Nos. 17-118, 17-133

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 *AMICI CURIAE* RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC., ALASKA CHAMBER, AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

When the National Marine Fisheries Service ("NMFS") determines that a species is presently abundant and healthy but speculates that it will lose its arctic sea ice habitat due to climate change by the end of the century, and further speculates that this species will be unable to adjust to potential habitat loss over 80 years from now, may NMFS list that species as threatened under the Endangered Species Act ("ESA")?

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Resource Development Council for Alaska, Inc. ("RDC") is an Alaska-based, not-for-profit trade organization representing Alaska's primary economic sector, natural resource development. Formed in 1975, the Council works to promote and support a strong, diversified private sector in Alaska, and to expand the State's economic base through responsible development of Alaska's natural resources. RDC has a broad-based membership that includes businesses and individuals from all resource sectors—including oil and gas, mining, fishing, timber, and tourism—as well as organized labor, local governments, industry support firms, and all twelve land-owning regional Alaska Native Corporations. Congress created these Native Corporations to develop resources on Native lands and provide for Native shareholders and descendants of shareholders. *See generally Alaska v. Native Village of Venetie Tribal Government et al.*, 522 U.S. 520, 523-24 (1998).

RDC's primary mission includes promoting responsible resource development in Alaska, linking diverse interests on resource issues, building and sustaining a diverse membership, and educating public policy makers and others about resource issues. In keeping with these goals, RDC provides forums for policy discussion and analysis, and it works with federal, state, and local

1. No counsel for any party authored this brief in whole or in part. No one other than the amici curiae, their counsel, or their members made a monetary contribution to fund the preparation or submission of this brief. All parties received timely notification of RDC's intent to file this brief pursuant to Supreme Court Rule 37.2(a) and all parties consented to the filing of this brief.

government officials to provide information and analysis on public policy issues of concern to its members. RDC has previously participated as amicus curiae in federal court litigation centering on resource development issues affecting Alaska.

The Alaska Chamber is a nonprofit founded in 1953 that represents hundreds of businesses, manufacturers, and local chambers across the state. Its mission is to promote a healthy business environment in Alaska. The Chamber is the voice of small and large business representing hundreds of employers and local chambers across Alaska. The Alaska Chamber's member companies employ over 100,000 hard-working Alaskans. The Alaska Chamber supports responsible resource development that brings economic opportunity to Alaska and its residents.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases like this one that raise issues of concern to the nation's business community. The Chamber supports responsible resource development in Alaska and recognizes the importance of developing Alaska's oil and gas resources to support national energy security.

Due to their potentially serious impact on the future development of Alaska's resources, the issues presented in this case are of great importance to amici and its diverse memberships. In this brief, amici will "bring[] to the attention of the Court relevant matter[s] not already brought to its attention by the parties[.]" Sup. Ct. R. 37(1). Amici will not focus on the merits and legal arguments regarding listings under the ESA as those issues are more than adequately covered by the Petitioners. Rather, amici will focus on the significant negative impact the Ninth Circuit's decision will have on future economic activity and responsible resource development on Alaska's arctic coastal areas, otherwise known as the "North Slope."

SUMMARY OF ARGUMENT

The listing of a species as threatened when it is currently healthy and exists in abundance, based solely on projections that it will suffer from speculative habitat loss in 100 years, removes all meaningful barriers to listing under the ESA. The Ninth Circuit's decision has laid the groundwork for hundreds of future ESA climate change listings based only on projections of events many decades in the future. As Petitioners have demonstrated, the Ninth Circuit's decision violates the text and purpose of the ESA. If left intact, it will also inflict serious economic harm on the State of Alaska and its residents.

A central premise behind admitting Alaska to the union was ensuring that the State could responsibly develop its resources and be economically self-sufficient. Since the discovery of oil at Prudhoe Bay and the construction of the Trans-Alaska pipeline, oil and gas development on the North Slope has been the cornerstone of Alaska's economy, providing over 80 percent of government revenue and

acting as the State's primary economic driver, creating jobs statewide.

