No. 17-118

In the Supreme Court of the United States

STATE OF ALASKA, *et al.*,

Petitioners,

v.

WILBUR L. ROSS, *et al.*,

Respondents.

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

BRIEF OF ALASKA FEDERATION OF NATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Nicole Borromeo
Alaska Federation of Natives
3000 A Street
Suite 210
Anchorage, AK 99503
(907) 274-3611
nborromeo
@nativefederation.org

Steven T. Seward
Counsel of Record
Ascent Law Partners, LLP
719 Second Avenue
Suite 1150
Seattle, WA 98104
(206) 920-4129
steve@ascentllp.com

Counsel for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTERESTS OF THE *AMICUS CURIAE*

The Alaska Federation of Natives (AFN) is a statewide, nonprofit organization representing more than one hundred thousand Alaska Natives—descendants of the original inhabitants of the State of Alaska.[1] AFN's membership includes 152-federally recognized tribes; 152 Native village corporations and 12 Native regional corporations established by the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.* (2012) (ANCSA); and 12 regional nonprofits and tribal consortiums. AFN is governed by a 38-member Board of Directors composed of three representatives from each of the 12 ANCSA regions, as well as two co-chairs elected at large. For more than 50 years, AFN has been the principal forum and voice of Alaska Natives in addressing critical public policy issues that affect the cultural and economic well-being of Native peoples and villages.

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[1] Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received notice of the intent to file this *amicus curiae* brief 10 days prior to the due date for such brief and have consented to its filing. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel for *amicus curiae* state that Van Ness Feldman, LLP (VNF), counsel for Petitioner North Slope Borough, authored this brief in part. VNF has served as AFN's counsel for nearly 40 years and has a unique understanding of AFN and its interests as well as the complex legal framework pertaining to ownership and management of Alaska Native lands. As such, to protect its interests with respect to the issues underlying the Petition, AFN requested that VNF assist AFN's counsel of record in the authoring of this brief.

Collectively, AFN's members own more than 44 million acres of land in Alaska. This land was conveyed by Congress to Native corporations for the express purpose of providing the economic and cultural foundation to support the ongoing needs of the Alaska Native people. This purpose would be undermined if the federal government is permitted to employ the U.S. Court of Appeals for the Ninth Circuit's (Ninth Circuit) expansive interpretation of the Endangered Species Act (ESA) for any species that could potentially be affected by climate change at some point in the distant future.

AFN agrees with the reasoning put forth in the Petition for a Writ of Certiorari filed by the State of Alaska et al.,[2] and writes separately because the ramifications of the Ninth Circuit's holding extend beyond the parties and areas implicated in this case and would have significant adverse impacts on Alaska Natives throughout the State.

SUMMARY OF THE ARGUMENT

The occurrence of climate change and its effects in Alaska do not justify the sweeping application of the ESA in derogation of the Act's explicit statutory standards. If left unrestrained by this Court, the Ninth Circuit's acquiescence to unprincipled species listings will result in the imposition of federal management authority across broad swaths of Alaska's lands and coastal waters with significant economic and regulatory consequences. As applied to Alaska Native lands, the Ninth Circuit's approach undermines the express purpose of ANCSA to the detriment of the Native

[2] AFN also supports the Petition for a Writ of Certiorari in *Alaska Oil & Gas Ass'n v. Ross*, No. 17-133 (July 21, 2017).

people throughout the State. It also unduly burdens national defense and security in the Arctic region.

Congress enacted the ESA with the goal of conserving species that are experiencing precipitous population declines to prevent their worldwide extinction. 16 U.S.C. § 1531(a) (2012). Rather than imposing the stringent protections of the ESA to all species, Congress restrained its application only to those species that are either "in danger of extinction" or "likely" to become so in the "foreseeable future." *Id*. §§ 1532(6), (20). By its plain language, the Act does not apply to species that are currently abundant and healthy merely because certain 100-year projections of global climate change suggest that changing habitat conditions may have some uncertain impact on the species by the end of the century.

