No. 17-118

IN THE

Supreme Court of the United States

STATE OF ALASKA, ET AL.,

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

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REPLY

The way the ESA interacts with global warming, perhaps the core phenomenon now bedeviling environmental law, is of course "an important question of federal law that has not been, but should be, settled by this Court," Sup. Ct. R. 10(c). As the Ninth Circuit's opinion made clear, this case "turns on one issue" of law: Whether the ESA requires listing species that are currently thriving if the government concludes they may lose their existing habitat by century's end due to global warming. The government (unlike intervenor CBD) makes no effort to argue that this case is factbound, nor does it contest any of the other key indicia of certworthiness identified in the State's petition. Instead, it simply argues the merits—it acknowledges a question of statutory interpretation, and defends the agencies' reading. SG-BIO 13-17. That reading is critically incorrect, however: Under the government's expansive view, endorsed by the Ninth Circuit, there is no functional limitation on listing species due to global warming; all species are now subject to listing if habitat loss can be projected to occur at some point within the distant future.

The petition raises an issue of critical importance nationwide. Eighteen other States, along with Alaska Native groups, have joined with Alaska in seeking this Court's review. The Ninth Circuit itself has also made clear that this issue disposes not only of this case, but of many others like it: It is currently holding another appeal regarding another arctic species for the disposition of this petition. *See Alaska Oil & Gas Ass'n v. Ross*, No. 16-35380 (9th Cir. hold order Dec. 5, 2017). Meanwhile, the government acknowledges that both the D.C. Circuit and Ninth Circuit have approved of

its statutory interpretation and the climate models it relies upon, SG-BIO 14, 16, and it does not dispute that this makes further percolation pointless: As the petition explained, Pet. 30-35, Alaska has no other venues available, and environmental petitioners can simply choose these favored forums (and already do). Nor does the government contest that the practical implications of listing on Alaska Native activities, State sovereignty, and industrial investment are substantial, *see* Pet. 18-23—even as it concedes (indeed, stresses, SG-BIO 23-24) that the conservation consequences are nil.

In short, the Ninth Circuit itself isolated the dispositive legal question, and the affected States, industries, and Native groups all agree that the stakes are high. This is the exact kind of question that should be resolved by this Court and not functionally obviated by two lower courts. Certiorari should be granted.

ARGUMENT

I. The Government's Reading Of The ESA Is Critically Incorrect.

A. The government reads "the foreseeable future" out of the ESA.

The Government reads the phrase "within the foreseeable future" out of the statute entirely. Essentially, it takes the position that if a threat to the species is "likely" (*i.e.* "more likely than not") to materialize *at any given point in the future*, then it can be foreseen, making the danger of extinction "likely … within the foreseeable future." But Congress added those words for a reason: The phrase "within the foreseeable future" is an independent limit on the government's ability to designate a species as

threatened. And as the statutory structure makes clear, this phrase means that a species may be listed as threatened only if the threat to the species' existence is reasonably imminent—not whenever the government decides that the species will more likely than not become in danger of extinction, no matter how many decades (or more) that might be in the future.

The government is thus plainly wrong that this case is resolved by the "ordinary meaning" of the "statutory text." SG-BIO 13, 16. The key turn in its reasoning occurs on pages 15 and 16 of its brief, and is noticeably devoid of content. The government construes the core argument of the petition—*i.e.*, that the agencies have read "foreseeable future" out of the statute, Pet. 23-29—as "principally" the argument that "NMFS was required to refrain from listing the Beringia DPS until 'the species actually experiences a decline.'" SG-BIO 15. The government then says *that* argument has no statutory support because it must list a species whenever the "'best scientific and commercial data available'" shows a threat "'within the foreseeable future'—even if the species is not presently endangered or suffering a decline." *Id.* 16 (quoting 16 U.S.C. §§1533(b)(1)(A), 1532(20)). But this yields no response at all to the petition's central claim: It simply *incorporates* "foreseeable future" into the question of how far into the future the government must look to find a decline. In this way, the government's argument collapses into the position that any foreseeable threat occurs in the foreseeable future, no matter how far off it may be.