Alaska's North Slope will bear the brunt of the coming ESA listings invited by the Ninth Circuit because this is the habitat for arctic species that rely on sea ice. North Slope development is already subject to a host of stringent state and federal regulations, with multiple state and federal agencies permitting and overseeing every aspect of every project. Imposing the ESA's extensive regulatory scheme on top of this existing regulatory matrix will add costs, result in regulatory delay, and create ongoing regulatory uncertainty, all of which will hamper further economic activity and, in some circumstances, grind it to a halt.

This threat to North Slope development could not come at a worse time for Alaska. Due to the decline in oil production since its peak in 1988 and persistent low oil prices, the State currently faces a multi-billion dollar deficit and ongoing job losses that are pushing it into recession. The State and its industry partners are engaged in a concerted effort to increase North Slope development and reverse these trends. Allowing multiple ESA climate change listings of currently healthy arctic species will stymie these efforts and exacerbate the State's economic tailspin. Even worse, the listings would have no appreciable ecological benefit because they cannot impact greenhouse gas emissions and by definition, could not aid in the recovery of currently healthy and thriving species.

Ultimately, this case is emblematic of the problems inherent in using the ESA listing process to address climate change. The Ninth Circuit's decision takes this notion to its logical extreme, essentially inviting the listing of all arctic species as endangered based on projected

habitat loss 100 years into the future. The irony is that NMFS readily acknowledges that its bearded seal listing has no impact on climate change and related carbon emissions. 77 Fed. Reg. at 76,764 ("[the] listing does not have a direct impact on loss of sea ice or the reduction of [greenhouse gases]"). As Ken Salazar, Secretary of the Interior under President Obama recognized:

> [T]he Endangered Species Act is not the proper mechanism for controlling our nation's carbon emissions. Instead, we need a comprehensive energy and climate strategy that curbs climate change and its impacts – including the loss of sea ice . . . .[2]

Because of the precedent the Ninth Circuit decision sets, this is the Court's last opportunity to rein in the improper use of the ESA as a tool to address climate change and restore the ESA to its intended purpose of protecting species that are facing actual foreseeable threats, based on solid scientific evidence. If the Court does not act now, the negative economic impacts in Alaska, and eventually nationwide, will be profound.

ARGUMENT

I. The Ninth Circuit's Decision Removes All Meaningful Barriers to Listing Arctic Species Under the ESA.

The ESA is meant to ensure conservation of "species of fish, wildlife, and plants [that] have been so depleted

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2. News Release, U.S. Fish & Wildlife Service, *Salazar Retains Conservation Rule for Polar Bears,* May 8, 2009.

in numbers that they are in danger of or threatened with extinction." 16 U.S.C. § 1531(a)(2). An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range[.]" *Id.* § 1532(6). A "threatened species" is "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). Section 4(a) of the ESA requires the Secretary of Commerce and the Secretary of Interior to determine by regulation whether any species, subspecies, or distinct population segments are "threatened" or "endangered" following consideration of five statutory factors. *Id.* § 1533(a)(1). The ESA further provides that a determination of whether to list a species must be made "solely on the basis of the best scientific and commercial data available to [the Secretary] after conducting a review of the status of the species and after taking into account those efforts, if any, ... to protect such species." *Id.* § 1533(b)(1)(A).

NMFS has, for the first time, determined that distinct population segments of a currently healthy and even abundant species, the Beringia distinct population segment ("Beringia DPS") of the bearded seal, are "threatened" based solely on harm predicted to occur nearly a century after the listing. NMFS ignored that the current Beringia DPS population is healthy at about 155,000 individuals, 77 Fed. Reg. 76,748, and that the International Union for the Conservation of Nature and Natural Resources has classified the bearded seal as a "species of least concern." 75 Fed. Reg. 77,511.[3]

3. In 2016 the IUCN again maintained that the bearded seal is a species of least concern. http://www.iucnredlist.org/details/8010/0.

