

Nos. 17-118, 17-133

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**In The  
Supreme Court of the United States**

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STATE OF ALASKA, *et al.*,  
*Petitioners,*

v.

WILBUR L. ROSS,  
SECRETARY OF COMMERCE, *et al.*,  
*Respondents.*

—◆—  
ALASKA OIL AND GAS ASSOCIATION, *et al.*,  
*Petitioners,*

v.

WILBUR L. ROSS,  
SECRETARY OF COMMERCE, *et al.*,  
*Respondents.*

—◆—  
**On Petition For Writs Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

—◆—  
**BRIEF IN OPPOSITION OF RESPONDENT  
CENTER FOR BIOLOGICAL DIVERSITY**

—◆—  
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October 2017

**QUESTION PRESENTED**

When the National Marine Fisheries Service determines that a species will lose its sea ice habitat because of climate change by the end of the century, may the agency list that species as threatened under the Endangered Species Act?

## **PARTIES TO THE PROCEEDING**

The Petition for Writ of Certiorari from the State of Alaska correctly identifies the parties to the proceedings below. This brief is submitted on behalf of respondent Center for Biological Diversity, which intervened as a defendant in the district court and was an appellant in the court of appeals.

### **RULE 29.6 STATEMENT**

Respondent Center for Biological Diversity is a nonprofit organization that has no parent corporations, and no publicly-held company has any ownership interest in it.

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## INTRODUCTION

The State of Alaska and the Alaska Oil and Gas Association (“Petitioners”) seek review of the Ninth Circuit’s decision upholding a rule listing the bearded seal as a threatened species under the Endangered Species Act (“ESA”). The National Marine Fisheries Service (“NMFS”) listed the bearded seal after concluding the best available science demonstrates that climate change will destroy the sea ice habitat the species needs to survive to such an extent that bearded seals will likely vanish from most of the places they live within the foreseeable future.

Petitioners present no credible reason why this Court should review such a fact-specific issue dependent on the agency’s exercise of its scientific expertise. The court of appeals’ unanimous decision does not conflict with a decision from this Court or any other court of appeals. And its narrow, record-based decision reflects the correct application of the relevant statutory standards and deferential standard of review.

In their struggle to persuade the Court to hear this case, Petitioners misconstrue the law and the decision below. First, Petitioners claim that NMFS’s decision was improper because NMFS should have waited to list the bearded seal until the species began suffering the impacts of the loss of its sea ice habitat. But the ESA contains no such restriction and the court of appeals correctly rejected Petitioners’ untenable approach. Indeed, Petitioners’ arguments directly contradict the ESA’s requirement that NMFS protect species

likely to become endangered within the foreseeable future.

Second, Petitioners complain that NMFS based its decision on habitat loss, but habitat loss is one of the five statutory factors NMFS is required to consider in deciding whether to list a species. And the ESA requires NMFS to list a species if it is threatened by any one of those factors. Consistent with these requirements, NMFS relied on the best available science to carefully analyze and explain how bearded seal habitat will change within the foreseeable future, and how those changes threaten the survival of the species.

Third, Petitioners cherry-pick from the opinion below to suggest the court of appeals ignored statutory standards. But read in context, the statements they cite reflect the correct application of the ESA's mandate that NMFS base its decision solely on the best available science – a standard that consistently has been interpreted to mean that NMFS must act on existing information, even where some uncertainty remains. As the court of appeals explained, the information on which NMFS based its decision reflects the international scientific consensus on climate change, which strongly supports NMFS's conclusion that Arctic sea ice will continue to recede through at least 2100.

Fourth, Petitioners argue that NMFS's decision to list bearded seals was improper because NMFS did not first establish a precise numerical tipping point for the species. But, as the court of appeals rightly recognized,

such requirements are constructs of Petitioners' own making. The ESA does not require NMFS to employ a quantitative analysis, and no court of appeals has held otherwise.

Finally, Petitioners and their supporting amici mistakenly claim that it was inappropriate for NMFS to list bearded seals because the listing would impose substantial costs without benefiting bearded seals. But these policy arguments have no bearing on the validity of the listing because the ESA requires NMFS to make listing decisions *solely* on the best available science – economic and political considerations cannot enter the equation. In any event, Petitioners' fears are vastly overblown and ignore the statutory scheme and NMFS's express findings regarding the benefits of listing bearded seals.

At bottom, Petitioners want this Court to review the decision below because they are dissatisfied with the outcome and NMFS's conclusion that bearded seals are threatened by climate change. Such dissatisfaction does not raise a significant issue requiring the Court's review. The Court should deny the Petitions.



## STATEMENT OF THE CASE

### I. The ESA Requires NMFS To List Species Based on the Best Available Science

Congress enacted the ESA “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b). To accomplish these goals, the ESA directs the Secretary of Commerce, through NMFS, to list species<sup>1</sup> it determines are endangered or threatened. 16 U.S.C. § 1533(a). A species is “endangered” if it “is in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). A species is “threatened” if it “is likely to become an endangered species within the foreseeable future.” *Id.* § 1532(20).

Section 4 of the ESA establishes a detailed process by which NMFS must add to or modify the list of threatened and endangered species. *Id.* § 1533. Specifically, in making all listing determinations, NMFS must assess five categories of threats: (A) the present or threatened destruction, modification, or curtailment of a species’ habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) predation or disease; (D) the inadequacy of existing regulatory mechanisms; and (E) other manmade or natural factors affecting the species’ continued existence. *Id.* § 1533(a)(1). If a species meets the

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<sup>1</sup> The definition of “species” includes “subspecies” and “distinct population segments.” 16 U.S.C. § 1532(16).

definition of “endangered” or “threatened” because of any one or more of these five factors, the ESA *requires* NMFS to list the species. *Id.*; 50 C.F.R. § 424.11(c).

The ESA also mandates that NMFS make listing determinations “solely on the basis of the best scientific and commercial data available.” 16 U.S.C. § 1533(b)(1)(A). In light of this explicit statutory directive, both the D.C. Circuit and the Ninth Circuit have consistently interpreted the statute to require that NMFS consider only *existing* data, even where there remains some uncertainty. *E.g.*, *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). Similarly, the best available science “standard does not require that [NMFS] 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, [NMFS] may – indeed must – still rely on it.” *Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000). Requiring reliance upon the best available science, rather than scientific certainty, “is in keeping with congressional intent” that NMFS “take preventive measures *before* a species is ‘conclusively’ headed for extinction.” *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 679-80 (D.D.C. 1997).

