No. 14-1209

IN THE

Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The question here is straightforward: whether NPS has plenary authority to regulate nonfederal lands in Alaska CSUs as though they were part of the National Park System. Brief for Petitioner ("Br.") *i*. As NPS's decision to bury its discussion of that question confirms, the Ninth Circuit's ruling is indefensible. Brief for Respondent ("Resp.") 47-58. Section 103(c)'s fundamental point, as the statutory text, structure, purpose, and history make plain, is to deny NPS such authority.

Unable to defend the Ninth Circuit's decision, NPS devotes most of its attention to alternative arguments concerning its regulatory authority over navigable waters. But not only are all those arguments beyond the question presented, they were not decided below. Even if the Court reaches these questions, it will not assist NPS. NPS lacks statutory authority over nonfederal waters in CSUs for the same reasons it lacks authority over nonfederal inholdings: the United States does not hold title. Alaska navigable waters (like the submerged lands beneath them) were conveyed to Alaska when it joined the Union. Because the United States does not own these waters, NPS may not manage them as though it does.

ARGUMENT

I. ANILCA Does Not Grant NPS Authority Over Any Nonfederal Lands Located In Alaska CSUs.

The text, structure, purpose, and history of ANILCA demonstrate that Section 103(c) bars NPS from issuing the hovercraft rule. Br. 21-30. NPS's contrary arguments all miss the mark.

A. ANILCA's text and structure contradict NPS's interpretation of Section 103(c).

The decision below cannot be squared with Section 103(c)'s text and structure. Br. 21-27. The first sentence of Section 103(c) provides that only "public lands" are part of CSUs. The second provides that NPS may not regulate State, Native Corporation, and private lands within those CSUs. And the third provides that those lands may not be administered as part of the National Park System unless they are conveyed to the United States. Section 103(c) thus makes triply clear that nonfederal lands are not part of the CSUs that ANILCA created and are not subject to federal regulation as though they were.

NPS agrees with almost all of this. In particular, NPS agrees that Section 103(c)'s first sentence means that NPS "may not treat inholdings in Alaska as though they were themselves public lands," and the third sentence "indicates that non-federal lands may not ordinarily be 'administered' as though they were 'part of the park.'" Resp. 48, 50. Yet NPS argues that the second sentence somehow grants it limitless authority to regulate these nonfederal lands. This is incorrect.

First, NPS asserts that Section 103(c)'s second sentence "is reasonably understood as a limit on rules 'applicable solely to public lands' ... within units that are 'in Alaska.'" Resp. 49. In other words, while NPS may not impose "special rules" applicable only in Alaska, Section 103(c) "has no effect on park rules that apply nationwide." *Id*. But NPS offers no textual basis for its strained interpretation. Br. 26. Further, NPS does not even attempt to explain why Congress would have denied

nonfederal lands "within such units" the benefit of the many Alaska-specific "special rules" that relax nationwide park regulations. Br. 32. Yet that is the necessary consequence of NPS's interpretation.

Second, NPS argues that Section 103(c)'s limitation on authority over nonfederal lands can be overcome by federal rules "written to apply to *all* lands within park boundaries, rather than only to public land." Resp. 50 (citing 36 C.F.R. § 1.29(a)(3)). According to NPS, ANILCA limits its power only until it issues rules, like the hovercraft regulation, "applicable to *both* public and nonpublic lands within park boundaries." *Id.* Once NPS takes that step, Section 103(c) is no longer a barrier because the rule, quite conveniently, is no longer "applicable solely to public lands within such units." 16 U.S.C. § 3103(c).

NPS's argument is circular and renders Section 103(c) meaningless. It would allow NPS to control the extent of its own authority: the agency could regulate nonfederal land simply by issuing a regulation to that effect. It would defy logic—and contravene Congress's expressed intent—to interpret Section 103(c)'s second sentence to create a loophole under which NPS could evade any limit on its authority merely by extending a regulation to both federal and nonfederal lands. NPS should not be allowed to nullify Section 103(c) by violating it.

NPS's structural arguments are no stronger. Pointing to Section 1301, NPS claims that "ANILCA elsewhere confirms" that it retains authority to regulate nonfederal land. Resp. 23. But the provision cannot bear that weight. Section 1301 directs NPS to prepare unit management plans containing various categories of information. These

plans should include descriptions of privately-held lands within CSU boundaries, the purposes for which they are used, and descriptions "of methods (such as cooperative agreements and issuance or enforcement of regulations) of controlling the use of such activities to carry out the policies of this Act and the purposes for which such unit is established or expanded." 16 U.S.C. § 3191(b)(7). NPS contends that Congress would not have directed it to consider issuing such rules if it lacked authority to regulate private land. Resp. 23.

But NPS ignores the next section, Section 1302, which empowers it to acquire nonfederal lands in Alaska CSUs from State, Native Corporation, and private landowners. 16 U.S.C. § 3192. