

Nos. 17-118 and 17-133

In the Supreme Court of the United States

STATE OF ALASKA, ET AL., PETITIONERS

v.

WILBUR L. ROSS, SECRETARY OF COMMERCE, ET AL.

ALASKA OIL AND GAS ASSOCIATION, ET AL., PETITIONERS

v.

WILBUR L. ROSS, SECRETARY OF COMMERCE, ET AL.

*ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of Commerce's listing the Beringia distinct population segment of the Pacific subspecies of the bearded seal as a threatened species under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-33¹) is reported at 840 F.3d 671. The opinion of the district court (Pet. App. 34-79) is not published in the Federal Supplement but is available at 2014 WL 3726121.

¹ Citations to “Pet. App.” refer to the appendix to the petition for a writ of certiorari in No. 17-133. References to “Alaska Pet.” are to the State of Alaska’s petition in No. 17-118. References to “AOGA Pet.” are to the Alaska Oil and Gas Association’s petition in No. 17-133.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2016. A petition for rehearing was denied on February 22, 2017 (Pet. App. 80). On May 12, 2017, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including July 22, 2017, and the petitions were filed on July 21, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2012, the Secretary of Commerce (the Secretary), acting through the National Marine Fisheries Service (NMFS), added the Beringia distinct population segment (Beringia DPS) of the Pacific bearded seal subspecies to the list of threatened species under the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.* Pet. App. 14. Petitioners challenged that decision under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Pet. App. 7. The district court concluded that NMFS's listing determination violated the APA. *Id.* at 34-79. The court of appeals reversed. *Id.* at 1-33.

1. Congress enacted the ESA to conserve species that are endangered or threatened, and to conserve the ecosystems upon which endangered and threatened species depend. See 16 U.S.C. 1531(b), 1532(6), (15), and (20), 1533. The ESA requires the Secretaries of the Interior and Commerce to maintain a list of all endangered or threatened species. 16 U.S.C. 1533. The ESA defines "endangered species" to mean "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. 1532(6). It defines "threatened species" to mean "any species which is likely to become an endangered species within the

foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. 1532(20). Species, in turn, include any subspecies and “any distinct population segment [DPS] of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. 1532(16).

The Secretary of Commerce or Interior (depending on the species at issue) may list a species as endangered or threatened on the Secretary’s own initiative or as a result of a petition submitted by an “interested person.” 16 U.S.C. 1533(b)(3)(A). In deciding whether to list a species, the Secretary must evaluate whether the species is threatened or endangered “because of any of the following factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.” 16 U.S.C. 1533(a)(1)(A)-(E). The determination 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.” 16 U.S.C. 1533(b)(1)(A).

Section 4 of the ESA, 16 U.S.C. 1533, requires the Secretary to designate critical habitat, to the maximum extent prudent and determinable, for a species listed as threatened or endangered, 16 U.S.C. 1533(a)(3)(A). Section 4 of the ESA also requires the Secretary to develop and implement plans for the conservation and survival of endangered and threatened species, known as “recovery plans,” unless the Secretary “finds that such a plan will not promote the conservation of the species.”

16 U.S.C. 1533(f)(1). In addition, for any species listed as endangered or threatened, Section 7 of the ESA, 16 U.S.C. 1536, requires federal agencies to consult with the Secretary regarding agency actions that may affect the species, and to ensure that agency actions are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species,” 16 U.S.C. 1536(a)(2).

Section 9 of the ESA, 16 U.S.C. 1538, prohibits certain actions with respect to endangered species of fish and wildlife. It generally prohibits the “take” of any endangered species without prior authorization, but does not prohibit the “take” of threatened species. 16 U.S.C. 1538(a)(1)(B) and (C). Instead, the Secretary may extend Section 9 prohibitions to a threatened species by regulation. 16 U.S.C. 1533(d). The ESA also provides that Alaskan Natives are generally exempt from the prohibitions on taking endangered or threatened fish or wildlife when they take fish or wildlife for subsistence purposes. 16 U.S.C. 1539(e).

