No. _____

In The
Supreme Court of the United States

STATE OF ALASKA,

Petitioner,

v.

ORGANIZED VILLAGE OF KAKE; THE BOAT COMPANY; ALASKA WILDERNESS RECREATION AND TOURISM ASSOCIATION; SOUTHEAST ALASKA CONSERVATION COUNCIL; NATURAL RESOURCES DEFENSE COUNCIL; TONGASS CONSERVATION SOCIETY; GREENPEACE, INC.; WRANGELL RESOURCE COUNCIL; CENTER FOR BIOLOGICAL DIVERSITY; DEFENDERS OF WILDLIFE; CASCADIA WILDLANDS; SIERRA CLUB; UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES FOREST SERVICE; TOM VILSACK, in his official capacity as Secretary of Agriculture, et al.,

Respondents.

On Petition For Writ Of Certiorari To The U.S. Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the waning days of the Clinton administration, the United States Department of Agriculture adopted a nationwide rule prohibiting logging and road construction in roadless areas of the national forests. The Department considered exempting the Tongass National Forest of Southeast Alaska from this rule but ultimately chose not to, concluding that the ecological benefits of applying it to the Tongass outweighed the socio-economic harms it would cause local communities. Two years later the Bush administration changed course and exempted the Tongass from the rule, concluding that the socio-economic well-being of local communities outweighed the value of additional environmental protections for a forest with many roadless areas already protected by existing law. In a 6-5 decision, the *en banc* Ninth Circuit struck down the Tongass exemption, ruling that the Department failed to provide sufficient justification for the policy change.

The question presented is: whether the Ninth Circuit's decision contravenes the basic administrative law principle, established by this Court's decisions, that an executive agency may change the policies of a previous administration based on the new administration's different values and priorities, even though the relevant facts are unchanged.

PARTIES TO THE PROCEEDING

The State of Alaska was a defendant-intervenor before the district court and an appellant before the Ninth Circuit.

Organized Village of Kake, The Boat Company, Alaska Wilderness Recreation and Tourism Association, Southeast Alaska Conservation Council, Natural Resources Defense Council, Tongass Conservation Society, Greenpeace, Inc., Wrangell Resource Council, Center for Biological Diversity, Defenders of Wildlife, Cascadia Wildlands, and the Sierra Club were plaintiffs before the district court and appellees before the Ninth Circuit.

The United States Department of Agriculture and Tom Vilsack, Harris Sherman, and Tom Tidwell, in their respective official capacities as Secretary of Agriculture, Under Secretary of Agriculture of Natural Resources and Environment, and Chief of the U.S. Forest Service, were defendants before the district court but did not participate in the appeal before the Ninth Circuit.

The Alaska Forest Association, Inc. was a defendant-intervenor before the district court and participated as an amicus curiae before the Ninth Circuit.

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RULEMAKINGS

PETITION FOR WRIT OF CERTIORARI

The Ninth Circuit struck down an executive agency's decision to reverse a policy of the previous administration. Though purporting to apply this Court's decision in *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), the Ninth Circuit contravened a basic principle underpinning *Fox* and other decisions of this Court: different values and priorities are a legitimate reason for a new administration to change the policies of its predecessor.

Judicial deference to the policy judgments of the executive branch is a basic principle of the separation of powers. *E.g.*, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) ("[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones. . . ."). An essential aspect of this deference is permitting the executive branch discretion to implement policy changes that reflect the values of a new administration. Even if the relevant facts remain unchanged, a new administration may—and is often expected to—change the policies of the previous administration based on the new administration's different value judgments and priorities. *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("A change in administration brought

about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. . . . [The agency] is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.").

This deference is essential to the proper functioning of American democracy. Every election, voters have the chance to direct the executive branch to change its policies to better reflect their priorities and values. Allowing executive branch agencies to change course on the basis of those priorities and values gives the government the flexibility it needs to carry out the evolving will of the electorate.

This Court most recently affirmed the principle that an agency may re-weigh the costs and benefits of existing policies in light of its own values and change course accordingly—without undue interference from the courts—in *Fox*, 556 U.S. 502. The Court held that an agency need not "demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one" or satisfy "heightened" judicial review. *Id.* at 515 (emphasis in original). If the agency's "new policy rests on factual findings that contradict those which underlay its prior policy," it must supply a reasoned explanation for the factual contradiction. *Id.* Otherwise, the normal rules apply: an agency merely has to acknowledge that it is changing course and show there are "good reasons" for the new policy, just as it would

need to do if it were writing "on a blank slate." *Fox*, 556 U.S. at 515.

