No. 17-118

In The Supreme Court of the United States

STATE OF ALASKA, et al.,

Petitioners,

v.

WILBUR L. ROSS, Secretary of the Department of Commerce, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE WYOMING, ALABAMA, ARIZONA, COLORADO, IDAHO, KANSAS, LOUISIANA, MONTANA, NEBRASKA, NEVADA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, WEST VIRGINIA AND WISCONSIN IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Wyoming and the other *amici* states are deeply concerned with the real-world ramifications of the Ninth Circuit's interpretation of what justifies listing a species as "threatened" under the Endangered Species Act (ESA or Act). (Pet. App. 1a). Unless this Court overturns it, the underlying decision will render meaningless the threshold for listing species as "threatened" under the ESA, which will significantly harm the states' economies and distort the goals established by Congress in the Act. All of this will occur while the "threatened" listing provides zero benefit to the species at issue. Moreover, it will encourage interest groups to petition for more unjustified and counterproductive "threatened" listings based on the Ninth Circuit's flawed interpretation of the ESA, thereby exacerbating the harm to the states.

Wyoming and the other *amici* states also have a profound interest in fostering collaboration and cooperation between the federal government and the states in their collective effort to achieve the ultimate goal of the Act – recovery of species and removal of those species from the ESA list. The underlying decision threatens these interests.

[1] The parties were notified ten days prior to the due date of this brief of the intention to file.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the underlying decision, the Ninth Circuit completely ignored this Court's ruling in *Bennett v. Spear* and endorsed a speculative decision by the National Marine Fisheries Service to list the U.S. population of the bearded seal as a "threatened" species under the ESA. The agency made this decision despite the fact that: (1) the bearded seal is a thriving species; and (2) the agency is powerless to do anything to address the sole perceived threat to the species – the loss of sea ice habitat in roughly 100 years due to the anticipated effects of climate change. The agency's decision, and the Ninth Circuit's endorsement of it, runs directly counter to this Court's command that agencies not list species under the ESA on the basis of speculation or surmise.

The *amici* states offer this brief to confirm their agreement with the points made by the State of Alaska and the Industry Groups in their respective petitions but more so to highlight the significant harm that the Ninth Circuit's ruling will have on the states and their citizens. The unnecessary and premature decision by the National Marine Fisheries Service could easily impose billions of dollars in economic costs on the *amici* states via future listings, while providing no benefit whatsoever to listed species. That is not what Congress intended when it enacted the ESA. Accordingly, the *amici* states respectfully ask this Court to grant the

State of Alaska's petition for review and overturn the underlying decision by the Ninth Circuit.

REASONS TO GRANT THE PETITION

I. The Ninth Circuit's ruling will lead to a flood of speculative listing decisions.

Wyoming and the other *amici* states wholeheartedly agree with the reasons identified by the State of Alaska and the Industry Groups for this Court to review the underlying decision. The decision by the National Marine Fisheries Service to list the bearded seal as "threatened" based solely on the projected loss of sea ice in roughly 100 years not only goes against the plain language of the ESA's requirement that, in order to be "threatened," it must be "likely" that the species will become "endangered" within the "foreseeable future," it directly violates this Court's command that the ESA "not be implemented haphazardly, on the basis of speculation or surmise." *Bennett v. Spear*, 520 U.S. 154, 176 (1997).[2]

The Ninth Circuit's flawed interpretation of the ESA poses significant risks to the states, because the underlying decision opens the door to a flood of unnecessary and premature "threatened" listings. As some

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[2] In order to respect this Court's admonition against duplication, the *amici* states adopt by reference the Statement of the Case provided by the State of Alaska. The *amici* states also support and adopt the arguments put forward by the State of Alaska and the Industry Groups.

commenters stated to the agency during the rulemaking process, if the National Marine Fisheries Service does not wait for better information, and simply lists the bearded seal based on speculation nearly 100 years out, "virtually every species could be considered threatened," regardless of the health of the population and the degree of certainty regarding potential, future risks. *See* 77 Fed. Reg. 76758. That is precisely what concerns the *amici* states, because the states will suffer significant harm as a result.