2. In 2008, NMFS received a petition from the Center for Biological Diversity requesting that the Secretary list the bearded seal and two other seal species as threatened or endangered under the ESA. Pet. App. 6. NMFS found that the petition presented substantial information indicating that the bearded seal may be threatened or endangered. See 77 Fed. Reg. 76,740 (Dec. 28, 2012). NMFS then undertook “a lengthy administrative process” that included multiple rounds of independent peer review, “several rounds of public notice and comment, and public hearings,” to determine whether to list the Beringia DPS as a threatened species. Pet. App. 6; see 77 Fed. Reg. at 76,740-76,741,

76,750-76,751. As part of that process, NMFS convened a Biological Review Team of 11 scientists to review the best scientific and commercial data available in order to assess threats to the bearded seal. *Id.* at 76,741.

The Biological Review Team determined that the bearded seal has Atlantic and Pacific subspecies, and that the Pacific subspecies has two distinct population segments. Pet. App. 10-11. One of those population segments—the Beringia DPS—is found in the Bering, Chukchi, Beaufort, and East Siberian Seas. *Id.* at 11; 75 Fed. Reg. 77,496, 77,501-77,502 (Dec. 10, 2010).

In conducting the risk assessment for the Beringia DPS, the Biological Review Team analyzed the species' habitat requirements relative to important life functions, including birthing, nursing, pup-rearing, hunting, mating, and molting. Pet. App. 11. It concluded that the seals rely on ice floes as a platform to “give birth (whelp) and to nurse their pups; to allow mothers close access to food sources while nursing; to enable their pups to gain experience with diving, swimming, and hunting away from their predators; to provide a location for males to attempt to attract females,” and to provide a platform where seals can rest while molting. *Ibid.*² It also determined that bearded seals require access to “shallow waters, where the seals have access to ‘more productive’ sea floors with a higher availability of food.” *Ibid.* The Biological Review Team determined that the Beringia DPS's continued viability depended on the availability of suitable sea ice in proximity to foraging habitats during crucial life stages. *Id.* at 12.

² Seals in the Beringia DPS whelp, nurse, and rear their pups during April and May and the molt peaks during May and June. Pet. App. 68; 77 Fed. Reg. at 76,743-76,744.

The Biological Review Team used observational and predictive data from the Intergovernmental Panel on Climate Change (IPCC), including the output from six climate models, to assess recent and future sea ice conditions within the range of the Beringia DPS. Pet. App. 12; 77 Fed. Reg. at 76,742-76,745. The Biological Review Team concluded that the projected loss of suitable sea ice habitat (particularly in the Bering Sea), combined with other habitat modifications (including impacts from changes in the ocean due to warming and acidification), posed a high threat to the continued existence (“persistence”) of the Beringia DPS. Pet. App. 12; 77 Fed. Reg. at 76,742-76,745, 76,747-76,748, 76,759.

In 2010, NMFS proposed listing the Beringia DPS as a threatened species. 77 Fed. Reg. at 76,740. After receiving peer review of the proposed rule, NMFS “sought additional independent peer reviews of * * * the timing and magnitude of climate change effects on the availability of sea ice” and related impacts to the Beringia DPS. Pet. App. 12; 77 Fed. Reg. at 76,741. NMFS also “updated its climate predictions” to include recently published studies. Pet. App. 12.

In 2012, after considering the Biological Review Team’s status review report, peer reviews, and public comments, NMFS listed the Beringia DPS as a “threatened” species under the ESA, based on “[t]he present or threatened destruction, modification, or curtailment of [the species’] habitat.” 77 Fed. Reg. at 76,742; see *id.* at 76,748-76,749; see also 16 U.S.C. 1533(a)(1)(A) (listing “the present or threatened destruction, modification, or curtailment of [the species’] habitat” as a basis for determining that a species is endangered or threatened).

NMFS determined that “the availability of sea ice in shallow water was crucial to the Beringia DPS’s viability,” Pet. App. 13, because the Beringia DPS relies on sea ice for critical life functions, such as mating, molting, and whelping and nursing pups, *id.* at 11; 77 Fed. Reg. at 76,742, 76,744, 76,754; see Pet. App. 68-69.

