No. 14-1209

IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

SUE MASICA, IN HER OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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REPLY BRIEF

The Ninth Circuit eviscerated the Alaska National Interest Lands Conservation Act's ("ANILCA") limitation on federal regulatory authority over non-federal lands in Alaska. In so doing, the court validated the National Park Service's ("NPS") regulation of all non-federal lands within the boundaries of Alaska national parks as though the federal government owned those lands when it is Alaska and its native peoples, in fact, who own them. As a result, vast swaths of Alaska—nearly 20 million acres of State and Native corporation land—are newly subject to intrusive federal regulation contrary not only to ANILCA, but to the Alaska Native Claims Settlement Act ("ANSCA") as well. Given how important these laws are to the people of Alaska, a Ninth Circuit ruling badly misinterpreting them warrants this Court's attention. Absent review from this Court, any future challenge to this extension of NPS authority will be permanently foreclosed.

NPS has offered no justification for declining review. The absence of a circuit split is irrelevant given that this Alaska-specific dispute is confined to the Ninth Circuit. The opposition thus boils down to two arguments, neither of which has merit. First, NPS claims the ruling is insignificant because it only reaches navigable waters. NPS made that argument below, but the Ninth Circuit instead ruled on the broadest possible grounds. The ruling must be evaluated on the actual basis for the judgment. Second, NPS argues that the ruling is correct or at least defensible on its alternative theories. But the decision is contrary to the text's plain meaning, is unreasonable, and cannot be salvaged based on arguments even the Ninth

Circuit bypassed. The Court should grant the petition.

I. The National Park Service Offers No Basis For Declining Review Of A Case This Important To The People Of Alaska.

It would be difficult to overstate how significant the disposition of the 20 million acres of land in dispute here is to Alaskans. Petition for Certiorari ("Pet.") 19-23. Yet NPS ignores the disposition of an acreage of land larger than eleven States and simply argues the Court should deny review because there is no conflict among the circuits and the judgment below is correct. Brief in Opposition ("BIO") 13. But there is no split because this case involves two statutes—ANILCA and ANCSA—specific to Alaska. Review is thus confined to the Ninth Circuit. The issue is whether the petition raises "an important question of federal law that has not been, but should be, settled by this Court." Sup Ct. R. 10(c). The petition meets that standard. The BIO's responses are not persuasive.

"Ownership of submerged lands—which carries with it the power to control navigation, fishing, and other public uses of water—is an essential attribute of sovereignty." *United States v. Alaska*, 521 U.S. 1, 5 (1997). That is the heart of this dispute. As the State's amicus brief explains, "Alaska has a direct and profound interest in maintaining its authority to keep its waterways open without federal regulatory interference, as Congress intended." Brief Amicus Curiae of Alaska ("Alaska Br.") 1. Since statehood, Alaska has possessed the authority to manage access to its navigable waters by watercraft and other vessels and, by constitutional and statutory authority, "holds and controls all navigable or public water in trust for the use of the people of the state." Alaska Stat. Ann. § 38.05.126.

NPS argues that Alaska cannot identify any sovereign interest the decision below impairs. BIO 20-21. But this very case is an example, as is the permitting requirement at issue in the State's companion case. Alaska Br. 17-18. Alaska's obligation to ask NPS for "permission" to use, or otherwise establish rules and regulations to govern the use of its land and water, is "a drastic departure from basic principles of federalism." *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2618 (2013).

The State also identified other nationwide regulations that interfere with its sovereignty. 36 C.F.R. § 2.17(a) bans helicopter use, which would foreclose access to remote areas for scientific studies (among other things); 36 C.F.R. §§ 1.4(a) and 4.10 prevent use of all-terrain vehicles, an essential mode of transport on Alaska's isolated trails and winter ice highways; 36 C.F.R. § 5.3's commercial use restrictions would cripple commercial fishing, hunting, and tourism industries in and near Native villages. Alaska Br. 20-21. The fact that NPS has not yet imposed all of them in Alaska is not the point. The decision has granted NPS plenary authority to do so. These sovereignty implications alone warrant review.