Once a species is listed as threatened, an array of statutory protections applies. For example, Section

7(a)(2) requires all federal agencies to ensure their actions do not “jeopardize the continued existence” of any listed species. 16 U.S.C. § 1536(a)(2). Section 4(a)(3) requires NMFS to designate “critical habitat” for listed species, *id.* § 1533(a)(3), to protect the breeding, feeding, and other areas deemed most essential to the species’ survival and recovery. *Id.* § 1532(5).

Section 9 prohibits the killing, injuring, or other “take”<sup>2</sup> of any *endangered* species of fish or wildlife without prior authorization, *id.* § 1538(a), but does not automatically prohibit takes of *threatened* species. Instead, NMFS can apply the prohibition (in whole or in part) to threatened species, and impose other protective regulations, through Section 4(d) if NMFS deems such measures “necessary and advisable to provide for the conservation” of the species. 16 U.S.C. § 1533(d).

## **II. NMFS’s Determination that the Bearded Seal Is Likely To Be Threatened with Extinction Within the Foreseeable Future**

The bearded seal, known for its mustachioed appearance and elaborate courtship songs, is an ice-dependent species. Bearded seals breed, reproduce, raise their young, and molt on sea ice, and they use it as a platform for hunting. 77 Fed. Reg. 76,740, 76,742-43 (Dec. 28, 2012). Bearded seals feed primarily on benthic (*i.e.*, seabed-dwelling) organisms that are more

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<sup>2</sup> The ESA defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

plentiful in shallow waters where light can reach the seafloor. 75 Fed. Reg. 77,496, 77,497 (Dec. 10, 2010). As such, the bearded seal's range is generally restricted to areas where seasonal sea ice occurs over relatively shallow waters, typically less than 200 meters in depth. *Id.*

Without the right amount of sea ice in the right place at the right time, bearded seals cannot perform their essential life functions. *Id.* But the broad scientific consensus is that climate change will destroy the sea ice bearded seals need to survive.

For example, in its Fourth Assessment Report, the Intergovernmental Panel on Climate Change ("IPCC"), an international body that produces objective reports synthesizing the best available scientific climate change data, found that "[w]arming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global average sea levels." M.F. Cameron, *et al.*, Status Review of the Bearded Seal (*Erignathus barbatus*), NOAA Tech. Memo. NMFS-AFSC-211, at 59 (Dec. 2010) (quoting IPCC's 2007 Fourth Assessment Report).<sup>3</sup> The IPCC is confident that "[a]nthropogenic warming and sea level rise would continue for centuries due to the time scales associated with climate processes and feedback, even if

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<sup>3</sup> The bearded seal status review was part of the record below and available at: <https://www.afsc.noaa.gov/Publications/AFSC-TM/NOAA-TM-AFSC-211.pdf>.

[greenhouse gas] concentrations were to be stabilized.” *Id.* at 60.

Accordingly, in 2008, the Center for Biological Diversity petitioned NMFS to list bearded seals under the ESA. 73 Fed. Reg. 51,615 (Sept. 4, 2008). Submission of the petition triggered a statutorily-mandated process that required NMFS to determine within 90 days whether the petition presented substantial information indicating that the petitioned action may be warranted; if so, NMFS was required to immediately begin reviewing the status of the species to determine, within 12 months of receiving the petition, whether listing was warranted. 16 U.S.C. § 1533(b)(3)(A), (B).

NMFS issued a positive 90-day finding in September 2008 and began reviewing the status of bearded seals. 73 Fed. Reg. at 51,615. To aid its review, NMFS convened a Biological Review Team (“BRT”) consisting of 11 scientists. 77 Fed. Reg. at 76,740. The BRT conducted a review of the species’ taxonomy and an extinction risk assessment by evaluating the five Section 4(a) listing factors and assessing how threats to bearded seals were likely to manifest in risks to abundance, productivity, and diversity. *Id.*; *id.* at 76,747.

The BRT determined that two subspecies of bearded seals exist: one in the Atlantic and one in the Pacific. 75 Fed. Reg. at 77,497. The BRT further determined that the Pacific subspecies consists of two distinct population segments (“DPS”): the Beringia DPS, which inhabits the U.S. Arctic, and the Okhotsk DPS, which inhabits the Russian Arctic. *Id.* at 77,496.

For the Beringia DPS, the BRT judged threats to the destruction, modification, or curtailment of its habitat or range to be the most significant extinction risk. 77 Fed. Reg. at 76,758. Specifically, the BRT identified the most significant threats “as decoupling of sea-ice resting areas from benthic foraging areas, decreases in sea ice habitat suitable for molting and pup maturation, and decreases in prey density and/or availability due to changes in ocean temperature and ice cover.” *Id.*

NMFS solicited scientists with expertise in bearded seal biology, Arctic sea ice, climate change, and ocean acidification to review the BRT’s status review. 75 Fed. Reg. at 77,496-97. Based on the BRT’s report and the peer review, NMFS issued a proposed rule to list both the Beringia DPS and the Okhotsk DPS as threatened. *Id.* at 77,496. NMFS determined that listing the Atlantic subspecies was not warranted. *Id.* Then, after accepting multiple rounds of public comment and soliciting multiple, independent peer reviews of the proposed rule, NMFS issued a final rule listing the Beringia DPS and the Okhotsk DPS as threatened species under the ESA. 77 Fed. Reg. at 76,740.

In both the proposed and final rules, NMFS evaluated sea ice decline as part of its duty to evaluate habitat destruction pursuant to the first listing factor of Section 4(a). 16 U.S.C. § 1533(a)(1); 75 Fed. Reg. at 77,502-06; 77 Fed. Reg. at 76,742-44. Specifically, NMFS analyzed the risks to bearded seals by considering the seals’ life-history functions, how they are

linked with sea ice, and “how altering that link will affect the vital rates of reproduction and survival.” 77 Fed. Reg. at 76,742.

