Nos. 16-596 and 16-610

In the Supreme Court of the United States

STATE OF ALASKA, ET AL., PETITIONERS

v.

RYAN K. ZINKE, SECRETARY OF THE INTERIOR, ET AL.

ALASKA OIL AND GAS ASSOCIATION, ET AL., PETITIONERS

v.

RYAN K. ZINKE, SECRETARY OF THE INTERIOR, 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 the Interior's designation of critical habitat for the polar bear, pursuant to 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. 1a-41a)[1] is reported at 815 F.3d 544. The opinion of the district court (Pet. App. 48a-95a) is reported at 916 F. Supp. 2d 974.

[1] Citations to "Pet. App." refer to the appendix to the petition for a writ of certiorari in No. 16-610. References to "Alaska Pet." are to the State of Alaska's petition in No. 16-596; references to "AOGA Pet." are to Alaska Oil and Gas Association's petition in No. 16-610.

JURISDICTION

The judgment of the court of appeals was entered on February 29, 2016. A petition for rehearing was denied on June 8, 2016 (Pet. App. 42a-47a). On August 30, 2016, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including November 4, 2016, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2008, the Secretary of the Interior, acting through the Fish and Wildlife Service (Service), added the polar bear to the list of threatened species pursuant to the Endangered Species Act of 1973 (ESA or Act), 16 U.S.C. 1531 *et seq.* Pet. App. 9a. As required by the ESA, the Service then designated the geographic area it determined to be critical habitat for the polar bear. *Ibid.* Petitioners challenge that designation under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Pet. App. 16a. The court of appeals rejected petitioners' challenge. *Id.* at 1a-41a.

1. Congress enacted the ESA in 1973 to, *inter alia*, conserve species that the Secretary of the Interior or Commerce (depending on the species) has determined are either endangered or threatened. See 16 U.S.C. 1531(b); 1532(6), (15), and (20); 1533. The ESA requires the Secretaries to maintain a list of all endangered or threatened species. 16 U.S.C. 1533(c). When one of the Secretaries lists a species as threatened or endangered, Section 4 of the ESA requires that the Secretary must also designate critical habitat concurrently with the final rule listing the species, "to the maximum extent prudent and determinable."

16 U.S.C. 1533(a)(3)(A). If the Secretary finds that critical habitat is "not then determinable," the Secretary "may extend" the period for designating critical habitat "by not more than one additional year." 16 U.S.C. 1533(b)(6)(C)(ii). By the close of that year, the Secretary "must" designate critical habitat "based on such data as may be available at that time * * * to the maximum extent prudent." *Ibid.*

As relevant here, the ESA defines "critical habitat" to include "specific areas within the geographical area occupied by the species * * * on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. 1532(5)(A)(i).[2] In designating critical habitat, the Secretary must rely on the "best scientific data available" and must take into "consideration the economic impact, * * * and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. 1533(b)(2). The Service designates critical habitat only within the jurisdiction of the United States. 50 C.F.R. 424.12(h) (2010).

Once an area is designated as critical habitat, Section 7(a)(2) of the ESA, 16 U.S.C. 1536(a)(2), requires each federal agency, in consultation with the relevant Secretary, to "insure that any action authorized, fund-

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[2] "Conserve," "conserving," and "conservation" are defined to mean "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. 1532(3). "'Conservation' is a much broader concept than mere survival," because "'conservation' speaks to the recovery of a threatened or endangered species." *Sierra Club* v. *United States Fish & Wildlife Serv.*, 245 F.3d 434, 441-442 (5th Cir. 2001).

ed, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of a listed species' designated critical habitat. *Ibid.* If consultation on the action with the Secretary reveals that the agency action is likely to destroy or adversely modify designated critical habitat, the Secretary will recommend reasonable and prudent alternatives to the action, if any are available. 16 U.S.C. 1536(b)(3)(A).

2. On May 15, 2008, the Service listed the polar bear as a threatened species under the ESA because of "ongoing and projected changes in sea ice habitat." 73 Fed. Reg. 28,277 (May 15, 2008); *In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig.—MDL No. 1993*, 709 F.3d 1 (D.C. Cir.) (upholding the Service's listing decision), cert. denied, 134 S. Ct. 310 (2013).

a. On December 7, 2010, after two rounds of public comment, the Service published its Final Rule designating critical habitat for the polar bear. Pet. App. 14a; see 75 Fed. Reg. 76,086 (Final Rule). As required by the ESA, the Service "used the best scientific data available in determining areas within the geographical area occupied at the time of listing that contain the features essential to the conservation of polar bears in the United States." *Id.* at 76,119. The Service did not designate any areas outside the geographical area currently occupied by polar bears because it determined that "occupied areas are sufficient for the conservation of polar bears in the United States." *Ibid.*

In determining which areas are "essential to the conservation of the" polar bear and "may require special management considerations or protection,"

16 U.S.C. 1532(5)(A)(i), the Service considered which areas within the polar bear's habitat contained the "primary constituent elements (PCEs) laid out in the appropriate quantity and spatial arrangement essential to the conservation of the species," as required by then-applicable regulations. 75 Fed. Reg. at 76,110. Those regulations provided in relevant part:

> In determining what areas are critical habitat, the Secretary shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection. Such requirements include, but are not limited to the following: (1) Space for individual and population growth, and for normal behavior; (2) Food, water, air, light, minerals, or other nutritional or physiological requirements; (3) Cover or shelter; (4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally; (5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. When considering the designation of critical habitat, the Secretary shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species. Known primary constituent elements shall be listed with the critical habitat description. Primary constituent elements may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.