In a recent study published in the journal *Science*, a noted ecologist found that climate change is a threat to one in six species. Carl Zimmer, *Study Finds Climate Change as Threat to 1 in 6 Species*, New York Times (Apr. 30, 2015).[3] These species are not limited to the arctic or to coastal areas and include species like the American pika, which lives in the mountainous West. *Id*. And some think that he underestimated the numbers. *Id*. Now that the Ninth Circuit has held that the National Marine Fisheries Service and the United States Fish and Wildlife Service (the Services) are required to list a species if a climate change model shows a potential yet speculative threat to a species in 100 years, the Services *must* list that species as "threatened" if petitioned by an interest group, regardless of the magnitude or the imminence of the threat posed by climate change.

[3] Available at https://www.nytimes.com/2015/05/05/science/new-estimates-for-extinctions-global-warming-could-cause.html.

This means that low-priority species that are currently thriving may be listed due to climate change advocacy while declining populations of another species – one not subject to a petition from an interest group – will languish without the ESA's protections, given the limited resources available to the Services. *Wildwest Inst. v. Kurth*, 855 F.3d 995, 1005 (9th Cir. 2017) ("the Secretary has limited resources" for ESA listings). This is not what Congress intended. *See* 16 U.S.C. § 1533(f)(1)(A) (directing the Services to give priority to the species that need it).

To be clear, even if the Services were not inclined to list a species due to the needs of other, higher priority species, interest groups focused on climate change advocacy will be able to compel the Services to conduct a premature listing analysis through the ESA's citizen suit provision, in conjunction with the Ninth Circuit's ruling. 16 U.S.C. § 1540(g). This not only frustrates the intent of the ESA, it is simply bad policy. The *amici* states ask this Court to grant Alaska's petition and overturn the Ninth Circuit's decision to prevent this result.

II. The listing will impose significant and unnecessary costs on state economies.

Now that the bearded seal is listed as "threatened," the ESA requires the National Marine Fisheries Service and other federal agencies to take steps that will impose significant regulatory burdens on the

states and other entities while also inflicting unnecessary costs on the American taxpayer.

1. First, the National Marine Fisheries Service must prepare a recovery plan. 16 U.S.C. § 1533(f). The agency designs these plans to "recover" the species to the point that the Service can remove it from the list of threatened and endangered species. 16 U.S.C. § 1533(f)(1)(B).

This process just played out to its regulatory conclusion with regard to the Greater Yellowstone Ecosystem population of grizzly bears. 82 Fed. Reg. 30502 (June 30, 2017). This population of bears, mostly contained within the State of Wyoming, reached the objectives set out in the recovery plan. *Id*. at 30503, 30628. Accordingly, the United States Fish and Wildlife Service removed the population from the list of threatened and endangered species. *Id*. at 30628. That is how Congress intended the ESA to work. The ESA directs the Services to protect a depleted population, return it to stable levels, and remove it from the list. 16 U.S.C. §§ 1531, 1533; 50 C.F.R. § 424.11. It is a simple yet durable concept if properly followed. The delisting of the Greater Yellowstone grizzly bear, which followed this approach, is a true ESA success story. Miles Grant, *Grizzly Bear Recovery an Endangered Species Act Success Story*, National Wildlife Federation (Mar. 3, 2016).[4]

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[4] Available at https://www.nwf.org/News-and-Magazines/Media-Center/News-by-Topic/Wildlife/2016/3-03-16-Grizzly-Bear-Recovery-an-Endangered-Species-Act-Success-Story.aspx.

Compare that successful story of ESA recovery with the listing of the bearded seal. A recovery plan for the bearded seal serves no purpose. The species is already thriving, so there is no action needed to return a depleted population to higher numbers. *See* 77 Fed. Reg. 76748. And the National Marine Fisheries Service admits that it cannot stop the long-term loss of sea ice or meaningfully reduce greenhouse gas emissions. *See id*. Indeed, the agency will not even try to do so. *See id*. So, the Service will prepare a recovery plan that, by the agency's own admission, *cannot* be designed to address the sole, purported threat to the species. This is not what Congress intended when it enacted the ESA, and it will impose significant and unnecessary costs on the *amici* states and others.

