16-596

No. 16-____

IN THE

Supreme Court of the United States

STATE OF ALASKA, ET AL.

Petitioners,

v.

SALLY JEWELL

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The U.S. Fish & Wildlife Services (FWS) typically must designate "critical habitat" for any species it lists as threatened or endangered under the Endangered Species Act (ESA). The statute clearly indicates that Congress intended these designations to encompass only the *specific* areas on which features essential to conserving the species are actually found. For decades, FWS applied the statute that way. But over the last decade, it has begun making wholesale designations that encompass huge swaths of territory—including areas that cannot possibly be critical habitat—and shifting the burden to states, Native communities, and regulated parties to prove that activities on certain included areas will not actually harm the species. Ironically, in the case of designations like the polar bear habitat at issue here, FWS's hugely overbroad approach threatens the viability of longstanding, Native *human* communities that have coexisted with the species for millennia, but are now struggling to maintain *themselves*. And it does so even though FWS amazingly admits that these designations achieve no conservation purpose at all.

The Ninth Circuit, which decides most of the relevant cases, has nonetheless approved such designations, adopting an exceptionally broad standard regarding the specificity required of FWS. It permits drawing enormous boundaries that encompass allegedly critical habitat without regard to whether essential features are found *throughout* the area, or whether such broad designations provide conservation benefits relative to their human cost. That permissive approach conflicts with the statute and decisions in other circuits. The question presented is:

Whether the Ninth Circuit's exceedingly permissive standard improperly allows FWS to designate huge geographic areas as "critical habitat" under the ESA when much of the designated area fails to meet the statutory criteria?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners: State of Alaska; Arctic Slope Regional Corporation; The North Slope Borough; Nana Regional Corporation, Inc.; Bering Straits Native Corporation; Calista Corporation; Tikigaq Corporation; Olgoonik Corporation, Inc.; Upeagvik Iñupiat Corporation; Kuukpik Corporation; Kaktovik Iñupiat Corporation; The Iñupiat Community of the Arctic Slope. Petitioners Alaska Oil & Gas Association and American Petroleum Institute are filing a separate petition for writ of certiorari.

Respondents: Sally Jewell, Secretary of the Interior; Daniel M. Ashe, Director of U.S. Fish & Wildlife Service); U.S. Fish & Wildlife Service.

Intervenors: Center for Biological Diversity; Defenders of Wildlife; Greenpeace, Inc.

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INTRODUCTION

This case concerns an area roughly the size of California that FWS has designated as "critical" habitat for the polar bear (*Ursus maritimus*) under the Endangered Species Act (ESA), even though that designation includes substantial areas the bears cannot possibly use. This overbroad designation also includes areas immediately surrounding Alaska Native communities, which are themselves threatened because of FWS's arbitrary imposition on ancestral lands that are vital to maintaining their traditional ways of life. Surprisingly, FWS imposed this massive, haphazard designation—which will have huge consequences for the State of Alaska, Alaska Native communities, and others—despite admitting that it will achieve virtually no conservation purpose. In short, FWS has chosen to designate a massive area that merely includes *some* critical polar bear habitat, without limiting the designation to areas that actually contain essential habitat features, even though the humans who live there (and have lived there for millennia) will suffer as a result, and nothing useful will come of it.

These stark facts illustrate the importance—and ultimately, the error—of the all-encompassing approach to habitat designation FWS now regularly employs, and which the Ninth Circuit has repeatedly blessed where other circuits would not. This relatively recent approach is directly contrary to how FWS long administered this statute—likely because it is irreconcilable with Congress's intent and harmful to State sovereignty and Native interests, while achieving essentially nothing from the *agency's own perspective*. This senseless situation should not persist, and only this Court can stop it.

This case, moreover, is a perfect vehicle through which to do so. The critical State and Alaska Native interests implicated by FWS's unusually massive and overbroad designation highlight the stakes at issue. And the record below, including the district court's opinion rejecting FWS's designation, isolates the core arbitrariness in FWS's approach. Among other things, it shows that FWS has fundamentally abandoned the statutory design by making haphazard designations measuring hundreds of thousands of acres and forcing affected communities—rather than the agency itself—to identify evidence that "specific" areas do or do not include "essential" features for the species. *See* 16 U.S.C. §1532(5). Meanwhile, the Ninth Circuit's opinion isolates the critical legal issue by specifically faulting the district court for imposing too high a "standard of specificity" on FWS, even though specificity is exactly what the statute requires. *See* Pet. App. 32a.

Because the Ninth Circuit has refused to change course, has exclusive jurisdiction over Alaska, and has an outsized role in this general area of law, only this Court can right this statutory ship and return critical habitat designations to Congress's intended purpose. In fact, as even the agency itself has recognized, over-designation not only harms human communities, but undermines conservation efforts by wasting resources that could be put to better use. Certiorari should be granted, the decision below should be reversed, and FWS should reconsider its designation with the specificity Congress required. That, in turn, will ensure the full protection of the law for the polar bear, the State and her citizens, and the Alaska Native communities that have inhabited this area for thousands of years.

PETITION FOR A WRIT OF CERTIORARI

The State of Alaska and other listed parties respectfully petition for a writ of certiorari to review judgments of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is published at 815 F.3d 544 (Pet. App. 1a). The district court's decision is published at 916 F. Supp. 2d 974 (Pet. App. 47a).

JURISDICTION

The Ninth Circuit's judgment issued February 29, 2016. Pet App. 46a. A timely rehearing petition was denied on June 8, 2016. Pet. App. 109a. Justice Kennedy extend this petition's due date to November 4, 2016, *see* No. 16A211. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

16 U.S.C. §1533(a)(3)(A)(i) provides in relevant part:

> The Secretary, ... shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat.

16 U.S.C. §1533(b)(2) provides in relevant part:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.

16 U.S.C. §1532(5) defines "critical habitat" as follows:

> (A) The term "critical habitat" for a threatened or endangered species means—
>
> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, 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 protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.
>
> * * * * *
>
> (C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

STATEMENT OF THE CASE

1. This case concerns the designation of critical habitat for the polar bear across huge swaths of Alaska. Among other things, this designation covers a long strip of Arctic coastline, stretching from the Canadian border around to Alaska's west coast and through the Bering Straits to points in the southwest. Much of the designation is on Alaska's "North Slope," which is high above the Arctic Circle, and one of the world's harshest environments: The total human population there is below 10,000; the high temperature is above freezing only about 120 days a year; and two weeks after this petition is filed, the sun will set and not rise again for 65 days. Yet while it may seem harsh and uninviting to some, this territory is vital to Alaska Natives who have called it home for millennia. They depend on the unencumbered use of their land—which they fought to retain in an express congressional settlement of their aboriginal land claims—to survive and maintain their traditional ways of life. *See infra* p.6.