In its analysis, NMFS relied on climate models developed by the IPCC in its Fourth Assessment Report, the most recent report at the time, to project impacts to bearded seal habitat through 2100. *Id.* at 76,741. NMFS determined that the IPCC’s models represented the best available science for purposes of the bearded seal listing and “reflect reasonable assumptions regarding habitat alterations to be faced by bearded seals in the foreseeable future.” *Id.* at 76,742.

NMFS also relied on two studies that estimated bearded seal preference for ice concentrations during various life history stages to identify ice concentration thresholds within bearded seals’ core distribution during key life stages: whelping, nursing, and molting. *Id.* at 76,743-44. NMFS found that areas within the core distribution of bearded seals need a minimum 25% concentration of sea ice cover in April and May to be adequate for whelping and nursing, and that a 15% ice concentration in June would be adequate for molting. *Id.* at 76,743. For all suitable habitat, NMFS considered 90% sea ice concentration as the upper limit. *Id.* NMFS “concluded that the above percentages are reasonable assumptions based upon the life history characteristics and field observations of bearded seals by NMFS marine mammal biologists.” *Id.*

Next, based on the IPCC models, NMFS determined that ice coverage in April, May, and June will

severely decrease by the end of the century in each of the regions where seals in the Beringia DPS live: the Bering, East Siberian, Chukchi, and Beaufort Seas. 77 Fed. Reg. at 76,743-44. For example, in the Bering Sea – where 70% of the Beringia DPS currently whelps – NMFS found that, by the second half of the century, average ice extent during April will shrink to approximately 50% of its present-day extent. *Id.* at 76,743. In May, when bearded seals are nursing, rearing, and beginning to molt, there will commonly be years with little or no ice; and in June (during molting) ice will often be non-existent. *Id.* at 76,743-44. NMFS also determined that the spring and summer ice edge may retreat to deep waters of the Arctic Ocean basin, which could separate sea ice suitable for pup maturation and molting from benthic feeding areas. *Id.* at 76,744.

NMFS then evaluated how this loss in sea ice habitat would impact bearded seals. NMFS found that for the Beringia DPS to adapt to such loss, bearded seals would likely have to shift their nursing, rearing, and molting to ice-covered areas north of the Bering Strait, or to coastal haul-out sites on shore. *Id.* NMFS found that both scenarios would require the seals to adapt to suboptimal conditions and exploit habitats to which they may not be well suited, likely compromising their reproduction and survival rates. 77 Fed. Reg. at 76,744. For example, this shift “would represent a major behavioral change that could compromise the ability of bearded seals, particularly pups, to escape predators, as this is a highly developed response on ice versus land.” *Id.* at 76,742. Accordingly, NMFS concluded that

projected changes in sea ice pose significant threats to the persistence of the Beringia DPS throughout all of its range in the foreseeable future, and that the Beringia DPS therefore met the definition of a threatened species. *Id.* at 76,748.

In the final rule, NMFS also found that climate change and melting sea ice would intensify other threats to bearded seals, including increased oil and gas development, increases in contaminants, and increased shipping. *Id.* at 76,745-47. Additionally, NMFS concluded that ocean acidification may negatively impact bearded seals by causing changes in their prey populations. *Id.* at 76,742.

### **III. The Litigation**

Following NMFS's final rule listing the Beringia DPS and Okhotsk DPS of the bearded seal as threatened, Petitioners filed separate cases in the District of Alaska challenging the listing. The Center for Biological Diversity intervened to defend the rule.

The district court held that Petitioners did not have standing to challenge the Okhotsk DPS listing<sup>4</sup> and vacated the listing as applied to the Beringia DPS after holding that NMFS's decision was arbitrary and

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<sup>4</sup> Petitioners did not appeal this holding. Their arguments on appeal and in their Petitions focus exclusively on the listing of the Beringia DPS.

capricious. Pet. App. at 42a, 46a, 80a.<sup>5</sup> The district court based its holding on the view that NMFS’s reliance on climate change science to forecast impacts more than 50 years into the future was improper because the science was too uncertain. *Id.* at 79a. The district court also criticized NMFS for not having quantitative data regarding the resilience of bearded seals to cope with climatic and sea ice changes and for not “defin[ing] an extinction threshold for bearded seals and assessing the probability of reaching that threshold within a specified time.” *Id.* at 77a.

NMFS and the Center for Biological Diversity appealed. The court of appeals unanimously overturned the district court’s decision and upheld NMFS’s listing rule. The court held that NMFS “demonstrated that it ‘considered the relevant factors and articulated a rational connection between the facts found and the choices made’” based on the best available science, as the ESA requires. *Id.* at 28a (citations omitted).

The court of appeals rejected the district court’s view that climate change science projecting sea ice loss through 2100 was too uncertain. The court recognized that the models on which NMFS relied represent the best available science on climate change and sea ice loss, just as the D.C. Circuit did in upholding the listing of the polar bear under the ESA. *Id.* at 18a (citing *In re Polar Bear Endangered Species Act Listing*, 709

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<sup>5</sup> “Pet.” refers to the State of Alaska’s petition in No. 17-118; “AOGA Pet.” refers to Alaska Oil and Gas Association’s petition in No. 17-133.

F.3d 1, 4-6, 9-11 (D.C. Cir 2013), *cert. denied sub nom. Safari Club Int'l. v. Jewell*, 134 S.Ct. 310 (2013)). These models leave “no debate that temperatures will continue to increase over the remainder of the century and that the effects will be particularly acute in the Arctic. The current scientific consensus is that Arctic sea ice will continue to recede through 2100.” Pet. App. at 19a. The court also recognized that while there is increased uncertainty in the models regarding the precise magnitude and timing of sea ice loss after 2050, “[t]he ESA does not require NMFS to make listing decisions only if underlying research is ironclad and absolute.” *Id.* at 19a-20a.

Further, as the court explained, NMFS accounted for uncertainties in the IPCC models in numerous ways, including comparing them to observational data and relying on only the models identified as satisfactorily reproducing the magnitude of the observed seasonal cycle of sea ice. *Id.* at 16a. Additionally, NMFS relied on studies conducted after the IPCC’s models that confirmed the downward trend. *Id.* at 21a. The court held that NMFS provided “a reasonable and evidenced-based justification” for its projections. *Id.* at 22a.