In this case the *en banc* Ninth Circuit purported to apply *Fox* but contravened its underlying principles. The court ruled that the United States Department of Agriculture did not adequately explain its decision to exempt the Tongass National Forest from the Roadless Rule, a nationwide rule prohibiting logging and roadbuilding in roadless areas of the national forests. Under the Clinton administration, the agency had considered exempting the Tongass from this rule but ultimately decided the ecological benefits of applying the rule to the Tongass outweighed the socio-economic harms. Two years later, the Bush administration reversed that decision. It acknowledged the relevant facts had not changed but explained it was changing course because it believed the socio-economic costs of the Roadless Rule outweighed the value of Roadless Rule's additional environmental protections in a forest with abundant roadless areas already protected under existing law. The Ninth Circuit disregarded this value-based explanation. Citing *Fox*'s caveat about contradictory factual findings, it treated the Department's judgment that the Tongass's roadless values were "sufficiently protected" without the Roadless Rule as a "factual finding" that contradicted the previous administration's conclusion that additional protections were needed. The court then held that the agency had not adequately explained the supposed contradiction.

The Ninth Circuit's decision stretched *Fox*'s straightforward caveat that factual contradictions must be explained far beyond its proper application and used it as a license to reject the agency's policy judgments. In treating the agency's judgment that a certain level of environmental protection was sufficient as a contradictory factual finding that had to be explained and ruling the agency's valued-based explanation inadequate, the Ninth Circuit set a nearly impossible bar for an agency to clear. An agency's judgments are not facts; they are conclusions reached after interpreting facts in light of the agency's values and priorities. And when an agency, considering the same facts as its predecessor, reaches a different judgment, the only real explanation it can offer is that it balanced the relevant concerns differently. By treating different judgments as factual contradictions for which value-based explanation is insufficient, the Ninth Circuit gutted the principle that a new administration is free to change course if it weighs the relevant interests differently than its predecessor.

If allowed to stand, the Ninth Circuit's approach to reviewing policy changes will curtail the executive branch's power to make changes that are the very point of democratic elections. As the dissent below pointed out, "[e]lections have legal consequences"—or at least they should. But those legitimate consequences will be thwarted if courts entrench the policies of outgoing administrations by ruling that the different values of a new administration are not a sufficient explanation for changing course. This Court

should grant a writ of certiorari to review the decision below and restore the separation of powers balance in the Ninth Circuit.

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals is reported at 795 F.3d 956 and reprinted in the appendix at App. 1-58. The opinion of the panel is reported at 746 F.3d 970 and reprinted at App. 69-105. The opinion of the district court is reported at 776 F. Supp. 2d 960 and reprinted at App. 106-45.

JURISDICTION

The Court of Appeals for the Ninth Circuit rendered its *en banc* opinion on July 29, 2015. App. 2. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Administrative Procedure Act, 5 U.S.C. § 706, provides in pertinent part that:

> The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious,

an abuse of discretion, or otherwise not in accordance with law. . . .

STATEMENT OF THE CASE

This case arises out of a change in policy for managing the nation's largest national forest, the Tongass National Forest. The Tongass, which is 90% roadless and undeveloped, spans 16.8 million acres of Southeast Alaska. *Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska*, 68 Fed. Reg. 75,136, 75,137 (Dec. 30, 2003) (reprinted at App. 160-205). The abundance of roadless areas in the Tongass, a stark contrast to national forests in the Lower 48, presents a policy choice to forest managers. This abundance gives foresters the unique opportunity to manage a forest primarily for roadless values: untouched landscapes, dispersed recreation, and wildlife habitat. Yet the forest's sheer size and abundant roadless areas means that much of the Tongass's uniquely wild nature can be preserved even if logging and roadbuilding—key to the economic survival of isolated towns and villages scattered throughout the forest—continue in some designated areas.

In the last days of the Clinton administration, the U.S. Department of Agriculture adopted a rule prohibiting logging, roadbuilding, and road reconstruction in inventoried roadless areas of all national forests (the "Roadless Rule"). *Special Areas; Roadless*

Area Conservation, 66 Fed. Reg. 3244, 3244-45 (Jan. 12, 2001) (reprinted in part at App. 146-59).[1] The Department adopted the rule, covering approximately 58.5 million acres, to preserve the ecological, cultural, and social properties of roadless areas ("roadless values") in an increasingly developed and fragmented national landscape. *Id.* at 3244-45.