The Ninth Circuit, in reversing the district court and upholding the listing of the bearded seal as a threatened species, has rendered the ESA's statutory provisions meaningless. All that is now necessary to justify an ESA listing is the identification of a single threat—even "volatile" climate projections that speculatively predict habitat conditions in the distant future will suffice. The Ninth Circuit also eliminated any obligation for the Secretary to assess the magnitude of a threat to a species' future survival or demonstrate that any such effects result in a likelihood of extinction. This expansive reinterpretation of the ESA's statutory listing criteria is unprecedented and impermissibly authorizes the listing of any species anywhere simply because it may somehow be impacted by global climate change.

The erroneous application of the ESA to uphold the listing of abundant and healthy species as threatened has unnecessary and unwarranted regulatory, economic, cultural, and national security consequences. As this Court recognized, the ESA's statutory provisions are intended to "avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997). Review by the Court is urgently needed to restore the ESA listing process to the bounds that Congress intended and explicitly delineated.

ARGUMENT

I. The Ninth Circuit's Decision Exceeds the ESA's Statutory Constraints on Listing Species.

On December 28, 2012, the National Marine Fisheries Service (NMFS) listed the Beringia distinct population segment of the bearded seal (*Erignathus barbatus*) as a threatened species under the ESA. 77 Fed. Reg. 76,740 (Dec. 28, 2012). The bearded seal has persisted as a species for over 11 million years and has survived previous periods of widespread, prolonged, and rapid global warming. The Arctic population is abundant and healthy, and is conservatively estimated to contain 155,000 seals. *Id.* at 76,748. In United States waters, the species is widely-distributed throughout the Bering, Chukchi, and Beaufort Seas, including areas adjacent to the coastal lands and villages where Alaska Native people have resided for millennia. The listing of the bearded seal (and other similarly situated species) imposes significant economic and other regulatory impediments on the Alaska

Natives' use of these lands and waters to ensure their own survival and perpetuate their traditional way of life.

The ESA contains explicit statutory criteria that limit the application of the Act to those species that truly warrant protection. As Congress explained, the ESA applies to those species "so depleted in numbers that they are in danger of or threatened with extinction." 16 U.S.C. § 1531(a)(2). A species is not protected under the Act until it is listed by NMFS or the U.S. Fish and Wildlife Service (FWS) (collectively, the Services) as either endangered or threatened based on an evaluation of five statutory factors. *Id.* § 1533(a)(1). The ESA defines an "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range." *Id.* § 1532(6) (emphasis added). A "threatened species" is defined as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20) (emphasis added). The Services must make their decision "solely on the basis of the best scientific and commercial data available" after conducting a status review of the species. *Id.* § 1533(b)(1)(A).

Ignoring these statutory standards, NMFS relied on climate models, which it previously characterized as too uncertain and unreliable for use after mid-century, to anticipate Arctic habitat conditions almost 100 years into the future.[3] 77 Fed. Reg. at 76,741. Despite

[3] NMFS projected that the bearded seal would have sufficient sea ice in all areas of its habitat through 2050, but that there would be little or no sea ice in the Bering Sea portion of its range by 2095. 77 Fed. Reg. at 76,744.

identifying the potential threat of climate-related habitat declines in the distant future, NMFS could not demonstrate how these projections would have a corresponding effect on the population status of the bearded seal. *Id*. at 76,758 ("[d]ata were not available to make statistically rigorous inferences about how [the species] will respond to habitat loss over time"). NMFS conceded that the degree of risk posed by global climate change "is uncertain due to a lack of quantitative information linking environmental conditions to bearded seal vital rates, and a lack of information about how resilient bearded seals will be to these changes." *Id*. at 76,747. The lack of data was so profound that NMFS could not "defin[e] an extinction threshold for bearded seals" or "assess the probability of reaching such a threshold within a specified time frame." *Id*. at 76,757.