The court of appeals also held that by requiring “highly specified data” regarding the bearded seal population’s tipping point and the timing with which the population would reach that point, the district court “imposed ad hoc requirements that exceed the ESA’s provisions.” *Id.* at 26a-27a. The court noted that uncertainty about the precise speed and magnitude of

negative impacts to bearded seals from sea ice loss “does not invalidate data presented in the administrative record that reasonably supports the conclusion that loss of habitat at key life stages will likely jeopardize the Beringia DPS’s survival over the next 85 years.” Pet. App. at 27a.

The court of appeals went on to reject Petitioners’ arguments that NMFS should have analyzed extinction risk using a quantitative analysis establishing the precise magnitude of the species’ decline, stating that it agreed with the D.C. Circuit on this issue. *Id.* at 27a-29a. The court noted that the ESA does not require NMFS “to calculate or otherwise demonstrate the ‘magnitude’ of a threat to a species’ future survival before it may list a species as threatened.” *Id.* at 29a. Instead, the ESA requires NMFS to list a species as threatened if it is “likely” the species will become endangered within the foreseeable future based on an evaluation of the Section 4(a) listing factors, and NMFS’s interpretation of the phrase in accordance with its common meaning as “more likely than not” was reasonable. *Id.*<sup>6</sup>

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<sup>6</sup> The court of appeals did not discuss the district court’s illogical conclusion that NMFS somehow invalidated the listing by not adopting a separate Section 4(d) rule, and Petitioners do not raise this issue in their Petitions. On appeal, AOGA expressly stated that it did not agree with the district court on this point. AOGA Answering Br. at 14, n.7.

The court of appeals also overturned the district court’s holding that NMFS failed to provide Alaska with an adequate response to its comments on the proposed rule under Section 4(i).

The court of appeals subsequently denied Petitioners' request for rehearing en banc. *Id.* at 82a. No judge requested a vote on whether to rehear the case. *Id.*



## **REASONS FOR DENYING THE WRIT**

### **I. Petitioners Present No Credible Argument Why This Case Is Worthy of Review**

Petitioners do not present any valid reason why the Court should hear this case. The listing of a species under the ESA fits squarely within the agency's scientific expertise, and is therefore entitled to deference. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995) (“[w]hen it enacted the ESA, Congress delegated broad administrative and interpretive power to [NMFS].”). The court of appeals correctly applied this well-established principle, and the relevant statutory standards, in upholding NMFS's bearded seal listing.

Petitioners' argument for review rests principally on fact-specific claims that the court of appeals erred in sustaining NMFS's action rather than on identification of legal issues on which the lower courts are divided and require this Court's guidance. In trying to convince the Court to hear this case, Petitioners invent standards they believe the agency should have followed that are not required by the ESA or any court of

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Pet. App. 34a-37a. Alaska does not challenge that holding in its Petition.

appeals. Petitioners also repeatedly pull statements from the record and decision below out of context to suggest the court ignored statutory requirements. The decision, read as a whole, belies Petitioners' fact-bound assertions that the court of appeals erred.

Equally unavailing are Petitioners' strained attempts to suggest the Ninth Circuit's opinion conflicts with this Court's decision in *Bennett v. Spear* and decisions from the D.C. Circuit. To the contrary, the decision below stands for the unremarkable, widely accepted principles that an agency can rely on modeling to project future impacts, and that, in situations where statistical proof is unavailable, it can use other evidence to support its conclusions.

**A. The Bearded Seal Listing Complies With the ESA, and the Court of Appeals Applied the Proper Standards in Upholding It**

The ESA requires NMFS to list a species as threatened when it concludes after analyzing the five categories of threats to the species detailed in Section 4(a) based solely on the best available science that the species is likely to be in danger of extinction within the foreseeable future. 16 U.S.C. §§ 1532(6), 1532(20), 1533(a)(1), 1533(b)(1)(A). In listing the bearded seal, NMFS conducted a rigorous examination of the best available science on changing sea ice levels, analyzed the threat of habitat destruction and the

other listing factors based on that science, and rationally explained its determination that bearded seals are likely to become endangered within the foreseeable future. That analysis fully complied with the ESA, and the court of appeals' fact-specific ruling that NMFS's action was supported by the record is correct.

**i. The Court of Appeals Correctly Upheld NMFS's Conclusion that Bearded Seals Are Threatened by Habitat Loss**

NMFS correctly determined that bearded seals are a threatened species because climate change will destroy the sea ice habitat the species needs to survive within the foreseeable future. In arguing otherwise, Petitioners repeatedly claim that it was inappropriate for NMFS to list bearded seals now because the species is currently abundant. Pet. at 1, 3, 10, 20, 23; AOGA Pet. at 32, 33. Petitioners believe the agency should have waited to list the species until the bearded seal begins to suffer a population decline. Petitioners are incorrect.

The pertinent question in analyzing whether to list a species as threatened is not how many individual animals exist now or whether the population is currently stable or declining. Rather, the deciding factor is how the species will fare *in the future*. See 16 U.S.C. § 1532(20) (threatened species means a "species which is likely to become an endangered species within the foreseeable future"). As Congress made clear, it included the threatened category to "give[] effect to

[NMFS's] ability to forecast population trends by permitting [NMFS] to regulate these animals before the danger becomes imminent." S. Rep. No. 93-307 at 3 (1973). The Ninth Circuit correctly rejected Petitioners' wait-and-see approach, noting that because the ESA is "concerned with protecting the future of the species, not merely the preservation of existing [animals] . . . [NMFS] need not wait until a species' habitat is destroyed to determine that habitat loss may facilitate extinction." Pet. App. at 27a (citations omitted). No court of appeals has adopted Petitioners' suggested approach.

Petitioners are also incorrect in suggesting that NMFS's decision was improper because it focused on habitat loss from climate change. Pet. at 9-10, 24; AOGA Pet. at 1, 18. As the court of appeals correctly recognized, Pet. App. at 28a, the ESA requires NMFS to determine the likelihood of the species' endangerment based on the five listing factors articulated in Section 4(a), including "the present or threatened destruction, modification, or curtailment of its habitat or range." 16 U.S.C. § 1533(a)(1). And the ESA requires NMFS to list a species if it is threatened by any one of those factors. *Id.*; Pet. App. at 28a. NMFS's bearded seal listing focused on habitat loss from climate change because the agency identified this factor as the primary threat to the species' continued existence. 75 Fed. Reg. at 77,502. Nothing in the ESA or its implementing regulations prohibit NMFS from listing a species based on the impacts of habitat destruction from

climate change. And no court of appeals has held otherwise. In fact, the two appellate courts that have considered the issue both held that an agency's reliance on climate change modeling to determine that a species dependent on sea ice likely would become endangered in the foreseeable future was entirely proper. Pet. App. at 18a (citing *In re Polar Bear*, 709 F.3d at 4-6, 9-11).