Importantly, in addition to the many obvious, day-to-day challenges created by this harsh environment, any new development or major maintenance projects pose special problems in this part of the world. Materials need to be shipped from great distances and ice and wind routinely make the area inaccessible. Moreover, it is simply too cold and dark to undertake many tasks for eight months of the year. Items that are daily indulgences or even necessities in most of the country are luxuries. Minor disruptions in a town's or business's plans quickly multiply into yearlong delays and genuine emergencies because of fading warmth, light, and accessibility. *See* ASRC Comments, 74 Fed. Reg. 56,068 ("2009 Comments") (Dec. 28, 2009), at 13.

The Arctic environment means that northern Alaska and its sea-ice are home to species unknown in the continental United States like polar bears, ice seals, and beluga and bowhead whales. Alaska Native peoples have long co-existed with and depended upon these species—hunting and sharing them as part of a traditional subsistence culture they have fought to maintain to this day. Accordingly, although whaling is now controlled and polar bears are listed as a threatened species, many Alaska Natives retain the right to hunt these Arctic marine mammals for subsistence, and are directly involved in managing their sustainability.

Alaska Natives' ancestral homelands spanned huge territories. Their current rights, however, result from the settlement of their aboriginal title claims by the Alaska Native Claims Settlement Act of 1971 (ANCSA). Hoping to improve on aspects of federal Indian policy from the Lower-48, Congress settled these claims not by creating reservations, but by establishing several "regional corporations" that would manage land and mineral rights, along with "village corporations" that would be centered in existing communities. Formation of these corporations was intended to assist Native people to remain in their traditional homes through the subsidies provided by their shares in these structures. *See generally* 43 U.S.C. §§1601 *et seq.*; *id.* §1606(r) (authorizing these corporations to provide for "the health, education or welfare of such shareholders or family members"). Importantly, this was a settlement; Alaska Natives surrendered their vast land claims *in exchange* for clear rights over a fraction of their ancestral lands to be administered and managed by their own regional corporations for their exclusive

benefit. Thus, the corporations like the Arctic Slope Regional Corporation (ASRC) and others who join the State of Alaska as petitioners here are representatives of the designated area's longstanding Alaska Native communities. Among the core values of these corporations is working to maintain their communities' traditional subsistence cultures and promoting the education of future generations of the community's "shareholders."[1]

The benefits ANCSA promised cannot be achieved, however, absent reasonable economic development of northern Alaska's natural resources. Indeed, oil and gas extraction is a key resource for the ANCSA corporations, the State, and local governments. Among other things, royalties and property taxes from these operations are critical in raising the funds necessary for Alaska Natives to maintain their traditional subsistence lifestyle and remain in their villages, given the difficulty of delivering food, supplies, medical treatment, and other necessities in this remote environment. Royalties also fund a major portion of Alaska's governmental services and operations. For decades,

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[1] Accordingly, the Alaska Native regional corporation stands in stark contrast to the typical corporation. Rather than purely maximizing shareholder return, regional ANCSA corporations treat the preservation of their community's culture and way of life as among its primary duties to shareholders. Business operations are thus governed by the respective Alaska Native community's longstanding values and norms. As an example, many of the regional corporations grant extensive leave so that their employees/shareholders can hunt or attend whaling festivals. Regional and village tribal organizations, like the Iñupiat Community of the Arctic Slope, have also been established for governance of members.

resource extraction has also been a means for corporations such as ASRC to fulfill their purpose under ANCSA to provide for the health, education, and welfare of its shareholders. Alaskans also share in the State's resource wealth through the yearly Alaska Permanent Fund dividend (and the current reprieve from income and sales taxes), which helps many Alaska Native families to stay above the poverty line. Barriers to effective development or maintenance projects (such as FWS's overbroad designations) thus threaten the State's sovereign interests, the life-blood of its citizens, and longstanding Alaska Native communities.

2. a. In 2008, FWS determined that the polar bear was a "threatened" species under the ESA, 16 U.S.C. §1533(a)(1). *See Determination of Threatened Status for the Polar Bear*, 73 Fed. Reg. 28,212 (May 15, 2008). Once a species has been listed as endangered or threatened, the Secretary of Interior (or FWS as her delegate) must typically "designate ... critical habitat" for that species. 16 U.S.C. §1533(a)(3)(A)(i). The statute defines two possible categories of designated critical habitat: FWS may designate a portion of the territory a species *currently* occupies, *id.* §1532(5)(A)(i), or, under different criteria, may designate territory the species does *not* now occupy, *id.* §1532(5)(A)(ii).

Under §1532(A)(5)(i), which FWS relied on exclusively for this designation, FWS may designate only "the *specific* areas within the geographical area occupied by the species, at the time it is listed ... *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 protection." *Id.* (emphases added). During the designation process, FWS must also consult, "as appropri-

ate," with "affected States." *Id.* §1536(a)(2); *see id.* §1535(a) ("[T]he Secretary shall cooperate to the maximum extent practicable with the States[.]"). In adopting this language in its 1978 ESA amendments, Congress explained that it had chosen an "extremely narrow definition" of critical habitat. S. Comm. on Env't & Pub. Works, 97th Cong., Legislative History of the Endangered Species Act of 1973, as Amended in 1973, 1977, 1978, and 1980, at 1220-21 (Comm. Print 1982).

This narrow definition was necessary to protect local populations from the serious consequences of potentially overbroad designations. Significantly, once an area is designated as a "critical habitat," no federal agency can authorize, fund or carry out any "action" that is "likely to ... result in the destruction or adverse modification of the habitat." 16 U.S.C. §1536(a)(2). This restriction triggers a so-called "Section 7 consultation" every time any project that requires a federal permit or involves a modicum of federal funding is contemplated within the designated area. In the Section 7 consultation, the acting agency, regulated parties, and FWS must consult regarding the effects of any proposed action, a process that creates "[c]onsiderable regulatory burdens and corresponding economic costs [that] are borne by landowners, companies, state and local governments, and other entities as a result of critical habitat designation." Andrew J. Turner & Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 Envtl. L. Rep. News & Analysis 10,678, 10,680 (2013). A Section 7 consultation sometimes allows the project to go forward, sometimes requires remediation or modifications before a project can proceed, and sometimes scuttles a project entirely.