As the District Court recognized, the listing here "relied principally, if not solely, upon climate change as the governing factor for listing the [bearded seal] as threatened." Pet. App. 63a. Moreover, NMFS has concluded that this identified threat will not likely manifest until the year 2100. *See* 77 Fed. Reg. at 76,743-44 (sufficient sea ice for bearded seals expected to persist "through 2050 and out to the second half of the 21st century" with significant impacts not occurring until 2100); 76,749 ("This is a long-term threat and the consequences for bearded seals will manifest themselves over the next several decades."). NMFS also readily acknowledges that the threat triggering the listings—climate induced reduction in Arctic sea ice—is not imminent, predictable, or addressable under the ESA's regulatory mechanisms. *See id.* at 76,740 ("[I]t is unlikely that the proposed protective regulations would provide appreciable conservation benefits."); 76,764 (this "listing does not have a direct impact on the loss of sea ice or the reduction of [greenhouse gases].").

With the bearded seal listing, NMFS has effectively replaced the ESA's listing framework with a new "precautionary" approach that, taken to its logical extreme, could result in the nearly automatic listing of almost all species. The District Court acknowledged as much, recognizing that:

> [A]n unknown, unquantifiable population reduction, which is not expected to occur until nearly 100 years in the future, is too remote and speculative to support a listing as threatened. *If [the Court] were to hold otherwise, such a holding could logically render every species*

> *in the arctic and sub-arctic areas potentially "threatened."*

Pet. App. 79a n. 69 (emphasis added). NMFS's approach is the stated goal of environmental litigants who have long sought to expand the application of the ESA to address the broad, far-reaching and complex problem of global climate change.[4]

Questions of statutory interpretation and intent aside, NMFS's newly-minted approach embodied in the bearded seal listing will create a flood of climate change listings for which the agency itself recognizes the ESA provides no avenue to address at this time.[5] In response to comments on the proposed listing, the Agency noted

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4. *See* Mark Clayton, *New tool to fight global warming: the Endangered Species Act?,* Christian Sci. Monitor, Sept. 7, 2007, https://www.csmonitor.com/2007/0907/p03s03-usgn.html (quoting Kieran Suckling, Policy Director, Center for Biological Diversity, "We think this victory on coral critical habitat actually moves the entire Endangered Species Act onto a firm legal foundation for challenging global warming pollution.").

5. This concern is not theoretical. Already there are currently three cases before the Ninth Circuit regarding other NMFS listings based on climate change considerations, CA9 Case Nos. 16-35380, 16-35866, and 14-17513, and several cases are pending in California where the Center for Biological Diversity has sued for failing to list species threatened by climate change. *See, e.g., Ctr. For Biological Diversity at al. v. U.S. Fish & Wildlife* Servs., No. 16-cv-06040 (N.D. Cal. Filed Oct. 19, 2016); *Ctr. For Biological Diversity v. U.S. Fish & Wildlife* Servs., No. 15-cv-05754-JST (N.D. Cal. Filed Dec. 16, 2015). Further, as noted above, the Center for Biological Diversity has made clear in public statements its intent to continue to use ESA listings to try to address global climate change.

that the "listing does not have a direct impact on the loss of sea ice or the reduction of GHGs," and indicated that the listing was primarily a policy statement that "may indirectly enhance national and international cooperation and coordination of conservation efforts[.]" 77 Fed. Reg. 76,764. Ironically, NFMS chided the State of Alaska in its response to comments on the proposed rule, admonishing that "the threats to bearded seals stem principally from habitat loss associated with global climate change, a threat the State could not single-handedly mitigate." *Id.* at 76,765. NMFS failed to explain, however, how the Agency can or will mitigate these global issues through its listing of the bearded seal.

The parties have argued extensively about NMFS's interpretation and application of Section 4 of the ESA. Those legal arguments will not be repeated here. Instead, amici offer the Court insight as to why the Ninth Circuit's decision, if left to stand, will stifle Alaska's economy without any commensurate benefit to arctic species, nor any change to current climate change trends.