**ii. The Court of Appeals Properly Upheld NMFS's Analysis of the Foreseeable Future for Threats to Bearded Seals**

NMFS's analysis of threats to bearded seals from climate change through 2100 was the appropriate course of action under the ESA, and the court of appeals was right in upholding it. Alaska's petition claims that by upholding this approach, the Ninth Circuit wrote the phrase "foreseeable future" out of the statute. Pet. at 24, 26. Alaska is wrong. Nothing in the ESA or its implementing regulations prohibits NMFS from finding the foreseeable future to be the next 85 years when the administrative record shows foreseeable threats to a species' habitat over that period. Nor does Alaska point to any conflict among appellate decisions over whether the agency may rely on accepted models showing future habitat loss to determine what is foreseeable. Here, NMFS defined the foreseeable future for threats from climate change and sea ice loss as 2100 precisely because the most recent IPCC models at the time NMFS made its decision analyzed foreseeable impacts through 2100. 77 Fed. Reg. at 76,741. To

ignore this information would have been to ignore the best available science.

As the agency and the court of appeals explained, because of the lag-time between greenhouse gas emissions and sea ice melt, the IPCC's climate forecasts through 2050 were based on existing data about emissions that had already occurred. Pet. App. at 15a-16a (citing 75 Fed. Reg. at 77,503). The projections for 2050 to 2100 used existing information to predict future climate impacts under multiple assumptions about how much greenhouse pollution society will emit in the future ("emission scenarios"). *Id.*

The court rightly decided that "[t]he fact that climate projections for 2050 through 2100 may be volatile does not deprive those projections of value in the rule-making process." *Id.* at 19a. As NMFS explained, while there is increased uncertainty in the models after 2050, they clearly show a continuing warming trend through 2100 that will result in lost sea ice. Specifically, "[a]lthough the magnitude of the warming depends somewhat on the assumed emissions scenario, *the trend is clear and unidirectional . . . there is relatively little uncertainty that warming will continue*"; moreover, "[b]ecause sea ice production and persistence is related to air temperature through well-known physical processes, the expectation is also that *loss of sea ice . . . will continue throughout the 21st century*"; and "[the models] *consistently show continued reductions in ice extent and multi-year ice . . . throughout the 21st century.*" 77 Fed. Reg. at 76,753 (emphasis added).

Further, as the court described, NMFS employed a reasonable, scientifically supported method to reduce the uncertainty in the models. Pet. App. at 20a. First, NMFS analyzed future climate change impacts using two emissions scenarios, one representing an intermediate scenario – which was the closest to the carbon dioxide concentrations observed in the last decade – and one representing an extreme scenario. *Id.* at 16a (citing 75 Fed. Reg. at 77,503-04). This is the typical scientific procedure for accounting for variability when projecting future impacts. 75 Fed. Reg. at 77,503.

Second, as the Ninth Circuit recognized, of the 24 models used to develop the IPCC's Fourth Assessment Report, NMFS relied on only six models to project sea ice concentrations through 2100 because those six models had been identified as satisfactorily reproducing the magnitude of the observed seasonal cycle of sea ice. Pet. App. at 16a-17a. NMFS then evaluated the performance of those six models at simulating sea ice conditions in reasonable agreement with observations in each of the regions inhabited by the Beringia DPS, and based its sea ice projections on only those models that met this performance criterion. *Id.* at 17a (citing 77 Fed. Reg. at 77,504).

Third, NMFS relied on multiple studies developed after the Fourth Assessment Report that not only confirm the downward trend in sea ice, but demonstrate that losses are likely to be worse than the IPCC's calculations suggest. *Id.* at 17a. For example, one study using observational data estimated that sea ice minimums in the Arctic are occurring *at least 30*

*years earlier* than that expected under the IPCC's Fourth Assessment Report, which suggests there could be "[a] nearly sea ice free summer Arctic by mid-century." *Id.* (citing 75 Fed. Reg. at 77,504). Another study found that the "observed rate of Arctic sea ice loss has been reported as *greater* than the collective projections of most IPCC-recognized [models] . . . suggesting that the *projections of sea ice declines within this century may in fact be conservative.*" 77 Fed. Reg. at 76,753 (emphasis added).

The court of appeals affirmed NMFS's reliance on the IPCC's models through 2100 because the agency "provided a rational and reasonable basis for evaluating the bearded seal's viability over 50 and 100 years, and . . . candidly disclosed the limitations of the available data and its analysis." Pet. App. at 22a. The court's holding reflects a careful, record-based analysis and the unexceptional, widely accepted notions that the ESA does not require scientific certainty and agencies can use models to project future impacts, provided the agency discloses the modeling's limitations. *See, e.g., In re Polar Bear*, 709 F.3d at 3, 8-9 (upholding agency's use of climate change and sea ice projections); *Sierra Club v. Costle*, 657 F.2d 298, 334 (D.C. Cir. 1981) (admitting model uncertainties is a "safety valve[]" that strengthens the validity of the process).

**iii. The Court of Appeals Correctly Determined that the ESA Does Not Require NMFS To Establish a Population Tipping Point**

Petitioner AOGA also faults the court of appeals for upholding the listing because it believes NMFS should have interpreted the phrase “likely” in a way that established a precise numerical population tipping-point for bearded seals and quantified the probability the species would reach that point within a specific timeframe. However, the question AOGA asks this Court to review is whether NMFS can list a species as threatened after determining that the species will lose its habitat due to climate change by the end of the century. AOGA Pet. at i. Whether NMFS must first establish an extinction threshold or some other sort of precise population tipping point before it can list a species is not fairly included in the question AOGA asks the Court to resolve.