The upshot is that the statute imposes no ceiling whatsoever on the "foreseeable future," nor any

functional limitation on listings tied to global warming. Uncertainty about when global warming will deplete sea ice in the bearded seal's habitat, how the species will respond, and how human policies might change conditions over the next century are permissibly excluded from view whenever a court, exercising deferential review, concludes that it is reasonable to think that (1) global warming will *eventually* erode the seals' sea-ice habitat, SG-BIO 14, and (2) the seals will be endangered whenever the habitat they rely on decades away from that time (*i.e.* today), may be lost, *id.* 14-15, 17-18. Because, according to the government itself, the Ninth Circuit and D.C. Circuit agree on these statutory readings *and* agree that the IPCC's climate models are the "best available science," there is no practical limit on the government's ability to list presently healthy arctic species: Those models will (necessarily) support the proposition that, at *some* future point, global warming is more likely than not to deplete arctic habitats that arctic species currently rely upon, and that (we are told) is enough.

Intervenor-respondent CBD acknowledges this reading of the statute even more expressly. On its view, "nothing in the ESA … prohibits NMFS from finding the foreseeable future to be the next 85 years when the administrative record shows *foreseeable threats* to a species' habitat over that period." CBD-BIO 20 (emphasis added). Accordingly, CBD acknowledges that "NMFS defined the foreseeable future for threats from climate change and sea ice loss as 2100 *precisely because* the most recent IPCC models at the time … analyzed foreseeable impacts through 2100." *Id.* (emphasis added). This reasoning

necessarily places any "likely" threat within the "foreseeable future," removing the statute's only imminence requirement.

B. The statute requires that the endangerment of the species be reasonably imminent.

The statute cannot support the government's reading, however, and apart from a reductionist "ordinary meaning" interpretation of the word "likely," neither respondent even tries to defend it. There are at least three intractable problems with tying the "foreseeable future" to any period in which the government can foresee a threat, particularly when it comes to a cumulative phenomenon like global warming.

1. As the petition explained, it violates the canon against reading words out of Congress's text. *See* Pet. 23-28. If the "foreseeable future" is merely the period over which "the administrative record shows foreseeable threats to a species' habitat," CBD-BIO 20, there is no reason for those words to appear in the statute at all.

It also makes no sense. Reading the statute this way means that every species is threatened *right now* because we know that the Sun will eventually burn out and swallow the Earth; that "threat" is more than likely, though very distant. Thus, for the statute to make sense, the "foreseeable future" requirement must demand some level of imminence apart from the likeliness of the threat itself. But the government and Ninth Circuit say otherwise.

As this (admittedly extreme) example shows, this reading of the statute works particularly poorly for

threats that cumulate, and so grow more certain over time. In that instance, the government's interpretation makes the ESA run backwards. The future must become less "foreseeable" the further it lies from today, but because (under the IPCC models both the Ninth Circuit and D.C. Circuit have approved) global warming becomes more likely with time, respondents essentially take the opposite view: Despite the acknowledged and ever-increasing *uncertainty* in the models, Pet.App. 16a-17a; 77 Fed. Reg. 76,740, 76,741-42 (Dec. 28, 2012), respondents defend listing the bearded seal now because "'*the trend* is clear and unidirectional,'" and "'there is relatively little uncertainty that warming will *continue*.'" CBD-BIO 21 (quoting administrative record with emphasis); SG-BIO 10 (quoting Ninth Circuit's reliance on consensus regarding the "'direction and effect' of climate change"). Simply put, construing the statute to support listing decisions *today* based on a "unidirectional" trend ironically treats the more distant future as *more* foreseeable.

