation results in an adverse modification determination, the Service develops measures that can be incorporated into the project to mitigate its impacts on the affected habitat and allow the project to go forward. 16 U.S.C. § 1536(b)(3)(A). In this way, the consultation process can steer development away from the most sensitive areas and help ensure any remaining significant impacts are properly mitigated.

Consultation is not required for activities on state or private lands in which there is no federal involvement, and the designation does not otherwise directly affect activities on state or private lands. *See, e.g.*, 75 Fed. Reg. at 76,099. And, as the Service explained, the designation does not affect subsistence activities of Alaska Natives. *Id.*; *id.* at 76,109, 76,132.

As such, the Service determined that the critical habitat designation would not add substantial costs on regulated industry or landowners. *Id.* Both the district court and the Ninth Circuit upheld the Service's economic impact analysis. Alaska Pet. App. 43-45a. Petitioners' and Amici's purported fears of the designation slowing, much less stopping, all oil development or other projects in northern Alaska are vastly overblown.

But even if Petitioner's inflated claims were accurate (which they are not), that would not invalidate the designation. As Congress made clear, the Service "is not required to give economics or any other 'relevant impact' predominant consideration in . . . specification of critical habitat." H.R. Rep. No. 95-1625, at 17. Rather,

"[t]he consideration and weight given to any particular impact is completely within the [Service's] discretion." *Id.*; *see also* Alaska Pet. App. 74a (citing *Bennett v. Spear*, 520 U.S. 154, 172 (1997) (district court recognizing the Service "has complete discretion over the application of [the economic impact] analysis vis-à-vis critical habitat designation"); *Tenn. Valley Auth.*, 437 U.S. at 174 (Congress intended listed species "to be afforded the highest of priorities"). Petitioners and Amici therefore do not provide a compelling reason why the Court should hear this case.

CONCLUSION

For the foregoing reasons, the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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January 6, 2017