In upholding the listing of the bearded seal, the Ninth Circuit deprives the word "foreseeable" of any independent significance.[4] Accepting NMFS's reliance on end-of-century climate projections, the Ninth Circuit concluded that "[t]he fact that climate projections for 2050 through 2100 may be volatile does not deprive those projections of value in the rulemaking process." *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 680 (9th Cir. 2016) (*AOGA*). In doing so, it extended the foreseeable future well beyond what other courts have

[4] While not defined in the ESA, the "foreseeable future" is interpreted to "extend[] only so far as the Secretary can explain reliance on the data to formulate a reliable prediction." Office of the Solicitor of the U.S. Dep't of the Interior, *Memorandum on the Meaning of "Foreseeable Future" in Section 3(20) of the Endangered Species Act*, No. M-37021 at 8 (Jan. 16, 2009).

accepted based on the same modelling projections. *See Center for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 965 (N.D.Cal. 2010) ("[climate] models after 2050 were too variable to be part of the foreseeable future"); *In re Polar Bear ESA Listing & § 4(d) Rule Litig.*, 794 F. Supp. 2d 65, 94 (D.D.C. 2011) ("minimum impacts to Arctic sea ice could be predicted with confidence for up to fifty years but projections became more speculative beyond that point"), *aff'd*, 709 F.3d 1 (D.C. Cir. 2013). If projections of habitat conditions in the distant future can be utilized merely because they provide "value," irrespective of any reliability, there is no temporal limitation on what may be considered—anything becomes conceivably foreseeable.[5]

The Ninth Circuit also obviates NMFS's obligation to demonstrate that a species is "likely" to become "in danger of extinction."[6] 16 U.S.C. §§ 1532(6), (20). To be threatened under the ESA, an identified threat must have a corresponding effect on the species such that it will ultimately become "on the brink of extinction." *In re Polar Bear ESA Listing*, 794 F. Supp. 2d at 89. The Ninth Circuit held that "neither the ESA nor our case law requires the agency to calculate or otherwise demonstrate the 'magnitude' of a threat to a species'

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[5] Some studies are now attempting to identify possible climate-related habitat conditions almost 500 years into the future. *See*, *e.g.*, S. Jevrejeva et al., *Sea Level Projections to AD2500 with a New Generation of Climate Change Scenarios*, 80 Global and Planetary Change 14 (2012).

[6] The Ninth Circuit appropriately determined that "likely" means that "an event, fact, or outcome is probable." *AOGA*, 840 F.3d at 684.

future survival before it may list a species as threatened." *AOGA*, 840 F.3d at 684. With no obligation or ability to demonstrate the magnitude of a threat, it is impossible to assess the degree (i.e., likelihood) of any extinction risk, let alone conclude that a now abundant and healthy species is "likely" to be on the brink of extinction many decades in the future. By endorsing this outcome, the Ninth Circuit reduces the listing inquiry to merely require the identification of a threat, no matter how consequential, and removes a fundamental statutory constraint on the ability to list a species as threatened.

Finally, the Ninth Circuit subverts the statutory requirement that listings be based upon the "best scientific and commercial data available." 16 U.S.C. § 1533(b)(1); *Bennett*, 520 U.S. at 176 ("[t]he obvious purpose of the requirement that each agency 'use the best scientific and commercial data available' is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise."); *Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior*, 646 F.3d 914, 918 (D.C. Cir. 2011) (the ESA does not authorize an agency "to act without data to support its conclusions, even acknowledging the deference due to agency expertise."). Contradicting these precedents, the Ninth Circuit held that NMFS only had to "candidly disclose[] the limitations of the available data and its analysis." *AOGA*, 840 F.3d at 681. This impermissibly converts the best available science standard into a meaningless disclosure provision whereby any speculative data or assumptions can now be used to support the listing of a species under the ESA.

In sum, the Ninth Circuit's decision reflects a remarkably expansive interpretation of the ESA's listing requirements that steps way beyond the statutory criteria that Congress imposed. With no limitation on what is "foreseeable" and no obligation to assess the magnitude of any threat, the Services now have unfettered authority to list a species as threatened if a conceivable threat to that species' survival can be identified at any time in the future. Any data will suffice to justify an ESA listing—even speculation or surmise—so long as NMFS or FWS "candidly disclose[s]" the limitations of its data and analyses. Lacking any statutory constraints, every species in Alaska is now susceptible to being listed due to the global impacts of climate change with severe repercussions for the Alaska Native people who reside in the affected areas. Given the Ninth Circuit's overly permissive approach, and the significant implications that follow, review by this Court is urgently needed to restore meaningful criteria to the ESA listing process consistent with the bounds that Congress established.

