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8 **UNITED STATES DISTRICT COURT**
DISTRICT OF ARIZONA

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10 _____
CENTER FOR BIOLOGICAL DIVERSITY)
378 N. Main)
11 Tuscon, AZ 85701,)
12 DEFENDERS OF WILDLIFE)
1130 Seventeenth Street, NW)
13 Washington, DC 20036,)

14 Plaintiffs,)

15 v.)

16
17 SALLY JEWELL,)
Secretary,)
18 U.S. Department of the Interior)
1849 C Street, NW)
19 Washington, D.C. 20240,)

20 DANIEL M. ASHE,)
21 Director)
22 U.S. Fish & Wildlife Service)
1849 C Street, NW)
23 Washington, D.C. 20240,)

24 Defendants.)

Case No.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

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INTRODUCTION

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2 1. Under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-44, the U.S.
3 Department of the Interior (“DOI”) and the U.S. Fish and Wildlife Service (“FWS” or
4 “Service”) must list and afford federal protection to a “species” if it is found to be either
5 “endangered” or threatened throughout “all or a significant portion of its range.” *Id.* §§
6 1532(6) (definition of “endangered species”), 1532(20) (definition of “threatened species”).
7 This case challenges the refusal of DOI and FWS to list the cactus ferruginous pygmy-owl
8 (“pygmy-owl”) as a threatened or endangered species notwithstanding the Service’s finding
9 that the species is in fact seriously imperiled in an “important portion” of its remaining habitat,
10 i.e., in Arizona and Sonora, Mexico. *See* 12-Month Finding on a Petition to List the Cactus
11 Ferruginous Pygmy Owl as Threatened or Endangered with Critical Habitat, 76 Fed. Reg.
12 61,856 (October 5, 2011) (“Final Pygmy Owl Rule”).

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14 2. Despite finding that the pygmy-owl is at grave risk in the “Sonoran Desert
15 Ecoregion” from multiple threats, including habitat degradation and destruction related to
16 urban and agricultural sprawl, livestock grazing, wood cutting, invasive species, and trans-
17 border problems, *see* 76 Fed. Reg. 61878, and that avoiding extirpation of pygmy owls in this
18 area is in fact important to “the taxon [i.e., species] as a whole,” *id.* at 61893, the FWS has
19 nonetheless found that the area in which the pygmy owl is imperiled does not constitute a
20 “significant portion of its range.” In arriving at this counterintuitive finding that an admittedly
21 “important portion” of the species’ range is not a “significant portion,” the FWS has applied an
22 interpretation of the phrase “significant portion of its range” that is contrary to the plain
23 language and patent purpose of the ESA, and that is otherwise arbitrary and capricious.

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25 3. In addition to challenging Defendants’ refusal to list the pygmy-owl, Plaintiffs
26 are also challenging the FWS’s July 1, 2014 issuance of a “final policy” which construes the
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1 phrase “significant portion of its range” in a manner that violates the ESA. *See* Final Policy on
2 Interpretation of the Phrase ‘Significant Portion of its Range,’ in the Endangered Species’ Act’s
3 Definitions of “Endangered Species” and “Threatened Species,” 79 Fed. Reg. 37578 (July 1,
4 2014) (“Final Policy”). The Final Policy adopts an interpretation that is not only contrary to
5 the plain language and conservation purposes of the ESA, but effectively reads the phrase
6 “significant portion of its range” out of the Act entirely. Accordingly, the Court should vacate
7 and remand the “Final Policy,” as well as the FWS’s decision refusing to list the pygmy-owl.
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9 **JURISDICTION AND VENUE**

10 4. This action arises under the ESA and the Administrative Procedure Act, 5
11 U.S.C. §§ 551, 701-06 (“APA”). This Court has jurisdiction over this action pursuant to 16
12 U.S.C. § 1540(g) and 28 U.S.C. §§ 1331 and 1346. Plaintiffs have properly given notice to
13 Defendants of their claims under the ESA in accordance with 16 U.S.C. § 1540(g)(2).
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15 5. Venue is proper in the District of Arizona pursuant to 28 U.S.C. § 1391(e), as
16 this civil action is brought against an agency of the United States and officers and employees of
17 the United States acting in their official capacities and under the color of legal authority, a
18 substantial part of the events giving rise to the claim occurred in Arizona, no real property is
19 involved in this action, and one of the Plaintiffs resides in this judicial district.
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21 **PARTIES**

22 6. Plaintiff Center for Biological Diversity (the “Center”) is a non-profit 501(c)(3)
23 corporation headquartered in Tucson, Arizona, with offices in San Francisco and Joshua Tree,
24 California, New Mexico, Washington, Oregon, Minnesota, Vermont, Florida, Colorado and
25 Washington, D.C. The Center works through science, law, and policy to secure a future for all
26 species, great or small, hovering on the brink of extinction. The Center is actively involved in
27 species and habitat protection issues throughout the United States and the world, including
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1 protection of plant and animal species from the impacts of global warming. The Center has
2 more than 800,000 members and supporters throughout the United States and the world,
3 including over 20,000 members and supporters in Arizona.