During the rulemaking process, the Department analyzed the special case of the Tongass National Forest, the only forest to receive individual consideration. The agency proposed deferring the decision about whether to apply the Roadless Rule to the Tongass until 2004 "in light of recent Forest Plan[2] decisions that conserve roadless areas and a Southeast Alaska

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[1] The phrase "inventoried roadless areas" refers to geographic areas of the national forests and grasslands managed by the U.S. Department of Agriculture that had previously been identified as areas without roads in periodic inventories of the agency's lands dating back to the 1970s. 66 Fed. Reg. at 3244.

[2] A "forest plan" is the Department of Agriculture's shorthand for the land and resource management plan establishing goals and standards designed to permit multiple uses of forest resources—e.g., recreation, logging, wildlife habitat, mineral development, and protection of water quality—that the agency is statutorily required to produce for each national forest. 16 U.S.C. § 1604. Any project or activity undertaken in the forest must be consistent with the plan. § 1604(i). Plans must be revised periodically, but at least every fifteen years. § 1604(f)(5). At the time the Roadless Rule was being considered, the forest plan for the Tongass National Forest had last been revised in 1999. *Notice of Proposed Rulemaking; Special Areas; Roadless Area Conservation*, 65 Fed. Reg. 30,276, 30,279-80 (May 10, 2000).

economy that is in transition." *Notice of Proposed Rulemaking: Special Areas; Roadless Area Conservation*, 65 Fed. Reg. 30,276, 30,279 (May 10, 2000).

The agency prepared an environmental impact statement (EIS), which observed that "the forest's high degree of overall ecosystem health is largely due to the quantity and quality of its inventoried roadless areas" and found that "[a]pproximately 84% of the forest is in land use designations, such as Wilderness Areas and National Monuments, which limit road construction and timber harvest activities." ER 211. It found that the Tongass—which is so large it is comparable to entire Forest Service *regions* in the Lower 48—"has a higher percentage of inventoried roadless areas where road construction and reconstruction are prohibited" than any other region. ER 211. The agency found that exempting the Tongass from the Roadless Rule would increase ecosystem fragmentation in areas that have been heavily logged, but that "under the current [Forest Plan] there is a moderate to high likelihood that habitat conditions will support well-distributed species." ER 220. Applying the Roadless Rule to the Tongass would lower risk to fish and wildlife species and maintain the wild nature of many inventoried roadless areas but would also sharply reduce timber harvest, eventually resulting in the loss of roughly 900 jobs in the region. ER 218-20. The EIS's preferred alternative was to apply the Roadless Rule to the Tongass, but defer its application until 2004 to blunt the socioeconomic impacts of the rule. ER 208-09.

The agency ultimately chose to apply the Roadless Rule to the Tongass immediately, permitting logging only pursuant to timber sales already in the pipeline. App. 150-51. The Department acknowledged the socioeconomic costs to Tongass communities but concluded that "the long-term ecological benefits to the nation of conserving these inventoried roadless areas outweigh the potential economic loss to those local communities." App. 152.

After the Bush administration came into office, the Department changed course. It agreed to settle a lawsuit against the Roadless Rule filed by the State of Alaska. As part of the settlement, the Department agreed to initiate new rulemakings concerning the management of Alaska's two national forests, the Tongass and the Chugach. App. 164.

In the record of decision for its 2003 final rule, the Department explained that it had decided to exempt the Tongass from the Roadless Rule because of "serious concerns about the previously disclosed economic and social hardships that application of the rule's prohibitions could cause in communities throughout Southeast Alaska." App. 169. It also explained that it had changed course due to litigation brought by the State of Alaska and others alleging that the application of the Roadless Rule to the Tongass violated statutes applicable to the management of Alaska's lands. App. 164, 169.

In the process of re-visiting the previous administration's decision, the agency concluded that "the

overall decisionmaking picture is not substantially different from what it was" when the Roadless Rule was adopted two years before. App. 187-88. It concluded a supplemental EIS was unnecessary and relied on the EIS prepared for the earlier rulemaking. App. 187-88.

