No. 17-133

In the Supreme Court of the United States

ALASKA OIL AND GAS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE,

Petitioners,

v.

WILBUR L. ROSS, Secretary of Commerce, *et al.*,

Respondents.

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

REPLY BRIEF

RYAN P. STEEN*
JEFFREY W. LEPPO
JASON T. MORGAN
STOEL RIVES LLP
600 University Street
Suite 3600
Seattle, WA 98101
(206) 624-0900
ryan.steen@stoel.com

December 13, 2017 *Counsel of Record

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY 1

A. A "Threatened" Listing Requires More Than Speculation About the Possible Effects of Projected Habitat Loss 3

B. The Decision Below Conflicts with the Structure and Purpose of the ESA and This Court's Instruction in *Bennett*. 8

C. NMFS Mischaracterizes and Incorrectly Downplays the Impact of its Listing Decisions. 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases

Abramski v. United States,
134 S. Ct. 2259 (2014)..... 9

Alaska Oil and Gas Ass'n v. Ross,
No. 16-35380 (9th Cir., Order dated
Dec. 5, 2017)..... 2

Ariz. Cattle Growers' Ass'n v. Salazar,
606 F.3d 1160 (9th Cir. 2010)..... 12

Bennett v. Spear,
520 U.S. 154 (1997).....passim

*Motor Vehicle Mfrs. Ass'n of U.S., Inc.
v. State Farm Mut. Auto. Ins. Co.*,
463 U.S. 29 (1983)..... 2

*Nat'l Ass'n of Home Builders v.
Norton*,
340 F.3d 835 (9th Cir. 2003) 10

*Otay Mesa Property, L.P. v. U.S.
Department of Interior*,
646 F.3d 914 (D.C. Cir. 2011)..... 11

Tenn. Valley Auth. v. Hill,
437 U.S. 153 (1978)..... 5

Statutes

16 U.S.C. § 1361 *et seq.* 11

16 U.S.C. § 1362(1)(C)..... 12

16 U.S.C. § 1362(19)(C)..... 12

16 U.S.C. § 1532(3)..... 10

16 U.S.C. § 1533(b)(2) 12

Regulations

77 Fed. Reg. 76,740 (Dec. 28, 2012)..... 6

79 Fed. Reg. 11,053 (Feb. 27, 2014)..... 7

79 Fed. Reg. 74,954 (Dec. 16, 2014)..... 5

81 Fed. Reg. 7226 (Feb. 11, 2016) 12

REPLY

Respondent ("NMFS") employs the well-worn agency opposition strategy of re-characterizing the decision below as blandly applying plain statutory terms to an undisputed agency record, the conclusions from which are entitled to great deference. Because, in NMFS's view, those conclusions are based upon the "best available science" and "substantial evidence," the courts have no business second-guessing its conclusion that the bearded seal is "likely" to face extinction in the "foreseeable future" (*i.e.*, by the end of this century). *See* U.S. BIO 22-23. Accordingly, NMFS asserts that the question framed by the Ninth Circuit is easily decided on the merits and (because the Ninth Circuit agreed with NMFS) there is no need for this Court's review.

Aside from being wrong, NMFS ignores the import of the Ninth Circuit's resolution of a critically important legal issue regarding the scope of the Endangered Species Act ("ESA"), the nation's most powerful and coercive conservation statute. To be sure, the Ninth Circuit's approval of NMFS's decision *expands* the reach of the ESA to include any species that *may* suffer a negative impact—regardless of its magnitude—from foreseeable habitat loss occurring by the year 2100 as a result of global warming. The so-called "substantial evidence" supporting this expansion was, in fact, admitted speculation as to how the bearded seal would actually respond to future changes in habitat, with NMFS *conceding* in the final rule that it could not reliably predict how the bearded seal

would respond to those changes. Pet. 11. NMFS's forecast of a substantial habitat decline at the end of this century was enough for NMFS and for the Ninth Circuit to conclude that the species should be listed now, as a safeguard against the as-yet unobserved impacts to the species that *might* occur in the distant future.

Two decades ago, the Court admonished that the ESA's powerful coercive measures were not to be "implemented haphazardly, on the basis of speculation or surmise." *Bennett v. Spear*, 520 U.S. 154, 176 (1997). The Ninth Circuit has now institutionalized the opposite result, paving the way to list species that are presently healthy, abundant, and wide-ranging based solely on distant model-driven predictions of impacts to habitat from a global phenomenon and admitted speculation as to how a species will respond to those predicted impacts. Indeed, the Ninth Circuit recently deferred its ruling in a challenge to the ESA listing of another healthy, abundant, and wide-ranging Arctic species (in which Petitioners prevailed) pending the disposition of this petition. *See Alaska Oil and Gas Ass'n v. Ross*, No. 16-35380 (9th Cir., Order dated Dec. 5, 2017).