II. The Ninth Circuit's Erroneous Application of the ESA Listing Criteria Raises Issues of Extraordinary Public Importance.

An ESA listing is a remarkably intrusive action with significant regulatory, economic, cultural, and national security consequences for the Alaska Native people who rely on the unencumbered use of land and water to survive. As this Court has stated, the purpose of the ESA is to "halt and reverse the trend towards species extinction, whatever the cost," and it requires federal agencies "to afford first priority to the declared national policy of saving endangered species." *Tenn.*

Valley Auth. v. Hill, 437 U.S. 153, 184-85 (1978). Recognizing these onerous implications, Congress included explicit statutory standards restricting the Secretary's unfettered authority to list any species under the ESA. In derogation of these essential safeguards, the Ninth Circuit has endorsed an approach whereby every healthy and abundant species in Alaska could now be listed as threatened based on the mere possibility of future climate-related habitat alterations. The ramifications of the Ninth Circuit's expansive interpretation, both for the Alaska Native people and the nation's broader security interests, warrant this Court's acceptance of the petitions for writ of certiorari.

A. Listing Decisions Based on Speculative Future Impacts of Climate Change Improperly Shift the Regulatory Burden to the Alaska Native People.

The Alaska Native people will be disproportionately affected by the impacts of climate change in the Arctic, and the Ninth Circuit's decision places them in the untenable position of being further impacted by the additional consequences that follow the now limitless ability of the Services to list species under the ESA. This result is particularly egregious because the Services have concluded that the listing of Alaska species does nothing to stop the international greenhouse gas (GHG) emissions contributing to climate change.[7] As such, the climate-driven protection

[7] 77 Fed. Reg. at 76,764 ("listing does not have a direct impact on the loss of sea ice or the reduction of GHGs"); Memorandum from Dale Hale, Director, to FWS Regional Directors at 1-2 (May 14, 2008), https://www.fws.gov/policy/m0331.pdf ("The best scientific

of currently healthy and abundant species (such as the bearded seal) provides no conservation benefit under the ESA. All that results is the imposition of federal management authority over the areas inhabited by the species, which allows the Services to dictate how any action involving a modicum of federal funding, authorization, or control can be conducted. These impacts will predominantly affect Alaska Natives, the people who have coexisted with, managed, and relied upon these species for millennia, and will add the additional burden of unnecessary federal regulation to an already overburdened people.

The listing of a species as threatened or endangered triggers a panoply of additional protections under the ESA. First, NMFS or FWS is statutorily required to designate critical habitat for that species, if prudent and determinable. 16 U.S.C. § 1533(a)(3)(A). In recent years, the Services have identified massive areas of land and water to protect as critical habitat for Alaska species that have been listed due to projected impacts of climate change. In 2010, FWS designated more than 187,000 square miles of the Alaska coastal plain and adjacent waters as critical habitat for the polar bear. 75 Fed. Reg. 76,086 (Dec. 7, 2010). For the Arctic ringed seal, which was listed contemporaneously with the bearded seal, NMFS proposed to designate approximately 350,000 square miles of Arctic waters adjacent to the Alaska coast as critical habitat, almost twice the area designated for the polar bear. 79 Fed.

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data available today do not allow us to draw a causal connection between GHG emissions from a given facility and effects posed to listed species or their habitats, nor are there sufficient data to establish that such impacts are reasonably certain to occur.").

Reg. 73,010 (Dec. 9, 2014). With additional listings of Alaska species under consideration now and likely in the future,[8] additional portions of the State will be designated as critical habitat.

Every listing decision and critical habitat designation imposes significant regulatory obligations that burden the covered areas and the activities conducted there. Under ESA Section 7, the Services are required to consult on any action authorized, funded, or carried out by a federal agency that may affect a listed species or its designated critical habitat.[9] 16 U.S.C. § 1536(a)(2). If such action is likely to adversely affect the species or critical habitat, FWS or NMFS will prepare a biological opinion and offer a reasonable and prudent alternative (RPA) to the proposed action that would avoid jeopardizing the species' continued existence or the destruction or adverse modification of its critical habitat. *Id*.