Reviewing the same administrative record (plus a new round of public comment), the Department explained that "[a]pproximately 90 percent of the 16.8 million acres in the Tongass National Forest is Roadless and undeveloped" and "[o]ver three quarters (78 percent) of these 16.8 million acres are either Congressionally designated or managed under the forest plan as areas where timber harvest and road construction are not allowed." App. 189. It observed that the total acreage suitable for commercial timber harvest within inventoried roadless areas is about 300,000 acres. App. 189. It also noted that the 1999 Forest Plan prohibits timber harvest "on the vast majority of the remaining highest volume stands" of old growth forest, App. 174, and that "[e]ven if the maximum harvest permissible under the Tongass Forest Plan is actually harvested, at least 80 percent of the currently remaining roadless areas will remain essentially in their natural condition after 50 years." App. 177. And it acknowledged the EIS's estimate that approximately 900 jobs could be lost in Southeast Alaska as a result of the Roadless Rule. App. 165.

Although none of these facts had changed, the agency weighed the costs and benefits differently:

> [In 2001], the Department decided that ensuring lasting protection of roadless values on the Tongass outweighed the attendant socioeconomic losses to local communities. The Department now believes that, considered together, the abundance of roadless values on the Tongass, the protection of roadless values included in the Tongass Forest Plan, and the socioeconomic costs to local communities of applying the roadless rule's prohibitions to the Tongass, all warrant treating the Tongass differently from the national forests outside of Alaska. [App. 178].

The agency also concluded that allowing some logging and roadbuilding in roadless areas of the Tongass reflected "how best to implement the letter and spirit of congressional direction" in the Tongass Timber Reform Act, which requires the agency to "seek to provide a supply of timber from the Tongass National Forest" that meets market demand, subject to the duty to manage forest resources for sustained yield and multiple uses. App. 192; 16 U.S.C. § 539d(a). It therefore decided to exempt the Tongass National Forest from the Roadless Rule.[3]

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[3] The Department later repealed the Roadless Rule entirely and replaced it with a new regime for managing roadless areas of national forests. *Inventoried Roadless Area Mgmt. Rule*, 70 Fed. Reg. 25,654 (May 13, 2005). But in 2005 a federal district court in California held the repeal of the Roadless Rule was

(Continued on following page)

The plaintiffs filed suit in 2009 challenging the Tongass exemption as arbitrary and capricious under the Administrative Procedure Act and as a violation of the National Environmental Policy Act. The district court granted summary judgment in favor of the plaintiffs, concluding that the Department failed to provide a reasoned explanation for its change of policy. App. 142-43. The district court did not rule on the NEPA claim. App. 143.

A three-judge panel of the Ninth Circuit reversed. Judge Bea, writing for the court, held that the Department acknowledged that it was changing its policy for the Tongass and gave reasoned explanations for doing so: to decrease socio-economic costs for Tongass communities, to meet demand for timber, and to cease litigation. The court ruled that each of these reasons was acceptable under the APA. App. 77-87. It observed that the agency was reconsidering the same facts that underlay the 2001 rulemaking and "decide[d] the socioeconomic hardships the 2001 Roadless Rule put on the unique and isolated communities of Southeast Alaska were no longer acceptable." App. 86. Judge McKeown, in dissent, argued this "monumental decision deserves greater scrutiny

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invalid, and as a remedy the court reinstated the Roadless Rule and the Tongass exemption. *California ex rel. Lockyer v. U.S. Dept. of Agric.*, 459 F. Supp. 2d 874, 916 (N.D. Cal. 2006), *aff'd*, 575 F.3d 999 (9th Cir. 2009). The Tongass exemption remained in effect until enjoined by the district court in the proceedings below.

than the majority gives it" and concluded that the agency did not provide the "more detailed justification" she believed was required by *Fox*. App. 89.

The full court voted to vacate the panel decision and hear the case *en banc*. In a 6-5 decision, the *en banc* court affirmed the district court's decision to strike down the Tongass Exemption.

Judge Hurwitz, writing for the court, reasoned that "[t]he central issue in this case is whether the 2003 ROD rests on factual findings contradicting those in the 2001 ROD, and thus must contain the 'more substantial justification' or reasoned explanation mandated by *Fox*." App. 27. The agency had explained that "the decisionmaking picture is not substantially different from what it was" when the roadless rule was adopted in 2001 and had relied on the factual findings of the EIS prepared for the earlier rulemaking. App. 187-88. But the court concluded that the rule of decision announcing the new policy "made factual findings directly contrary to the 2001 ROD and expressly relied on those findings to justify the policy change." App. 25. It ruled that the agency failed to provide a reasoned explanation for these supposed contradictions.