50 C.F.R. 424.12(b) (2010).

Based on its assessment of the location and abundance of PCEs, the Service designated three different critical habitat units: (1) sea-ice habitat, where polar bears feed, breed, and migrate long distances (Unit 1); (2) terrestrial denning habitat, where female polar bears come on land, build dens, give birth, emerge with their cubs, and then return to the sea ice (Unit 2); and (3) barrier-island habitat, where polar bears den, rest, and migrate along the coast (Unit 3). 75 Fed. Reg. at 76,115; see *id.* at 76,113-76,122.

b. i. More than 95% of the designation consists of Unit 1, the sea-ice habitat where polar bears hunt, feed, breed, and migrate long distances. Pet. App. 14a. The Service determined that "sea ice over the shallower waters of the continental shelf * * * is an essential physical feature for polar bears." 75 Fed. Reg. at 76,112, 76,121. The Service identified the relevant PCE for Unit 1 as "[s]ea ice habitat used for feeding, breeding, denning, and movements, which is sea ice over waters 300 m (984.2 ft) or less in depth that occurs over the continental shelf." *Id.* at 76,111-76,112, 76,115. The Service designated approximately 179,508 square miles of sea-ice habitat as Unit 1. *Id.* at 76,121.

ii. Unit 2 (which is now the primary subject of petitioners' challenge) includes "[s]ites for breeding, reproduction, [and] rearing of offspring." 50 C.F.R. 424.12(b)(4) (2010); see 75 Fed. Reg. at 76,111. The Service determined that denning is "[o]ne of the most critical periods for polar bears" "because the newborn cubs are completely helpless and must remain in the maternal den for protection and growth until they are able, at approximately 3 months of age, to survive the

outside elements." 75 Fed. Reg. at 76,113. When polar bear cubs are strong enough to leave the den, moreover, they need space around the dens to acclimate to the harsh environment. *Id.* at 76,099.

The Service identified four components of the PCE that are necessary for successful denning in Unit 2: (1) steep, stable slopes that collect snow drifts where the polar bears dig their dens; (2) undisturbed access between the den sites and the coast, so the bears can travel from the coast to the den sites and back again with the cubs; (3) sea ice close to the coastal area in the Fall, at the onset of denning, so that the female polar bears can swim to shore from the sea ice; and (4) an absence of human disturbance during denning because human disturbances have caused bears to abandon their dens prematurely, resulting in the death of cubs. Pet. App. 23a; 75 Fed. Reg. at 76,113-76,115, 76,119-76,120.

The Service chose to designate the "core denning areas" on the North Slope of Alaska that are currently occupied and used for denning by the Southern Beaufort Sea population of polar bears. 75 Fed. Reg. at 76,113, 76,120. In determining the core denning areas, the Service relied on radio-telemetry data collected between 1982 and 2009 to determine historical confirmed and probable dens in the area east of Barrow, Alaska. Pet. App. 23a, 26a-27a. The Service used those data to "define[] the maximum inland extent of the critical denning habitat to be the distance from the coast, measured in [five-mile] increments, in which 95 percent of all [those] historical confirmed and probable dens have occurred." 75 Fed. Reg. at 76,120; Pet. App. 26a. The denning area in Unit 2 extends between 5 and 20 miles inland from the coast. Pet. App.

23a-24a. The Service explained that using the radio-telemetry data to establish five-mile increments of denning habitat, while excluding denning sites atypically far from shore, represented the "best available" method for identifying critical denning habitat because, *inter alia*, (1) there were uncertainties associated with fine-scale mapping of potential den-site areas; (2) the den identifications were based on known dens for approximately 20 to 40 radio-collared females, which represents a small subset of the approximately 240 females denning on land in any given year; and (3) only a portion of the North Slope, which contains ample potential denning habitat, had been mapped. *Id.* at 26a; see also 75 Fed. Reg. at 76,096, 76,099. Moreover, those identified denning sites—which include the necessary steep, stable slopes, undisturbed access to the coast, and proximity to Fall sea ice—are "widely dispersed" across the North Slope of Alaska. 75 Fed. Reg. at 76,113. Although bears show an affinity for particular denning areas, they typically do not return to the same denning sites from year to year. Pet. App. 28a. Studies that tracked polar bear activity indicated that bears moved throughout all of Unit 2, and the Service determined that it would be difficult, if not impossible, to predict where bears would move within the denning area in the future. *Ibid.*

iii. Unit 3 of the critical-habitat designation includes "all barrier islands along the Alaska coast and their associated spits * * * and the water, ice, and terrestrial habitat within 1.6 km (1 mi) of these islands (no-disturbance zone)." Pet. App. 30a (citation omitted). The Service explained that "[c]oastal barrier islands and spits off the Alaska coast provide areas

free from human disturbance and are important for denning, resting, and migration along the coast." 75 Fed. Reg. at 76,114. During the Fall season, for example, bear surveys along the northern coast of Alaska have indicated that more than 80% of detected bears were on barrier islands, which bears use "to move along the Alaska coast as they traverse across the open water, ice, and shallow sand bars between the islands." *Ibid.* The Service further explained that some female bears use barrier islands for denning "as a place to avoid human disturbance" and that bears use the islands to move among preferred feeding locations. *Id.* at 76,115. The Service found that the barrier islands are "essential to [polar bears'] existence and conservation," Pet. App. 31a-32a, because bears rely on those undisturbed areas for migration, feeding, resting, and denning. 75 Fed. Reg. at 76,114.

c. The Service did not designate any Alaska Native villages as critical habitat. See 75 Fed. Reg. at 76,127-76,129. Instead, the Service exercised its discretion to exclude Barrow and Kaktovik—the only "two formally defined Native coastal communities that overlap with the polar bear critical habitat"—because (1) the benefits of exclusion outweighed the benefits of inclusion, and (2) the dense cores at the centers of those communities generally do not contain the requisite PCEs. *Id.* at 76,109, 76,128. The Service also excluded all existing manmade structures, including buildings and paved roads. Pet. App. 16a, 29a.