NMFS then determined that “the projected changes in sea ice habitat” due to global warming “pose significant threats to the persistence of the Beringia DPS throughout all of its range,” 75 Fed. Reg. at 76,744, and would likely make the Beringia DPS endangered within the foreseeable future, *id.* at 76,748. In assessing the impact of climate change on the sea ice habitat of the Beringia DPS, NMFS used the IPCC’s predictive models along with observational records of sea ice conditions. Pet. App. 15; see *id.* at 72; 75 Fed. Reg. at 77,503-77,504. Those models indicated that there would be little or no sea ice suitable for whelping and pup-rearing in the Bering Sea in some years in the 2020s and that the frequency of minimal-ice years would increase over the coming decades. Pet. App. 66; 77 Fed. Reg. at 76,744. By mid-century, the model projections indicated that there would be inadequate ice in the Bering Sea for molting in June and that in July “sea ice would recede to less than 20% of the mean or disappear entirely” from the continental shelves of the “Beaufort, Chukchi, and East Siberian seas.” Pet. App. 16-17; 77 Fed. Reg. at 76,744, 76,759; 75 Fed. Reg. at 77,504. And by the end of the century, the predictive models indicated, sea ice suitable for the seals’ critical life functions would be gone from the Bering Sea during May and June. Pet. App. 13, 66; 77 Fed. Reg. at 76,744, 76,759. NMFS also observed that research published while

NMFS was seeking comment on its IPCC-based projections indicated “that the IPCC climate models understated the speed at which temperatures were rising at the poles,” Pet. App. 17, and that observed sea ice losses were occurring approximately 30 years earlier than the IPCC models projected, 77 Fed. Reg. at 76,753; C.A. E.R. 159. After considering the impact of warming trends on the sea-ice habitat on which the Beringia DPS relied for critical life functions, NMFS concluded that the Beringia DPS is “likely to become endangered within the foreseeable future (threatened), primarily due to the projected loss of sea ice habitat.” 77 Fed. Reg. at 76,758. NMFS accordingly listed the species as “threatened.” *Id.* at 76,748.

NMFS did not issue a Section 4(d) regulation extending the “take” prohibitions in ESA Section 9 to the Beringia DPS, explaining that the principal threat to the Beringia DPS is habitat alteration stemming from climate change in the foreseeable future and that extending the “take” prohibitions would not presently “provide appreciable conservation benefits.” 77 Fed. Reg. at 76,749. NMFS also concluded that “[s]ubsistence harvest[s] of bearded seals by Alaska Natives appear[] sustainable and do[] not pose a threat to the populations,” and that there was no current basis for NMFS to regulate subsistence harvests. *Id.* at 76,763. NMFS has also not yet designated critical habitat for the Beringia DPS.

3. After petitioners brought suit under the APA to challenge the listing of the Beringia DPS as a threatened species, the district court granted summary judgment to petitioners. Pet. App. 34-79.

The district court noted that its function in determining whether an agency action is “arbitrary, capricious,

an abuse of discretion, or otherwise not in accordance with law’” is “extremely narrow.” Pet. App. 39 (citation omitted). The court observed that “as long as the agency states a rational connection between the facts found and the decision made it must be upheld.” *Ibid.* And it noted that judicial deference was particularly appropriate when the matter at issue “requires a high level of technical expertise.” *Id.* at 40 (citation omitted).

Nevertheless, the district court concluded that the listing of the Beringia DPS violated the APA. Pet. App. 76-78. The court described it as “[t]roubling” that NMFS had listed the Beringia DPS as threatened based on threats to the species’ population level that would manifest toward the end of the century, when it did not appear “that any serious threat of a reduction in the population * * * exists prior to the end of the 21st century.” *Id.* at 76. It concluded that the designation was invalid because of “the lack of any articulated discernable, quantified threat of extinction within the *reasonably* foreseeable future.” *Id.* at 77. The court also faulted the agency for listing the Beringia DPS as threatened even though the agency had determined that “because existing protections were adequate, no further protective action [under Section 4(d) of the ESA] need be taken at this time.” *Id.* at 77-78.

In addition, the district court held that NMFS failed to comply with an ESA provision requiring that when a State has filed comments disagreeing with a proposed regulation, “the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency’s comment or petition.” Pet. App. 63 (quoting 16 U.S.C. 1533(i)). While NMFS had “argue[d] that it responded to each of the State’s comments in either its direct response to the

State's comments or in the Listing Rule itself," the court concluded that NMFS "did not fulfill its response obligations" because some responses were in NMFS's rule but not in a separate response to the State. *Id.* at 63-64 (citation omitted).