The court asserted a contradiction between the 2001 decision's conclusion that exempting the Tongass from the Roadless Rule "would risk the loss of important roadless area values" and the 2003 decision's conclusion "that the Roadless rule was 'unnecessary to maintain the roadless values'" that are

"sufficiently protected by the Tongass Forest Plan." App. 25. The court did not mention that the 2003 decision acknowledged some roadless areas would be lost due to an exemption, as it had in 2001. App. 175. Nor did it discuss the Department's explanation for why, despite those losses, it believed the Roadless Rule was unnecessary. First, almost 80% of the forest is already off-limits to logging and road-building—a fact noted in the roadless rule EIS. App. 166; ER 211. And second, even if timber is harvested for 120 years at the maximum level allowed by the Tongass Forest Plan, over 80% of productive old-growth forest that was present on the Tongass in 1954 would remain—a point taken from the EIS for the 1999 Forest Plan, which was discussed extensively in the Roadless Rule EIS. App. 175; ER 215-20.

The court also asserted a factual contradiction between the Department's 2003 view of the risk from loss of roadless values as "minor" and—as the court put it, in a phrase the agency itself did not use—the Department's earlier "finding" that continued management under the Tongass Forest Plan was "unacceptable because it posed a high risk to the 'extraordinary ecological values of the Tongass.'" App. 26; *see also* App. 148-59. Again, the court did not discuss the actual facts offered by the agency to explain its judgment.

The court rejected the explanation that the new administration "merely decided that it valued socio-economic concerns more highly than environmental protection," instead concluding that the agency failed

to give a "reasoned explanation" for the supposed factual contradictions in its decision. App. 26.

Judge Smith, joined by four other judges in dissent, argued that the court flouted the requirements of *Fox* by "select[ing] what it believes to be the better policy, and substitut[ing] its judgment for that of the agency, which was simply following the political judgments of the new administration." App. 57. The dissent rejected the court's assertion that the 2003 decision rested on contradictory factual findings; rather, "[a]fter analyzing essentially the same facts, the USDA changed policy course at the direction of the new president, prioritizing some outcomes over others." App. 59. Recognizing that "*Fox* fully envisions such policy changes," the dissent identified four independent reasons for the change supported by the 2003 decision: "(1) resolving litigation by complying with federal statutes governing the Tongass, (2) satisfying demand for timber, (3) mitigating socioeconomic hardships caused by the Roadless Rule, and (4) promoting road and utility connections in the Tongass." App. 60-61. Judge Smith concluded that *Fox*'s central tenet—that courts must uphold regulations resulting from policy changes, even if explained with "less than ideal clarity," so long as "the agency's path may reasonably be discerned"—is "clearly" met

in this case. App. 59 (quoting *Fox*, 556 U.S. at 513-14).[4]

By enjoining the Tongass exemption, the Ninth Circuit has condemned the forest communities of Southeast Alaska to suffer socio-economic harms the executive branch did not want to impose. The EIS concluded that roaded areas can yield only 50 million board-feet (MMBF) of timber harvest annually, far short of projected market demand of 124 MMBF. ER 218. The shortfall will push loggers and mills out of business, eventually resulting in roughly 900 lost jobs in the region. ER 218-20. Though losing 900 jobs might not seem earth-shattering in the far more populated, prosperous, and connected cities of the Lower 48, it would be devastating to the small, geographically isolated towns and villages of the Tongass, where few other cash jobs are available for residents. The inability to build roads may make it cost-prohibitive to improve the efficiency of Southeast Alaska's power grid by connecting towns and villages, let alone develop hydropower, geo-thermal, and other

[4] In addition to the main opinions for the majority and dissent, three judges wrote separate opinions. Judge Christen joined the majority's opinion but wrote separately to emphasize that the personal views of the judges had no bearing on the outcome of the case. App. 31. Judge Callahan joined Judge Smith's dissent on the merits but wrote separately to argue that the State of Alaska did not have standing to maintain the appeal. App. 34. Judge Kozinski also joined the dissent on the merits but wrote separately to bemoan the "glacial pace of administrative litigation." App. 68.

renewable energy resources that could alleviate Southeast Alaska's reliance on expensive diesel fuel power generation. App. 193-94.