In places like the North Slope—where the risks associated with undertaking development are acute and the annual window for such projects is small—the associated burdens and uncertainties can keep important development or maintenance projects from even getting off the ground. *See supra* p.5. That uncertainty is amplified here because, to the best of our knowledge, no previous critical habitat designation has—like this one—swept so broadly and encompassed so much territory that is within or immediately adjacent to areas where people already live, work, and commute. Accordingly, regulated parties affected by the designation have no way of predicting how FWS will manage the endless Section 7 consultations that will result, and that uncertainty alone is certain to have serious consequences.

b. Since the current requirement went into effect in 1978, FWS's approach to critical habitat designation has been both inconsistent and baffling. Alarmingly, FWS and Interior have themselves repeatedly recognized—under multiple administrations—that their designations are *achieving virtually nothing* by way of conservation. Indeed, FWS summarized its own experience as follows: "In 30 years of implementing the [ESA], the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources." 70 Fed. Reg. 68,294, 68,294-95 (Nov. 9, 2005).

This is not a new position. President Clinton's Interior Secretary Bruce Babbitt told Congress in 1999 that "the designation of critical habitat under the Endangered Species Act ... does not work," and "does not produce good results." 145 Cong. Rec. S4423-4424

(daily ed. Apr. 29, 1999). FWS Director Jamie Clark similarly testified that "in 25 years of implementing the Act we have found that designation of critical habitat provides little additional protection." *Hearing before the House Comm. on Nat. Resources on Endangered Species Act Enforcement*, 1999 WL 350545 (May 27, 1999). FWS has proclaimed that designation "provides little or no conservation benefit despite the great cost to put it in place .... lead[ing] the Service to seriously question its utility and value." 62 Fed. Reg. 39,129, 39,130-31 (July 22, 1997).[2] And recent academic studies have backed up that view, finding that critical habitat designations promote little conservation effect as compared to other measures available to FWS. *See* Owen, *supra*, at 172-73 (concluding, after empirical study of 4,000+ biological opinions, "that critical habitat designations have little effect").

As the Tenth Circuit aptly explained, "[t]he root of the problem lies in the FWS's policy position that [critical habitat designations] are unhelpful, duplicative, and unnecessary." *N.M. Cattle Growers Ass'n v. FWS*, 248 F.3d 1277, 1283 (10th Cir. 2001). For a long time, FWS's skeptical attitude towards designations led it to avoid making them at all—and when it did, it made them narrow and specific. Recently, however, FWS's indifference towards this process has led it to respond to lawsuits from environmental groups by simply over-

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[2] See generally Dave Owen, *Critical Habitat & the Challenge of Regulating Small Harms*, 64 Fla. L. Rev. 141, 144-45 (2012); Amy Sinden, *The Economics of Endangered Species: Why Less is More in the Economic Analysis of Critical Habitat Designations*, 28 Harv. Envtl. L. Rev. 129, 157-59 (2004) (discussing FWS's attempts to avoid designations throughout the 1980s and 1990s).

designating huge areas of territory as critical habitat—apparently on the theory that it can still permit development through the Section 7 process later on. *See, e.g.*, 75 Fed. Reg. 63,898 (Oct. 18, 2010) (designating approximately 20,000 miles of streams and shorelines and 800 square miles of lakes and reservoirs as critical habitat for the Bull Trout); 74 Fed. Reg. 8,616 (Feb. 25, 2009) (designating approximately 39,000 square miles as critical habitat for the Canada Lynx).

c. The habitat designation at issue here epitomizes this newer approach. FWS ultimately designated about 187,000 square miles in northern Alaska and the adjacent Outer Continental Shelf region as critical. *Designation of Critical Habitat for the Polar Bear*, 75 Fed. Reg. 76,086 (Dec. 7, 2010). This area is larger than all but two states (Texas, and Alaska itself). At the time, it was by far the largest critical habitat designation in ESA history, although the troubling trend towards even larger and less-specific designations has continued. *See, e.g.*, 79 Fed. Reg. 73,010 (Dec. 9, 2014) (proposed designation of approximately 350,000 square miles as critical habitat for Arctic Ringed Seal). 79 Fed. Reg. 39,756, 39,856 (July 10, 2014) (designation of approximately 317,000 square miles as critical habitat for Loggerhead Sea Turtle).

As noted above, the statute only permits FWS to designate *specific* areas within the polar bear's occupied range that *actually* contain the physical or biological features *essential* for polar bear conservation (so-called "essential features"). *See supra* p.8. FWS thus deconstructed the territory into three "units" that (it said) contained different essential features: Unit 1 was "sea ice over waters 300m or less in depth that occurs over the continental shelf with adequate prey re-

sources"; Unit 2 was "terrestrial denning habitats"; and Unit 3 was "barrier island habitats." 75 Fed. Reg. at 76,115. For Unit 2 in particular, FWS concluded that the present, "essential features" included "[s]teep, stable slopes;" (b) "unobstructed, undisturbed access between den sites and the coast;" (c) "sea ice in proximity of terrestrial denning habitat ... to provide access to terrestrial den sites;" and (d) "the absence of disturbance from humans and human activities." *Id.*

Affected communities submitted extensive comments challenging the massive breadth of the proposed designation. The State of Alaska argued that this broad designation would: (1) stifle the resource extraction that supports critical State operations and benefits; (2) lead to extensive litigation and consultation costs; and (3) harm Alaska Native interests by decreasing available job opportunities. State of Alaska, Additional Comments, 75 Fed. Reg. 24,545 ("Alaska Comments") (July 6, 2010). Alaska Native groups explained that the designation would "diminish our ability to do the very things that Congress authorized us to do: provide benefits for the health, education and welfare of our Iñupiat shareholders," and that it would "impose[] burdens on [the] life-style, economy and future" of Alaska Natives, who make up 70% of the North Slope's population. *See, e.g.*, 2009 Comments, *supra*, at 4, 7. Meanwhile, these local burdens, would not "address[] the sources of the threats to the polar bear or its habitat," which are rooted in a *global* cli-

mate phenomenon rather than a *local* conservation effort. *Id.*[3]