4. The court of appeals reversed, concluding that NMFS's listing decision was not arbitrary, capricious an abuse of discretion, or otherwise not in accordance with law. Pet. App. 1-33. The court explained that petitioners "contend[ed] that NMFS used climate models that cannot reliably predict the degree of global warming beyond 2050 or the effect of that warming on a sub-region, such as the Arctic." *Id.* at 17. The court observed that, in assessing that challenge, it was required to "defer to the agency's interpretation of complex scientific data so long as the agency provides a reasonable explanation for adopting its approach and discloses the limitations of that approach." *Ibid.* (citation and internal quotation marks omitted).

The court of appeals reviewed the models that NMFS used to assess the effects of climate change on sea ice, Pet. App. 15-17, and concluded that NMFS had "provided ample evidence of significant sea ice loss from 2007 to 2050, a period in which specific data supports the IPCC climate change projections," *id.* at 18. In addition, the court determined that "NMFS's projections for the second-half of the century are also reasonable, scientifically sound, and supported by evidence." *Ibid.* The court further noted that "[t]he majority of independent peer reviewers agreed that NMFS's long-term climate projections were based on the 'best scientific and commercial data available,'" and that "there was scientific consensus regarding the 'direction and effect' of climate change." *Id.* at 20.

The court of appeals also noted the scientific consensus that “there would be significant sea ice loss in the Beringia DPS’s habitat, and that such a significant loss of habitat would almost certainly have a negative effect on the bearded seal’s survival.” Pet. App. 20. Indeed, it observed that “even if global warming plateaued in the second-half of the century, devastating sea ice losses would still result during months that are currently critical to the bearded seal’s propagation.” *Ibid.* The court also noted that more recent studies in the administrative record indicated that sea ice was disappearing faster than projected under the IPCC models. *Id.* at 21. Under these circumstances, the court concluded, NMFS “provided a reasonable and evidence-based justification for its mid-century and end-of-century sea ice projections,” “provided a rational and reasonable basis for evaluating the bearded seal’s viability over 50 and 100 years,” and “did not act arbitrarily or capriciously in concluding that the effects of global climate change on sea ice would endanger the Beringia DPS in the foreseeable future.” *Id.* at 21-22.

The court of appeals rejected petitioners’ arguments that NMFS should have “set[] the year 2050 as the outer boundary of its ‘foreseeable future’ analysis” as it had done in an earlier assessment of the status of the ribbon seal under the ESA. Pet. App. 22, 24.³ The court explained that “NMFS has argued, and several courts

³ While NMFS determined that the ribbon seal should not be listed as endangered or threatened in 2008, based on consideration of data through 2050, NMFS reassessed the 2008 ribbon-seal finding in 2013, utilizing data regarding climate-change-related threats through 2100. NMFS’s 2013 evaluation again determined that listing of the ribbon seal was unwarranted. 78 Fed. Reg. 41,371-41,373, 41,383-41,384 (July 10, 2013).

have agreed, that the agency may determine the time-frame for its ‘foreseeable future’ analysis based upon the best data available for a particular species and its habitat.” *Ibid.* (citation omitted). The court concluded that NMFS’s basis for adopting a “dynamic, species-specific and evidence-based definition” of “foreseeable future” was “well-reasoned and consistent with the ESA’s mandate.” *Id.* at 24-25.

The court of appeals also declined to hold that NMFS acted arbitrarily and capriciously by listing the Beringia DPS as threatened without making certain additional quantifications or findings. Pet. App. 29. The court explained that the ESA directed the agency to designate as “threatened” any species that would “‘likely become an endangered species within the foreseeable future.’” *Id.* at 28 (citation omitted). The court reasoned that, contrary to petitioners’ suggestions, the statute did not require that the agency “quantify population losses, the magnitude of risk, or a projected ‘extinction date’ or ‘extinction threshold’” in order to list a species as threatened. *Id.* at 29.

The court of appeals further concluded that NMFS had reasonably interpreted the relevant statutory phrase “likely to become endangered” in the ESA to mean “probable” or “more likely than not.” Pet. App. 29. Applying that standard, the court held, NMFS had permissibly determined that “the bearded seal was ‘likely to become an endangered species within the foreseeable future’” after “a thorough assessment based on the best available scientific and commercial data.” *Id.* at 30. The court therefore concluded that “NMFS’s final rule listing the Beringia DPS as threatened was not arbitrary or capricious, and its listing decision was supported by substantial evidence.” *Id.* at 30.