4 7. The Center brings this action on its own institutional behalf and on behalf of its
5 members and board members, many of whom regularly seek to observe the pygmy-owl in the
6 Sonoran Desert Ecoregion and also have other concrete educational, recreational, and
7 scientific interests in the pygmy-owl and other species harmed by Defendants' new
8 interpretation of the phrase "significant portion of its range." On behalf of its members and
9 board members, for more than two decades the Center has expended substantial organizational
10 resources attempting to obtain needed ESA protections for the pygmy-owl. The interests of
11 the Center and its members and board members in observing, studying, and otherwise
12 enjoying the pygmy-owl and other endangered and threatened species and their critical
13 habitats, and in obtaining and disseminating information regarding the survival of endangered
14 and threatened species and their critical habitats, have been harmed by defendants' refusal to
15 list the pygmy- owl and adoption of the Final Policy.
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18 8. Plaintiff Defenders of Wildlife ("Defenders") is a non-profit 501(c)(3)
19 organization headquartered in Washington, D.C. with field offices in Arizona, Alaska,
20 California, Florida, Idaho, Montana, Oregon, and Mexico. Founded in 1947, Defenders is a
21 science-based conservation organization with more than 1,200,000 members and supporters
22 nationwide, and approximately 8,400 members in Arizona. Defenders is dedicated to the
23 protection of all native wild animals and plants in their natural communities, and the
24 preservation of the habitat on which they depend. Defenders advocates for new approaches to
25 wildlife conservation that will help keep species from becoming endangered, and it employs
26 education, litigation, research, legislation, and advocacy to defend wildlife and their habitat.
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1 Defenders is one of the nation’s leading organizations seeking to advance endangered species
2 protection and has been involved in issues of ESA implementation for more than 30 years.

3 9. Defenders brings this action on its own institutional behalf and on behalf of its
4 members who derive scientific, aesthetic, recreational, and spiritual benefit from the pygmy-
5 owl and other species and their habitats that will be harmed by Defendants’ new interpretation
6 of “significant portion of its range.” For many years, Defenders has expended substantial
7 organizational resources attempting to secure ESA protections for the pygmy-owl. The
8 interests of Defenders’ members in observing, studying, and otherwise enjoying pygmy-owls
9 and other imperiled species and their critical habitats, and in obtaining and disseminating
10 information regarding the survival of endangered and threatened species and their critical
11 habitats have been harmed by Defendants’ refusal to list the pygmy-owl and their adoption of
12 the Final Policy.
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14 10. Defendant Sally Jewell, United States Secretary of the Interior, is the highest
15 ranking official within the U.S. Department of the Interior and, in that capacity, has ultimate
16 responsibility for the administration and implementation of the ESA with regard to terrestrial
17 endangered and threatened species, and for compliance with all other federal laws applicable
18 to the Department of the Interior. Ms. Jewell is sued solely in her official capacity.
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20 11. Defendant Daniel M. Ashe is Director of the U.S. Fish and Wildlife Service, a
21 federal agency within the Department of the Interior authorized and required by law to protect
22 and manage the fish, wildlife, and native plant resources of the United States, including
23 enforcing and implementing the ESA. The Service has been delegated primary authority for
24 day-to-day administration of the ESA with respect to terrestrial species. Mr. Ashe is sued
25 solely in his official capacity.
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STATUTORY AND REGULATORY FRAMEWORK

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2 12. In enacting the ESA, Congress found that “various species of fish, wildlife, and
3 plants in the United States have been rendered extinct as a consequence of economic growth
4 and development untempered by adequate concern and conservation,” that other species “have
5 been so depleted in numbers that they are in danger of or threatened with extinction,” and that
6 these species “are of esthetic, ecological, educational, historical, recreational, and scientific
7 value to the Nation and its people.” 16 U.S.C. §§ 1531(a)(1)-(3). Congress further found that
8 pursuant to various treaties, including “migratory bird treaties” with Canada, Mexico, and
9 Japan, the “United States has pledged itself as a sovereign state in the international community
10 to conserve to the extent practicable the various species of fish or wildlife facing extinction,”
11 and that “develop[ing] and maintain[ing] conservation programs which meet national and
12 international standards is a key to meeting the Nation’s international commitments and to
13 better safeguarding, for the benefit of all citizens, the Nation’s heritage in fish, wildlife, and
14 plants.” *Id.* at §§ 1531(a)(4), (5). In light of these Congressional findings, the purposes of the
15 Act are to “provide a means whereby the ecosystems upon which endangered species and
16 threatened species depend may be conserved” and to “provide a program for the conservation
17 of such endangered species and threatened species” *Id.* at § 1531(b).

20 13. The ESA defines a “species” to “include[] any subspecies of fish or wildlife or
21 plants, and any distinct population segment [“DPS”] of any species of vertebrate fish or
22 wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16). In evaluating whether a
23 “DPS” qualifies as a “species,” the FWS has adopted a policy that analyzes the “[d]iscreteness
24 of the population segment in relation to the remainder of the species to which it belongs”; the
25 “significance of the population segment to the species to which it belongs”; and “the
26 population segment’s conservation status in relation to the Act’s standards for listing,” i.e.,
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1 whether the population segment, when treated as if it were a full species, is “endangered or
2 threatened.” 61 Fed. Reg. 4722, 4725 (Feb. 7, 1996). An “endangered species” is any species
3 as defined by the Act “which is in danger of extinction throughout all or a significant portion
4 of its range,” *id.* at § 1531(6), and a “threatened species” is one that is “likely to become an
5 endangered species within the foreseeable future throughout all or a significant portion of its
6 range.” *Id.* at § 1531(20).

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8 14. The FWS must determine, based “solely” on the “best scientific and
9 commercial data available,” 16 U.S.C. § 1533(b)(1)(A), “whether any species is an
10 endangered species or a threatened species because of any of” five factors, including the
11 “present or threatened destruction, modification, or curtailment of its range,” the “inadequacy
12 of existing regulatory mechanisms,” or “other natural or manmade factors affecting it
13 continued existence.” *Id.* at 16 U.S.C. § 1533(a)(1). Any “interested person” may petition for
14 listing of a species and, in response to such a petition that “present[s] substantial information
15 indicating that the petitioned action may be warranted,” *id.* at § 1533(b)(3)(A), the Service
16 must, within twelve months after receipt of the petition, make a final determination of whether
17 listing is “warranted.” *Id.* at § 1533(b)(3)(B). Any “negative finding” is expressly made
18 “subject to judicial review” under the Act’s citizen suit provision. *Id.* at § 1533(b)(3)(C)(ii);
19 *id.* at § 1540(g).