In short, the loss of well-paying jobs and prohibition against building roads threatens to mire the small communities of Southeast Alaska in isolated poverty, unable to enjoy basic amenities "that almost all other communities in the United States take for granted." App. 165.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's decision conflicts with this Court's decisions and with the approach of the D.C. Circuit.

The Ninth Circuit's decision conflicts with the rule that courts must accept a new administration's different values and priorities as a legitimate reason for changing policies so long as the explanation provided is reasonable. If the Ninth Circuit is permitted to re-cast differing value judgments as contradictory factual findings for which value-based explanations are inadequate, then a court can strike down any policy change based on a new administration's priorities if it does not find them compelling—exactly what this Court rejected in *Fox*. *See* 556 U.S. at 515 (an agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one" (emphasis in original)). The Ninth Circuit's approach gives courts far too much

power to hinder—under the guise of APA review—policy changes that are the legitimate result of democratic elections.

Judicial review of executive agency action under the APA is supposed to be "narrow." *Fox*, 556 U.S. at 513 (quoting *State Farm*, 463 U.S. at 43). To satisfy this review, an agency must "examine the relevant data and articulate a satisfactory explanation for its action." *Id.* (quoting *State Farm*, 463 U.S. at 43). But a court "is not to substitute its judgment for that of the agency and should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* at 513-14 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)).

These principles apply with equal force when an agency changes course. "An agency's view of what is in the public interest may change, either with or without a change in circumstances," and the agency may change course on this basis so long as it "suppl[ies] a reasoned analysis." *State Farm*, 463 U.S. at 43. Indeed, an agency "must consider . . . the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in administrations." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citing *Chevron*, 467 U.S. at 863-64, and *State Farm*, 463 U.S. at 59 (internal citations and quotation marks omitted)). Courts cannot second-guess the wisdom of policy changes by requiring the agency to

"demonstrate to [their] satisfaction that the reasons for the new policy are *better* than the reasons for the old one" or by subjecting a change in policy to more "searching" review. *Fox*, 556 U.S. at 515 (emphasis in original). An agency must provide more detailed justification for a policy change only if the change is based on factual findings that contradict factual findings underlying the previous rule. *Id.*

In striking down the Tongass Exemption, the Ninth Circuit used *Fox*'s straightforward caveat that factual contradictions require reasoned explanation as a license to reject the agency's value judgments. The Ninth Circuit purported to identify "factual contradictions" between the 2003 decision and the 2001 decision and then ruled that these supposed contradictions were not adequately explained. But none of the asserted contradictions the majority opinion identifies is truly factual. Rather, they are differing judgments about the appropriate balance between environmental and socio-economic interests.

The opinion starts with the 2001 decision's statement that allowing logging and road construction to continue under the Forest Plan "would risk the loss of important roadless area values." App. 25. It asserts a contradiction with the 2003 conclusion that "roadless values in the Tongass are sufficiently protected under the Tongass Forest Plan." App. 25. But this statement is not factual. It is a judgment that the level of roadless values protected by the Forest Plan is "sufficient"—in other words, "good enough" in light of competing considerations. And this judgment is

based on undisputed facts from the same administrative record as before—that roughly 80% of the Tongass is already off-limits to logging and road-building and that "[e]ven if timber is harvested for 120 years at the maximum level allowed by the Tongass Forest Plan, 83 percent of the productive old-growth forest that was present on the Tongass in 1954 would remain." App. 166, 175. In other words, the Department did not alter the factual conclusion about how much protection the Forest Plan provides roadless values. It changed its judgment about how much protection the Tongass's roadless values need given competing concerns.

The other supposed contradictions identified by the Ninth Circuit are similar. The Ninth Circuit faults the 2003 decision for concluding the Roadless Rule is "unnecessary to maintain the roadless values." App. 25. But this too is a judgment about how much protection roadless values need in a vast forest with abundant roadless areas, many of them already protected by law. Not only that, the Ninth Circuit also failed to acknowledge the express factual basis for that judgment, which the court excerpted from a longer passage explaining that "[c]ommercial timber harvest and road construction are already prohibited in the vast majority of the 9.34 million acres of inventoried roadless areas in the Tongass" and that the Roadless Rule "is unnecessary to maintain the roadless values *of these areas*." App. 166 (emphasis added).