II. The Coming Flood of Listings Will Have Drastic Consequences for Alaska's Economy.

Alaska will be uniquely affected by the Ninth Circuit's decision in two respects. *First*, it is the United States' only arctic state and it provides some of the most visible and immediate examples of climate change impacts in the country. The listing of both the Polar Bear and the Beringia DPS are evidence that Alaska's species will be the first listed under this new "precautionary" use of the ESA. *Second*, the North Slope of Alaska, and the adjacent offshore areas of the Beaufort and Chukchi Seas

in particular, are areas of national importance for their oil and gas exploration, development, and production potential. *See, e.g.,* Outer Continental Shelf Lands Act 43 U.S.C. § 1332(3) (mandating "expeditious and orderly development" of the Alaska Outer Continental Shelf). As discussed below, climate change listings will delay or defeat the projects that fuel Alaska's economy, without providing any commensurate conservation gains.

A. Responsible Resource Development is Part of the Statehood Compact and Critical to the Alaska Economy.

Allowing the new State of Alaska to control its land and resources was a central compact of statehood. In the Alaska Statehood Act, Congress granted approximately 103,350,000 acres of land to the new State of Alaska (or 28 percent of its overall area), and required that any further conveyance of this land must reserve mineral and other rights to the State. *See* Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 339; *see also Sturgeon v. Frost*, 136 S.Ct. 1061, 1065 (2016). "The primary purpose of the statehood land grants . . . was to ensure the economic and social well-being of the new state." *Trustees for Alaska v. State*, 736 P.2d 324, 335 (Alaska 1987). The grants were to be "an endowment which would yield the income that Alaska needed to meet the costs of statehood." *Id.* at 336.

Responsible resource development is the mainstay of Alaska's economy. Given Alaska's remote location and limited ability to depend on other economic drivers such as agriculture, manufacturing, or emerging technology industries, ensuring future opportunities for resource development is vital to continued economic opportunity for all Alaskans. Oil and gas development on Alaska's

North Slope is of particular importance. The oil industry accounts for one-third of Alaska jobs and about one-half of the overall economy when the spending of state revenues from oil production is considered.[6] In other words, without oil, Alaska's economy would be half its size. In addition, from 2005 to 2014, oil revenues have accounted for 90 percent of Alaska's unrestricted general fund revenues.[7] Even considering the recent decline in oil prices, 72 percent of Alaska's unrestricted general fund revenues remain a product of oil revenue.[8]

North Slope production, however, has declined significantly since its peak in 1988. To counter this trend, the State and its industry partners are engaged in a concerted effort to increase development and exploration in order to maintain the State's economic health.[9] These

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6. *See* Northern Economics and Institute of Social and Economic Research, University of Alaska Anchorage, Potential National-Level Benefits of Alaska OCS Development (2011) (available at http://arcticenergycenter.com/wp-content/uploads/2015/08/National-Effects-Report-FINAL.pdf) ("ISER Report"); McDowell Group, The Role of the Oil and Gas Industry in Alaska's Economy (2017) 4, 44 (available at http://www.aoga.org/sites/default/files/news/final_mcdowell_group_aoga_report_7.5.17.pdf) ("McDowell Report").

7. Mouhcine Guettabi, *What Do We Know About the Alaska Economy and Where Is it Heading*, Institute of Social and Economic Research, University of Alaska Anchorage, January 18, 2017. http://www.iser.uaa.alaska.edu/Publications/presentations/2017_01_18-WhatDoWeKnowAKEconomy.pdf.

8. McDowell Report at 27.

9. *See, e.g.*, Alaska Oil and Gas Workforce Development Plan, https://www.alaska.edu/research/wp/plans/oil-and-gas/OilGasPlan.pdf.

efforts are critical as Alaskans are facing a multi-billion dollar budget deficit and significant job losses due to low oil prices and declining production.[10]

B. Allowing Numerous Climate Change ESA Listings Will Negatively Impact Current and Future North Slope Development.

1. The North Slope's Remote Environment Presents Unique Development Challenges.

Alaska's North Slope is one of the most isolated and challenging environments in the world. It is a flat, treeless plain that covers 88,000 square miles, an area slightly larger than Idaho. It extends north from the foothills of the Brooks Mountain Range to the Arctic Ocean and west from the Canadian border to the Chukchi Sea. Winter temperatures across the North Slope frequently dip to minus 30 degrees Fahrenheit with winds to 30-40 miles per hour, resulting in severe chill factors and zero visibilities due to blowing snow.