20
21 15. A species that is listed as endangered or threatened receives substantial
22 protections under the ESA. The species’ “critical habitat” – the habitat needed for its
23 “conservation,” i.e., recovery – must be designated, *see* 16 U.S.C. §§ 1532(3), 1532(5)(A),
24 1533(a)(3)(A), and all federal agencies must, in consultation with the FWS, “insure that any
25 action authorized, funded, or carried out by such agency [] is not likely to jeopardize the
26 continued existence of any endangered species or threatened species or result in the
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1 destruction or adverse modification of habitat of such species which is determined . . . to be
2 critical” *Id.* at § 1536(a)(2). In addition, the Act and implementing regulations broadly
3 prohibit the “take” of any species that has been listed as endangered or threatened. *Id.* at §
4 1538(a); 50 C.F.R. § 17.32; *see also* 16 U.S.C. § 1532(19) (defining “take” to mean to
5 “harass, harm, pursue, hunt, would, kill, trap, capture, or collect”).

6 **FACTS GIVING RISE TO PLAINTIFFS’ CLAIMS**

7 **A. The FWS’s Refusal To List The Pygmy-Owl**

8 **1. Plaintiffs’ Petition To List The Pygmy-Owl**

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10 16. The pygmy-owl is a small diurnal owl, approximately 6.75 inches long, which
11 is generally reddish brown, with a cream-colored belly streaked with reddish brown. The
12 crown is streaked and a pair of dark brown or black spots outlined in white appear on its nape
13 suggesting “eyes,” leading to the name “Cuatro Ojos” or four eyes as it is sometimes called in
14 Mexico. Pygmy-owls have large feet and talons relative to their body size. In Arizona and
15 northern Sonora, pygmy-owls are found in Sonoran desertscrub, but were historically found in
16 riparian habitats. 76 Fed. Reg. 61862.

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18 17. The Center and others first petitioned for protection of the pygmy-owl under
19 the ESA in 1992. In response, FWS listed the pygmy-owl as an endangered species in
20 Arizona on the grounds that the Arizona population constituted a DPS that was at risk of
21 extinction and that the pygmy-owl had “declined throughout Arizona to the degree that it is
22 now extremely limited in distribution in the State.” 62 Fed. Reg. 10,740 (March 10, 1997).
23 Litigation brought by the National Association of Homebuilders challenging the listing
24 resulted in a remand of the listing decision on the grounds that the Service had not adequately
25 explained why the Arizona population standing alone constituted a DPS under the FWS’s
26 policy delineating the criteria for DPS designation. The Service subsequently published a
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1 final rule removing the pygmy-owl in Arizona from the list of protected species on the sole
2 grounds that it did not qualify as a DPS. 71 Fed. Reg. 19452 (April 14, 2006).

3 18. In 2007, on the basis of new scientific evidence, the Center and Defenders
4 submitted a petition to list the pygmy-owl as endangered or threatened, and requested that the
5 Service consider in its analysis not only the gravely imperiled Arizona population but also the
6 greater Sonoran desert population, which is declining due to myriad threats. In June 2008, the
7 FWS found that the “petition presents substantial scientific or commercial information
8 indicating that listing the pygmy-owl may be warranted.” 73 Fed. Reg. 31418 (June 2, 2008).

9 The Service found that the “current distribution of pygmy-owls within Arizona is much
10 reduced when compared to its historical distribution” and that “[r]ecent data indicate that there
11 are fewer than 50 adult pygmy-owls and fewer than 10 nest sites in Arizona in any given
12 year.” *Id.* at 31421. In addition, the Service found that there was “substantial and reliable
13 evidence” that “pygmy-owl populations in Arizona and Sonora, Mexico are declining” and
14 that there are a host of threats to the species and its habitat in that portion of its range. *Id.* at
15 31422-23. Based on this finding, the Service “initiat[ed] a status review to determine whether
16 listing the pygmy-owl under the Act is warranted.” *Id.* at 31424.

19 **2. The FWS’s Draft Finding Listing The Pygmy-Owl**

20 19. After conducting an extensive review of the “best available scientific and
21 commercial information,” the FWS’s pygmy-owl experts prepared a draft finding that “listing
22 the pygmy-owl as threatened or endangered within a significant portion of its range in the
23 United States and Mexico (the Sonoran Desert Ecoregion) is warranted under the Act”
24 Draft, Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition to List
25 the Cactus Ferroguinous Pygmy-Owl (*Glaucidium brasilianum cactorum*) as Threatened or
26 Endangered with Critical Habitat (“Draft Warranted Finding”) at 2. The Draft Warranted
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1 Finding analyzed in detail the threats facing the pygmy-owl throughout its range and
2 concluded that, while the species is neither endangered nor threatened throughout the entirety
3 of its range, the species *is* endangered or threatened within a “significant portion of its range.”
4 *Id.* at 57-72.