2. Worse, as the petition explained at length, *see* Pet. 23-27, this reading of the "foreseeable future" requirement is woefully inconsistent with the structure of the statute. The government openly concedes that the statute's remedial tools will provide no conservation benefits under the circumstances. SG-BIO 23-24. Indeed, the only benefit it even purports to find from the listing is that "listed status *can* lead to increased … 'cooperation'" into "'research'" or the like. *Id.* 21 (emphasis added). The government does not explain *how* that will happen, nor why the extreme consequences for States and local populations that stem from listing are necessary to obtain benefits

that flow from a purely symbolic gesture. And yet this effect is the sole basis on which the government argues that the statutory "design is sensible." *Id*.

In truth, the government mostly minimizes this key argument by misconstruing it. According to the government, petitioners are making the argument—"neither pressed nor passed upon" below—that "the listing … should be invalidated because" the statute's remedial provisions would be ineffective or were not invoked by the agency. SG-BIO 20. As an initial matter, the district court itself emphasized the lack of any remedial effect from the listing as a reason to doubt the government's decision, so the issue is undoubtedly presented. Pet.App. 79a-80a. ("Listing the Beringia DPS as endangered had no effect [on conservation]. … A listing … that provides no additional action intended to preserve the continued existence of the listed species[] is inherently arbitrary and capricious."). But more importantly, the government simply misses the import of this argument: Petitioners are not arguing that the absence of a remedial effect is an *independent* reason to invalidate the listing; they argue, instead, that the statute's lack of *any* effective remedies for species that are currently healthy and not facing any localized or immediate threats is powerful evidence that the "foreseeable future" requirement in fact limits the statute to immediate, local threats. Put otherwise, that the statute has no remedies remotely tailored to a temporally distant threat like global warming is the best indication that the statute does not place such threats within its definition of the "foreseeable future." *See* Pet. 27-29.

3. The government also misunderstands petitioners' point about the agencies' ability to wait to list a species as threatened until it sees a demonstrable or imminent population effect. As explained above, the government construes this as an argument that no listing is ever appropriate until a species is in decline. *See* SG-BIO 15-16. But petitioners' point is a simpler one about reading the statute so that it makes some sense. As the district court and petition explained, if any species under a plausible (*i.e.*, "more likely than not") threat of habitat loss must be listed right now, then *every* species in the arctic must be listed right now. That is a senseless reading of the statute; there is no point to immediately listing every species whose habitat is threatened by global warming unless the threat of extinction is imminent enough that local conservation measures can do something about it. Concretely speaking, once the government can foresee a *reasonably imminent* threat to bearded seal populations from habitat erosion, there will be a reason to list and take immediate measures to address or remediate that threat. Until then, there is *none*.

That is particularly so because of the limited connection that the Ninth Circuit approved between foreseeable habitat loss (which may well become more foreseeable farther into the future) and a foreseeable threat of extinction (which does not).

This is another argument from the petition that the government misunderstands. The government contests the assertion that the Ninth Circuit approved the bearded-seal listing by finding it reasonable to conclude that loss of existing habitat would have a "negative impact" on the species. SG-BIO 16-17. On

its view, the Ninth Circuit required more by pointing to the "more likely than not" standard. *See id.* (citing 17-133 Pet.App. 29-30). But petitioners' point was not that the Court of Appeals thought *any* negative impact was enough. Instead, the key point is that the only connection the Ninth Circuit required between habitat loss and an effect on population was that it was "reasonable" to conclude—subject to highly deferential, substantial-evidence review—that a species would be adversely impacted by the loss in the *future* of habitat it relies on *now*. *See* Pet. 24-26; Pet.App. 26a-27a, 30a.