In a determination that petitioners do not challenge, the court of appeals also reversed the district court's holding that NMFS had not adequately responded to Alaska's comments on NMFS's proposed rule. Pet. App. 31-33.

ARGUMENT

The court of appeals correctly sustained NMFS's decision to list the Beringia DPS as a threatened species. And its case-specific determination does not conflict with decisions of this Court or any court of appeals. Further review is unwarranted.

1. The court of appeals correctly concluded, based on the record in this case, that NMFS's listing decision was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. Under the ESA, an endangered species is one that "is in danger of extinction throughout all or a significant portion of its range," 16 U.S.C. 1532(6), and a "threatened species" is one that "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range," 16 U.S.C. 1532(20). In accordance with ordinary meaning, NMFS has reasonably determined that a species is "likely" to become endangered within the foreseeable future if it is "more likely than not" that the species will become endangered within the foreseeable future. Pet. App. 29 (citing dictionaries).

NMFS's determination that it is more likely than not that the Beringia DPS will become endangered in the foreseeable future was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. NMFS projected the effect that climate change would have on the Beringia DPS's sea-ice habitat using multiple IPCC models. Pet. App. 12, 16-17. NMFS deter-

mined that the IPCC models represent the “best scientific and commercial data available” regarding the future effects of global warming, *id.* at 20, and both the D.C. Circuit and Ninth Circuit have likewise concluded that “the IPCC climate models constitute[]the ‘best available climate science.’” *Id.* at 17 (citing *Alaska Oil & Gas Ass’n v. Jewell*, 815 F.3d 544, 558-559 (9th Cir. 2016), cert. denied, 137 S. Ct. 2091 and 137 S. Ct. 2110 (2017)); *In re Polar Bear Endangered Species Listing & § 4(d) Rule Litig.*, 709 F.3d 1, 4-6, 9-11 (D.C. Cir.), cert. denied, 134 S. Ct. 310 (2013)). After reviewing those projections, independent peer reviews, and public comments, Pet. App. 12, 16-17, NMFS determined that there would be little or no sea ice suitable for whelping and pup-rearing in the Bering Sea in some years in the 2020s and that the frequency of such minimal-ice years is projected to increase over the coming decades, and that by mid-century there would be inadequate ice in the Bering Sea for molting in June, Pet. App. 16, 66; 77 Fed. Reg. at 76,744. NMFS further determined that by the end of the century, sea ice suitable for critical life functions would be gone from the Bering Sea entirely during May and June. Pet. App. 13, 66; see 77 Fed. Reg. at 76,744, 76,759.

NMFS then reasonably determined that as a result of the loss of sea-ice habitat, the Beringia DPS was “likely to become [an endangered species] within the foreseeable future.” 77 Fed. Reg. at 76,748. NMFS explained that bearded seals rely on sea ice in shallow water for critical life functions, such as mating, molting, whelping, and nursing pups. Pet. App. 11; 77 Fed. Reg. at 76,742, 76,754. As a result, NMFS “concluded that the availability of sea ice in shallow water was crucial to the Beringia DPS’s viability.” Pet. App. 13. And with

the potential for the spring and summer ice edge to retreat to deep waters of the Arctic basin and to other regions, potentially separating suitable ice from productive feeding habitat, the independent peer reviewers agreed that the “Beringia DPS’s continued viability depended on the availability of sea ice in the Bering [] Sea[] during crucial life stages.” *Id.* at 12. While acknowledging some disagreement among peer reviewers regarding the “magnitude and immediacy of the threats posed to the Beringia DPS by the projected changes in sea ice habitat,” 77 Fed. Reg. at 76,750, NMFS determined that “the projected changes in sea ice habitat pose significant threats to the persistence of the Beringia DPS throughout all of its range,” *id.* at 76,744, and that the Beringia DPS was likely to become endangered within the foreseeable future, *id.* at 76,748; see Pet. App. 26-27; *id.* at 27 (NMFS “drew upon existing research to explain how habitat loss would likely endanger the bearded seal”).