In contrast, the Service declined to exclude some other areas near human development. Pet. App. 29a. The record provides support for the Service's conclusion that, although polar bears do not often den in areas affected by human activities, they do move

through such areas to find suitable denning sites. *E.g.*, C.A. E.R. 304-305, 417, 419, 426-427, 772-773. The Service therefore chose not to exclude the entire industrial area called Deadhorse, for example, because although "there is very little polar bear critical habitat in the vicinity of Deadhorse and the airport," polar bears are already "hazed from actively used areas but are allowed to exist in the areas between the widely dispersed network of roads, pipelines, well pads, and buildings" 75 Fed. Reg. at 76,097-76,098. Additionally, "Deadhorse is primarily an industrial staging area for oil and gas operations, and has no legally defined boundaries and almost no permanent residents." Pet. App. 29a; see also 75 Fed. Reg. at 76,097-76,098. The Service also declined to create a "buffer zone" around the excluded communities of Barrow and Kaktovik, explaining that bears routinely pass through those areas and that the developed communities in the excluded areas were a relatively small part of the excluded areas and therefore were already surrounded by a buffer zone as a result of the exclusions. Pet. App. 29a-30a; see also 75 Fed. Reg. at 76,097.

d. The Service considered the economic impacts of the designation, including the direct and indirect costs of the designation on activities taking place within and adjacent to the habitat ultimately designated. 75 Fed. Reg. at 76,126-76,127; see C.A. E.R. 530-706 (Final Report on Economic Analysis of Critical Habitat Designation for Polar Bear). In particular, the Service analyzed the effects of the designation on oil and gas exploration, development, and production, as well as on construction and development activities. 75 Fed. Reg. at 76,126-76,127. The Service estimated that the designation would have a direct cost over 30 years of

between $677,000 and $1,210,000. *Id.* at 76,127. The Service also undertook a qualitative assessment of indirect and uncertain costs of the designation arising from, *e.g.*, delay and litigation, among other factors (*i.e.*, factors that could not reliably be quantified). Pet. App. 39a-40a.

In addition, the Service examined existing statutory and regulatory protections for polar bears and determined that the statutorily required designation of critical habitat for the bear is not likely to impose any additional requirements on regulated entities at this time. C.A. E.R. 537, 570-572; 75 Fed. Reg. at 76,118. In particular, the Service explained that oil and gas development activity in the critical-habitat area is already subject to Incidental Take Regulations (ITRs) issued pursuant to the Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. 1361 *et seq.*, and to protections under the ESA based on the listing of the polar bear as a threatened species. C.A. E.R. 537. Because the designation of critical habitat for the bear is "not expected to result in additional regulation," the Service concluded that "forecast costs" resulting from the designation "are limited to additional administrative costs of consultation."[3] *Ibid.* The Service also noted that "manmade structures on all types of land ownership"—*i.e.*, "[h]ouses, gravel

[3] The Service also explained that the designation of critical habitat has benefits for a listed species even when the designation does not impose additional regulatory requirements, because the designation "serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area," and because the listing process "helps focus and promote conservation efforts by other parties by clearly delineating areas of high value for polar bears in Alaska." 75 Fed. Reg. at 76,125.

roads, airport runways and facilities, pipelines, central processing facilities, saltwater treatment plants, well heads, pump jacks, housing facilities or hotels, generator plants, construction camps, pump stations, stores, shops, piers, docks, jetties, seawalls, and breakwaters on the lands owned or leased by the oil and gas industry, [United States Air Force] lands, and local communities that overlap with [the] critical habitat designation"—are excluded from the designation. 75 Fed. Reg. at 76,119. And the Service explained that actions on state, tribal, local, or private lands that are not federally funded or authorized do not require Section 7 consultation. *Id.* at 76,122.

3. Petitioners filed suit challenging the Secretary's critical-habitat designation under the ESA and the APA. Pet. App. 10a. The district court ruled in favor of the government on most of petitioners' claims, holding that the designation was not overbroad and that the Service had sufficient evidence that the area designated as critical habitat was occupied by polar bears. *Id.* at 59a-62a. The court rejected petitioners' specific challenges to the designation of Unit 1, which makes up more than 95% of the total designated area, *id.* at 63a-64a, holding that the Service adequately considered all potential economic effects of the designation, *id.* at 67a-71a, and concluding that the Service reasonably exercised its discretion by not excluding certain areas from the designation, *id.* at 72a-74a. Finally, the court rejected petitioners' argument that the Service failed to satisfy its obligation to consult with the State of Alaska. *Id.* at 78a-81a.

The district court ruled in petitioners' favor on three issues. First, the court held that the designation of Unit 2 failed to comply with the ESA's defini-

tion of critical habitat in 16 U.S.C. 1532(5)(A)(i) because the record evidence about the presence and distribution of components of the denning PCE in the area was insufficient. Pet. App. 83a-88a. Second, the court similarly held that the record lacked sufficient evidence of the presence of PCEs in Unit 3. *Id.* at 89a-90a. Finally, the court held that the Service failed to provide the State of Alaska with an adequate response to the State's comments on the proposed rule. *Id.* at 91a-93a.