The remoteness of the North Slope creates major logistical challenges for moving people and materials. Materials must be driven over the Dalton Highway (which

10. Annie Zak, *2016 Was Bad for the Alaska Job Market. 2017 Might Be Worse*, Alaska Dispatch News, January 5, 2017, https://www.adn.com/business-economy/2017/01/05/alaska-can-expect-even-more-job-losses-in-2017-than-last-year; Becky Bohrer, *Alaska Preparing Layoff Notices With State Budget Unsettled*, Associated Press, May 30, 2017; Bob Loeffler, *Alaska Budget Crisis: How Did We Get Here? What Can We Do?*, Institute of Social and Economic Research, University of Alaska Anchorage, https://pmiak.org/index.php/files/215/Presentations/673/Budget-Crisis-101.pdf.

runs between the Yukon River and Prudhoe Bay), airlifted in, or transported by barge from Seattle during the limited ice-free period from late July to early September. These transportation options are costly and subject to constant weather disruptions. Further, there are no roads connecting Prudhoe Bay with the rest of the North Slope. Instead, most transportation takes place over an extensive network of ice roads constructed in the winter, all at a cost of about $400,000 per mile.[11] As a result, a significant portion of development work can occur only during the narrow 90–100 day window from when a season's ice roads are complete until breakup begins in April.[12] Work during the North Slope's short summer season is no easier. Cool and wet conditions can hinder construction efforts and inclement weather often grounds flights for days at a time.

All of these challenges mean that North Slope development is particularly susceptible to regulatory delay and uncertainty. Adding the regulatory burdens associated with multiple ESA listings may sound the death knell for many of these development efforts.

2. ESA Regulatory Hurdles Could Permanently Stifle North Slope Development.

Once a species is listed under the ESA, significant regulatory consequences follow. The ESA tasks the agency (either NMFS of FWS (c) with developing a

11. Elizabeth Harball, *Waiting for Winter: Ice Roads Mean the North Slope Can Get to Work*, Alaska Public Media, February 17, 2017, http://www.alaskapublic.org/2017/02/17/ice-roads-mean-the-north-slope-can-get-to-work/.

12. *Id.*

"recovery plan" specifying "actions as may be necessary to achieve . . . conservation and survival of the species" where it will "promote conservation of the species." 16 U.S.C. § 1533(f)(1). To the same end, the agency, where possible and prudent, must designate "critical habitat" for the listed species. *Id.* § 1533(a)(3)(A)(i).

The biggest consequence is the Act's Section 7 consultation requirement, which requires federal agencies to consult with NMFS or FWS to "insure that any action authorized, funded, or carried out by such agency… is not likely to [1] jeopardize the continued existence of any… threatened species… or [2] result in the destruction or adverse modification of that species' critical habitat." 16 U.S.C. § 1536(a)(2). The consultation requirement captures a broad swath of agency action. All projects with federal funding or that require any federal approval are caught in this net. Section 7 consultation injects uncertainty into projects in that the Services have wide leeway to modify or prohibit a proposed action or project to fulfill their duties under the ESA.

The regulatory burdens associated with the Beringia DPS listing, and future climate change listings, will fall most heavily on Alaska's North Slope because this is the habitat of the various species most affected by potential loss of sea ice. Here, the offshore areas inhabited by the Beringia DPS are the location of nationally strategic oil and gas leasing, exploration, development, and production. These areas are part of the Alaska Outer Continental Shelf ("OCS"), which constitutes one of the world's largest untapped resources, potentially reaching as high as 20.5 billion barrels of oil, and 73.35 trillion cubic feet of natural gas. Bureau of Ocean Energy Management, "Assessment

of Undiscovered Technically Recoverable Oil and Gas Resources of the Nation's Outer Continental Shelf," BOEM Fact Sheet RED-2011-01a, November 2011. It is estimated that developing these reserves would create an annual average of 54,700 new jobs nationwide through the year 2051.[13] Saddling these areas with overlapping critical habitat designations and recovery plans will inject an additional federal management overlay in an already crowded regulatory environment.