The unfettered deference afforded by the Ninth Circuit to impose significant regulatory burdens based on little more than guesswork about future events converts agency expertise under the ESA into "a monster which rules with no practical limits on its discretion." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) (internal quotation marks and

citation omitted). The Court should grant review, and reverse.

A. A "Threatened" Listing Requires More Than Speculation About the Possible Effects of Projected Habitat Loss.

The Ninth Circuit framed the broad legal issue presented by this case as follows:

> When [the government] determines that a species that is not presently endangered will lose its habitat due to climate change by the end of the century, may NMFS list that species as threatened under the Endangered Species Act?

Pet. App. 6. The Ninth Circuit answered that question in the affirmative, overlooking statements by NMFS that it could not predict how the bearded seal would respond to climate change. It was sufficient (in the court's view) that warming-induced habitat changes would have *some* indeterminate "negative effect" on the species. *Id.* at 20. After determining that a species can only be listed if it is "likely" to face a threat of extinction (which the court conceded means "more likely than not"), the Ninth Circuit inexplicably held that "neither the ESA nor our case law requires an agency to calculate or *otherwise demonstrate* the 'magnitude' of a threat to a species future" or the "probability of reaching that threshold." *Id.* at 29 (emphasis added).

NMFS cannot rationally determine that the threat posed by climate change will "more likely

than not" cause the bearded seal to be "in danger of extinction" without evaluating the "probability of reaching that threshold" or the likely "magnitude" of the foreseeable impact on the species. As the State of Alaska Petitioners correctly explain, the Ninth Circuit's decision drastically lowers (if not eliminates) the bar for listing decisions, and unnecessarily imposes serious burdens on state and local sovereignty. Alaska Pet. 18-29.

1. NMFS's first tack in response is to minimize the sweeping consequences of the Ninth Circuit's holding by rewriting what the court said. As to the need to demonstrate the magnitude of risk, NMFS argues that the Ninth Circuit "simply rejected the arguments" that NMFS "was required to make quantitative or fine grained assessments beyond the necessary more-likely-than-not determination." U.S. BIO 19. This characterization is false.

Petitioners never argued that NMFS is required to make "fine grained" or "quantitative" assessments, or that such assessments were *in addition* to the more-likely-than-not assessment. U.S. BIO 19. Rather, Petitioners argued that NMFS had *no basis* to reach the required more-likely-than-not conclusion because it conceded in the final rule that it does not know whether and to what degree the bearded seal species will respond to future climate-driven habitat changes. *See* AOGA Ninth Cir. Br. 33-41, 44-49, 52-55. Petitioners argued that, *inter alia*, NMFS admittedly does not know the magnitude of the risk (quantitative or otherwise) posed by climate change to the bearded seal and therefore has no basis to

determine whether the species (not its habitat) will be "in danger of extinction" in the year 2100.

These are not fine-grained factors in *addition* to the more-likely-than-not determination. Rather, this inquiry is the *sine qua non* of a rational, evidence-based finding that a species is "likely to" be "in danger of extinction" in the "foreseeable future." Indeed, this is how NMFS itself previously evaluated (before this detour) the more-likely-than-not determination in prior listing decisions: "[T]he likelihood and magnitude of threats from climate change . . . must be examined . . . to fully assess extinction risk." *See* 79 Fed. Reg. 74,954, 74,978 (Dec. 16, 2014). Without this examination, there is no rational basis for the agency to conclude that the bearded seal's future status as an "endangered species" is either "likely" or "foreseeable," and the more-likely-than-not threshold determination becomes nothing more than an exercise in speculation.

There is no conceivable reason for Congress to have intended to allow speculation to transform the management of a presently healthy species into the "first priority" of every federal agency with the intent that the species be fully protected, "whatever the cost." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185, 184 (1978). Rather, Congress imposed a "best scientific and commercial data" requirement on listing decisions "to ensure that the ESA [is] not … implemented haphazardly, on the basis of speculation or surmise." *Bennett,* 520 U.S. at 176. The Ninth Circuit's decision fundamentally transforms the congressionally intended more-likely-than-not probabilistic inquiry based upon the

best available scientific data into an exercise in guesswork. This sweeping change warrants review by this Court.