4. The Service appealed, and the court of appeals reversed all of the district court's rulings against the Service. Pet. App. 1a-41a. The court of appeals held that the Service "drew rational conclusions from the best available scientific data, which is what the statute requires." *Id.* at 33a. In so holding, the court explained that the district court erred by requiring the Service "to identify where each component part of each PCE was located within Units 2 and 3 * * * by establishing current use by existing polar bears." *Id.* at 21a. The ESA, the court of appeals explained, requires the Service to designate as critical habitat areas "where, within the polar bears' occupied range, the physical or biological features essential to polar bear conservation are found," *id.* at 20a—and the court held that the Service had satisfied that duty by "looking to areas that contained the constituent elements required for sustained preservation of polar bears," *id.* at 23a. By way of illustration, the court explained that the ESA requires the Service to designate "areas containing habitat suitable for denning" rather than designating "only areas containing actual den sites." *Id.* at 21a.

Addressing the district court's holding with respect to Unit 2, the court of appeals held that the Service had used the best available scientific data to identify possible polar bear denning sites. Pet. App. 23a-30a. The court of appeals faulted the district court for failing to take into account either the radio-telemetry data tracking female bear movements or "the need for denning habitat to include not only the dens themselves, but also undisturbed access to and from the sea ice." *Id.* at 25a. The court of appeals also emphasized that the Service cannot supply "greater scientific specificity than available data could provide," *ibid.*, and concluded that "it is difficult (if not impossible) to predict precisely where [bears] will move within denning habitat in the future" because "[d]ens are widely dispersed across the North Slope in a non-concentrated manner," bears reach suitable denning sites "by walking across the relatively flat topography of" the North Slope area, and bears are not faithful to particular denning sites, *id.* at 28a. The court further concluded that the Service had sufficiently explained its reasons for designating some areas near human development. *Id.* at 29a-30a.

The court of appeals held that the district court had made similar errors with respect to its holding that the record underlying the designation of Unit 3 was inadequate. Pet. App. 30a-33a. The court of appeals held that the Service "appropriately looked to the specific features of the islands that meet the bears' critical needs and to the area in which they occur," explaining that the "district court erroneously focused on the areas existing polar bears have been shown to utilize rather than the features necessary for future species protection." *Id.* at 31a-32a. The court of ap-

peals ultimately upheld the Service's finding that "bears use the barrier islands, associated spits, and surrounding water in ways that are essential to their existence and conservation." *Ibid.*[4]

Petitioners cross-appealed, challenging the adequacy of the Service's finding that the designated critical habitat may require special management considerations or protections, arguing that the Service failed to take into account the economic effects of the designation, and challenging the Service's designation of a no-disturbance zone in Unit 3.[5] See Alaska Native Orgs. C.A. Br. 56-69. The court of appeals rejected each of those arguments. Pet. App. 37a-41a.

ARGUMENT

Petitioners argue (Alaska Pet. 18-33; AOGA Pet. 19-29) that the court of appeals erred in reversing the district court's determination that certain aspects of the Service's critical-habitat designation for the polar bear did not meet the statutory criteria in the ESA and were arbitrary, capricious, an abuse of discretion, or otherwise in contravention of law. The court of appeals correctly rejected petitioners' arguments, and its decision does not conflict with any decision of this Court or of any other court of appeals. While a different designation could have been permissible, the Service's designation here is based on a permissible

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[4] The court of appeals also overturned the district court's holding that the Service failed to provide the State of Alaska with an adequate response to the State's comments on the proposed rule. Pet. App. 34a-37a. Petitioners do not challenge that holding in their petitions for writs of certiorari.

[5] Petitioners also unsuccessfully challenged the adequacy of the Service's consultation with the State, see Alaska C.A. Br. 48-65, but do not raise that issue in their petitions for writs of certiorari.

interpretation and application of the ESA's mandatory standards for designating critical habitat. In any event, the Service recently amended the relevant regulations governing critical-habitat designations, and the new regulations have themselves been challenged in a different action. See *Alabama* v. *National Marine Fisheries Serv.*, No. 16-593 (S.D. Ala. Feb. 10, 2017) (stayed for 60 days). Review of the court of appeals' fact-bound decision under the prior regulations is unwarranted.

1. The court of appeals correctly rejected petitioners' challenge to the Service's designation of critical habitat for the polar bear. In their petitions for writs of certiorari, petitioners focus almost exclusively on policy arguments about why the statutory requirement that the Service designate critical habitat for listed species is overly burdensome and does not reflect a valid balancing of costs and benefits. Those arguments are properly directed to Congress rather than this Court and do not provide a basis for review of the court of appeals' decision. Petitioners briefly touch on various legal challenges to the court of appeals' decision, but those arguments are meritless and do not provide a basis for further review.

a. Petitioners broadly contend (Alaska Pet. 1, 18, 20-22, 25-27; AOGA Pet. 1, 28-29) that the designation of critical habitat for the polar bear does not comply with the ESA because it is too large. Petitioners do not identify any aspect of the applicable statutory or regulatory scheme that imposes a limit on how large a critical-habitat designation may be. For purposes of this case, the ESA defines "critical habitat" to include only the areas in which a species is located (at the time of the listing) that include the physical or biologi-

cal features that are essential to the conservation of the species and that may require special management. 16 U.S.C. 1532(5)(A)(i). For some listed species, critical habitat may be more limited. For other listed species (including, for example, migratory species), critical habitat may be larger. As the court of appeals explained, the best available data show that polar bears regularly use huge and variable areas as part of their life cycle. Pet. App. 28a; see *ibid.* (noting one study that showed that "annually, the active range of a [single] female polar bear is an average of 92,584 square miles."). [6] Under the statutory scheme that Congress devised, a determination of whether a critical-habitat designation is too large or too small must be made *not* with reference to the total size of the designation, but with reference to the location of the physical or biological features that are essential to the conservation of a listed species and that may require special management. The court of appeals correctly concluded that that is exactly what the Service did.