North Slope resource development projects are already subject to rigorous permitting and oversight from the State of Alaska, which implements robust environmental permitting processes through the Alaska Department of Environmental Conservation[14], and closely manages State lands through both the Department of Natural Resources, AS 38.05, *et seq.*; 11 AAC 83.300, *et seq.*, and the Alaska Oil and Gas Conservation Commission. AS 31.05, *et seq.*; 20 AAC 25.005, *et seq.* In addition, these projects are also subject to an array of federal oversight through the Marine Mammal Protection Act,[15] the Clean Water Act, the National Environmental Policy Act, and the Oil

13. ISER Report at ES-1.

14. *See, e.g.*, The State of Alaska's Comments on the Proposed Listing, Attachment 3 (March 25, 2011) (available at https://www.regulations.gov/document?D=NOAA-NMFS-2010-0259-0054).

15. The Beringia DPS already benefited from the Marine Mammal Protection Act's safeguards, prior to listing. Ironically, the listing of the Beringia DPS as threatened automatically triggers "depleted" status and "strategic stock" status under the Marine Mammal Protection Act, despite the fact that the bearded seal population is currently healthy and abundant. 16 U.S.C. § 1362(1) (C), (19)(C).

Pollution Act of 1990. It already takes new development projects anywhere from six to 36 months to secure the necessary permits to proceed, depending on the size and scope of the project. The ESA Section 7 consultation process, stacked upon these existing regulatory hurdles, is redundant at best. The delay and added cost triggered by additional listings may prove insurmountable for many projects.

The fact that this listing is breaking new ground only increases uncertainty, making an already difficult situation worse. There are significant open questions regarding how a critical habitat can be designated for a species that is currently thriving and facing no present threats. Similarly, it is unclear how the Agency could draft a recovery plan detailing "actions as may be necessary to achieve . . . conservation and survival of the species," 16 U.S.C. § 1533(f)(1)(A)(B), given the Agency's acknowledgment that local human activity is not posing a threat to the recovery or survival of the Beringia DPS. Further, because the Beringia DPS listing is based only on *projected*, not current climate change impacts to its habitat, it is unclear what constitutes "jeopardy" to the species or its habitat for purposes of a Section 7 consultation – current, known impacts of an action, or projected, hypothetical impacts? Finally, NMFS has not addressed how to reconcile the fact that the local oil and gas development activities that will be subjected to this new regulatory regime have no significant impact on ice seals and do not pose a threat to the recovery or survival of the species.[16]

16. Specifically, NMFS concluded that threats to the Beringia DPS from oil and gas exploration were only "moderately

The only certainty, if the listing is left in place, is that extensive litigation targeting oil and gas development will follow any designation of critical habitat, including multiple claims alleging "adverse modification" of critical habitat Under Section 7. This regulatory uncertainty, combined with the cloud of certain litigation, will have chilling effect on all future development projects and will place the entire North Slope at a significant worldwide competitive disadvantage.

Recent experience with the polar bear listing confirms these concerns. As ConocoPhillips noted in its critical habitat comments to NMFS in this case, that listing has already spawned fourteen separate federal lawsuits and significantly increased the costs of development.[17] For example, the 30-year total cost of designating polar bear critical habitat was estimated by the Fish and Wildlife Service to range up to a maximum of approximately

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significant." 77 Fed. Reg. at 76,746. This is consistent with the Fish and Wildlife Service's incidental take regulations for polar bears and walrus under the Marine Mammal Protection Act where the agency concluded: "[i]ndustry exploration activities . . . will have a negligible impact on these species . . . ." 78 Fed. Reg. 35,364 (June 12, 2013) (Chukchi Sea). NMFS has issued similar findings under the Marine Mammal Protection Act. *See, e.g.*, 77 Fed. Reg. 25,829, 25,834 (May 1, 2012) ("Bowhead whales have continued to travel to the eastern Beaufort Sea each summer despite seismic exploration in their summer and autumn range for many years (Richardson *et al.* 1987), and their numbers have increased notably (Allen and Angliss 2010).").