Likewise, the opinion faults the agency for not explaining "why an action that it found posed a prohibitive risk to the Tongass environment only two years before now poses merely a 'minor' one." App. 26. But the agency itself did not use the term "prohibitive" to describe the risk to roadless values under the Forest Plan, so the majority can only mean that the agency in 2001 perceived the risk to roadless values as great enough to prohibit future logging and road-building. In other words, in 2001 the agency believed the risks of management under the Forest Plan outweighed the benefits. In 2003, the agency weighed the competing interests differently and viewed the risk to roadless values as "minor" enough that socio-economic considerations warranted an exemption from the Roadless Rule. The asserted contradiction rests solely on the difference between "prohibitive" and "minor"—*i.e.*, on the agency's changed judgment about how the same facts should be weighed.

Unlike a true factual contradiction, which an agency could explain by pointing out why the earlier finding was wrong or irrelevant, a decision to give different weight to the same facts can be explained only by reference to the values and priorities of the administration making it. By disregarding the agency's value-based explanation for reaching a different judgment as an insufficiently reasoned explanation for the change, the Ninth Circuit has made it difficult, if not impossible, for agencies to govern in accordance with evolving values and effectuate new priorities. Even though the Clinton administration

concluded important roadless values would be lost without the Roadless Rule, the Bush administration concluded that the existing environmental protections offered "sufficient"—enough—protection to those values when weighed against the socio-economic concerns it gave more weight to. App. 170. If this clear value-based explanation for the Department's action is insufficient, it is hard to imagine what more the Department could say that would satisfy the Ninth Circuit.

Not only does the Ninth Circuit's decision conflict with this Court's decisions, it conflicts with the D.C. Circuit's approach as well. In *National Association of Home Builders v. Environmental Protection Agency*, 682 F.3d 1032 (D.C. Cir. 2012), the D.C. Circuit rejected an argument that *Fox* required an agency to supply more detailed justification for changed policy judgments like those at issue here. *Id.* at 1037-38. That case arose from a petition to review a change in EPA regulations for renovation activities that increased risk of exposure to lead-based paint. In 2008, the EPA issued regulations containing an "opt-out" provision exempting certain owner-occupied homes. 682 F.3d at 1035. Two years later, under a new presidential administration, the EPA eliminated the opt-out provision. *Id.* at 1036. The D.C. Circuit acknowledged the petitioners' argument that under *Fox* an agency must sometimes provide a more detailed justification for changing course. *Id.* at 1037. But it ruled that because the petitioners could not identify any new factual findings on which the EPA relied, the

agency had only to satisfy *Fox*'s "core requirements": that it "display awareness that it is changing position" and "provide[ ] a reasoned explanation for its decision." *Id.* at 1038 (quoting *Fox*, 556 U.S. at 515) (emphasis omitted).

The D.C. Circuit rejected the invitation to conflate policy judgments with facts the way the Ninth Circuit did here. The EPA originally created the opt-out provision because it believed that a more stringent rule "would not be 'an effective use of society's resources.'" 682 F.3d at 1035 (quoting, *Lead; Renovation, Repair, and Painting Program*, 73 Fed. Reg. 21,692, 21,710 (Apr. 22, 2008)). But the new administration concluded that the opt-out provision "was not sufficiently protective . . . for . . . the most vulnerable populations" and did not "sufficiently account for . . . the health effects of lead exposure on adults and children age 6 and older." *Id.* at 1038-39 (quoting, *Lead; Amendment to the Opt-Out and Recordkeeping Provisions in the Renovation, Repair, and Painting Program*, 75 Fed. Reg. 24,802, 24,805-06 (May 6, 2010)). The D.C. Circuit recognized that these competing conclusions about the sufficiency of the protections against lead exposure—analogous to the Department's conclusions about the sufficiency of the Forest Plan's protections for the Tongass's roadless values—were not contradictory factual findings that required more detailed justification. *See id.* at 1037-38 ("But the petitions cannot point to any new findings, let alone contradictory ones, upon which EPA relied.").

Instead, the D.C. Circuit observed that the election of a new president and the appointment of a new EPA administrator "go a long way toward explaining why EPA reconsidered the opt-out provision" and reiterated that "[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations." 682 F.3d at 1043 (quoting *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part)). Because the Ninth Circuit has decided otherwise, this Court should grant certiorari to resolve the split between the circuits and reaffirm this basic principle of administrative law.

II. This Court should review the Ninth Circuit's decision because it harms the isolated communities of the Tongass and undermines the separation of powers.

This Court should review the Ninth Circuit's decision because it harms the isolated communities of the Tongass and undermines the government's ability to carry out the will of the electorate.