To the extent petitioners have argued—throughout this litigation—that the administrative record does not support the scope of the designation because it

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[6] The record also demonstrated that among the Southern Beaufort Sea polar bear population, the female bear with the maximum annual activity area occupied 596,800 square kilometers (approximately 230,400 square miles). C.A. E.R. 1304, 1308, 1384. That single bear used an area larger than the entire designation in a single year. See 75 Fed. Reg. at 76,121 (noting that entire designation is 484,734 square kilometers). The Beaufort Sea population alone occupies more than 900,000 square kilometers (approximately 347,500 square miles). C.A. E.R. 955-956, 1317-1318. The court of appeals' observation "that bears need room to roam," Pet. App. 28a, is thus well-supported by the record. The size of the designation accurately reflects the life cycles of polar bears.

fails to establish that the requisite physical or biological features are found in the area designated as critical habitat for the polar bear, they have challenged the designation of Units 2 and 3 only. Petitioners do not now argue, and have never argued, that the Service failed to make the requisite findings about the location or abundance of PCEs in Unit 1 (the sea-ice habitat). And in their petitions for writs of certiorari, petitioners challenge the adequacy of the underlying evidence only with respect to the designation of Unit 2. Although petitioners repeatedly assert (Alaska Pet. 1, 18, 21, 26) that the designation is too large because it is "the size of California" and, in their estimation, "5% [of the size] of the United States," they fail to acknowledge either that nearly 96% of the designation covers the Unit 1 sea-ice designation, Pet. App. 14a-15a, or that they have identified no error in the scope of the Unit 1 designation. Because Unit 2—the only portion of the designation with respect to which petitioners now purport to identify a statutory violation going to the scope of the designation—covers only three percent of the total designation, see 75 Fed. Reg. at 76,086, 76,121 (noting relative sizes of total designation and each unit within the designation), petitioners' repeated references to the total size of the designation are irrelevant and misleading.

b. Petitioners are also incorrect in contending (Alaska Pet. 8-9, 12-13, 20-21, 26-27; AOGA Pet. 1-2) that the court of appeals erred by overturning the district court's conclusion that the Service's designation of Unit 2 violated the ESA because the Service failed to identify the "specific" areas within that area where the PCEs are located. After reviewing the extensive record (see, *e.g.*, C.A. E.R. (1844 pages);

C.A. Joint Supp. E.R. (320 pages)), the court of appeals correctly held that the Service had relied on the best available scientific data to designate critical habitat in the manner prescribed by the ESA. Pet. App. 33a. The court of appeals' fact-bound conclusion is correct and does not warrant this Court's review.

i. The ESA imposes a mandatory duty on the Service to designate "critical habitat" for listed species, including the polar bear, based on "the best scientific data available," and "after taking into consideration the economic [and other relevant] impact[s]." 16 U.S.C. 1533(b)(2). As explained, the ESA defines "critical habitat" as "the specific areas within the geographical area occupied by" a listed species at the time of listing "on which are found those physical or biological features" that are both "essential to the conservation of the species" and "may require special management considerations or protection." 16 U.S.C. 1532(5)(A)(i). Petitioners contend (Alaska Pet. 2, 24-27; AOGA Pet. 1) that the designation of Unit 2 does not satisfy that definition because it does not identify the "specific areas" in the bear's occupied territory where the necessary physical and biological features are found. Petitioners do not challenge the Service's determination of which physical or biological features should be covered in the designation of critical habitat for the bear. Nor do petitioners argue that the Service identified the wrong PCEs of those features. Instead, petitioners argue that the Service erred by failing to identify the specific areas within Unit 2 where the PCEs are located.

In particular, petitioners repeatedly rely on the district court's statements that the designation of Unit 2 was "[b]ased *solely* on the location of the confirmed

or probable den sites," Alaska Pet. 15-16, 20, 26; AOGA Pet. 16 (brackets in original) (quoting Pet. App. 85a), and that there was "no way to know if ninety-nine percent of Unit 2 contains the essential features," Pet. App. 88a. See Alaska Pet. 20 (arguing that "[t]he district court found that no more than 1% of the designated area [in Unit 2] contained the required" PCEs). But petitioners fail to mention that the court of appeals held that the district court's conclusion on that issue was based on an erroneous understanding of the record. Pet. App. 32a-33a. The district court relied on information indicating that "only 1% of Unit 2 is suitable as 'denning habitat,'" *id.* at 32a, but the court of appeals explained that the district court's conclusion was premised on an incorrect understanding of the term "denning habitat." *Ibid.* The district court relied on studies that "refer[red] to the habitat suitable for the building of the actual den itself." *Ibid.* Because "the average den is about 20 feet wide (6.4 m), it is unsurprising that actual den sites themselves would encompass less than 1% of Unit 2." *Ibid.*