Petitioners argue that NMFS lacked authority to list as “threatened” a population segment that is “not presently endangered” based on the likelihood that the population segment will become endangered as a result of loss of “its habitat due to climate change [through] the end of the century.” Alaska Pet. i (question presented); *id.* at 1, 16; AOGA Pet. i (same question presented). In support of that contention, petitioners principally argue that NMFS was required to refrain from listing the Beringia DPS until “the species actually experiences a decline.” Alaska Pet. 1; see *id.* at 29 (“The agencies can list the species when (if ever) the immediate population effects of climate change begin to manifest.”); see also AOGA Pet. 21 (the agencies must have data showing

that “impacts to the species have been observed”); *id.* at 33.

That argument is contradicted by the statutory text. The ESA provides for listing a species as threatened if “the best scientific and commercial data available,” 16 U.S.C. 1533(b)(1)(A), demonstrates that the species is “likely to become an endangered species within the foreseeable future,” 16 U.S.C. 1532(20)—even if the species is not presently endangered or suffering a decline.⁴ Petitioners suggest (Alaska Pet. 32; AOGA Pet. 20-21) that their proposed standard is supported by *In re Polar Bear, supra*. But while the court in that case rejected a challenge to a listing that was supported by evidence that some populations of the species had already experienced declines, the court did not suggest that such a decline was a prerequisite to a “threatened” listing. 709 F.3d at 2-3.

Petitioners alternatively suggest that the court of appeals erroneously held that NMFS could list a species as threatened based merely on findings that the impact of global warming was uncertain or that global warming would have some negative impact on the species—without finding it likely that the species would become endangered within the foreseeable future. See AOGA Pet. 14 (arguing that the court of appeals “excus[ed]” the agency from establishing that the Beringia DPS would become threatened “because the agency ‘candidly disclosed’ its uncertainty and lack of supporting data”); *id.* at 19, 21-22; Alaska Pet. 24, 27 (arguing that the court

⁴ The AOGA petitioners expressly disavowed this argument in the court of appeals, stating that they “did not contend below and do not contend here that there must be a present documented decline in a species’ abundance or range to justify an ESA listing.” AOGA C.A. Br. 19.

of appeals held that the Beringia DPS could be listed based only on a showing that climate change would have a “negative impact” on the species or would “affect” the seals’ habitat).

These arguments misunderstand the decision below. The court of appeals recognized that the agency had interpreted “threatened” status to be proper only if it was “more likely than not” that a species would become endangered within the foreseeable future—thereby requiring more than some “negative impact,” Alaska Pet. 24, or “uncertainty” regarding whether a species would become endangered, AOGA Pet. 14. The court of appeals then concluded that substantial evidence supported the agency’s determination that this “more likely than not” standard was satisfied with respect to the Beringia DPS. Pet. App. 29-30 (stating that “NMFS has interpreted the term ‘likely’ to have its common meaning (i.e., more likely than not)” and that “NMFS did not misinterpret or misapply the word ‘likely’ when it concluded that the bearded seal was ‘likely to become an endangered species within the foreseeable future’); *id.* at 27 (“[T]he agency drew upon existing research to explain how habitat loss would likely endanger the bearded seal.”); *id.* at 30 (concluding that “substantial evidence” supports the listing of the Beringia DPS as threatened). The court thus sustained NMFS’s listing determination because it found that NMFS had permissibly concluded that the Beringia DPS is likely to become endangered within the foreseeable future—not merely because there exists uncertainty about the impact of global warming or because global warming would have some impact on the Beringia DPS.

The passages in the court of appeals' opinion on which petitioners rely do not hold that NMFS was permitted to designate a species as threatened without satisfying its own definition of "threatened," but instead summarize parts of the administrative record or reject discrete arguments advanced by petitioners below. The footnote to which the Alaska petitioners refer (Pet. 24-25) cited portions of NMFS's proposed and final rules that "provided information regarding the negative impact of mid-century sea ice melt on the bearded seal's survival." Pet. App. 20 n.7. It did not state that an agency needed only find some "negative impact" in order to list a species as threatened under the ESA.