Dismissing these concerns, FWS designated a huge critical habitat for the polar bear. For Unit 2, FWS designated *all* land five miles inward from the Arctic coast from Barrow to the Kavik River, and 20 miles inward from there to Canada. This coastal strip, FWS said, would encompass at least 95% of "all historical confirmed probable dens," 75 Fed. Reg. at 76,120, although much of the territory included was not even potentially suitable for polar bear denning. Remarkably, this designation included areas *immediately* surrounding developed and inhabited villages—areas where polar bears are routinely and legally hazed away, *see* 50 C.F.R. §18.34 (2016)—as well as preexisting industrial development in Deadhorse, which is home to the largest oil field in North America. 75 Fed. Reg. at 76,128-29. For "Unit 3," FWS designated *all* barrier islands along the coast from the Canadian border to Hooper Bay, as well as all "ice, marine waters, and terrestrial habitat" within 1 mile of the islands' mean high-tide line as a "no disturbance zone." *Id.* at 76,120.

Shockingly, FWS made this super-broad designation even though its economic analysis concluded that

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[3] As these groups further explained, unencumbered use of the land and its resources is necessary to Alaska Natives' "ability to maintain cultural traditions," which "depends in large part on their ability to stay in their ancestral villages." ASRC Comments, 75 Fed. Reg. 24,545 ("2010 Comments") (July 6, 2010). That ability in turn depends on the "jobs," "tax base," and "revenues that are broadly shared among Alaska Natives" and generated by the leasing activity that FWS's designation would severely harm.

it "d[id] not anticipate that the critical habitat designation will result in polar bear conservation measures above and beyond those already required." *Economic Analysis of Critical Habitat Designation for the Polar Bear in the United States: Final Report*, FWS (Oct. 14, 2010), goo.gl/IccIcw. This was a sound conclusion because the Marine Mammal Protection Act (MMPA) already severely limits hunting and other activities detrimental to polar bear. The MMPA, in coordination with efforts by Alaska Natives themselves and the Iñuit value of respect for nature, has been highly effective for decades in managing the impact of human activity on polar bear habitat. *See* 16 U.S.C. §1372. But it is nonetheless remarkable: FWS designated a "critical" habitat for the polar bear the size of California, while affirmatively finding that there was no good reason to do so.

3. Thereafter, various parties—including Alaska Native organizations, the North Slope Borough, and the State—challenged aspects of FWS's designation, including the size and scope of Units 2 and 3. Concluding that they lacked the required specificity, as well as evidence to support the actual presence of essential features throughout the designated areas, the district court invalidated these designations. Pet. App. 47a-101a.

With respect to Unit 2, the district court explained that "in order to be designated as critical habitat, the entirety of Unit 2 had to have located within it at least one of the" essential features. *Id.* 89a. Looking at the agency's data, however, the court found that the Unit 2 designation was "[b]ased *solely* on the location of the confirmed or probable den sites," as the record was largely devoid of any evidence on the other three es-

sential features (described *supra* p.13). *See id.* 90a-91a. Meanwhile, the evidence showed terrain *even potentially* suitable for polar bear dens on *only 1%* of the designated area—let alone sites with confirmed or probable dens themselves. *Id.* 91a. There was thus "no way to know if ninety-nine percent of Unit 2 contains the essential features because there is no evidence in the record ... that shows where such features are located." *Id.* 93a. In short, the district court concluded that FWS could only designate territory on which the data showed essential features were actually "found," 16 U.S.C. §1532(5)(A)(i), rather than a huge ribbon of coastline capturing some specific areas with those features along with substantially more land.

Further, the district court recognized the inherent arbitrariness of FWS including within its Unit 2 designation areas around Deadhorse, Alaska, which were "rife with humans, human structures, and human activity." *Id.* 91a-92a. Such areas necessarily place bears and humans in close proximity, which would appear to be the antithesis of a proper habitat for polar bear denning, *id.* 92a—particularly given FWS's own conclusion that one "essential feature" of critical denning habitat would be "the absence of disturbance from humans and human activities." *Supra* p.13.

For Unit 3, the district court similarly found that FWS failed to present any evidence showing the location of the polar bear's "access along the coast to maternal den sites and optimal feeding habitat"—one of the supposedly essential features of barrier island territory. *Id.* 94a-96a. According to the court, simply noting that polar bears moved between the barrier islands provided insufficient support for designating *all* of the barrier islands along the western and northern

coast from Hooper Bay to Canada as critical habitat. *Id.*

The Ninth Circuit reversed. Most importantly, it held that the district court applied too high a "standard of specificity," and that FWS did not have to limit its critical habitat designation to the particular areas where evidence showed the presence of essential features. Pet. App. 24a. The court explained that the broad purposes of the ESA required FWS to "*look beyond evidence* of actual presence" and consider *all* land that *may* include essential features and *might* be necessary to grow polar bear populations in the future—not just the land necessary to maintain the current population. *Id.* 25a-26a (emphasis added). For Unit 2, the court held that FWS properly relied on the "unassailable fact that bears need room to roam," and climate-change considerations in designating a large area for future denning even though all potential denning habitats accounted for less than 1% of the designated area. *Id.* 30a-32a. Similarly, for Unit 3, the court noted that FWS properly examined record evidence which showed that polar bears use "barrier islands as migration corridors" in deciding to designate *all* land and water one mile beyond the high tide line of the islands. *Id.* 35a-38a.

4. The State, Alaska Native Corporations and Village Corporations, a regional Alaska tribal organization, local governments for the North Slope region, and affected industry groups sought rehearing *en banc*, urging the Ninth Circuit to reconsider its permissive approach to review of critical habitat designations. Rehearing was denied. Pet. App. 108a-109a.