In the Final Rule, however, the Service defined the area suitable for denning habitat to include "the habitat necessary for birthing as well as the post natal care and feeding essential to survival." Pet. App. 32a. In particular, the Service "defined denning habitat more broadly" than the studies the district court relied on "to include not only the denning site itself, but also the area necessary for access to the ice from the den." *Ibid.* In other words, the Service "considered the denning habitat essential for protection to encompass the areas where polar bears could not only successfully build a den, but also travel, feed, and acclimate cubs." *Ibid.* That is a permissible interpreta-

tion, and the court of appeals correctly concluded that the Service's approach "was in accord with the statutory purposes, and thus it was not arbitrary or capricious for [the Service] to include areas necessary for such related denning needs." *Id.* at 33a. Petitioners simply reiterate the district court's error without acknowledging or attempting to rebut the court of appeals' identification of that error. And petitioners' entire argument about the scope of Unit 2 is premised on that error.[7]

The court of appeals correctly concluded that the designation of Unit 2 was premised on extensive record evidence establishing that the necessary PCE components are found throughout Unit 2. Pet. App. 23a-30a. The court explained that the Service had "provided a rational explanation for using the mapping methodology that it did," *id.* at 25a, and that the Service had reasonably concluded its method was "the best available choice," *id.* at 26a. In concluding otherwise, the district court failed to take into account, *inter alia*, "the radio-telemetry data tracking female bear movements." *Id.* at 25a. As the court of appeals noted, moreover, "[a]dditional studies tracked polar bear activity and showed that polar bears move through *all* of Unit 2." *Id.* at 28a (emphasis added); see, *e.g.*, C.A. E.R. 161-177, 1296-1327, 1384, 1409. The court correctly held that "the data supports [the Service's] position that it is difficult (if not impossible) to predict precisely where [polar bears] will move within denning habitat in the future." Pet. App. 28a.

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[7] The court of appeals concluded that the same error infected the district court's conclusion that the designation of Unit 3 was invalid. Pet. App. 32a-33a. Petitioners do not now separately argue that the designation of Unit 3 was invalid.

As the Service explained in the designation, uncertainty arises from the polar bears' variable movements, their wide distribution and tendency not to congregate, the dynamic and shifting topography of the land, the even more dynamic sea ice, the variable weather patterns, and the shifting prey population. See, *e.g.*, 75 Fed. Reg. at 76,099, 76,113-76,114; see also, *e.g.*, C.A. E.R. 778-780, 923, 1065-1066, 1306, 1329, 1395, 1437-1438, 1447. Consistent with the statutory commands that the Service base any critical-habitat designation on "the best scientific and commercial data available," 16 U.S.C. 1533(b)(2), and that critical habitat encompass "specific areas," 16 U.S.C. 1532(5)(A)(i), the Service made the statutorily required designation as "specific" as it could be, based on the "best available science." See 75 Fed. Reg. at 76,120.

ii. Petitioners do not take issue with the Service's identification of the four PCE components in Unit 2—steep, stable slopes for den sites; access between den sites and the coast; sea ice in proximity to the denning habitat prior to the onset of denning season; and freedom from human disturbance. Pet. App. 23a. Once arguments based on a faulty understanding of denning habitat are cleared away, petitioners' only remaining challenge to the scope of Unit 2 is their contention (Alaska Pet. 10, 14, 18, 32; AOGA Pet. 4, 14-15, 18, 31-32) that the Service erred by designating areas inhabited by humans (including areas where hazing of polar bears is sometimes authorized) when one of the PCE components was freedom from human disturbance. The court of appeals correctly rejected that argument. Pet. App. 29a-30a.

The court of appeals correctly concluded that the Service reasonably included some areas near human development because evidence showed that polar bears use those areas and because the areas include at least one of the Unit 2 PCE components—undisturbed access between den sites and the coast. See Pet. App. 29a-30a; 75 Fed. Reg. at 76,096-76,099. Petitioners' arguments are largely premised on a mistaken view that the Service should consider an entire area to be irrevocably tainted by human disturbances based on occasional temporary human disturbance of individual bears. Nothing in the statutory or regulatory scheme—not to mention any scientific analysis—supports such a view. The record reflects that, even in actively managed areas near human development, polar bears often pass through undisturbed without the need for hazing. See 75 Fed. Reg. at 76,097-76,098, 76,118. The type of human disturbance that is most harmful during denning season is disturbance in proximity to a den (which might cause a mother polar bear to abandon her den before her cubs can survive outside the den). See *id.* at 76,099. But occasional human contact in areas that are not proximate to dens but that are still essential for denning because they provide adult bears with access to sea-ice feeding locations is significantly less harmful. See *id.* at 76,115. The Service reasonably included those areas, and the court of appeals correctly upheld that decision.

The court of appeals also correctly rejected petitioners' related arguments (see Alaska Pet. 32-33) that the Service acted unreasonably when it declined to exclude certain human-occupied areas by creating "buffer zones" around human communities or by ex-

cluding the areas around Deadhorse and Prudhoe Bay. Pet. App. 29a-30a. As the court explained, the record showed both that bears exist in and routinely pass through those areas and that the man-made structures and communities represent a relatively small portion of those areas. *Ibid.*; see 75 Fed. Reg. at 76,097-76,098; see also, *e.g.*, C.A. E.R. 146-147, 187-205, 361-365, 416, 424, 443, 448-449, 451-466, 1184-1186, 1195-1211, 1366, 1430, 1472, 1612-1613.

c. In addition to challenging the scope of the critical-habitat designation, petitioners also argue (Alaska Pet. 19-20, 30-31, 33-35; AOGA Pet. 14-15, 20-29) that the Service failed to consider the economic effects of the designation as required by the ESA. The court of appeals correctly rejected those arguments, Pet. App. 39a-40a, as did the district court, *id.* at 67a-71a. The ESA requires the Service to "tak[e] into consideration" potential economic and other relevant impacts of a critical-habitat designation. 16 U.S.C. 1533(b)(2). As the lower courts correctly concluded, the Service fulfilled its duty, and petitioners have not identified any error in the courts' or the Service's analysis.