This case also is vitally important to Alaska Natives. Brief Amicus Curiae of Ahtna Inc., *et. al.* ("Ahtna Br."); Brief Amicus Curiae of Arctic Slope Regional Corp. ("ASRC Br."). Under ANCSA, which settled claims between Alaska Natives and the United States, the Native corporations hold title to 18 million acres of land and water that the Ninth Circuit's ruling implicates. Ahtna Br. 5. In fact, the Ahtna group's brief, which was submitted on behalf of roughly 60,000 Native Alaskans, includes a map that is a sobering illustration of how dramatic an

effect the Ninth Circuit's decision has on the disposition of Native territory. The ruling makes "meaningful economic development impossible" and will scuttle ongoing "resource development projects on these lands, including mining and oil and gas projects on which millions of dollars have already been spent." *Id.* 1.

ASRC's amicus brief highlights the significance of this dispute for Native communities. "ASRC is owned by 12,000 Iñupiat Eskimo shareholders" and its "lands, including its inholdings within federal CSU's, have high potential for oil and gas development, other mineral development, tourism, and other economic uses. These acres are also critically important to ASRC's shareholder communities for village use and subsistence fishing and hunting." ASRC Br. 1-2. The ruling threatens "economic development" of their land and the "subsistence rights" of the Alaska Natives who live off of it. *Id.* 3.

The decision, moreover, injures hunters and Alaska's tourism industry. To the economic benefit of all Alaskans, sportsmen come from around the world to enjoy the Alaska wilderness. Yet the decision below, as this case illustrates, "threatens the ability of hunters and guides generally throughout Alaska to access hunting opportunities located both inside and outside the boundaries of CSUs managed by the NPS." Brief Amicus Curiae of Safari Club Int'l ("Safari Club Br.") 5. In particular, the Ninth Circuit's ruling jeopardizes the ability of sportsmen to use float planes to access remote regions of the State. *Id.* 6 (citing 36 C.F.R. § 2.17(a)). "Hunters need to be able to land float planes on the waters running through National Preserves to reach the bear, moose, caribou, sheep, goat and other species that Congress directed the NPS to make available

to them to hunt." *Id.* 8. The recreational and economic ramifications of inhibiting hunters' access to the Alaska wilderness are significant. *Id.* 9-14.

The case is personally important for Mr. Sturgeon too. It is no small thing to be threatened with federal prosecution by armed NPS officers for using a state-licensed hovercraft on state-owned lands. Pet. 15-16. Congressional deprivation of individual liberty is always a judicial concern; but when a federal agency seizes power Congress did not grant it, *infra* 9-11, the Court has shown special concern, Pet. 23.

NPS does not dispute any of these concerns about the sweep of the Ninth Circuit's ruling. It argues instead that they are not presented here because the decision is far narrower than Petitioner suggests. According to NPS, the court did *not* hold that "nationwide park regulations" can be imposed on "privately-held, state-held, or Native-held lands" physically located in Alaska's national parks. BIO 21-22. NPS contends that the Ninth Circuit held only that it may extend those regulations to "navigable waters" on those lands. *Id.* 22.

NPS's attempt to characterize the ruling as narrow is understandable, but has no foothold in the decision itself. To be sure, NPS below raised these alternative arguments, *viz.*, that federal statutory and constitutional power over navigable waters was sufficient to uphold the regulation, regardless of any limitation on its authority under Section 103 of ANILCA. BIO 15-16. But NPS fails to mention that the Ninth Circuit bypassed those arguments to reach the issue presented here. The court instead adopted the broadest possible holding, ruling that "*even*

assuming that the waters of and lands beneath the Nation River have been 'conveyed to the State' for purposes of ANILCA § 103(c), NPS's hovercraft ban is not a regulation that applies *solely to public lands within CSUs in Alaska*." Pet. App. 26a (emphasis added).

Indeed, the court repeated the holding to ensure there was no confusion as to its breadth:

> [T]he hovercraft ban is not one that 'appli[es] solely to public lands within [CSUs]' in Alaska. 16 U.S.C. § 3103(c). Rather, this regulation applies to all federal-owned lands and waters administered by NPS nationwide, as well as all navigable waters lying within national parks. Thus, even assuming (without deciding) that the waters of and lands beneath the Nation River have been 'conveyed to the State' for purposes of § 103(c), that subsection does not preclude the application and enforcement of the NPS regulation at issue.