2. NMFS's merits-based argument repeatedly claims that its decision to list the bearded seal was supported by "substantial evidence." U.S. BIO 12, 17, 19, 22, 23. This argument also misses the mark.

a. The fundamental flaw with NMFS's "substantial evidence" argument is that the Ninth Circuit expressly acknowledged that the information necessary to rationally support a "likely to be in danger of extinction" finding was "unavailable or does not exist." Pet. App. 26. NMFS resorted to speculation about how the bearded seal *might* respond to climate change as a substitute for the "unavailable" information. Although this was good enough for the Ninth Circuit, it directly contradicts this Court's admonition that the ESA may not be "implemented haphazardly, on the basis of speculation or surmise." *Bennett*, 520 U.S. at 176.

b. Moreover, NMFS made express findings that the "degree of risk posed by the threats associated with … climate change on bearded seal habitat is uncertain" and that it could not make "statistically rigorous inferences about how [the bearded seal] will respond to habitat loss over time" and that it was "not possible" to assess the probability of extinction within a specified time frame. 77 Fed. Reg. 76,740, 76,747, 76,757-58 (Dec. 28, 2012). Having found that it is "not possible" to evaluate the impacts of future climate change on

extinction risk and that the "degree of risk" is "uncertain," there is no credible way to conclude that the species is *more likely than not* to become in danger of extinction in the distant future. Tellingly, NMFS ignores these concessions and they were disregarded without explanation by the Ninth Circuit.

c. The Ninth Circuit further concluded that the loss of "habitat would almost certainly have a negative effect on the bearded seal's survival." Pet. App. 20. However, it is axiomatic that not every "negative effect" on a species renders that species in likely danger of extinction. NMFS itself used to apply this commonsense reasoning in its listing decisions, explaining that "mere identification of factors that *could* impact a species negatively is not sufficient to compel a finding that listing is appropriate; we require evidence that these factors are operative threats that act on the species *to the point* that the species meets the definition of endangered or threatened under the Act." 79 Fed. Reg. 11,053, 11,070 (Feb. 27, 2014) (emphases added). The Ninth Circuit's decision here makes this logical basis for listings entirely irrelevant.

NMFS dismissively contends that Petitioners "misunderstand" the Ninth Circuit's "negative effect" rationale because the Ninth Circuit found that "substantial evidence supported" NMFS's determination that extinction was "more likely than not." U.S. BIO 17. However, saying something is supported by substantial evidence does not make it so. The evidence identified by the court was projected habitat loss and NMFS's

speculation that the loss *could* have some indeterminate "negative effect" on the bearded seal. Pet. App. 20. That potential and uncertain impact is no basis for making it a national priority to protect the bearded seal *now*.

The core legal issue presented in this case makes it the perfect vehicle for review. The Ninth Circuit conceded that the information necessary to make predictive judgments about the bearded seal's response to climate change "was unavailable or does not exist." Pet. App. 26. NMFS concedes in the rule itself that the impacts of climate change on the bearded seal are uncertain and cannot be reliably predicted. Pet. 11. Yet, the Ninth Circuit concluded that this thin record was enough for NMFS to make the statutorily required findings. If this dearth of evidence suffices to support a finding that a species is more likely than not to be on the brink of extinction in the foreseeable future (and thereby give protection of that species priority over the primary missions of all federal agencies), then there is no principled limitation on the agency's power to list species under the ESA. Review by this Court is urgently needed to avoid that result.

B. The Decision Below Conflicts with the Structure and Purpose of the ESA and This Court's Instruction in *Bennett*.

1. Petitioners demonstrated that the listing of a presently healthy species based on distant and speculative future harms is incompatible with both the definition of a threatened species and the ESA when viewed as a whole. Pet. 15-24. Among other arguments,

Petitioners demonstrated that such a listing leads to absurd statutory results, such as immediately turning the protection of that species into a national priority (even though it faces no present threats), requiring the investment of millions of dollars in recovery planning (even though the species is already "recovered"), designating millions of acres of critical habitat for the species (even though the species has lost no habitat, and no local actions impact the ample existing habitat), and subjecting federally authorized activities in the range of the species to extensive consultation (even though NMFS concedes that conservation measures are unnecessary). *Id.* at 25-34.

NMFS contends that these arguments are waived, because "they were neither presented nor pressed below." U.S. BIO 20. NMFS's contention misses the point. Petitioners' arguments provide the context for interpreting the statute by reference to its structure, history, and purpose. *Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014) ("[W]e must (as usual) interpret the relevant words not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'" (citation omitted)). The fact that NMFS's decision makes even less sense when viewed within the structure, history, and purpose of the ESA as a whole is not a separate claim that can be "waived." It is a principle of statutory construction that favors Petitioners' arguments over NMFS's arguments.