17. *See* Alaska Oil and Gas Association and American Petroleum Institute's Comments on Critical Habitat Designation for the Beringia DPS at 10 (February 26, 2013) (available at https://www.regulations.gov/document?D=NOAA-NMFS-2010-0259-0092).

$1.2 million.[18] However, the increased cost of wetland mitigation for Point Thomson, the first new oil and gas development project to obtain a Section 404 permit within polar bear critical habitat, has already exceeded this maximum estimate. *Id.*

Point Thomson already stood as a prime example of how regulatory delays can set back projects by years, given the narrow seasonal construction windows and long lead times associated with North Slope development. Specifically, an entire construction season was lost when the Corps of Engineers delayed completion of an Environmental Impact Statement from November 2010 to November 2011.[19] Similarly, Alaskans have watched as regulatory delays have set back and even defeated other important projects associated with North Slope development. Recent examples include a delay of more than a year in Bureau of Land Management permitting (thus far) for its Greater Mooses Tooth-2 Project in the National Petroleum Reserve A,[20] the departure of Royal

18. *See* ConocoPhillips' Comments in Docket Nos. NOAA-NMFS-2010-0258 and NOAA-NMFS-2010-0259 re "Designation of Critical Habitat for Ringed Seal Subspecies and for Bearded Seal Distinct Population Segments" at 4-5 (February 26, 2013) (available at https://www.regulations.gov/document?D=NOAA-NMFS-2010-0259-0090).

19. *Federal Permitting Delays Threaten Point Thomson Development Project*, Alaska Bus. Monthly (Aug. 12, 2012), http://www.akbizmag.com/Alaska-Business-Monthly/August-2012/Federal-Permitting-Delays-Threaten-Point-Thomson-Development-Project/index.php.

20. Elwood Brehmer, *Permitting Delays Put ConocoPhillips' GMT-2 Timeline In Jeopardy*, Alaska J. of Com. (Jan. 26, 2017),

Dutch Shell from the State after seven years of regulatory battles over its plans to drill in the Arctic OCS,[21] and Statoil's outright abandonment of its Alaska offshore leases in 2015.[22]

If the Ninth Circuit's decision stands, Alaska can expect that future listings based on the same long-term threat to sea ice or other potential climate change impacts will place large swathes of land off limits to development and lead to a string of cancelled and delayed projects. All of this will cause significant and irreparable harm to Alaska's economy without any corresponding ecological benefits. This is precisely the "needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives" under the ESA that this Court has previously condemned. *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997).

CONCLUSION

Alaska is in many ways "ground zero" for the impacts of climate change. Allowing multiple pointless ESA listings of Arctic species will make things materially worse for Alaskans. These listings will have no appreciable

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http://www.alaskajournal.com/2017-01-26/permitting-delays-put-conocophillips'-gmt-2-timeline-jeopardy#.

21. Erica Martinson, *Shell calls off its multibillion-dollar Mission in Alaska's Arctic*, Alaska Dispatch News (Sept. 28, 2015), https://www.adn.com/energy/article/shell-drops-arctic-drilling-plans/2015/09/28/.

22. Richard Milne, *Statoil Abandons Alaska Oil Projects*, Fin. Times (Nov. 17, 2015), https://www.ft.com/content/5c623998-8d46-11e5-94a4-639039952d45.

conservation benefits and instead, will stifle the responsible economic development that is the lifeline for all of Alaska. If the Ninth Circuit's decision were to stand, however, improper ESA listings would continue unabated.

This case perfectly encapsulates why the ESA is not an appropriate or effective tool to combat the long-term challenges posed by global climate change. Climate change should be addressed through thoughtful policies that will have a meaningful impact. Under our system of government, these policies should come from Congress and the Executive Branch, not the courts. Amici therefore respectfully request that the Court grant the petitions for certiorari and reverse the Ninth Circuit's decision.

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