Similarly, the passage in the court of appeals' opinion that the AOGA petitioners highlight (Pet. 18-19) rejected the argument that NMFS could not list the Beringia DPS because there exists some uncertainty regarding the impact of climate change. The court rejected the proposition that NMFS must "base its decision on ironclad evidence," explaining that the ESA "simply requires the agency to consider the best and most reliable scientific and commercial data and to identify the limits of that data when making a listing determination." Pet. App. 21; see *id.* at 19 ("The ESA does not require NMFS to make listing decisions only if underlying research is ironclad and absolute."). The court's statements rejecting an ironclad-evidence requirement cannot reasonably be read as holding that a species can be listed as threatened regardless of whether it is more likely than not that the species will become endangered within the foreseeable future. Both before and after rejecting an ironclad-evidence rule, the court stated that it was sustaining NMFS's listing determination because the agency had concluded it was

more likely than not that the Beringia DPS would become endangered within the foreseeable future, and substantial evidence supported the agency's determination. See p. 17, *supra*.

The AOGA petitioners likewise err in asserting (Pet. 23-24) that the court below held that an agency may list a species as "threatened" without reasonably concluding that the species is likely to become endangered in the foreseeable future when the court stated that NMFS was not required to present data regarding the "magnitude" of the global-warming threat. As noted above, the court below accepted the agency's understanding that a "threatened" listing requires a showing that it is more likely than not that a species will become endangered within the foreseeable future, and it then concluded that substantial evidence supported NMFS's determination that that standard was satisfied. See p. 17, *supra*. In stating that NMFS was not also required to show evidence of the "magnitude" of the global-warming threat, the court simply rejected the arguments of petitioners and the district court that the agency was required to make quantitative or fine-grained assessments beyond the necessary more-likely-than-not determination. Pet. App. 29 ("[T]he ESA does not require an agency to quantify population losses, the magnitude of risk, or a projected 'extinction date' or 'extinction threshold' to determine whether a species is 'more likely than not' to become endangered in the foreseeable future."); *id.* at 26 (rejecting the view that NMFS could not list the Beringia DPS as threatened without "provid[ing] a predicted 'population reduction,' 'extinction threshold,' or 'probability of reaching that threshold,'" because that view "imposed ad hoc requirements that exceed the ESA's provisions"); *id.* at 26-27

(stating that “[u]ncertainty regarding the speed and magnitude of [global warming’s] adverse impact * * * does not invalidate data presented in the administrative record that reasonably supports the conclusion that loss of habitat at key life stages will likely jeopardize the Beringia DPS’s survival over the next 85 years.”).⁵

Petitioners alternatively argue that the court of appeals erred by failing to consider whether ESA “remedial tools” would be effective in assessing NMFS’s decision to designate the Beringia DPS as threatened. Alaska Pet. 1-3, 26-28; AOGA Pet. 25-32. Those arguments are not properly presented, because they were neither pressed nor passed upon in the court of appeals. None of the petitioners argued to the court of appeals that the listing of the Beringia DPS should be invalidated because a recovery plan under Section 4(f) of the ESA would not be effective or because protections under Section 4(d) of the ESA have not presently been issued for the species. The court of appeals accordingly did not address those arguments.

In any event, there is no merit to petitioners’ arguments that, in making the listing determination, NMFS was required to consider whether remedial measures taken pursuant to the ESA would effectively protect the Beringia DPS from the harms of climate change. The ESA directs the Secretary to determine whether a spe-

⁵ Similarly, NMFS acknowledged disagreement among peer reviewers regarding the magnitude of threats from global warming, 77 Fed. Reg. at 76,750, but concluded that “the risks to the persistence of the Beringia DPS” stemming from changes to spatial structure and productivity were “high,” and that in light of those risks the Beringia DPS “is likely to become [endangered] within the foreseeable future” throughout its range, *id.* at 76,747-76,748.

cies is threatened”—that is, “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range,” 16 U.S.C. 1532(20)—due to any of five threats, including “the present or threatened destruction, modification, or curtailment of its habitat or range.” 16 U.S.C. 1533(a)(1)(A). It does not authorize the Secretary to refrain from designating a species that meets the statutory definition based on an assessment of the efficacy of ESA remedial measures. That design is sensible, because even when listing a species as threatened or endangered does not lead to compulsory measures to remediate the threat, listed status can lead to increased “national and international cooperation and coordination of conservation efforts; enhance research programs; and encourage the development of mitigation measures that could help slow population declines.” 77 Fed. Reg. at 76,764.