5 20. The Draft Warranted Finding explained that a “significant portion of a species’
6 range is an area that is important to the conservation of the species because it contributes
7 meaningfully to the representation, resiliency, or redundancy of the species,” and that the
8 “contribution must be at a level such that its loss would result in a decrease in the ability to
9 conserve the species.” *Id.* at 57. Applying this standard, the Service biologists focused their
10 analysis on the Sonoran Desert Ecoregion, which has the “greatest diversity and vegetative
11 growth of any desert worldwide” and “shows a concentration and imminency of threats [to the
12 pygmy-owl] that is not being experienced in the remainder of its range.” *Id.* at 60.

13 21. The Draft Warranted Finding set forth in detail how the Sonoran Desert
14 Ecoregion is extremely important to the conservation of the pygmy-owl and contributes
15 meaningfully to the resiliency, redundancy, and representation of the species as a whole,
16 including findings by the Service’s pygmy-owl experts that: the “unique characteristics and
17 diversity of the Sonoran Desert Ecoregion provides for diverse, high-quality habitat unique
18 within the overall range of the pygmy-owl,” *id.* at 64; suitable “patches of habitat” within this
19 area “are important in maintaining the metapopulation structure and function within the range
20 of the pygmy-owl,” *id.*; the “population groups of pygmy-owls found in the Sonoran Desert
21 Ecoregion are already adapted to the hotter, drier climate that is likely to become more
22 widespread under current climate change scenarios and, therefore, are likely to become more
23 significant contributors to the long-term viability of this species,” *id.*; the “demographic
24 characteristics of this population may be important for the species to recover from predicted
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1 changes in the ecosystem due to climate change,” *id* at 65; when “climate change results in a
2 reduction of the wetter, more tropical habitats to the south, this area, which already provides
3 habitat under hot, dry conditions, may become a refugium for the subspecies” and this
4 “portion of the range is more likely to become a refugium as climate change progresses,” *id.* at
5 65; the Sonoran Desert Ecoregion “provide[s] population support for the entire western
6 portion of the range,” *id.* at 66; the area “supports a large enough proportion of the overall
7 pygmy-owl population to provide support for population recovery in the face of catastrophic
8 events,” *id.* at 67; and this “portion of the range contributes substantially to the genetic
9 diversity of the entire species” as well as the pygmy-owl’s “adaptive capabilities.” *Id.* at 68.

11 22. The Draft Warranted Finding concluded that, “[b]ased on the unique
12 characteristics of pygmy-owls within” the Sonoran Desert Ecoregion, “we believe that the loss
13 of this portion would result in a decrease in our ability to conserve the subspecies as a whole,”
14 and that the “pygmy-owl population in this portion of the range is important for long-term
15 survival of the subspecies as a whole due to its substantial contributions to the resiliency,
16 redundancy, and representation” of the species. Draft Warranted Finding at 71. The FWS
17 pygmy-owl experts further found that the “loss of this portion of the range (15-20 percent of
18 the range geographically, and [with] significant ecological, morphological, and genetic
19 diversity) would move the subspecies towards extinction, decrease the ability to conserve the
20 subspecies, and the status of the subspecies is likely to change in the future as the identified
21 threats throughout the range of the pygmy-owl continue.” *Id.* at 71-72. The biologists further
22 found that listing was warranted because the pygmy-owl’s status within the Sonoran Desert
23 Ecoregion is “declining, and is affected by ongoing threats” from “urban development,
24 agriculture, woodcutting, invasive species and associated fire, improper grazing, OHV use”
25 and other harmful activities. *Id.* at 72, 75.

3. The FWS's Final Determination Refusing To List The Pygmy-Owl

23. On October 5, 2011, the FWS issued a final determination refusing to list the pygmy-owl as endangered or threatened. *See* 76 Fed. Reg. 61856. In doing so, the Service did not reject the findings by the agency's pygmy-owl experts that the pygmy-owl is in fact endangered or threatened in the Sonoran Desert Ecoregion. To the contrary, the final determination reaffirmed the biologists' prior findings that "in the Arizona and Sonoran Desert Ecoregion, pygmy-owl habitat loss and fragmentation resulting from urbanization, changing fire regimes due to the invasion of buffleggrass, agricultural development and woodcutting, overgrazing, and border issues have had significant negative impacts on pygmy-owl habitat in these areas and will likely continue to do so in the foreseeable future." *Id.* at 61878. Accordingly, the FWS's final determination specifically found that the pygmy-owl "may be threatened or endangered" in this portion of the species' range, *id.* at 61891, and the determination is replete with dire assessments of pygmy-owls' fate in the Sonoran Desert Ecoregion in the absence of ESA protection. *See, e.g., id.* at 61866 (the "best available scientific and commercial information indicates that the impacts to pygmy-owls in the northern portion of their range are severe"); *id.* at 61870 ("This elimination of trees, shrubs, and columnar cacti from these areas is a significant negative impact and potentially a threat to the survival of the pygmy-owl in the northern portion of its range, as these vegetation components are necessary for roosting, nesting, protection from predators, and thermal regulation"); *id.* at 61871-72 ("conversion of Sonoran desertscrub to nonnative plant pastures composed of buffleggrass and the subsequent change in the fire regime, has resulted in the loss of large areas of pygmy-owl habitat in the northern range of the pygmy-owl, is negatively impacting the remaining areas of pygmy-owl habitat in the Sonoran desert and tropical thornscrub/dry deciduous forest communities of Arizona, Sonora, and northern Sinaloa, and is

1 expected to continue to do so in the foreseeable future”); *id.* at 61874 (“In the Sonoyta region
2 of Sonora, an area occupied by pygmy-owls, more than 193,000 ha (478,000 ac) have been
3 affected by deforestation related to charcoal production, brick foundries, tourist crafts, and
4 pasture conversion”); *id.* at 61877 (“Within the Sonoran desert, over grazing can result in loss
5 of structural habitat components important to pygmy-owls, as well as reducing prey
6 availability and diversity.”); *id.* at 61877 (“Areas occupied by pygmy-owls in Organ Pipe
7 Cactus National Monument [in Arizona] have been abandoned by the owls, likely due, at least
8 in part, to heavy illegal immigrant traffic and associated enforcement actions.”).