Id.

The Ninth Circuit thus was explicit in holding that Section 103 of ANILCA did not bar NPS from regulating non-federal lands in Alaska pursuant to any regulation that applied nationwide, *regardless of what interests the State and federal government may (or may not have) in navigable waters*. NPS should not be permitted to secure the benefit of a sweeping ruling, especially on an issue confined to the Ninth Circuit, by characterizing it as narrow based on alternative arguments bypassed below.

Indeed, NPS could have appropriately confessed error so that the court's broad holding would be vacated and the alternative arguments could be heard on remand. *See, e.g.*, *Alvarado v. United States*, 497 U.S. 543, 544 (1990). But it did not. The focus of this Court's attention, accordingly, must be the actual holding of the decision and its effect on Alaska. The holding's consequences are indisputable. The alternative arguments that NPS showcases here to avoid review will never need to be raised in the Ninth Circuit again. NPS now has the benefit of a sweeping rule that grants it plenary authority over *all* non-federal Alaska lands and waters.

NPS promises it will not exercise its newfound power unless it "dramatically shifts its regulatory approach." BIO 22. But that rings hollow. There is no longer any barrier preventing NPS from doing so. The regulated entities and individuals are all too aware that the federal government's enforcement priorities can shift more rapidly than they or the courts can anticipate. As explained above, the Ninth Circuit's ruling is already causing present harm. The decision means that the sovereignty and property rights the State and Native Alaskans held under ANILCA have been extinguished. As a consequence, the governing rule is deterring investment in and economic development of Native lands.

Finally, even if the decision were limited to navigable waters, it would solve nothing. Not only would it reflect an expansion of NPS authority far beyond what Congress has authorized or the Constitution would allow, *infra* 9-11, it would cause nearly all of the same harm. The ability of Alaskans to make productive use of their land depends on access to the waterways, and the waterways themselves

are economically vital to Alaska. Further, the hovercraft rule in dispute (and other water-centric regulations) harm hunters and other sportsmen. If this is the legal ground on which NPS defends the judgment, the Court's review is no less important.

II. The Ninth Circuit's Decision Is Unsustainable And Cannot Be Salvaged Based On Alternative Arguments.

The Ninth Circuit held that Section 103(c) of ANILCA is no barrier to imposing nationwide regulations on non-federal Alaska land because such regulations are not "solely" applicable to "public lands" in national parks. That interpretation of Section 103(c) cannot be defended. Pet. 23-30. NPS barely tries. NPS just reiterates the holding without explaining why it follows from the statutory text. BIO 16. Petitioner will not burden the Court by repeating arguments to which there has been no response.

The most NPS is willing to say in defense of the Ninth Circuit's textual analysis is that "'solely' cannot naturally be understood to reach *both* regulations solely applicable to CSUs *and* certain types of other regulations." BIO 16-17 n.7. But NPS misses the point. The function of "solely" in Section 103(c) is to keep NPS from regulating these lands and waters as if they were federally owned, while ensuring that federal statutes (and their implementing regulations) that apply across the board (such as the Clean Water Act) are not impaired. Pet. 28-29 (citing S. Rep. No. 96-413, at 303 (1979)). Under the Ninth Circuit's construction, Section 103(c) serves no discernible function since NPS can make *any* regulation applicable by giving it nationwide effect. This Court does not interpret statutes

in ways that make them "pointless." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001). Unlike NPS's interpretation, Petitioner's reading gives meaning to each word of Section 103(c).

NPS counters that the Ninth Circuit's interpretation advances ANILCA's conservationist objective. BIO 17-18. Conservation was not, however, Congress's singular focus. ANILCA balances conservation and Alaska's economic and cultural needs. Pet. 8-11. NPS ignores the bargain the law struck. ANILCA's expansion of national parks (*i.e.*, the transfer of millions of acres of Alaska wilderness to the United States) achieved Congress's conservationist goals; fencing off the non-federal land and waters now physically located inside those newly-expanded parks from intrusive NPS oversight secured Alaska's interests. Only Petitioner's construction of Section 103(c) balances both goals.