Regardless, the Ninth Circuit correctly rejected Petitioner’s arguments on this point. The ESA states that a species qualifies as “threatened” when it is “likely to become an endangered species within the foreseeable future.” 16 U.S.C. § 1532(20) (emphasis added). As the court noted, the ESA does not define the term “likely,” so NMFS is under no obligation to define it in a way that quantifies population losses, the magnitude of risk, or an expected “extinction date” or “extinction threshold.” Pet. App. at 29a. NMFS’s interpretation of “likely” in accordance with its common meaning as “more likely than not” was reasonable. *Id.*

AOGA cites no appellate precedent supporting its argument that NMFS was required to quantify likelihood more precisely under the ESA. And the D.C. Circuit has specifically rejected similar arguments that an agency is required to interpret “likely” by reference to some statistically significant threshold. *In re Polar Bear*, 709 F.3d at 15-16.

Imposing a more rigid requirement would be particularly unwarranted for the bearded seal listing, where the available data did not allow computation of precise quantitative targets. Under such circumstances, requiring greater precision would conflict with the ESA’s requirement that NMFS make listing determinations based on the best available science. In its decision, NMFS explained that there is no scientific evidence of the precise numerical point at which bearded seals will be at risk of extinction, but that it could reliably link future declines in specific sea ice habitat to adverse effects on bearded seal survival rates based on available, qualitative evidence. 77 Fed. Reg. at 76,743-44.

Specifically, NMFS determined that it could use forecasted reductions in sea ice, especially where losses would separate sea ice from shallow-water feeding habitat, as a proxy to predict years of reduced survival and recruitment. *Id.* The court of appeals’ decision upholding this approach stands for the unremarkable notion that when statistical data is unavailable, an agency can use other evidence. *See, e.g., In re Polar Bear*, 709 F.3d at 9-10, 15 (analysis of how sea ice loss

harmed polar bears without quantitative population analysis satisfied the ESA).

Petitioners' contention that under this standard, any Arctic species could be listed, Pet. App. at 25, is untrue. Indeed, in the very same rule challenged by Petitioners, NMFS concluded at the proposed rule stage that another population of bearded seals, the Atlantic subspecies found in the Eastern Canadian Arctic, did *not* meet the criteria for listing as threatened or endangered. 77 Fed. Reg. at 76,751. NMFS reached this determination after finding there would still be sufficient sea ice in April-June for the Atlantic bearded seal to perform its essential life functions within major portions of its range through 2100. 75 Fed. Reg. at 77,507. Similarly, after examining how climate change will affect ribbon seals, another Arctic seal species, through 2100, NMFS determined that listing was *not* warranted. 78 Fed. Reg. 41,371 (July 10, 2013). Each listing decision presents a fact-bound question based upon the best available science of the species at issue, and how that particular species will respond to identified threats.

While Petitioners "may have less confidence than [NMFS] in the conclusions that the agency reached" regarding bearded seals, "that is not an appropriate basis for invalidating an agency's rational choice, particularly in matters requiring scientific or technical expertise." *In re Polar Bear Endangered Species Act Listing*, 794 F. Supp. 2d 65, 96 (D.D.C. 2011). Nor does it raise a significant issue meriting this Court's review.

## **B. The Court of Appeals' Decision Does Not Conflict with a Decision from this Court or Any Other Circuit**

The court of appeals upheld the bearded seal listing after thoroughly reviewing the record and correctly applying 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 decision, Petitioners cite decisions from this Court and the D.C. Circuit to suggest a conflict with the Ninth Circuit's approach. But the decisions are inapposite.

First, Petitioner AOGA claims that the court of appeals' decision conflicts with this Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997). AOGA Pet. at 16-19. However, *Bennett* was a standing decision that involved whether the plaintiffs had standing to challenge a biological opinion issued under Section 7(a)(2) of the ESA on the impacts of a particular project on endangered fish. *Bennett*, 520 U.S. at 157. The case did not involve an ESA-listing decision.

In any event, Petitioner's contention that the decision below conflicts with the Court's instruction in *Bennett* that decisions under the ESA "not be based on speculation or surmise" is wholly unfounded. In listing bearded seals, NMFS made three straightforward findings: (1) bearded seals depend on sea ice to survive; (2) sea ice is declining and likely to dramatically decline over the coming decades; and (3) future loss of sea ice is likely to render bearded seals in danger of extinction within the foreseeable future.

As explained in detail above, to reach these findings, NMFS relied on a wealth of scientific evidence demonstrating the vital importance of sea ice to the health and survival of bearded seals. *See, e.g.*, 75 Fed. Reg. at 77,497, 77,504-05 (“[b]earded seals are closely associated with sea ice, particularly during the critical life history periods related to reproduction and molting” and citing numerous studies). NMFS also relied on models widely accepted as the international consensus on climate change to analyze the extent of sea ice loss within the foreseeable future. 77 Fed. Reg. at 76,753; *see also Alaska Oil and Gas Ass’n v. Jewell*, 815 F.3d 544, 558-59 (9th Cir. 2016), *cert. denied sub nom. Alaska Oil and Gas Ass’n v. Zinke*, 137 S.Ct. 2091 (2017) (recognizing IPCC models as the best available science on climate change); *In re Polar Bear*, 709 F.3d at 4-6, 9-11 (same); *Eagle-Picher Industries v. EPA*, 759 F.2d 905, 921-22 (D.C. Cir. 1985) (use of models to project future impacts is widely employed by federal agencies and widely accepted by the courts).

NMFS also determined based on studies in the record that to survive this dramatic loss in its sea ice habitat, bearded seals would have to adapt to suboptimal conditions and exploit habitats to which they may not be well suited, which would likely compromise their reproduction and survival rates. 77 Fed. Reg. at 76,744. Based on this information, NMFS concluded that the projected changes in sea ice habitat pose significant threats to the Beringia DPS throughout all of its range, and it met the definition of a threatened species. NMFS’s determination that listing is warranted

is not based upon “speculation or surmise,” but upon scientific evidence that links declines in sea ice to myriad negative biological responses in bearded seals that threaten the species’ continued existence.

Next, Petitioner AOGA also erroneously suggests that the decision below is inconsistent with the D.C. Circuit’s decision in *Otay Mesa Property, L.P. v. Dep’t of the Interior*, 646 F.3d 914, 916-17 (D.C. Cir. 2011). AOGA Pet. at 21-22. AOGA claims the decisions are in conflict because the D.C. Circuit in *Otay Mesa* rejected the notion that an agency can act without data to support its conclusions whereas the Ninth Circuit endorsed such an approach. AOGA is wrong.