10 24. The FWS’s final determination refusing to list the pygmy-owl as endangered or
11 threatened did not reverse the agency’s biologists’ prior findings that the Sonoran Desert
12 Ecoregion is in fact important to the conservation of the pygmy-owl. To the contrary, the final
13 determination found that the “Sonoran Desert Ecoregion represents an important portion . . .
14 of the taxon as a whole,” 76 Fed. Reg. 61893 – i.e., the entire species – as well as an
15 “important portion” of a Western Distinct Population Segment of pygmy-owls (“Western
16 DPS”) that the FWS found could qualify for ESA protection as a “species” under the Service’s
17 policy delineating criteria for designating DPS’s. *Id.*; *see also id.* at 61887-88 (explaining that
18 the western portion of the species’ range qualifies as a DPS because it is “discrete” and
19 “comprises approximately 68% of the entire range of the taxon”).

22 25. In determining that the Sonoran Desert Ecoregion is “important to the
23 conservation” status of the pygmy-owl “as a whole,” as well as pygmy-owls in the Western
24 DPS, the FWS’s final determination applied the same principles of “redundancy, resiliency,
25 and representation” that the Service’s pygmy-owl experts applied in the Draft Warranted
26 Finding, in applying those principles, the final determination again stressed the potential
27 importance of the pygmy-owl population in the Sonoran Desert Ecoregion, especially in the
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1 face of foreseeable climate change adversely affecting other portions of the species' range.
2 See 76 Fed. Reg. 61891 ("The habitat found in this portion of the range may become
3 increasingly important if the predictions about climate change prove correct. As hotter, drier
4 conditions prevail, this area, which already provides habitat under these conditions, may
5 provide the largest, most contiguous blocks of higher quality habitat if the wetter, more
6 tropical climate habitats [] are reduced due to climate change."); *id.* at 61892 ("This
7 population group of pygmy-owls is likely to become a more significant contributor to the
8 long-term viability of the species"); *id.* at 61892 ("We have found that the Sonoran Desert
9 Ecoregion has unique habitat characteristics and the pygmy-owl in this area possesses some
10 unique behavioral and genetic adaptations to this area."); *id.* at 61892 (explaining that the
11 "portion of the Sonoran Desert Ecoregion currently occupied by pygmy-owls represents
12 approximately 33 percent of the Western DPS" and that "this portion of the DPS may provide
13 important contributions to population numbers, genetic diversity, and status of the pygmy-
14 owls within this DPS"); *id.* at 61893 ("Loss of this segment of the population might
15 substantially decrease the genetic diversity of the overall DPS to the point that the pygmy-owl
16 may not be able to adapt to what may be the predominant vegetation community under the
17 predicted effects of climate change."); *id.* ("The ability of the western DPS to adapt to impacts
18 from climate change may be substantially reduced with the theoretical loss of the Sonoran
19 Desert Ecoregion."); *id.* ("This loss and fragmentation of habitat, and the influence of climate
20 change on the remaining areas of native habitat, may substantially reduce the availability of
21 pygmy-owl habitat and, consequently, pygmy-owl populations in the foreseeable future.").

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25 26. In light of the final determination's reaffirmation that (1) the Sonoran Desert
26 Ecoregion is in fact "important" to conservation of the pygmy-owl as a whole, as well as to
27 the Western DPS; and (2) the pygmy-owl is in fact endangered or threatened in the Sonoran
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1 Desert Ecoregion, the *only* justification that the final determination proffered for rejecting
2 listing of the pygmy-owl based on its imperiled status in the Sonoran Desert Ecoregion was
3 that, although admittedly “important,” that portion of the species’ range is not “significant”
4 within the meaning of the phrase “significant portion of its range” in the ESA’s definitions of
5 endangered and threatened species. The final determination’s finding that the Sonoran Desert
6 Ecoregion is not “significant” was based entirely on the Service’s adoption of a novel,
7 extraordinarily stringent legal test for “significance,” pursuant to which the portion of the
8 range under consideration must be “so important that, without that portion the pygmy-owl
9 would be in danger of extinction.” 76 Fed. Reg. 61893. Finding that the “best available
10 information does not indicate that, under the theoretical removal of the Sonoran Desert
11 Ecoregion from the current range of the pygmy-owl, the remaining portion of the range” for
12 the pygmy-owl as a whole or in the Western DPS “is likely to become extinct,” *id.* at 61892,
13 the FWS rejected listing of the pygmy-owl.
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16 27. While acknowledging that “this definition of ‘significant’ establishes a
17 threshold that is relatively high,” and that the Service could not legally apply a definition that
18 fails to give the “[significant portion of its range] phrase independent meaning,” *id.* at 61890,
19 the FWS failed to explain exactly how the new definition gives the phrase independent
20 meaning such that a species could be deemed endangered or at least threatened based on its
21 status in a portion of its range without it also being endangered throughout “all” of its range.
22 Nor did the Service explain why the imminent loss of pygmy-owls in Arizona should not be
23 factored in any manner into the agency’s “significance” determination in light of Congress’s
24 express desire, in enacting the ESA, to avoid extinctions *in the United States* because species
25 such as the pygmy-owl are of particular “value to the Nation and its people.” 16 U.S.C. §
26 1531(a)(3).
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1 **B. Defendants’ Adoption Of A Final Policy That Effectively Reads The**
2 **Phrase “Significant Portion Of Its Range” Out Of The ESA**