REASONS FOR GRANTING THE WRIT

This case compellingly illustrates the need for this Court to clarify the appropriate application of sections 1532 and 1533 of the ESA, and to rescue the critical habitat designation process from FWS's increasingly arbitrary and capricious implementation. Here, FWS designated a California-sized critical habitat in contravention of the applicable statute, all while affirmatively recognizing that doing so was pointless. Included within that designation are areas where polar bears are actively chased away to protect the safety of the local community. The only effect of such a broad and haphazard designation is to undermine Alaska's sovereignty with respect to the designated land and the resources used to fund critical operations. Relatedly, such a carelessly overbroad designation imposes potentially incurable harms on Alaska Native communities that have called this area home for thousands of years. The text, context, and legislative history of the ESA make quite clear that Congress intended essentially the opposite approach from the one FWS has adopted: Critical habitat designations were meant to be specific, narrow, and limited, rather than drawing a large, undisciplined circle around *some* critical habitat and so much more. It is thus remarkable both that FWS makes these hugely overbroad designations—which even *it* thinks have no purpose—and that the courts have failed to rein them in.

This situation persists, however, because (1) FWS has chosen to massively over-designate habitat in the hopes of avoiding interest-group lawsuits and cleaning up the problem through the Section 7 process; and (2) the Ninth Circuit, which hears the bulk of these cases, has abdicated serious scrutiny of FWS's approach. On-

ly this Court can now fix the problem, and there are two broad sets of reasons it should grant immediate review.

First, the decision below is plainly wrong and precisely isolates both FWS's untenable approach to the statute and the Ninth Circuit's toothless review. The district court here rejected FWS's designation because it stretched far beyond the areas on which the data showed that "essential features" could actually be "found," 16 U.S.C. §1532(5)(A), and yet the Ninth Circuit reversed because this was too high a "standard of specificity." Pet. App. 24a. Specificity, however, is just what the statute requires. The Ninth Circuit has an outsized role in this area of law and has shown no inclination to change course, even though the holdings that make its review so lax are in tension with other circuits'. Moreover, there are many sovereign states and Native groups that are yoked to the Ninth Circuit's serious error until this Court intervenes. If this Court denies review, the harms visited on them in the interim may be irremediable.

Second, this issue is critical for both States and Native communities *and* environmental interests alike. FWS's capricious implementation of the statute imposes momentous harms on the former parties by impinging their sovereignty and needlessly destroying economic development in areas with threatened *human* communities. Meanwhile, the designations' overbreadth robs them of any meaning when it comes to making concrete conservation decisions. The result is to broadly stymie development while guaranteeing no focused protection in the parts of the designated area that might really be essential to the species. This is textbook agency arbitrariness. If, instead, the agency

hewed to the statutory design, designations would both (1) limit the collateral harm they cause to local populations; and (2) highlight the importance of actually maintaining *specific* habitat. In short, enforcing Congress's intent would be better for everyone.

This case is a perfect vehicle through which to consider this issue, because its facts highlight both the stakes and the absurdity of the current regime. FWS's relatively recent approach to these designations has become entrenched over the last decade in part because every designation is different and the harms can sometimes be hard to perceive—limiting this Court's ability to step in. This case, however, finally provides an ideal opportunity for this Court to clarify a badly broken area of the law in a way that promotes cooperative federalism, respect for longstanding Native populations, *and* meaningful environmental protection. Certiorari should be granted.

I. This Case Exemplifies FWS's Improper ESA Designations And The Ninth Circuit's Overly Deferential Review.

The question here is whether FWS acts arbitrarily, in violation of the Administrative Procedure Act (APA) and ESA, when it designates a massive land area as "critical habitat" even though much of the designated area affirmatively lacks the characteristics that would make such a designation appropriate. FWS's designation in Unit 2 particularly highlights this issue: The district court found that no more than 1% of the designated area contained the required "essential features," and that parts of the designated habitat were in fact inhabited by longstanding human communities who have a legal right to chase the bears

away. The Ninth Circuit nonetheless reversed on the express premise that the district court applied too high a "standard of specificity" in review of FWS's over-broad designation. Pet. App. 24a. This decision cries out for review; the Ninth Circuit's permissive approach is exactly the opposite of what Congress intended, and leaves states like Alaska and affected Alaska Native communities at the mercy of FWS in attempting to protect their citizens and longstanding ways of life.

A. This case perfectly isolates the key legal issue.

Three elements of this case isolate the key legal problem with FWS's designations: (1) the unique vastness of this designation, (2) its obvious human toll, and (3) the undisputed absence of any appreciable conservation benefit.

The size of this designation was unprecedented under the ESA, encompassing almost 5% of the entire area of the United States. U.S. Dep't of Commerce, Economics & Statistics Admin, *United States Summary: 2010*, tbl. 1 & 18 (Sept. 2012). The agency also designated as "critical" every inch of Arctic coast along a stretch of land at least as long as the California coast from San Francisco to Los Angeles. That coastal area is particularly essential to the local Alaska Native communities, its residents and businesses, and the long-term wellbeing of the State and her citizens.

Nor should the toll these indiscriminate designations impose on vulnerable communities be underestimated. "Critical habitat has significant legal and economic consequences for landowners and resource users." Norman D. James & Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species*

Act & Its Improper Transformation into 'Recovery' Habitat, 34 UCLA J. Envtl. L & Pol'y 1, 4 (2016). Once FWS designates a critical habitat, any "action" involving any aspect of federal regulatory or spending authority that may affect the area requires an ESA Section 7 consultation. 16 U.S.C. §1536(a)(2). That consultation process itself is time-consuming and may derail any development. Moreover, the alternatives proposed by FWS in that process may multiply the costs of a project or prevent it entirely. Turner & McGrath, *supra*, at 10,680.

The scope of the Section 7 consultation requirement, moreover, is itself enormously broad. It applies to any "action," which FWS has defined to encompass "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas." 50 C.F.R. §402.02 (2016). As FWS has recognized, this includes essentially all federal licensing or permitting programs, including any actions "*indirectly* causing modifications to the land, water, or air." *Id.* (emphasis added).

For the polar bear designation, this results in an exceptionally broad area of federal superintendence over matters of traditional state concern. It is already difficult to build airstrips, roads, docks, public utility infrastructure, medical facilities, or much of anything else in northern Alaska. *See supra* p.5-8. This critical habitat designation will add another layer of federal review to the process, including the potential imposition of new conditions or compensatory mitigation strategies to already difficult endeavors. As explained above, the uncertainty this process creates may alone be sufficient to derail economic development in the

unusually challenging environment at issue. There is thus no question that the State and local Alaska Native communities will suffer under FWS's overbreadth.