*Otay Mesa* involved a challenge to a critical habitat designation by the Fish and Wildlife Service (“FWS”) for the San Diego fairy shrimp – an animal the size of an ant that lives for roughly 30 days. *Otay Mesa*, 646 F.3d at 915. The FWS determined the species occupied the plaintiff’s property at the time it was listed in 1997 based on a single survey in 2001 that found four individual animals in a tire-rut on the property. *Id.* at 916-17. The court held that the FWS’s conclusion was not supported by substantial evidence because the relevant year for such a determination was 1997, not 2001, and seven other surveys of the property in 2001 *did not find any evidence* of the species in the area. *Id.* at 918.

Here, in contrast, there is ample evidence to support NMFS’s conclusion that bearded seals are a threatened species. As explained above, NMFS based

its decision on IPCC data broadly accepted as the best available science on climate change and subsequent studies supporting the IPCC's findings, the documented relationship between sea ice and bearded seal essential life functions, and the seal's inability to adapt to the dramatic loss of its habitat.

Finally, Alaska appears to suggest that the Ninth Circuit's decision is inconsistent with the D.C. Circuit's decision in *In re Polar Bear*, 709 F.3d 1, upholding the FWS's decision to list polar bears as threatened under the ESA. Pet. at 31-33. But as Alaska itself paradoxically acknowledges, the decision below and the D.C. Circuit's polar bear decision agree at the most fundamental level. *Id.* Indeed, the Ninth Circuit explicitly relied on the *Polar Bear* opinion, and the decisions are entirely consistent.

In both cases, the courts determined that the agency could rely on IPCC models to forecast the impacts of climate change; and both courts held that an agency's reliance on those models to determine that a species dependent on sea ice likely would become endangered in the foreseeable future was reasonable. *In re Polar Bear*, 709 F.3d at 8; Pet. App. at 18a. Moreover, like the decision below, the D.C. Circuit held that an analysis of how sea ice harmed a species satisfied the listing requirements without a quantitative population analysis. *In re Polar Bear*, 709 F.3d at 9-10; Pet. App. at 18a. And, while the loss of sea ice was already having negative impacts on polar bears at the time it was listed, *In re Polar Bear*, 709 F.3d at 9, nowhere in the opinion did the D.C. Circuit hold that a species has

to be in decline in order for an agency to list it, as Alaska suggests. Pet. at 1, 29, 32. Alaska's claim of a conflict between the circuits is therefore unfounded.

## **II. Petitioners' and Amici's Irrelevant Policy Arguments Do Not Justify Granting the Writ**

Petitioners' and their amici's policy arguments do not justify granting their requests that the Court hear this case. Petitioners and amici claim that it was inappropriate for NMFS to list bearded seals because the listing would not benefit the species, but would entail substantial costs. Petitioners' and amici's arguments misstate the facts and the applicable law. Petitioners and amici ignore the numerous conservation benefits embedded in the ESA and NMFS's explicit statements in the final rule regarding the benefits of the listing, and they grossly exaggerate the alleged burdens.

Moreover, the ESA requires NMFS to make listing determinations *solely* on the basis of the best available science. 16 U.S.C. § 1533(b)(1)(A). The economic or political implications of the listing are therefore immaterial. Nor are such implications relevant to the question Petitioners have asked the Court to review.

### **A. Listing Bearded Seals as Threatened Provides Important Conservation Benefits**

The ESA affords bearded seals a number of important safety nets not provided for by any other law.

The entire purpose of listing a species is to trigger these very protections, which include consultation, critical habitat designation, and recovery planning.

For example, Section 7 requires federal agencies to consult with NMFS when their actions may affect bearded seals. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). “The purpose of consultation is to obtain the expert opinion of wildlife agencies to determine whether the action is likely to jeopardize a listed species . . . and, if so, to identify reasonable and prudent alternatives that will avoid the action’s unfavorable impacts.” *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012) (en banc). Additionally, NMFS may “suggest modifications” to an action during consultation to “avoid the likelihood of adverse effects” to the listed species even when the action would not by itself jeopardize the species’ continue existence. 50 C.F.R. § 402.13(b).

Further, the requirement that NMFS designate critical habitat for bearded seals, 16 U.S.C. § 1533(a)(3), will also provide important benefits. Critical habitat includes the specific areas occupied by the species that contain physical or biological features essential to its survival and recovery. *Id.* § 1532(5)(A)(i). Section 7 requires federal agencies to consult with NMFS to ensure their actions will not destroy or adversely modify this habitat. *Id.* § 1536(a)(2).

A critical habitat designation also provides several additional benefits. For example, designating critical habitat identifies those geographical areas most vital

to the species. Without a critical habitat designation, the process of identifying the most important habitat features “will be made piecemeal, as individual federal projects arise.” *Conservation Council v. Babbitt*, 2 F. Supp. 2d 1280, 1288 (D. Haw. 1998). Moreover, “the designation of a critical habitat educates the public as well as state and local governments, and affords them the opportunity to participate in the designation.” *Id.* This awareness, in turn, can help land owners and managers develop conservation plans for identified areas and inform local governments about areas that could be conserved under local ordinances. 75 Fed. Reg. 76,086, 76,125 (Dec. 7, 2010).

Additionally, Section 4(f) mandates that NMFS develop and implement a recovery plan for bearded seals. 16 U.S.C. § 1533(f). Such a plan must include management actions that provide a roadmap for the species to be removed from the ESA-list. *Id.* Recovery planning for bearded seals can include measures to mitigate or avoid actions that exacerbate climate change, and call for the stabilization of sea ice loss at a particular threshold, among other things.

NMFS expressly recognized the benefits these provisions would provide to bearded seals. For example, NMFS found the listing could “enhance national and international cooperation and coordination of conservation efforts.” 77 Fed. Reg. at 76,764. NMFS also found the listing would “enhance research programs; and encourage the development of mitigation measures that could help slow population declines.” *Id.*

Further, according to NMFS, “the development of a recovery plan will guide efforts intended to ensure the long-term survival and eventual recovery of the Beringia DPS.” *Id.*

Petitioners do not acknowledge these findings, and instead claim that NMFS “recognized that there would be no conservation benefit from its decision to list the bearded seal as threatened.” Pet. at 22. In support, Petitioners cite NMFS’s decision not to issue regulations for bearded seals under Section 4(d) of the ESA. *Id.* But this separate, discretionary decision is not relevant to the agency’s decision to list the species in the first instance and does not negate NMFS’s clear findings regarding the benefits of the listing.