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[8] FWS has announced that it will decide whether to list the Pacific walrus in 2017. FWS, *National Listing Workplan, 2017-2023* at 2 (Sept. 2016), https://www.fws.gov/endangered/improving_ESA/pdf/Listing%207-Year%20Workplan%20Sept%202016.pdf. FWS will consider listing the yellow cedar in southeast Alaska in 2019. *Id*. at 9. FWS has also received ESA petitions to list the Western bumble bee and tufted puffin, both of which occur in Alaska. 80 Fed. Reg. 56,423, 56,431 (Sept. 18, 2015) (finding that petition to list contiguous U.S. distinct population segment of tufted puffin may be warranted); 81 Fed. Reg. 14,058, 14,071 (Mar. 16, 2016) (finding that petition to list the Western bumble bee may be warranted).

[9] The relevant regulations define "action" broadly to include the "granting of licenses, contracts, leases, easements, right-of-way, permits, or grants-in-aid," and "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02 (2016).

§ 1536(b)(4)(A). Typically, the proponent of a federal action will have to accept and implement the RPA, adopt other similar modifications or mitigation measures, or not proceed with the contemplated action.

These Section 7 consultations impose "[c]onsiderable regulatory burdens and corresponding economic costs [that] are borne by landowners, companies, state and local governments, and other entities." Andrew J. Turner & Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 Envtl. L. Rep. 10,678, 10,680 (2013). For example, there are costs associated with conducting biological surveys and assessments, and for implementing measures to avoid or minimize the effects of the proposed action on the species or designated critical habitat. The consultation process itself has economic impacts because it "often takes months or years, significantly delaying projects and resulting in substantial additional project costs, if not destroying the projects' economic viability." *Id*. at 10,681. This is particularly true within Alaska because of the unique planning and logistical obstacles associated with the harsh climate, remote operation areas, and limited windows of seasonal access.

Due to these substantial regulatory and economic impacts, the Ninth Circuit's decision has significant implications for the Alaska Native people. Approximately 40% (229 of 567) of the federally recognized tribes in the United States are located in

Alaska.[10] Given the isolated and unforgiving environment of Alaska, the unencumbered and productive use of lands and waters is essential to the survival of the Alaska Native people who rely upon the region's natural resources for subsistence, economic development, and to sustain their traditional way of life. Most Native villages are isolated and not connected to the State's highway system or electrical grid; the cost of living is high; and there is limited access to food, fuel, health care, and other essential services. The imposition of the Section 7 consultation requirement can make necessary infrastructure or development projects—such as roads, sea walls, oil and gas exploration, port facilities, and water treatment upgrades—logistically impractical or economically prohibitive. As a result, these predominantly rural Alaska Native villages are particularly vulnerable to the impacts that result from the unlawful and unnecessary listing of a species.

Compounding these impacts, the ESA allows the Services to impose restrictions on the ability of Alaska Natives to harvest listed species for subsistence and cultural purposes.[11] 16 U.S.C. § 1539(e)(4). The Alaska

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[10] U.S. Dep't of the Interior, *Alaska Region Overview*, http://www.bia.gov/WhoWeAre/RegionalOffices/Alaska/ (last visited Aug. 15, 2017).

[11] While generally exempt from the ESA prohibition on take, the Services can limit subsistence harvest if it "materially and negatively affects the threatened or endangered species." 16 U.S.C. § 1539(e)(4). For federally protected species, there can be significant public pressure, including harassment of individual hunters, to curtail traditional subsistence activities. *See*, *e.g.*, Julia O'Malley, *The Teenage Whaler's Tale: Internet Death Threats Hound a Young Alaskan after a Successful Hunt*, High Country

Native people have co-existed and maintained a sustainable subsistence relationship with a variety of species—including bearded and ringed seals, polar bear, walrus, and bowhead whale—for millennia. In many villages, the foods and grocery products that are taken for granted in the lower 48 states are simply not available or are prohibitively expensive, so Alaska Natives hunt or harvest these and other species to survive. Subsistence species are also incorporated into Native articles of handicrafts and clothes which allow the Alaska Native people to maintain and perpetuate their traditional cultural heritage, and which they also sell for economic support.[12] The role of subsistence, and its importance to Alaska Natives, is explicitly recognized by Congress, and it should not be infringed by federal agencies through the cavalier exercise of unbridled regulatory authority.