Indeed, over 30 years ago, the United States Department of the Interior estimated that "the potential direct costs from the recovery plans of all listed species were about $4.6 billion." Jason F. Shogren, *Economics and the Endangered Species Act*, Endangered Species Act Update, University of Michigan School of Natural Resources and Environment (Jan./Feb. 1997).[5] Since that time, the Services have listed many more species and created many more recovery plans at further expense.

The costs soar much higher when one considers the economic costs related to lost opportunities as a result of a recovery plan. One study estimated that the

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[5] Available at http://www.umich.edu/~esupdate/library/97.01-02/shogren.html.

recovery plan for the spotted owl alone "would decrease economic welfare" in an amount ranging from $33 billion to $46 billion. *Id*. The vast majority of the costs of lost opportunities fall on the states, whether that be through drastic reductions in logging to protect the spotted owl or the loss of fishing revenue to protect salmon. However, at least those recovery plans were designed to actually recover the species and increase depleted populations to the point that the species can be delisted. *See id*. Not so with the bearded seal. This is precisely the kind of "needless economic dislocation" that this Court found the ESA requires agencies to avoid. *Bennett*, 520 U.S. at 176-77. Only review by this Court will prevent the Ninth Circuit from allowing this unwarranted economic disruption to occur on a widespread basis.

2. And the recovery plan is just one facet of the larger problem. The National Marine Fisheries Service is now working on designating critical habitat for the bearded seal. 77 Fed. Reg. 76740. Critical habitat designations often impose significant economic hardship on states and other entities. The economic effects include the following: (1) increased costs related to permitting; (2) inability to develop projects and related lost opportunities; (3) relocation or modification of development; (4) mitigation requirements; (5) consulting and legal expenses; and (6) delay. David Sunding, *The Economic Impacts of Critical Habitat Designation*, Agricultural and Resource Economics Update, Vol. 6, No.

6, University of California Giannini Foundation of Agricultural Economics (July/Aug. 2003).[6] Ultimately, the states and their citizens must shoulder these costs. *See id*. For example, a study of the economic impact of the critical habitat designation for the California coastal gnatcatcher estimated costs to developers of $4.6 to $5.1 billion between 2003 and 2020. David Sunding, *Economic Impacts of Critical Habitat Designation for the Coastal California Gnatcatcher* (Aug. 15, 2003).[7]

Moreover, just as with a recovery plan, a critical habitat designation will not provide any meaningful benefit to the bearded seal vis-à-vis recovery. The only purported threat to the species is the loss of sea ice due to climate change in the distant future. And the National Marine Fisheries Service concedes that it cannot do anything meaningful about that threat. By necessity then, the designation of critical habitat will do nothing to address the future loss of sea ice, making it a burden without benefit. The *amici* states implore this Court to grant Alaska's petition and prevent the National Marine Fisheries Service from imposing this needless burden on the states and their citizens.

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[6] Available at https://giannini.ucop.edu/publications/are-update/issues/2003/6/6/the-economic-impacts-of-c/.

[7] Available at https://www.researchgate.net/profile/David_Sunding/publication/268000666_Economic_Impacts_of_Critical_Habitat_Designation_for_the_Coastal_California_Gnatcatcher_Prepared_by/links/54ca56000cf2c70ce521c5c6.pdf?origin=publication_list.

3. The listing decision will also require federal agencies to "consult" with the National Marine Fisheries Service when an agency wants to, for example, "issue permits and authorizations relating to coastal development and habitat alteration, oil and gas development (including seismic exploration), toxic waste and other pollutant discharges, and cooperative agreements for subsistence harvest." 77 Fed. Reg. 76749. Consultation on these types of actions will be legally required even though the National Marine Fisheries Service just determined that none of these actions threaten the bearded seal. *Id*. at 76742-48. And to the extent that the consultation covers climate change, there will be no meaningful action, as admitted by the National Marine Fisheries Service. *See, e.g.*, *id*. at 76748. Consultation will necessarily result in delays and increased costs to states and the businesses that wish to pursue development opportunities in those states. And all of this will occur despite no benefit to the species. Congress did not intend this perverse result when it enacted and later amended the ESA.