### **B. The Bearded Seal Listing Will Not Unduly Burden Alaska Natives or Industry**

Petitioners’ and amici’s contentions about the economic and societal impacts of the designation are both disingenuous and irrelevant. Petitioners and amici try to create the impression that the bearded seal listing means that Alaska Natives can no longer engage in traditional subsistence activities and that resource extraction in the Alaskan Arctic can no longer proceed. Pet. at 2, 18-22; AOGA Pet. at 3, 25-31; Wyoming Pet. at 7-9; AFN Pet. at 9-23; ARDC Pet. at 9-19. Those claims are false.

As an initial matter, NMFS did not extend the “take” prohibition to bearded seals. This means that Alaska Natives can continue to harvest bearded seals

for subsistence and cultural purposes.<sup>7</sup> Moreover, while the take prohibition applies to any person, the consultation, critical habitat, and recovery planning requirements mandated by the listing only apply to the federal government. *See* 16 U.S.C. §§ 1533(a)(3); 1533(f); 1536(a)(2). This means that the duties and prohibitions of the rule fall not on the public, but the federal government.

For example, federal agencies must ensure that actions they fund, carry out, or permit will not jeopardize the continued existence of bearded seals or adversely modify their critical habitat (once designated by NMFS), which federal agencies will do through Section 7 consultation with NMFS. 16 U.S.C. § 1536(a)(2). Consultation is not required for activities in which there is no federal involvement.

Contrary to Petitioners' suggestions, 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 the species or its critical habitat, and NMFS concurs in writing. *See, e.g.*, 50 C.F.R. § 402.13(a).

If bearded seals might be adversely affected, formal consultation is initiated, which culminates in a biological opinion in which NMFS determines whether

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<sup>7</sup> Even if NMFS had prohibited take of bearded seals, takes by Alaska Natives for subsistence purposes would not be prohibited because the ESA expressly exempts such takes from the ESA's prohibitions. 16 U.S.C. § 1539(e).

the federal action is likely to jeopardize the species' survival or recovery or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.14, 402.02. If consultation results in a jeopardy or adverse modification determination, NMFS develops measures that can be incorporated into the project to mitigate impacts on bearded seals and allow the project to proceed. 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. *See id.*; 50 C.F.R. § 402.11. The speculation that the bearded seal listing will devastate economic activity is unwarranted. Indeed, multiple Arctic drilling projects have recently been proposed or approved in bearded seal habitat.<sup>8</sup>

Moreover, Petitioners' complaints about the delay consultation can cause are also exaggerated. Scientific research demonstrates that the median duration for consultations conducted from 2008-2015 was 13 days for informal consultation and 82 days for formal consultation,<sup>9</sup> well-within the 90-day timeframe contemplated by the ESA. 16 U.S.C. § 1536(b).

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<sup>8</sup> *See* Eni US Operating Co., Inc. – 2017 Beaufort Sea EP, <https://www.boem.gov/eni-ep-2017/> (approval of exploratory drilling in Beaufort Sea) (last visited Oct. 18, 2017); Hilcorp Alaska LLC, <https://www.boem.gov/Hilcorp-Liberty/> (proposal to approve oil development project in Beaufort Sea) (last visited Oct. 18, 2017).

<sup>9</sup> Jacob W. Malcom and Ya-Wei Li, Data contradict common perceptions about a controversial provision of the US Endangered

Petitioners also try to demonstrate the alleged burden of the listing by pointing to the estimated costs of recovering elkhorn and staghorn corals, Snake River sockeye salmon, and Oregon Coast coho salmon. AOGA Pet. at 26. But the cost of recovering other imperiled species has no bearing on whether the Court should grant review in *this* case.

If anything, Petitioners' examples demonstrate the prudence and importance of listing bearded seals now *before* the species suffers a precipitous decline, as recovering the species at that point will likely be more difficult, and thus more expensive. *See Fed'n of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, 1165 (N.D. Cal. 2000) (“[t]he ESA recognizes that the task of conservation becomes more difficult and perhaps moot if restoration action is taken only when there is imminent threat of extinction.”). NMFS estimated elkhorn and staghorn corals had declined *more than 97%* by the time it listed them under the ESA. Dep't of Commerce *et al.*, Recovery Plan: Elkhorn coral (*Acropora palmata*) and Staghorn coral (*A. cervicornis*), at ix (Mar. 2015). Similarly, by the time Snake River sockeye salmon were listed as endangered in 1991, all of the Snake River sockeye salmon populations but one were gone, and that population had dwindled to *fewer than 10 fish* per year. NOAA Fisheries, ESA Recovery Plan for Snake River Sockeye Salmon (*Oncorhynchus nerka*), at 29 (June 8, 2015). And NMFS

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Species Act, Proceedings of the National Academy of Sciences, Vol. 112, No. 52, Dec. 2015, <http://www.pnas.org/content/112/52/15844.full>.

estimated that Oregon coast coho salmon declined by *more than 95%* before being protected under the ESA. NOAA Fisheries, Final ESA Recovery Plan for Oregon Coast Coho Salmon (*Oncorhynchus kisutch*), at 1-1, 1-2 (Dec. 2016).

Finally, even if Petitioners' inflated claims were accurate (which they are not), the ESA provides that listing determinations must be based "solely" on the "best available . . . data" concerning the listing factors. 16 U.S.C. § 1533(b)(1)(A). Thus, "the ESA clearly bars economic considerations from having a seat at the table when the listing determination is being made." *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277, 1284 (10th Cir. 2001). In fact, "the word 'solely' is intended to remove from the process of the listing or delisting of species *any factor* not related to the biological status of the species." *Id.* at 1284-85 (citing H.R. Rep. No. 97-567, pt. 1, at 29 (1982), emphasis added). Petitioners' and amici's policy arguments thus in no way call into question the correctness of the lower court's opinion or establish a need for this Court to review it.



**CONCLUSION**

The Court should deny the Petitions.

Respectfully submitted,

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October 2017