The Service carefully considered each of the activities that might require consultation under Section 7 regarding critical habitat, keeping in mind that actions on state, tribal, local, or private lands that are not federally funded or authorized do not require Section 7 consultation. 75 Fed. Reg. at 76,122. The Service explained that any activity requiring a Section 7 consultation for critical habitat was already required to comply with the MMPA's requirement that the activity "have no more than a negligible impact" on the polar bear, a standard that provides a "greater

level of protection" for the bear than does the ESA. *Id.* at 76,118. The U.S. Army Corps of Engineers agreed that the critical-habitat designation was unlikely to affect the issuance of Clean Water Act permits. C.A. E.R. 639. Although petitioners had multiple opportunities—during the rulemaking process, during the district court litigation, on appeal, and in their petitions for writs of certiorari—to identify a specific project that would require greater mitigation because of the critical-habitat designation than would be required by the MMPA, they have never done so.

Petitioner Alaska relies (Alaska Pet. 31) on a report it submitted during the rulemaking process that estimated huge costs associated with the designation. But that report did not show that the critical-habitat designation would actually cause those speculative costs. C.A. Joint Supp. E.R. 223-224. The Service considered those potential costs qualitatively but explained that the report relied on "layered assumptions" and that, due to unknown variables, it was unclear if the costs would ever be incurred, much less how large they would be. 75 Fed. Reg. at 76,105-76,107; C.A. E.R. 593; C.A. Joint Supp. E.R. 223-224. Also unsupported is petitioner AOGA's contention (AOGA Pet. 25) that the federal government will delete areas from leasing based on the critical-habitat designation. The Service has expressly stated that no areas will be deleted. 75 Fed. Reg. at 76,106. In general, Alaska's broad assertions (Alaska Pet. 21-24) about the costs of the designation have no support in the record. Alaska relies (*ibid.*) on numerous articles that it did not rely on in the rulemaking process or earlier in this litigation. Notably, the only empirical article Alaska cites found that, although "critical

habitat does matter," "any perception of * * * heightened regulatory burdens for regulated entities[] is mostly a mirage." Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 Fla. L. Rev. 141, 181 (2012).

In sum, the administrative record shows that the Service reasonably considered the potential economic impacts, which is all that the ESA requires. Pet. App. 39a-40a, 67a-71a. Petitioners have not identified any error in the courts' analyses.

d. In addition to arguing that the critical-habitat designation is invalid because it is unduly burdensome, petitioners also argue (Alaska Pet. 23; AOGA Pet. 3) that the designation is invalid because it has no effect at all. The court of appeals correctly rejected that argument. Pet. App. 38a-39a. As the court explained, the Service's determination that the critical-habitat designation would not result in additional requirements on regulated entities reflected the Service's conclusion that, "in light of existing regulatory measures, [the Service] could not foresee any additional expense for affected parties." *Id.* at 38a. But the court also correctly concluded that the existence of overlapping protective measures does not excuse the Service from its duty under the ESA to designate critical habitat. *Ibid.* To the contrary, the existence of protective measures in areas considered for designation indicates that such areas are indeed critical to the species in question. In addition, the Service explained in the Final Rule that a critical-habitat designation benefits a listed species even when the designation does not impose additional regulatory requirements because the designation "serves to educate landowners, State and local governments, and the

public regarding the potential conservation value of an area" and because the listing process "helps focus and promote conservation efforts by other parties by clearly delineating areas of high value for polar bears in Alaska." 75 Fed. Reg. at 76,125.

2. Petitioners further err in contending (Alaska Pet. 29-30; AOGA Pet. 30-31) that the court of appeals' decision conflicts with decisions of the D.C. Circuit and the Tenth Circuit.

a. First, petitioners appear to argue (Alaska Pet. 29; AOGA Pet. 31) that the decision below conflicts with the D.C. Circuit's decision in *Otay Mesa Property LP* v. *United States Department of the Interior*, 646 F.3d 914, 918 (2011), because the D.C. Circuit held that the Service was required to support its conclusion that the San Diego Fairy Shrimp occupied particular land with substantial evidence while the court of appeals in this case upheld the critical-habitat designation in the alleged absence of substantial evidence that bears occupy the designated area. That contention misses the mark for several reasons. First, petitioners did not argue on appeal—and have not squarely argued in their petitions for writs of certiorari—that the Service's finding that the entire designation is "occupied" (within the meaning of 16 U.S.C. 1532(5)(A)(i)) was not supported by substantial evidence. Thus, even if such an argument might have merit, it is not presented in this case and cannot provide the basis for a circuit conflict.

Second, as the district court correctly concluded, Pet. App. 59a-62a, the administrative record in this case contains ample evidence that the entire critical-habitat designation was occupied by the polar bear at the time of the bear's listing. 75 Fed. Reg. at 76,121.

The Service based its conclusions about polar bear occupation on numerous scientific studies, including radio-telemetry data from radio-collars on adult female polar bears. *E.g.*, C.A. E.R. 161-177, 1307, 1315-1327, 1409; see Pet. App. 28a (court of appeals explaining that "studies tracked polar bear activity and showed that polar bears move through all of Unit 2"); Pet. App. 33a (court of appeals explaining that the record contained "evidence showing that polar bears regularly move across the barrier islands" that make up Unit 3).