NPS further contends that Congress would not have buried an important provision in ANILCA's maps section. BIO 18-19. But that too misses the point. Section 103(c) is in the maps section because it is part of an enactment that was redrawing maps that divide federal from non-federal land. The territory that Section 103(c) applies to is literally allocated in those maps. It also strains credulity for NPS to attack as "implausible" an interpretation that it held itself until 1996. Pet. 12-14.

NPS's reliance on agency deference also is mistaken. BIO 19. The regulation conflicts with the "unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Deference also is inapplicable because the interpretation is

"unreasonable." *United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999). It would paradoxically prevent these non-federal lands from sharing in the numerous Alaska-specific exemptions from nationwide NPS regulations. Pet. at 29-30. These "relaxations of prohibitions contained in the general regulations," 61 Fed. Reg. at 35,134 (1996), by NPS's reasoning, could not be shared because they apply "*solely* to public lands within [conservation system] units." BIO 16 (quoting 16 U.S.C 3103(c)) (emphasis added). NPS does not even try to justify this absurd result. Any interpretation of Section 103(c) imposing all nationwide regulations on Native, State, and private Alaska lands—even those rules from which Alaska federal lands have been exempted—is facially unreasonable.

NPS is thus left with its alternative argument that, no matter what, it has plenary control over navigable waters. BIO 15-16. But there are good reasons why the Ninth Circuit bypassed this issue. NPS acknowledges that Alaska owns the land underneath the water. The Alaska Statehood Act of 1958 and the "Equal Footing Doctrine" required it. *United States v. Alaska*, 545 U.S. 75, 79 (2005). It is common ground, therefore, that these submerged lands are not "public lands" under ANILCA. 16 U.S.C. § 1302(3). NPS thus does *not* have a statutory "interest" in the waters. ANILCA defines "'land'" to mean "lands, waters, and interests therein." *Id.* § 1302(1). When Congress ceded title over submerged lands to Alaska, the navigable waters above them transferred too.

NPS's claim to "reserved water rights" is no stronger. BIO 15-16. At most, ANILCA grants the United States rights over navigable waters to ensure a "subsistence way of life for rural" Alaskans. *John v. United States*, 720 F.3d 1214, 1218 (9th Cir. 2013). But this case has nothing to do with subsistence issues, except of course that NPS's claim of plenary authority actually impairs the ability of rural Alaskans to live off their land. ASRC Br. 3 ("Most importantly to *amicus*, the Ninth Circuit's ruling threatens the economic development and subsistence rights of thousands of Alaska Native corporation shareholders on their privately-held ANCSA lands within ANILCA-created federal conservation system units.").

Finally, NPS's suggestion that the Constitution gives it sweeping power over navigable waters, even if ANILCA does not, provides no justification for declining review—it is additional reason to grant it. BIO 15. The only possible sources of authority would be the Property Clause and the Commerce Clause. Pet. 21-22. But the idea that hovercraft "imperil" adjacent federal land, which would be required to invoke the Property Clause, is untenable. *United States v. Alford*, 274 U.S. 264, 267 (1927). And Congress has not granted NPS *any* authority under the Commerce Clause to regulate these waters, let alone the kind of authority it exercised here. *State of Alaska v. Babbitt*, 72 F.3d 698, 703 (9th Cir. 1995) ("Neither the language nor the legislative history of ANILCA suggests that Congress intended to exercise its Commerce Clause powers over submerged lands and navigable Alaska waters.").

* * *

This important Ninth Circuit decision warrants the Court's attention. The ruling is as sweeping as it is wrong. The amicus briefs that all the stakeholders—the State, the Native corporations, and hunters—submitted confirm the case's significance. Recognizing the decision's weak footing, NPS relies almost entirely on alternative arguments. But the Court rarely declines to review a significant issue subject to exclusive review to one circuit on such grounds. The inquiry at this juncture is whether the actual basis for the Ninth Circuit's ruling, which has controlling force absent further review, raises an important federal issue that should be settled. It does.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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