III. The Ninth Circuit's decision may frustrate cooperation and innovation.

The Ninth Circuit's flawed interpretation of the ESA also threatens to chill attempts by states to protect species through local measures that could obviate the need for listing under the ESA. The Act provides that the Services may decline to list a species if existing regulatory mechanisms sufficiently ameliorate any extant threats to the species. *See* 16 U.S.C. § 1533(a)(1);

80 Fed. Reg. 59858 (Oct. 2, 2015). In other words, if the states and others are already doing enough to protect the species, the ESA does not require the Services to list that species. This shows that Congress did not intend for the Services to list a species as threatened if the species is robust and thriving, like the bearded seal, or even if the species needs assistance and is already receiving it.

One recent example of a state-based approach that prevented an unnecessary ESA listing in Wyoming is the State's collaboration with the United States Fish and Wildlife Service to protect the sage-grouse. In 2002, an environmental interest group petitioned the United States Fish and Wildlife Service to list the western sub-species of the sage-grouse as an endangered species. Temple Stoellinger and David "Tex" Taylor, *A Report on the Economic Impact to Wyoming's Economy from a Potential Listing of the Sage Grouse*, Wyoming Law Review, Vol. 17, No. 1 (2017). What followed was over a decade of agency decisions and related litigation without a resolution as to the status of the species. *Id*. at 83-87.

In the midst of this debate, Wyoming decided to develop its own measures to: (1) protect the sage-grouse; (2) allow for development to continue; and (3) hopefully obviate the need to list the sage-grouse as "threatened" or "endangered" under the ESA. *Id*. at 88. The result was Wyoming's Core Population Area Strategy, which the Governor of Wyoming adopted by Executive Order in 2009. *Id*. The current Governor of Wyoming adopted

this Executive Order after he took office and last amended it in 2015. *Id*.

Under Wyoming's strategy, conservation of the sage-grouse is the top priority in geographic areas that contain the core-population of sage-grouse. *Id*. at 88. In 2009, the United States Bureau of Land Management adopted Wyoming's strategy within the state and directed its field offices to manage sage-grouse in a manner consistent with Wyoming's strategy. *Id*. In 2015, the Bureau and the Forest Service developed a plan to manage sage-grouse, largely following the approach used in Wyoming's strategy. *Id*. at 89-90.

That same year, the United States Fish and Wildlife Service once again considered whether the ESA required the sage-grouse to be listed. *Id*. at 87. The Service determined that listing was not warranted because the regulatory mechanisms provided by the federal government, Wyoming, and other states, sufficiently addressed the primary threats to the sage-grouse. *Id*. In short, collaboration between the federal government and the states obviated the need to list the species. Department of the Interior Secretary Zinke, acting on the advice of senior BLM officials, recently adopted a new approach to sage-grouse protection designed to deepen his Department's "continued collaboration with the States" and to "increase consistency" between state and federal plans. *See* Report in Response to Secretarial Order 3353, at 2 (Aug 4, 2017).[8]

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[8] Available at https://www.doi.gov/sites/doi.gov/files/uploads/so3353_memo_coverletter_report_080717.pdf.

While the impacts of this effort affect each state differently, a recent study estimated the projected economic impacts that a listing of the sage-grouse would have imposed on the State of Wyoming. On the low-end, a listing would have cost Wyoming $1.5 billion in total economic impact, over 8,000 jobs (in a state of around 600,000), over $500 million in labor earnings, and over $96 million in state and local revenue per year. *Id*. at 99. For Wyoming, the ability to collaborate with the federal government and avoid a listing of the sage-grouse made all the sense in the world.