Petitioners' discussion of the ESA's remedial measures here underscores the impropriety of NMFS's expansive reading of "threatened species" to include species that would derive no meaningful

benefit from the listing decision. Indeed, the core purpose of the ESA is to rehabilitate imperiled species "to the point at which the measures provided pursuant to [the ESA] are no longer necessary." 16 U.S.C. § 1532(3). This express objective is irrelevant to the bearded seal listing because, according to NMFS's own findings, there is no status to be recovered and the ESA's conservation-based measures are unnecessary.

2. Petitioners further demonstrated that NMFS's reliance on speculation is contrary to this Court's instruction in *Bennett* that the ESA's best available science requirement is intended to prevent the ESA from being "implemented haphazardly, on the basis of speculation or surmise." *Bennett*, 520 U.S. at 176. In response, NMFS studiously attempts to constrain *Bennett*'s instruction to cases about jurisdiction and to distinguish *Bennett* on the basis that NMFS used the best science available. U.S. BIO 21-22.

Bennett is not so easily avoided. Courts have long interpreted *Bennett* as establishing the evidentiary standard for evaluating the merits of all ESA decisions, including listings. *See, e.g., Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 847 (9th Cir. 2003) (relying on *Bennett* to reject a listing decision based on speculation). The Ninth Circuit violated that standard by allowing NMFS to rely on speculation while conceding that the information needed to turn speculation into a rationally based conclusion is "unavailable or does not exist." Pet. App. 26. This is precisely the type of situation that *Bennett* intended to address.

In addition, NMFS's effort to distinguish the D.C. Circuit's decision in *Otay Mesa Property, L.P. v. U.S. Department of Interior*, 646 F.3d 914 (D.C. Cir. 2011) is misplaced. In *Otay Mesa*, the court held that the ESA's best available science requirement did not allow the agency "to act without data to support its conclusions." *Id*. at 918. This is what the Ninth Circuit allowed here, excusing NMFS from its obligation to provide a rational and record-supported decision because the necessary data are "unavailable or [do] not exist." Pet. App. 26. Moreover, as described above, NMFS itself admitted that the degree of risk posed to the bearded seal species was uncertain and could not be reliably assessed. Accordingly, the Ninth Circuit's decision is contrary to both *Bennett* and *Otay Mesa*, and this Court should accept review.

C. NMFS Mischaracterizes and Incorrectly Downplays the Impact of its Listing Decisions.

NMFS trivializes the impact of its decision by claiming that critical habitat designations can be tailored to avoid economic impacts and that the bearded seal listing is unlikely to have regulatory impacts because the bearded seal is already protected under the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq*. U.S. BIO 23-24.

NMFS's *post-hoc* justifications lack merit. NMFS does not dispute the large and growing list of examples of listing decisions leading to economic calamity. Pet. 27-29. To the contrary, NMFS and the U.S. Fish and Wildlife Service have repeatedly

and successfully argued that these kinds of hardships are directly attributable to the *listing decision*, which must occur regardless of the economic consequences. *See Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1173 (9th Cir. 2010) ("Congress has directed the FWS to list species, and thus impose a regulatory burden, without consideration of the costs of doing so.").

NMFS's suggestion that it can ameliorate the impacts of an ESA listing with critical habitat exclusions provides no comfort. Although NMFS has the authority to exclude areas from a critical habitat designation (*see* ESA Section 4(b)(2), 16 U.S.C. § 1533(b)(2)), NMFS rarely does so in practice, and has issued an official policy stating that any such decision is entirely discretionary (and beyond judicial review). 81 Fed. Reg. 7226 (Feb. 11, 2016).

Furthermore, in an effort to direct attention away from the serious listing consequences set forth in the Petition, NMFS incorrectly claims that no additional conservation measures are likely to be imposed for species protected under the MMPA. However, as already demonstrated by Petitioners (Pet. 30), the listing of the bearded seal as threatened immediately triggers *additional* protections under the MMPA itself by requiring the species to be categorized as "depleted" under the MMPA, which carries new regulatory implications. 16 U.S.C. § 1362(1)(C), (19)(C). This is particularly vexing because the bearded seal, by NMFS's admission, is not really "depleted."

NMFS's effort to downplay the importance and impact of its listing decisions is not credible. As this Court has held, the listing decision immediately makes protection for the listed species a national priority, elevating conservation over the primary missions of federal agencies. The Ninth Circuit's decision here lowers the bar for listing decisions by allowing the agency to trigger these extreme protections based on nothing but unbounded speculation. This Court's review is needed to redirect the Ninth Circuit's unprincipled course and to reinstate Congress's intention that ESA listings must be reserved to species that are truly in need of enhanced federal protection.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

RYAN P. STEEN*
JEFFREY W. LEPPO
JASON T. MORGAN
STOEL RIVES LLP
600 University Street
Suite 3600
Seattle, WA 98101
(206) 624-0900

Counsel for Petitioners
**Counsel of Record*