ESA listings and the attendant protective measures must only occur pursuant to the criteria and scientific principles established by Congress. In derogation of these essential safeguards, the Ninth Circuit's decision imposes "unfairness to the point of financial ruin" and impermissibly allows the conscription of Alaska Native lands "to national zoological use." *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515

News (July 17, 2017), http://www.hcn.org/issues/49.12/tribes-a-teenage-whaler-pride-of-his-alaska-village-is-haunted-by-trolls.

[12] "For many of the Alaskan Natives, the selling of their handicrafts, fashioned painstakingly and with great skill from ocean mammals is the sole basis of their cash economy. These include the carving of ivory, the sewing of fur parkas and mukluks, and the sale of mammal food to other Natives." 118 Cong. Rec. 25,259 (July 25, 1972) (statement of Sen. Stevens).

U.S. 687, 714 (1995) (Scalia, J., dissenting). Congress did not intend such a result, and this Court's review is necessary to restrain the Ninth Circuit's expansive interpretation of the ESA and prevent the unnecessary burdens imposed on the Alaska Native people.

B. Listing Decisions Based on Speculative Future Impacts of Climate Change in Alaska Undermine the Purpose of ANCSA.

The unlawful listing of currently unimperiled species, both in the Arctic and throughout Alaska, imposes federal management oversight and economic burdens across huge expanses of lands and waters in the State.[13] Included within these areas are lands conveyed by Congress through ANCSA to Alaska Native corporations so that they can provide for the health, education, and welfare of the Native people of Alaska. The unbounded application of the ESA undermines the purpose of ANCSA by imposing barriers to development on the very lands that Congress granted to Alaska Natives to provide for their own economic benefit.

Congress passed ANCSA in 1971 to address the "immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." 43 U.S.C. § 1601(a). In doing so, Congress diverged from previous approaches

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[13] While economic impacts are not a factor that is considered when listing a species, the erroneous application of the ESA listing criteria will obviously have economic consequences. *Bennett*, 520 U.S. at 176-77 ("another objective [of the best available science requirement] (if not indeed the primary one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.").

to American Indian policy in the lower 48 states, and sought to avoid creating "a reservation system or lengthy wardship or trusteeship." *See id*. § 1601(b); *see also Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 523-24 (1998). Instead, Congress divided Alaska into 12 geographic regions, and directed the formation of 12 corresponding Alaska Native regional corporations along with more than 200 Native village corporations. 43 U.S.C. §§ 1606(a), 1606(d), 1607(a). Alaska Natives were enrolled as shareholders in those corporations according to their place of residence or origin. *Id*. §§ 1606(g); 1607(a).

In exchange for the extinguishment of their aboriginal land claims, ANCSA authorized the conveyance of approximately 44 million acres of land—12% of the land in Alaska (about the size of New England)—to the newly formed Native regional and village corporations.[14] *Id*. §§ 1611, 1613. Congress intended that the conveyance of these lands would ensure that Alaska Natives have the necessary means by which to provide for their own economic and social well-being, and to maintain their subsistence and cultural traditions. *See id*. § 1601(b) (settlement to be accomplished "in conformity with the real economic and social needs of Natives"); *id*. § 1606(r) (Native Corporations authorized "to provide benefits . . . to promote the health, education, or welfare of [its] shareholders").

A fundamental purpose of ANCSA was that the Native corporations would use the conveyed lands for

[14] These conveyances made the Alaska Native corporations collectively the third-largest landowners in Alaska, following the federal government and the State.

their economic benefit. H.R. Rep. 92-523, at 5 (Sept. 28, 1971) (recognizing that most land "will be selected for its economic potential"); *City of Saint Paul v. Evans*, 344 F.3d 1029, 1031 (9th Cir. 2003) (Alaska Native corporations "receive land from the federal government for the purpose of economic development in Native communities"); *Koniag, Inc. v. Koncor Forest Res.*, 39 F.3d 991, 997 (9th Cir. 1994) ("we have no doubt that Congress intended, at least, that those Native corporations that did select land for its economic potential would be able to develop that land and to realize that potential.").