Finally, petitioner AOGA errs in suggesting (AOGA Pet. 31, 33) that the D.C. Circuit applies a "substantial evidence" standard of review while the Ninth Circuit applies a more deferential review. The APA enumerates several grounds on which a reviewing court may invalidate final agency action, including because the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. 706(2)(A), or because the action was "unsupported by substantial evidence," 5 U.S.C. 706(2)(E). In its brief on appeal petitioner AOGA argued (at 15-17, 58) that the court should invalidate the critical-habitat designation under the arbitrary-and-capricious standard, but did not argue that the Final Rule was unsupported by substantial evidence. AOGA cannot now manufacture a circuit conflict based on a legal argument it did not even assert on appeal. And, in any event, ample record evidence establishes that the Service's findings were supported by "substantial evidence." *Dickinson* v. *Zurko*, 527 U.S. 150, 162 (1999) (describing APA "substantial evidence standard as requiring a court to ask whether a reasonable mind might accept a particular evidentiary

record as adequate to support a conclusion") (internal quotation marks omitted).

b. Petitioners similarly err in arguing (Alaska Pet. 30; AOGA Pet. 29-30) that the court of appeals' decision conflicts with the Tenth Circuit's decision in *New Mexico Cattle Growers Ass'n* v. *United States Fish & Wildlife Service*, 248 F.3d 1277 (2001). In that case, the Tenth Circuit held that, in determining the costs that would flow from a critical-habitat designation, the Service was required to "take into account all of the economic impact of the [critical-habitat designation], regardless of whether those impacts are caused co-extensively by any other agency action (such as listing) and even if those impacts would remain in the absence of the [designation]." *Id.* at 1283. In contrast, the Ninth Circuit has held that any economic effects attributable to conservation measures that would exist in the absence of a critical-habitat designation may be treated as the regulatory "baseline" rather than treated as a cost that would be imposed by the designation itself. *Arizona Cattle Growers' Ass'n* v. *Salazar*, 606 F.3d 1160, 1172 (2010), cert. denied, 562 U.S. 1216 (2011). The Service applied the Ninth Circuit's baseline approach in analyzing the potential costs of the critical-habitat designation. See 75 Fed. Reg. at 76,126-76,127. Because petitioners did not argue on appeal that the Service erred by considering only incremental costs—and the court of appeals therefore did not consider that issue—the decision below does not conflict with the Tenth Circuit's decision.

In any event, the extent of any ongoing tension between the applicable law in the Ninth and Tenth Circuits is uncertain. As the Ninth Circuit explained in

its decision in *Arizona Cattle Growers' Ass'n*, the Tenth Circuit's analysis turned on now-superseded regulatory definitions of ESA terms that establish the standards for listing a species and for designating critical habitat. 606 F.3d at 1172-1173. The Tenth Circuit has not yet reconsidered its rule in light of the new regulatory definitions. The Ninth Circuit's approach to economic analysis also makes sense. "The very notion of conducting a cost/benefit analysis is undercut by incorporating in that analysis costs that will exist regardless of the decision made." *Id.* at 1173. Here, the Service reasonably decided not to attribute costs associated with MMPA requirements—requirements that have existed and will continue to exist independent of the critical-habitat designation—in assessing the costs predicted to flow from the designation.

c. Petitioners attempt (Alaska Pet. 27-28; AOGA Pet. 33) to excuse the absence of a circuit conflict by pointing out that the Ninth Circuit "encompass[es] some of the country's most extensive regions of natural diversity" and is therefore home to many ESA challenges. Alaska Pet. 27. Petitioners fail to mention that a litigant can file a challenge to a final rule designating critical habitat pursuant to the ESA in a district where the rule applies *or* in the District Court for the District of Columbia. 28 U.S.C. 1391(e)(1). Indeed, the final rule listing the polar bear as threatened was challenged in the District of Columbia—and most of the petitioners participated in that litigation. See *In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 794 F. Supp. 2d 65, 77-78 (D.D.C. 2011), aff'd, 709 F.3d 1 (D.C. Cir.), cert. denied, 134 S. Ct. 310 (2013). Petitioners had the option of filing

this challenge in that district as well. Petitioners chose instead to file in the District of Alaska. Their contention now that governing law in the D.C. Circuit is more favorable to their view of the ESA does not provide a basis for further review.

3. Finally, this Court's review is unwarranted for the additional reason that the regulations governing the designation of critical habitat have been amended.

Petitioners' primary legal argument (see Alaska Pet. 24-27; AOGA Pet. 31-32) is that the Service failed to adhere to the ESA's definition of "critical habitat" in assessing the location and prevalence of PCEs in the polar bear's occupied territory. The designation at issue in this case was governed by then-applicable regulations that required the Service, *inter alia*, to focus on PCEs. See 50 C.F.R. 424.12(b) (2010) (effective until May 31, 2012). But the agencies charged with enforcing the ESA have amended those regulations. 50 C.F.R. 424.12 (2016); 81 Fed. Reg. 7414 (Feb. 11, 2016). The new regulations remove all references to PCEs, 50 C.F.R. 424.12 (2016); 81 Fed. Reg. at 7431, instead providing a formal definition of the statutory term "[p]hysical or biological features," 50 C.F.R. 424.02 (2016). The new regulations also differ with respect to the ESA term "specific areas," compare 50 C.F.R. 424.12(b) (2016), with 50 C.F.R. 424.12(c) (2010), a term that is central to petitioners' legal arguments.

The new regulations have themselves been challenged as unlawful, and that challenge is currently stayed. *Alabama*, *supra* (stayed for 60 days). That review, in combination with the changes that have already been made, substantially limits the prospec-

tive importance of the decision below, which applied a now-superseded version of the regulations.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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