On the other side of the ledger, FWS itself has recognized that *no* conservation benefits will flow from this critical habitat designation. *See supra* p.14-15. Protection for threatened or endangered species is triggered through the listing determination; the habitat designation merely doubles down on protecting the animal's territory *itself*, even though anything that adversely affects a listed species is independently addressed. *See* Owen, *supra,* at 145. The resulting problem, as commentators have noted, is that a critical habitat designation often leads to a small local population shouldering disproportionate costs despite the lack of any improvement in conservation benefits—particularly if that designation is overbroad. *See, e.g.*, Sheila Baynes, *Cost-Consideration and the Endangered Species Act*, 90 N.Y.U. L. Rev. 961, 998 (2015) ("The fact that the biologists themselves have found critical habitat of such little utility bespeaks the low tally on the benefits side, and the costs of the provisions are evinced in the delays and resource drain caused by both designation and the frequent litigation that follows."). These communities are forced to endure "[c]onsiderable regulatory burdens and corresponding economic costs," for frequently little, or no, benefit to the species or conservation efforts. Turner & McGrath, *supra*, at 10,680. These harms of course multiply exponentially when the agency chooses to designate a massive stretch of land as "critical," leaving it to regulated parties to essentially prove otherwise during the Section 7 process. Moreover, as explained below, *infra* p.35, the unfairness becomes par-

ticularly acute when the threat to the species comes not at all from local activities, but from a necessarily global phenomenon.

B. The statute and its history clearly show the error below.

Importantly, Congress addressed these very concerns in the 1978 ESA amendments, which is why those amendments call for narrow and specific designations. Most importantly, the statutory text added in 1978 expressly limits "critical habitat" to "*specific* areas within the geographical area occupied by the species" where features "essential to the conservation of the species" are "found." 16 U.S.C. §1532(5)(A)(i) (emphasis added). Congress also expressly provided that "critical habitat shall not include the entire geographical area which can be occupied" by the listed species unless the Secretary makes a specific determination to the contrary. *Id.* §1532(5)(C). The Secretary is also supposed to make a designation only where it is "prudent and determinable" and must base her decision on the "best scientific data available." *Id.* §1533(a)(3)(A), (b)(2). The overwhelming force of this statutory language is that the grant of authority to the Secretary is highly circumscribed: She must use *the best available* scientific data to identify *particular* features within the species' range *essential* to conservation, and then designate those *specific* areas. Moreover, the burden to identify these specific areas is on the Secretary herself; it is not the responsibility of regulated parties to clean up FWS's improper assertion of authority over land that does not meet the statutory definition of a critical habitat during the Section 7 process. *Id.*

If the text left any doubt on this score, the legislative context and history do not. Originally, the ESA did not define or describe critical habitat, only mentioning the term once in connection with the requirement that a Section 7 consultation occur in order to prevent "the destruction or modification of habitat ... which is determined by the Secretary ... to be critical." Endangered Species Act of 1973, Pub. L. No. 93-205, §7, 87 Stat. 884, 892 (1973). FWS issued guidelines interpreting critical habitat broadly to include "any air, land or water ... the loss of which would appreciably decrease the likelihood of survival and recovery of a listed species." *Interagency Cooperation,* 43 Fed. Reg. 870, 874-75 (Jan. 4, 1978). The regulatory definition also included within the critical habitat "additional areas for reasonable population expansion." *Id.*

Congress found that definition overbroad, however, and so narrowed "critical habitat" through the 1978 amendments. *See* S. Rep. No. 95-874 (1978) (noting that Congress was "particularly concerned about the implications" of critical habitat designations "when extremely large areas are involved"). The Committee Report accompanying the House version stated that "this definition narrows the scope of the term as defined in the existing regulations," H.R. Rep. No. 95-1625, at 25 (1978), and instructed FWS to "be exceedingly circumspect in the designation of critical habitat." *Id.* at 18. Representative Bowen explained that the critical habitat definition was necessary to restrain the prevailing practice of "just designating territory as far as the eyes can see and the mind can conceive," and instead required "a very careful analysis of what is actually needed for survival of [the] species." 124 Cong. Rec. 38,131 (1978). Indeed, the critical habitat must

be "essential to the conservation of the species and not simply one that would appreciably or significantly decrease the likelihood of conserving it." *Id.* at 38,154 (statement of Rep. Duncan).

The Senate agreed, adopting an "extremely narrow definition of critical habitat, virtually identical to the definition passed by the House." S. Comm. on Env't & Public Works, 97th Cong., A Legislative History of the Endangered Species Act of 1973, as Amended in 1973, 1977, 1978, and 1980, at 1220-21 (Comm. Print 1982). Congress has not amended the definition of critical habitat since this substantial narrowing. Subsequently, though, the Senate has criticized FWS for designating geographic ranges instead of specific areas as critical habitats. S. Rep. No. 97-418, at 12 (1982); *see also* James & Ward, *supra*, at 27-30 ("[T]he legislative history subsequent to the 1978 Amendment lends additional support to the limited scope and role of critical habitat.").

Considering the full scope of the statutory language and legislative history, Congress's import is clear: A critical habitat designation must involve a detailed analysis by the Secretary of what *specific* areas must be protected to ensure listed species survival and recovery, all while balancing conservation with the impact on humans. FWS must thus only designate the *specific* areas that contain features that are *essential* to the species, not merely draw a massive circle around general areas that may contain such features. Unit 2 provides a disturbing example of FWS's failure to comply with the statutory directive, as 99% of the covered territory has no data to support its designation. Certainly, Congress did not intend for FWS to designate an area as large as 5% of the United States

without an extensive analysis showing that the *entire* area contains features essential for polar bear conservation. And the statute plainly does not authorize FWS to broadly over-designate enormous land masses only to rely on the Section 7 consultation process as an ad hoc error-correction system; Congress specifically chastised the agency for taking just that approach in 1982. S. Rep. No. 97-418, at 12 (1982). FWS's overbroad critical habitat designations contravene the plain language of the statute and Congress's evident intent. And yet that approach has become endemic—this case is just an extreme example of a phenomenon that shows no sign of slowing down. *See supra* p.12.

C. Only this Court can correct the Ninth Circuit's uniquely and improperly deferential review of ESA designations.

Meanwhile, the Ninth Circuit's deferential holdings condone FWS's over-designation, leaving the State and Alaska Native communities without any recourse save this Court. As this case shows, the time has come for this Court to intervene.