3 1. The 2007 Solicitor’s Opinion

4 28. In 2007, the Solicitor of the Department of the Interior issued a
5 Interpretative “Memorandum” to the Director of the FWS regarding the interpretation
6 of the phrase “significant portion of its range.” *See* M-37013, “The Meaning of ‘In Danger of
7 Extinction Throughout All or a Significant Portion of its Range’” (March 16, 2007) (“2007
8 Interpretation”). The 2007 Interpretation first addressed whether the “significant portion of its
9 range” phrase is a “substantive standard” that affords an independent basis for listing species
10 as endangered or threatened – rather than merely “‘clarifying’ the evidentiary burden the
11 [FWS] must satisfy” when determining whether a species is endangered or threatened in “all”
12 of its range – and, if so, what factors should go into determining whether a particular portion
13 is sufficiently “significant” to warrant listing. *Id.* at 2, 3.

14 29. The 2007 Interpretation concluded that the “significant portion of its range”
15 language “is a substantive standard for determining whether a species is an endangered
16 species” that must have meaning independent from whether a species is imperiled in “all” of
17 its range; hence the FWS “may not, for example, define ‘significant’ to require that a species
18 is endangered only if the threats faced by a species in a portion of its range are so severe as to
19 have threatened the viability of the species as a whole.” *Id.* at 3; *see also id.* at 10 (the FWS
20 “may not define the term in a way that would make any other portion of the statute
21 superfluous”).

22 30. With respect to how “significance” should be defined, the 2007 Interpretation
23 explained that the Service “should do so in a way that is consistent with achieving the
24 purposes of the statute,” *id.*, and with reference to “various values listed in the Act that would
25 be impaired or lost if the species were to become extinct in either that portion of the current
26 purposes of the statute,” *id.*, and with reference to “various values listed in the Act that would
27 be impaired or lost if the species were to become extinct in either that portion of the current
28 purposes of the statute,” *id.*

1 range or in the current range as a whole.” *Id.* at 11. In particular, the 2007 Interpretation –
2 which was in effect when the pygmy-owl biologists drafted the “warranted” finding for the
3 pygmy-owl – stressed the Act’s findings that “species of fish, wildlife, and plants are worthy
4 of conservation because they are of ‘esthetic, ecological, educational, historical, recreational,
5 and scientific value to the Nation and its people,’” *id.* (internal quotation omitted), and that to
6 read the “significant portion of its range” phrase as “requiring that a species be in danger of
7 extinction throughout its entire range before it could be considered ‘endangered’ for purposes
8 of the ESA would severely diminish the Secretary’s ability to achieve one of the primary
9 objectives of the ESA, which is to ‘[safeguard], for the benefit of all citizens, the Nation’s
10 heritage in fish, wildlife, and plants.’” *Id.* at 5 (quoting 16 U.S.C. § 1531(a)(5)).

12 31. In addition to defining “significant portion of its range” in such a manner as to
13 have independent meaning in the statutory scheme – and specifically to take into account the
14 importance of conserving species in the United States – the 2007 Interpretation also addressed
15 the consequences of finding that a species is imperiled in a significant portion, but not all, of
16 its range. The Interpretation concluded that such a species should be listed and benefit from
17 the ESA’s protections only in that portion of the range where the species is deemed to be
18 endangered, rather than in the entirety of its range. 2007 Interpretation at 17-18.

19 Subsequently, several court decisions rejected that specific feature of the 2007 Interpretation,
20 holding that if a species is deemed to be endangered or threatened in a significant portion of
21 its range, the species must be listed and protected under the ESA throughout its range. *See,*
22 *e.g., Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010); *WildEarth*
23 *Guardians v. Salazar*, 2010 U.S. Dist. Lexis 105253 (D. Ariz. Sept. 30, 2010). Neither these
24 nor any other judicial rulings construing the phrase “significant portion of its range” cast any
25 doubt on the aspect of the 2007 Interpretation that determined that the phrase must have
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1 independent meaning, and that a range portion's "significance" should be evaluated with
2 reference to the conservation purposes and values of the ESA, including Congress's objective
3 to conserve species in the United States for the benefit of the nation and its citizens.

4 Nonetheless, the 2007 Interpretation was withdrawn in its entirety in May 2011.

5 **2. The Final Policy Defining "Significant Portion Of Its Range"**

6 32. On December 11, 2011, two months after finalizing the listing determination
7 for the pygmy-owl, the FWS, along with the National Marine Fisheries Service, published a
8 "Draft Policy on Interpretation of the Phrase 'Significant Portion of Its Range' in the
9 Endangered Species Act's Definitions of 'Endangered Species' and 'Threatened Species.'" 76
10 Fed. Reg. 76994 (Dec. 11, 2011). The FWS stated that its "intent is to finalize a legally
11 binding policy that will set forth the Service's interpretation of 'significant portion of its
12 range' and its place in the statutory framework of the Act." *Id.* Consistent with the final
13 determination refusing to list the pygmy-owl, the Service proposed an interpretation under
14 which a "portion of the range of a species is 'significant'" only if its "contribution to the
15 viability of the species is so important that, without that portion, the species would be in
16 danger of extinction." *Id.* at 76990-91.