In addition, Congress explicitly intended that the Native corporations would use and develop these lands to benefit both their shareholders and all Alaska Natives. Each regional corporation is required to share 70% of the annual revenue from timber resources and use of the subsurface estate conveyed pursuant to ANCSA with all 12 regional corporations. 43 U.S.C. § 1606(i)(1)(A); *Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723, 732 (9th Cir. 1978) (ANCSA Section 7(i) "was intended to achieve a rough equality in assets among all the Natives. . . [and] insures that all of the Natives will benefit in roughly equal proportions from these assets.") (citation omitted). And half of these revenues are further distributed to the village corporations within the boundaries of each regional corporation and to those shareholders not residing in these villages. 43 U.S.C. § 1606(j). Thus, through these revenue sharing provisions, the economic benefits provided by resources on ANCSA lands support all Alaska Natives throughout the State.

The listing of species, and subsequent designation of critical habitat, that occur on ANCSA lands imposes economic burdens that impair the ability of Alaska Natives to develop those lands for their own economic benefit. This conflict is created by the obligation to conduct Section 7 consultation on any federal actions that may affect the species or its designated critical habitat. 16 U.S.C. § 1536(a)(2). As noted above, there are significant costs associated with ESA consultations, which are further magnified in Alaska due to the unique operating conditions and permitting-related project delays. For example, for a hypothetical oil field in existing polar bear critical habitat, the State calculated that economic impacts of a delay in development could range from $202.8 million (one-year delay) to $2.6 billion (five-year delay). 75 Fed. Reg. at 76,106. These additional costs pose significant threats to pending and future natural resource development projects, and will result in lost revenue, wasted expenditures, missed employment opportunities, and even the termination of the project. The repercussions for Alaska Natives will be felt within individual villages and State-wide, and will only increase in severity as more species are listed pursuant to the Ninth Circuit's permissive interpretation of the statute.

This Court can easily alleviate these significant economic and regulatory burdens by reinstating the listing requirements that the Ninth Circuit has read out of the statute. Congress did not intend for the ESA to be a mechanism to list any species based on any conceivable threat within any conceivable timeframe. On the contrary, a threat, and its corresponding effect, must "likely" result in the species being "in danger of extinction" at a "foreseeable" point in time. By

restoring meaning to each of these terms, the application of the ESA can be better harmonized with the intent of Congress in ANCSA to secure the Alaska Natives' economic and social well-being.

C. Listing Decisions Based on Speculative Future Impacts of Climate Change Impair National Security Interests.

Along with the imposition of economic impacts, the unbounded ability to list species also impairs the United States' national security interests. In the Arctic, thawing ice has led to increased shipping activity, a push to develop natural resources, and a rise in geopolitical tensions. These issues not only implicate the safety of Alaska Native villages—which are on the proverbial and actual frontline—but also the welfare and security of the country in general. Northern Alaska has long played a crucial role in national security, and is regarded as "a major area of importance to the United States, both strategically and economically in the future." S. Rep. No. 114-255, at 289 (2015).

A key driver of the Arctic's increasing national security significance is climate change. Diminishing Arctic sea ice will have consequences for access to mineral and biological resources, the economic welfare and cultural survival of people in the region, and global shipping and maritime power on two new trans-Arctic sea routes. *See* Ronald O'Rourke, Cong. Research Serv., R41153, *Changes in the Arctic: Background and Issues for Congress* 1 (2016). The possibility of increased shipping and mineral development has already led to international disputes as countries, including Russia and China, have stepped-up

commercial and military activity in the region. *See id*. at 62-63; *see generally also* Vsevolod Gunitskiy, *On Thin Ice: Water Rights and Resource Disputes in the Arctic Ocean*, 61 J. of Int'l Aff. 261, 265-67 (2008).