2. The court of appeals’ decision does not conflict with decisions of this Court or any court of appeals.

Contrary to the suggestion of the AOGA petitioners (Pet. 16-19), the decision below does not conflict with *Bennett v. Spear*, 520 U.S. 154 (1997). *Bennett* held that plaintiffs could bring suit under the ESA and APA to challenge a biological opinion concluding that an irrigation project was likely to jeopardize the continued existence of certain fish. *Id.* at 157. The Court held that the plaintiffs had Article III standing, that their claims were not barred under the zone-of-interests test, and that their claims were statutorily cognizable under the ESA and APA. *Id.* at 179. Among the claims that the Court agreed the plaintiffs could pursue under the APA was a claim that the Fish and Wildlife Service had failed to “use the best scientific and commercial data available” in its biological opinion, as the ESA requires. *Id.*

at 176 (quoting 16 U.S.C. 1536(a)(2)). The Court concluded that the claim fell within the zone of interests protected by Section 1536 because “[t]he obvious purpose of the requirement that each agency ‘use the best scientific and commercial data available’ is to ensure that the ESA [will] not be implemented haphazardly, on the basis of speculation or surmise,” including by preventing “uneconomic (because erroneous) jeopardy determinations.” *Id.* at 176-177. The decision below is consistent with *Bennett*. The court of appeals did not hold that petitioners lacked standing or that the court lacked jurisdiction, and it recognized that NMFS was required to use the “best scientific and commercial data available.” Pet. App. 20-21. The court of appeals simply found that petitioners’ APA challenge failed on its merits because the agency did not act arbitrarily, capriciously, or contrary to law, when it concluded that the climate-change models and other information it used reflected the best and most reliable scientific data. *Id.* at 17.

The court of appeals’ fact-intensive determination that the “threatened” listing of the Beringia DPS was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law does not conflict with any decisions of other courts of appeals. The AOGA petitioners assert a conflict (Pet. 21-22) with *Otay Mesa Property, L.P. v. United States Department of the Interior*, 646 F.3d 914 (D.C. Cir. 2011), which invalidated as unsupported by substantial evidence a determination that a particular property was a critical habitat for the San Diego fairy shrimp. *Id.* at 915. The AOGA petitioners assert that while *Otay Mesa* stated that the ESA’s requirement that an agency act ““on the basis of the best scientific data available”” was not ““an authorization to

act without data to support its conclusions,” Pet. 22 (quoting *Otay Mesa*, 645 F.3d at 918), the court in this case “authorize[d] NMFS to act without data to support its conclusions,” *ibid.* (citation and internal quotation marks omitted). That assertion of conflict is mistaken, because the court below did not authorize the agency to act without data to support its conclusions. Instead, it affirmed NMFS’s designation of the Beringia DPS because it determined that “substantial evidence” supports “listing the Beringia DPS as threatened.” Pet. App. 30.

3. Finally, petitioners err in contending (Alaska Pet. 18-22; AOGA Pet. 25-35) that the listing of the Beringia DPS warrants certiorari in the absence of any conflict. Petitioners observe (Alaska Pet. 18-19; AOGA Pet. 25-35) that critical habitat designations can cover large areas, but the Secretary has not yet designated any critical habitat for the Beringia DPS. He must consider economic impact in making critical habitat designations, and has discretion to exclude areas if he determines that the benefits of exclusion outweigh the benefits of designation, unless failure to designate an area will result in extinction of the species. 16 U.S.C. 1533(b)(2); see, e.g., 75 Fed. Reg. 76,086, 76,109, 76,128 (Dec. 7, 2010). Nor are petitioners correct in asserting (Alaska Pet. 21-22) that the listing is likely to impose significant new impediments to oil and gas development. When a species of marine mammal is already subject to the protections of the Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq.*—as the Beringia DPS is, see 77 Fed. Reg. at 76,740—the Fish and Wildlife Service has previously explained that listing under the ESA is unlikely to re-

sult in the imposition of significant additional conservation requirements. See 75 Fed. Reg. at 76,086, 76,118, 76,122.

CONCLUSION

The petitions for writs of certiorari should be denied.
Respectfully submitted.

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