The problem is that, in light of the Ninth Circuit's decision, as states work to protect their native species, there is nothing to stop various interest groups from filing hundreds of petitions with the Services to *force* the agencies to list species as "threatened" based on the threat of climate change in 100 years. Because the Services and the states (and, indeed, the entire United States government) cannot unilaterally solve the challenges posed by climate change, the Ninth Circuit's decision will discourage states from pursuing collaborative solutions to other challenges posed to listed species. The reason for this is that, no matter what efforts the states take, the species will never come off the list, because the threat of the effects of climate change in 100 years will remain regardless of any action taken by the states. If the Ninth Circuit takes away the carrot of keeping a species off the list or removing a healthy species from the list, states and private landowners will be less inclined to collaborate with the

Services to protect species, which is a lost opportunity for all involved, including the species.

Congress did not intend the ESA to be a vehicle for the permanent listing of species based on potential threats a century in the future. To say otherwise ignores the entire purpose of the Act – recovery of a depleted species.

IV. The "threatened" listing is unnecessary and premature.

Even if this Court were to look past the speculative nature of the National Marine Fisheries Service's decision to list the bearded seal as "threatened," the fact remains that the listing will not benefit the species at issue. Instead, the listing is the epitome of what this Court warned of as "agency officials zealously but unintelligently pursuing their environmental objectives." *Bennett*, 520 U.S. at 176-77. Such an outcome is contrary to the spirit of the ESA, the plain language of the Act, and this Court's prior decisions.

1. In the listing rule, the National Marine Fisheries Service admits that federal agencies lack the ability to take action that will reduce the loss of sea ice used by the bearded seal, despite the fact that the projected loss of sea ice is the sole reason that the agency relied upon to justify listing the species as "threatened." *See, e.g.*, 77 Fed. Reg. 76748. This alone renders the listing rule unnecessary and "unintelligent." *See Bennett*, 520 U.S. at 176-77.

The National Marine Fisheries Service further highlighted the unnecessary nature of the "threatened" listing by deciding that "take" prohibitions were not needed for the healthy and abundant bearded seal population. 77 Fed. Reg. 76749. Put simply, this "threatened" species faces no observable threats to its existence and is so robust that the National Marine Fisheries Service determined that ESA restrictions on hunting are unnecessary. *Id*. The listing is similarly unnecessary.

2. The listing rule is also premature. The intent of Congress in enacting the ESA was to "halt and reverse" negative population trends. *TVA v. Hill*, 437 U.S. 153, 184 (1978). And the purpose of the ESA is to protect "threatened" species that are "so depleted in numbers that they are threatened with extinction." 16 U.S.C. § 1531(a)(2). That is not the situation here. The bearded seal, which ranks as a species of "Least Concern" on the International Union for Conservation of Nature and Natural Resources' "Red List," is thriving, not declining and depleted. 77 Fed. Reg. 76748.

As a peer reviewer informed the National Marine Fisheries Service during the rulemaking process, "the proposed listings are premature, suggesting that there is still time to monitor the status of the bearded seal populations and their responses to changes to have better information upon which to base management decisions." *Id*. at 76758. If a threat to a species will not manifest itself for decades and the listing of the species will do nothing to reduce the projected threat, the Service should not list the species, particularly when

doing so will have real-world negative impacts on states and their citizens. *Id*. at 76764-65. To list a species with those underlying facts is the epitome of "unintelligently pursuing . . . environmental objectives." *Bennett*, 520 U.S. at 176-77. Accordingly, this Court should grant Alaska's petition and overturn the Ninth Circuit's decision.

CONCLUSION

In sum, the National Marine Fisheries Service determined that the ESA required the agency to list the bearded seal as "threatened," despite the following: (1) the bearded seal population is robust and thriving; (2) there are *zero* current threats to the species; (3) the degree of future risk is currently unknown; (4) no one can predict how the species may adapt to future loss of sea ice; and (5) the National Marine Fisheries Service cannot do anything to stop the future loss of sea ice via the ESA. In so doing, the agency acted in an "unintelligent" and speculative manner, and the Ninth Circuit incorrectly upheld the agency's determination. For the reasons discussed, the *amici* states respectfully submit that this Court grant the State of Alaska's

petition and overturn the Ninth Circuit's misguided decision.

Respectfully submitted,

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