The Ninth Circuit covers a sizable portion of the American Southwest and Northwest, including Alaska and Hawaii, which encompass some of the country's most extensive regions of natural diversity.[4] This happenstance means that critical habitat designations disproportionately occur within the geographic scope of

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[4] According to FWS, the states within the Ninth Circuit contain 1000 species (cumulative) that have been listed as threatened or endangered. *See Listed Species Believed To Or Known To Occur In Each State*, https://ecos.fws.gov/ecp0/reports/species-listed-by-state-totals-report (last accessed Oct. 28, 2016).

the Ninth Circuit. Thus, although the Ninth Circuit does not have exclusive appellate jurisdiction over ESA appeals, it does exert enormous influence over the Act's implementation. Data regarding circuit court opinions bear this out.[5]

Because the majority of ESA appeals happen in the Ninth Circuit, circuit splits are significantly less likely to occur in this area. Thus, while the Ninth Circuit *is* prone to errors involving general principles of administrative law that have stymied challenges in this general area, *compare Bennett v. Spear*, 520 U.S. 154, 161-66 (1997) (permitting industry petitioners to challenge FWS's compliance with 16 U.S.C. §1533 under citizen-suit provisions of ESA), *with Bennett v. Plenert*, 63 F.3d 915, 919-22 (9th Cir. 1995) (holding ranchers lacked prudential to challenge agency determination under same provision), the paucity of appeals in other circuits has led to few direct disagreements in cases respecting the designation of critical habitat. Nonetheless, it is clear that other circuits' recent decisions involving related areas of the process conflict with the Ninth Circuit's excessively deferential approach—so much so, that FWS has actually tried to transfer cases it eventually lost in these other circuits to the Ninth

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[5] A recent search on Westlaw for opinions discussing 16 U.S.C. §1532(5) and the definition of "critical habitat" shows that over 60% of the decisions came from the Ninth Circuit, another 18% came from the Tenth Circuit (another circuit covering the western portion of the country) and no other circuit contributing more than 5% of opinions. Similarly, well over half of district court opinions that touched on the statutory definition of "critical habitat" derived from district courts under the Ninth Circuit's umbrella.

Circuit for review. *See, e.g.*, *Otay Mesa Property L.P. v. Dep't of Interior*, 584 F. Supp. 2d 122 (D.D.C. 2008) (rejecting transfer request).

Indeed, that case is a perfect example of the conflicting approaches to review. In *Otay Mesa Property L.P. v. Dep't of Interior*, 646 F.3d 914, 918 (D.C. Cir. 2011) (Kavanaugh, J.), the D.C. Circuit eventually rejected the agency's argument that it could designate land as "occupied" during the critical habitat designation process because it believed that the land would at some point become occupied. Instead, the court required data demonstrating that the species occupied or would almost certainly occupy the land in order for FWS to designate the land as such. *Id.*; *see also Cape Hatteras Access Preservation Alliance v. Dep't of Interior*, 344 F. Supp. 2d 108, 122 (D.D.C. 2004) ("The Service may not statutorily cast a net over tracts of land with the mere hope that they will develop [essential features] and be subject to designation."). In contrast, the Ninth Circuit, in *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), explained that it would accept an agency's decision that a particular area was "occupied" even "in the face of uncertainty" as long as the agency was not acting "on pure speculation or contrary to the evidence." *Id.* at 1164. Under this far too deferential standard, the Ninth Circuit permitted a 187,000-square-mile designation here on the theory that polar bears might one day justify it because they "need room to roam," Pet. App. 31a, and in fact directed FWS to look "beyond [the] evidence" to achieve the Act's broad "purposes." *Id.* 25a-26a. Such speculative hand-waving is markedly inconsistent with the D.C. Circuit's approach to review in *Otay Me-*

sa, as well as the requirement that the agency employ the "best scientific data available."

Similarly, the Ninth Circuit has adopted a more permissive construction of the requirement that the Secretary consider economic impact in making a critical habitat designation. The Tenth Circuit, in *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Servs.*, 248 F.3d 1277, 1283-85 (10th Cir. 2001), reviewed FWS's preferred method for measuring costs. Under FWS's "baseline" analysis, the agency only assessed the incremental costs of a critical habitat designation, often resulting in the agency calculating *zero* economic impact because (according to FWS) the costs of the critical habitat designation overlap with those of the listing decision itself. *Id.* at 1283-84. The Tenth Circuit soundly rejected this approach and required FWS to take into account *all* economic impacts attributable to the designation, "regardless of whether those impacts are attributable co-extensively to other causes," such as the listing decision. *Id.* at 1284-85. The Ninth Circuit, meanwhile, has upheld FWS's preferred baseline analysis of only looking at the incremental cost of the designation, which elides the real and unjustified toll of a massive designation on the affected local communities. *Arizona Cattle Growers*, 606 F.3d at 1172-74.

Indeed, to the extent the appeal below did not raise FWS's erroneous approach to measuring the costs of its designation, it is because Ninth Circuit precedent renders that effort hopeless. But this of course reinforces the error—and the human cost—of the Ninth Circuit's permissive approach to the "standard of specificity" FWS must use in making massive designations. Pet. App. 24a. For example, while FWS estimated the

cost of designation to be approximately $670,000 over a thirty-year period, the State estimated that, due to the delays and unique problems related to Alaska's harsh climate, the development setbacks in the North Slope would result in first-year costs of $202.8 million and an additional $2.6 billion in costs over the next five years. Alaska Comments, *supra*, at 9. The resulting delay in development would cause further economic devastation for Alaska and Alaska Natives. A one-percent decrease in oil and gas production would result in the loss of approximately 214 jobs—many of which are filled by Alaska Natives. *Id.* The State further projected that the Section 7 consultation process alone would impose huge costs as well. *Id.* And yet the Ninth Circuit imposes no discipline on the designation process under this provision or any other.