Notably, in the two paragraphs from the Court of Appeals decision that the government cites in this regard, the court points to its "highly deferential standard of review" under the substantial-evidence rule, and yet identifies no evidence at all regarding the likely effects that loss of existing habitat would have on the seal 85 years hence. *See* Pet.App. 26a-27a, 30a. That is because that evidence is extraordinarily sparse. In fact, the agency has consistently acknowledged that it did not have tangible evidence of how the seal population would respond to the threat of global warming, beyond simply identifying that the Beringia DPS depended upon sea ice for certain aspects of its lifecycle, [*] and the Ninth Circuit

[*] Although the government claims the Biological Review Team agreed that the sea-ice habitat was important to the Beringia DPS's livelihood (SG-BIO 5-6, 15), it identifies no evidence (and the agency acknowledged the lack of any) on how the seals would respond to habitat alteration on the timeline it placed within the "foreseeable future." *See* 77 Fed. Reg. at 76,748 (lacking quantitative data about population resilience in light of habitat change).

nonetheless found that this was sufficient under its deferential standard of review.

The upshot is that the government's approach—now approved by both the Ninth and D.C. Circuits—has no meaningful limitation with respect to arctic species or any others affected by global warming. Absent a requirement that the agency present tangible evidence that populations are declining or that habitat loss will lead directly to population decline, the "foreseeability" window extends forever, and the "likely" threat condition will always be met because of global warming's cumulative effects under the two-circuit-approved IPCC models.

The absurdity of this interpretation is highlighted by the Beringia DPS's currently healthy population. Pet. 10. By combining an interpretation of the ESA that (1) focuses only on the identification of a threat at any point instead of the immediacy of any local danger with one that (2) requires no quantitative response by the population to the threat, the agency essentially removes any consideration of the present from its analysis. This does not mean (contrary to the government's assertions (SG-BIO 19), that petitioners are trying to read some sort of numerical threshold of decline into the statute or impose a requirement that the species be experiencing a decline at the time of the listing decision. Instead, it isolates the dispute between petitioners and the agencies over whether the ESA imposes *any* imminence requirements, or whether even fully healthy populations should be listed *right now* because their habitat is at risk far into the future.

II. This Issue Is Vitally Important.

Both petitions and the *amicus* filings highlight the heavy toll of the listing decision on local populations, industry, and the State itself. *See, e.g.*, Pet. 18-23. Indeed, eighteen States filed an amicus brief requesting that this Court review the dispositive legal issue presented here because of the significant impact it has on State sovereignty. *See* Wyo. Amicus Br. 5-13. And although the listing decision will have little to no immediate conservation benefit, it will create substantial and unnecessary hurdles to both vital industrial operations and the survival of the subsistence cultures of Alaska Native groups that have continued for generations. Pet. 20-22; AFN Amicus Br. 9-23.

Respondents' efforts to dispute these important effects are a double-edged sword that mostly cuts against them. By pointing out that the species is sufficiently healthy that the listing did not need to be accompanied by any meaningful, new "conservation requirements," the government effectively concedes that listing such healthy populations is pointless. *See* SG-BIO 23-24. Further, the government's attempt to equalize the protections afforded under the MMPA and the ESA elides the critical *practical* differences between the statutes. For example, although both statutes include take prohibitions on marine animals, *see* 16 U.S.C. §1372 (MMPA); 16 U.S.C. §1538(a) (ESA), the MMPA lacks remedies such as the Section 7 consultation requirement that can have a significantly detrimental effect on development, particularly in Alaska. Pet. 18-23.

In the end, the proof is in the pudding; although respondents dismissively waive their hands at well-

developed concerns about intrusion into both Native Alaskan and State sovereignty, the *amici* States and Native Alaskan groups would not be participating in these proceedings if there was nothing at stake. As the petition demonstrates, Pet. 18-23, the practical burdens created by unnecessary listing decisions are not at all negligible—particularly in the arctic—although the *conservation* benefits are effective nil. And because the statutory reading approved in the Ninth and D.C. Circuits imposes no effective limits on future listings, these impacts will undoubtedly multiply, as outside groups bring serial, mandatory petitions for one arctic species after another. This Court's intervention is necessary to halt this march toward federal conservatorship over Alaska before it has progressed beyond a point of no return.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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