17 33. In proposing this interpretation, the FWS acknowledged that it was obligated to
18 "give operational effect to the ["significant portion of its range"] language instead of treating
19 it as merely a clarification of the 'throughout all' language." *Id.* at 76991. The Service also
20 asserted that it "now agree[d]," *id.*, with the Ninth Circuit's analysis in *Defenders of Wildlife*
21 *v. Norton*, 258 F.3d 1136 (9th Cir. 2001), in which that court held that the phrase "significant
22 portion of its range" could not be rendered "superfluous," as would occur if the "effect of
23 extinction throughout 'a significant portion of its range'" must rise to the level of posing a
24 "threat of extinction everywhere" in the species' range. *Id.* at 1141. However, the FWS did
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1 not explain how its proposed approach – under which a “significance” finding would depend
2 on whether the entire species “would be in danger of extinction” without the portion, 76 Fed.
3 Reg. at 76990-91 – actually gives any independent “operational effect” to the “significant
4 portion of its range” phrase, or how this approach is in any meaningful way distinguishable
5 from the one rejected by the Ninth Circuit.

6 34. During the public comment period on the proposed policy, the FWS received
7 approximately 42,000 comments. *See* 79 Fed. Reg. 37587. On information and belief, the
8 overwhelming majority of these commenters, including conservation and scientific
9 organizations, opposed the new interpretation and urged that it be abandoned in favor of a
10 more species-protective standard. Plaintiff Center for Biological Diversity commented that
11 the proposed policy had been “specifically rejected by the Ninth Circuit” and that the
12 “definition is functionally equivalent to a species being endangered throughout all of its range,
13 thereby rendering the [significant portion of its range] phrase superfluous and nullifying any
14 conservation benefit to protecting species before they are threatened with worldwide
15 extinction.” The Center pointed out that both in the proposed policy and in other
16 communications, “FWS could not produce a single example of a species that would receive
17 protection under the policy because it was at risk in a [significant portion of its range] that
18 would not otherwise receive protection based on being at risk in all of its range.”

19 35. Similarly, Plaintiff Defenders of Wildlife explained that the proposed “policy’s
20 unreasonably narrow focus on species viability fails to accommodate the ESA’s broader
21 species conservation goals and purposes,” and that the Service’s “exceptionally restrictive
22 approach to [significant portion of its range] is also contrary” to the Act’s “goal of protecting
23 species in the United States.” Defenders’ comments also pointed out that “even the now
24 withdrawn [2007 Interpretation] concluded that the Services, in determining whether a portion
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1 of a species range is significant,” could consider the “various values listed in the Act,”
2 including the paramount importance of “conserving domestic populations” of species
3 irrespective of their status elsewhere.

4 36. The FWS issued its Final Policy defining “significant portion of its range” on
5 July 1, 2014. *See* 79 Fed. Reg. 37578. The Final Policy, which the Service stated it was
6 “effectively treating” as an “APA rulemaking,” *id.* at 37608, provides that a “portion of the
7 range of a species is ‘significant’ if the species is not currently endangered or threatened
8 throughout all of its range, but the portion’s contribution to the viability of the species is so
9 important that, without the members in that portion, the species would be in danger of
10 extinction, or likely to become so in the foreseeable future, throughout all of its range.” *Id.* at
11 37579. The FWS asserted that this “revised” definition will “[l]ower and simplify the
12 threshold for ‘significant’” from the definition the Service previously proposed – and applied
13 in rejecting listing of the pygmy-owl – and stated that a “lower threshold will further the
14 conservation purposes of the statute and more clearly avoid the appearance of similarity with
15 the ‘clarification’ approach” rejected by the Ninth Circuit. *Id.* In fact, however, the revised
16 definition suffers from the same basic legal flaw identified in Plaintiffs’ comments on the
17 proposal and that resulted in the Service’s refusal to list the pygmy-owl, i.e., the definition
18 renders the phrase “significant portion of its range” superfluous because any species’ status
19 that would satisfy the definition would also describe a species that should be considered
20 endangered or threatened in “all” of its range.

21 37. While asserting that by “using th[e] standard” in the Final Policy the FWS
22 “may list a few more species with important populations that are facing substantial threats”
23 than the Service would have listed under the definition in the proposed policy, 79 Fed. Reg.
24 37579, and that “[w]e agree that the threshold should be lower than in the draft policy to
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1 ensure that species with important populations that are facing significant threats receive
2 protection under the Act,” *id.* at 37595, the Service again failed to identify even a single real-
3 world species that *would be listed* as endangered or threatened under the Final Policy’s
4 “significant portion of its range” standard that would not otherwise qualify for listing as a
5 species endangered or threatened throughout “all” of its range. In response to commenters’
6 requests that “we provide examples for real species” that would be affected by the Policy, the
7 Service was able only to identify species that had previously been *denied* ESA protection
8 based on the standard in the proposed policy. *See* 79 Fed. Reg. 37601 (pointing to prior
9 refusals to list Van Rossem’s gull-billed tern and Steller sea lion and stating that “[w]hile the
10 definitions applied on a case-by-case basis prior to this final policy may differ slightly from
11 this final policy’s definition of [significant portion of its range] our recent determinations
12 generally illustrate how we would apply the framework laid out in this policy”).

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15 38. In contrast to the 2007 Interpretation, the Final Policy’s definition of
16 significance affords no consideration whatsoever to “one of the primary purposes of the ESA,”
17 i.e., Congress’s intent to protect “for the benefit of all citizens, the Nation’s heritage in fish,
18 wildlife, and plants,” 2007 Interpretation at 5 (internal quotation omitted), although that
19 specific feature of the 2007 Interpretation was not called into question by any judicial rulings
20 construing the phrase “significant portion of its range.” In this and other respects the Final
21 Policy is *less* protective of imperiled species than the now-discarded 2007 Interpretation.
22 Although the 2007 Interpretation only afforded protection to species in specific portions of
23 their ranges in which they were deemed to be endangered or threatened, the Interpretation
24 established a standard for “significant portion of its range” that did not render this language
25 redundant of other bases for listing under the Act. In contrast, although the Final Policy
26 *theoretically* extends the safeguards of the ESA to the entire ranges of species listed on the
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1 basis of their imperilment in portions of their ranges, the Policy establishes a threshold for
2 “significant portion of its range” that is so high that the Policy can never be invoked to protect
3 species that would not otherwise be eligible for listing under the Act.