Applying the Roadless Rule to the Tongass will cause small, poor communities to suffer disproportionate socioeconomic harms. With the Roadless Rule in place, the Southeast Alaska timber industry cannot meet market demand for Tongass timber, which will ultimately devastate it. The EIS concluded that

roaded areas can yield only a fraction of the projected demand for Tongass timber. ER 218. The harvest reductions will drive timber outfits out of business, resulting in job losses in the industry the loss of many Forest Service jobs related to timber management. ER 219. The agency predicted the eventual result would be loss of around 900 jobs, concentrated in the smaller communities of Southeast Alaska. ER 220. These communities, with populations in the hundreds or less, can scarcely afford the loss of well-paying jobs with so few other opportunities for residents to earn cash income.

"The potential for economic development of [Tongass] communities is closely linked to the ability to build roads and rights of way for utilities in roadless areas of the National Forest System." App. 177. As the 2003 decision observed, "the roadless rule significantly limits the ability of communities to develop road and utility connections that almost all other communities in the United States take for granted." App. 165. Although the Roadless Rule permits federal-aid highways, it does not permit construction of logging or other roads that, over time, have organically evolved into the limited road system that exists in Southeast Alaska. App. 194-95.

The inability to build new roads may also make it cost-prohibitive to improve the efficiency of Southeast Alaska's power grid by connecting towns and villages, let alone develop alternative sources of energy like hydropower that could offset the need for expensive imports of diesel fuel. App. 193-94. And because roads

are often needed for development of leasable minerals, the Roadless Rule will likely hinder this kind of development as well, 66 Fed. Reg. at 3268, further limiting economic opportunities for Southeast Alaska communities.

The Ninth Circuit's decision will also have profound effects far beyond the Tongass because it upsets the separation of powers balance established by this Court's decisions.

The judiciary generally defers to executive branch decision-making because "[t]he responsibilities for assessing the wisdom of [ ] policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'" *Chevron*, 467 U.S. at 866 (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978)). In allowing an agency to change course for the sole reason that it has different values and priorities than the previous administration —without being second-guessed by the judiciary— this Court's decisions give the executive branch sufficient flexibility to carry out changes in policy that are the legitimate result of democratic elections.

The Ninth Circuit's decision threatens that flexibility. By recasting different policy judgments as contradictory factual findings for which value-based explanations are inadequate, the Ninth Circuit's approach entrenches the policies of outgoing administrations by making it much harder for their successors to change course. If an agency concludes

that keeping people employed is more important than keeping forests untouched by modern life, that purely value-based judgment is not susceptible to mathematically precise justification of the sort demanded by the Ninth Circuit. As Judge Kozinski lamented in dissent: "How can a President with a mere four or eight years in office hope to accomplish any meaningful policy change—as the voters have a right to expect when they elect a new President—if he enters the White House tethered by thousands of Lilliputian ropes of administrative procedure?" App. 68.

If left unchecked, the Ninth Circuit's opportunistic interpretation of *Fox* will have ripple effects far beyond management of Alaska's forests. Administrative agencies regulate a wide swath of American life. The circuit courts have already applied *Fox*'s rule for agency policy shifts in subject areas as diverse as protections against lead paint exposure, *see Nat'l Ass'n of Home Builders*, 682 F.3d at 1034, minimum wage and overtime laws to home health care workers employed through agencies, *see Home Care Ass'n of America v. Weil*, 2015 WL 4978980 at *10 (D.C. Cir. Aug. 15, 2015), and eligibility for asylum, *see Rivera Barrientos v. Holder*, 658 F.3d 1222, 1227 (10th Cir. 2011), *as corrected on denial of reh'g en banc sub nom. Rivera-Barrientos v. Holder*, 666 F.3d 641 (10th Cir. 2012). Under the Ninth Circuit's new approach, however, courts can prevent evolution of policies in any of these areas by demanding that agencies provide detailed justification for their actions—even for policies that would be upheld if the agency were writing

on a "blank slate" rather than attempting to effectuate change. *Fox*, 556 U.S. at 515. In this way, the Ninth Circuit's decision transforms the judicial branch from a deferential reviewer of agency action into a roadblock against political will. This Court should not leave such a troubling decision unreviewed.

CONCLUSION

For these reasons, the State of Alaska respectfully requests the Court to issue a writ of certiorari to review the decision of the Ninth Circuit below.

Respectfully submitted,

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