Most fundamentally, the Ninth Circuit decision below finally isolates a "standard of specificity" that is neither specific nor comports with the statutory language or history, and that it uses to permit designations that cannot properly withstand scrutiny. Again, the statute requires designating "specific" areas where essential features "are found" based on "the best available scientific data," and the legislative context and history both confirm Congress's intent to carefully narrow these designations' scope. *Supra* p.24-27. Yet despite this clear directive, the Ninth Circuit faulted the district court for imposing too great a "standard of specificity" and for requiring evidence that the essential features were actually "found" throughout the des-

ignated areas. Pet. App. 24a-26a.[6] Citing the Act's "conservation purposes," the court found that it "contemplates the inclusion of areas that contain [features] essential for occupation by the polar bear, even if there is *no available evidence* documenting current activity." *Id.* 25a (emphasis added). Indeed, the court went so far as to say that FWS should look "beyond evidence of actual presence to where the species is likely to be found." *Id.* 26a. Ultimately, this is just willful rewriting of the ESA and abrogation of the few, critical limitations it places upon the designation process.

Perhaps the most illuminating example of the Ninth Circuit's abandonment of its review responsibilities under the APA and ESA is its validation of FWS's treatment of already-developed areas of northern Alaska. As explained above, *supra* p.14, FWS swept into its broad designation areas surrounding Deadhorse and other industrial sites where human activity is pervasive. This designation was made *despite* FWS's own acknowledgement that an "essential feature" of critical denning habitat would be the absence of human interference. *Supra* p.13. Remarkably, in these areas, and the areas surrounding inhabited villages, it is already legal and common for polar bears to be "hazed" away for the protection of both the humans *and* the bear. Existing regulations even permit such hazing and deterrence. 50 C.F.R. §18.34 (2016). The idea that these areas amount to part of the bears' critical, pre-existing denning habitat is facially absurd,

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[6] The Ninth Circuit erroneously described the applicable standard as "best available technology," Pet. App. 24a, when the ESA prescribes use of the "best scientific data available," 16 U.S.C. §1533(b)(2).

and yet the Ninth Circuit brushes these concerns aside.

As further explained below, FWS's approach not only causes enormous harms to State sovereignty and Native communities, it undermines conservation efforts as well. Yet even setting those issues aside, the Ninth Circuit's current approach to review at least demonstrates a manifest disregard for the system Congress created *to protect those very interests*. *Supra* p.13-15. Alaska and other states with substantial ESA dockets will not be free of the FWS's and Ninth Circuit's unlawful approach until this Court intervenes to enforce Congress's intent. It should do so.

II. This Case Is An Ideal Vehicle Because It Isolates The Important Harms Created By Overbroad Designations.

More than any prior case, this one demonstrates the real human toll caused by improper application of the ESA's critical habitat provision, as well as the extent of its impingement on state sovereignty. As commenters have noted, FWS's now-entrenched, overbroad, and Ninth-Circuit-immunized approach to such designations places an enormous burden on local populations with almost nothing to show for it. Turner & McGrath, *supra*, at 10,680. This is palpably true here. As the State explained in its rulemaking comments, this designation will drastically increase the difficulty of oil and gas operations in the State. Those operations provide for approximately 90% of the State's annual revenue and constitute the State's largest industry. Alaska Comments, *supra*, at 6. As noted, the Section 7 consultation process often slows down approval necessary for new projects. *Id.* And the delays and

uncertainties associated with the process are uniquely harmful in this harsh environment because of the limited window each year in which any productive work can be accomplished. *Id.*

These are not speculative harms; vital State and local government services will be curtailed because of FWS's action here. Yet these harms result directly from a federal overreach that—according to *FWS itself*—is unlikely to provide any measurable improvement to polar bear conservation. Providing services to Alaska's remote populations is difficult enough as it is; there is literally no reason here to hamper that effort further.

The harm is even more acutely felt by the Alaska Native population in northern Alaska. Alaska Natives constitute 70% of the population on the North Slope. *Id.* at 6. They depend on both "subsistence hunting and fishing" as well as "jobs and benefits" tied to "oil and gas exploration" in order to survive in an area with an inordinately high cost of living. NANA Regional Corp., Comments on Proposed Rule to Designate Critical Habitat for the Polar Bear in the United States (Dec. 28, 2009); *supra* p.5-8. "Even *with* these benefits, Alaska Natives struggle to support themselves in a region where basic necessities in the Lower 48 are an expensive luxury." 2010 Comments, *supra*, at 2. The viability of these longstanding human communities is very much at stake.

By applying its overbroad and haphazard designation approach in northern Alaska, however, FWS has prioritized preservation of not-really-critical polar bear habitat over operations that are demonstrably necessary to maintain the Alaska Native way of life. This is

both cruel and unfair. As ASRC explained, this designation "imposes burdens on our life-style, economy and future without addressing the source of the threats to the polar bear or its habitat." That is because FWS explicitly relied on *climate-change* considerations as a basis for its polar bear listing and habitat designation. 75 Fed. Reg. at 76,115-16, but then disclaimed any effort to address that issue, *id.* at 76,116, the causes of which have nothing to do with local activities or Alaska Natives in particular. FWS has thus undermined, for no reason, the very organizations Congress created in ANCSA to protect Alaska Natives' traditional ways of life in settlement of their land claims, while affirmatively leaving any actual threat to polar bear habitat unaddressed. FWS's purely symbolic action on this front thus amounts to punishing Alaska Native communities for matters they cannot control, while doing nothing to protect the polar bears that have coexisted with the Iñuit and their ancestors in northern Alaska for millennia.

In contrast to the pointless harms that FWS's current, Ninth-Circuit-approved approach visits on state sovereignty, Native groups, and local communities, there is a better way forward. Part of what makes this case an ideal vehicle for review is that the district court enforced the statutory requirements here exactly as Congress intended. In contrast to the Ninth Circuit, it rightly rejected FWS's designations to the extent that they swept broadly without evidence that features essential for species conservation were actually "found" in all of the areas designated. Pet. App. 89a-95a. Suppose that, instead of simply designating the entire Arctic coast from below the Bering Strait to Canada as "critical" polar bear habitat, FWS did as the

district court suggested and designated the *specific* areas containing the identified essential features for species conservation. This approach would have left much of the designated area open for necessary development for the State and Alaska Native communities, without any offsetting harm to the bears whatsoever. Meanwhile, by carefully designating the areas known to include essential features, FWS would have a basis to propose mitigation or project-related modifications in those specific areas in the Section 7 consultation process, thereby vindicating the very conservation purpose that critical habitat designations were meant to serve. All that is needed for protection of both the animal and human populations in the affected areas is for this Court to enforce the scheme Congress designed.

CONCLUSION

This petition should be granted.

Respectfully submitted,

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November 4, 2016

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