4 39. In establishing what the FWS itself concedes is a “relatively high” threshold
5 for making a “significant portion of its range” determination, the Service asserted that “this is
6 desirable because we have concluded that, if a species is endangered or threatened in a
7 significant portion of its range, it is protected throughout all of its range” under the scheme
8 adopted by Congress. 79 Fed. Reg. 37570. The Final Policy does not coherently explain why
9 Congress’s intention to apply the ESA’s protections to species on a range-wide basis means
10 that the threshold for listing should be set so high that few if any species will be able to satisfy
11 it, especially since the Final Policy concedes that “protections throughout all of the range may
12 lead to recovery” of a species that is listed based primarily on its status in a significant portion
13 of its range. *Id.* at 37951.

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16 40. By letter dated September 22, 2014, the Center and Defenders provided formal
17 notice of their intent to sue Defendants with respect to both their refusal to list the pygmy-owl
18 and the Final Policy. Plaintiffs explained that “since the pygmy-owl decision reflects an
19 unlawful approach to the Service’s listing responsibilities that is also embodied in the [Final
20 Policy], we intend to pursue litigation over both the refusal to list the pygmy-owl as an
21 application of that unlawful policy, and the policy as a whole.” Plaintiffs have received no
22 response to the notice letter.
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1 **CLAIMS FOR RELIEF**

2 **CLAIM ONE**

3 **(The Final Policy’s Interpretation of “Significant Portion of Its Range”**
4 **Violates The ESA And Is Otherwise Arbitrary And Capricious)**

5 41. The Final Policy adopts, as a matter of binding agency policy, an interpretation
6 of the phrase “significant portion of its range” that violates the ESA. By providing that a
7 portion of a species’ range may only be deemed “significant” if, without that portion, the
8 species would “be in danger of extinction, or likely to become so in the foreseeable future,
9 throughout all of its range,” the Final Policy effectively reads the phrase “significant portion of
10 its range” out of the Act as an independent basis for listing species such as the pygmy-owl and
11 other similarly situated species. The Final Policy also violates the ESA because the Policy’s
12 definition of “significant portion of its range” undermines rather than furthers the conservation
13 objectives of the Act, including the Act’s express purpose to safeguard imperiled species in the
14 United States even if they are more abundant elsewhere. The Final Policy is also arbitrary and
15 capricious because, while the preamble to the Policy asserts that the FWS adopted a “lower
16 threshold” in order to “more clearly avoid the appearance of similarity to the ‘clarification’
17 approach” rejected by the Ninth Circuit, 79 Fed. Reg. 37579, the interpretation adopted in the
18 Final Policy is in fact functionally identical to the “approach” rejected by the Ninth Circuit.
19 For all of these reasons, the Final Policy is arbitrary, capricious, an abuse of discretion, and not
20 in accordance with law, in violation of the ESA and the APA.
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23 **CLAIM TWO**

24 **(Defendants’ Refusal To List the Pygmy-Owl As Endangered Or Threatened Based On**
25 **Defendants’ Interpretation Of The Phrase “Significant Portion of Its Range” Violates The**
26 **ESA And Is Otherwise Arbitrary and Capricious)**

27 42. The FWS’s determination that, although the Sonoran Desert Ecoregion is
28 declining and facing myriad threats, and is “important” to the conservation of the pygmy-owl

1 as a whole as well as the Western DPS, the Sonoran Desert Ecoregion does not constitute a
2 “significant portion of [the pygmy-owl’s] range” contravenes the ESA’s definitions of
3 endangered and threatened species, 16 U.S.C. §§ 1532(6), (20), and disregards the Service’s
4 obligation to make listing decisions in view of the statutory listing factors and on the “basis of
5 the best scientific and commercial data available.” *Id.* at § 1533(b)(1)(A).

6 43. The FWS’s refusal to list the pygmy-owl based on the Service’s determination
7 that a portion of a species’ range may only be deemed “significant” when, without that portion,
8 the entire species is likely to become extinct, is contrary to the plain language of the ESA;
9 renders the statutory phrase “significant portion of its range” redundant and hence meaningless;
10 undermines the core conservation purpose of the ESA to afford sufficient species protection to
11 not only stave off species’ imminent extinction, but to conserve species over the long-term and
12 to bring about their eventual recovery; and ignores the Congressional purpose to protect species
13 in the United States irrespective of whether they may be more plentiful elsewhere. In addition,
14 if, as Defendants asserted in adopting the Final Policy, the standard set forth in the Final Policy
15 was necessary in order to “[l]ower and simplify the threshold for ‘significant’” so as to “further
16 the conservation purposes of the statute,” 79 Fed. Reg. 37578, then the Service’s refusal to list
17 the pygmy-owl – which applied the standard set forth in the *proposed* policy – is unlawful for
18 that reason as well. Consequently, Defendants’ refusal to list the pygmy-owl based on its
19 status in the Sonoran Desert Ecoregion violates the ESA and is otherwise arbitrary and
20 capricious and contrary to law, in violation of the APA.

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiffs respectfully request this Court:

26 1. declare that Defendants’ Final Determination refusing to list the pygmy-owl
27 violates the ESA and APA;
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