It is essential for the United States to adequately track climate change, engage in Arctic energy development and resource management, prepare for increased maritime and military activity, and enhance Arctic territorial domain awareness in order to preserve national security. *See generally* Arctic Executive Steering Committee, *Implementation Framework for the National Strategy for the Arctic Region* (Mar. 2016) [hereinafter, *Arctic Strategy Implementation Framework*]; Dep't of Def., *Arctic Strategy* (Nov. 2013). This is particularly true in the northernmost portion of Alaska—i.e., the area most immediately and directly affected by emerging climate-driven ESA listings.

The now expansive ability of the Services to list species under the ESA impacts national security by preventing and impeding development of the civil infrastructure and strategic military assets needed to adequately protect the nation's interest in the Arctic. For example, the Arctic Strategy Implementation Framework specifically calls for the construction, maintenance, and improvement of ports and other infrastructure needed to preserve the mobility and safe navigation of United States vessels and aircraft. *Arctic Strategy Implementation Framework*, at 5.

Given the onerous consultation process that applies following an ESA listing, the construction or improvement of infrastructure may become cost prohibitive or facilities could be relocated to areas of

less strategic significance. For example, the U.S. Army Corps of Engineers (Corps) has considered a $210 million investment to develop the first deepwater port in the Alaskan Arctic by expanding existing facilities at the Port of Nome. In 2015, the Corps suspended its consideration of the project due to decreased oil and gas exploration activities in the Arctic,[15] which were caused, in part, by the burdensome federal regulatory regime in offshore Alaska.

The U.S. Government Accountability Office also has noted that since 2010 the Coast Guard is challenged by limited maritime domain awareness and a lack of communication infrastructure. *See* U.S. Gov't Accountability Office, GAO-16-453, *Arctic Strategy is Underway, but Agency Could Better Assess How Its Actions Mitigate Known Arctic Capability Gaps* (2016). This lack of infrastructure and domain awareness is most prominent on the United States' Arctic coastline. However, as a result of the increased listing of species and designation of critical habitat on the northern shores of Alaska, the Coast Guard will be unable to prioritize these highly needed maritime infrastructure improvements due to the additional costs and the limited funding available. *See* U.S. Comm. on the Marine Transp. Sys., *U.S. Arctic Marine Transportation System: Overview and Priorities for Action* (2013).

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[15] U.S. Army Corps of Engineers, *Corps Announces 12-Month Pause in Alaska Deep-Draft Port System Study* (Oct. 26, 2015), http://www.poa.usace.army.mil/Media/News-Releases/Article/625969/corps-announces-12-month-pause-in-alaska-deep-draft-arctic-port-system-study/.

Finally, the ability to access, transport, and utilize Alaska's oil and gas resources is critical to both the long-term security of the United States and the nation's economy. The National Petroleum Reserve-Alaska was created in 1923 to reserve oil for times of national crisis. In addition, Alaska's offshore region has significant oil and gas potential—greater than that of the Atlantic and second only to the Gulf of Mexico.[16] Without the availability of Arctic oil and gas resources, the United States risks ceding its long-term energy security to unreliable foreign entities in regions rife with geopolitical instability.

Ultimately, the speculative, climate-driven listing of species under the ESA imposes significant regulatory burdens and economic costs on military and civilian infrastructure projects and the development of strategic natural resources, unnecessarily impacting national security interests in Alaska's Arctic. These effects could have been avoided if NMFS and the Ninth Circuit had adhered to the constraints that Congress explicitly required.

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[16] Bureau of Ocean Energy Management, *Assessment of Undiscovered Oil and Gas Resources of the Nation's Outer Continental Shelf* at 2 (2016), https://www.boem.gov/2016-National-Assessment-Fact-Sheet/ (estimating that Alaska contains more than a quarter of undiscovered oil (26.61 Bbbl) and more than a third of undiscovered gas (131.45 Tcfg) that can be recovered from U.S. Outer Continental Shelf waters).

CONCLUSION

For the foregoing reasons, AFN respectfully urges the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

Steven T. Seward
Counsel of Record
Ascent Law Partners, LLP
719 Second Ave., Suite 1150
Seattle, WA 98104
(206) 920-4129
steve@ascentllp.com

Nicole Borromeo
Alaska Federation of Natives
3000 A Street, Suite 210
Anchorage, AK 99503
(907) 274-3611
nborromeo@nativefederation.org

August 21, 2017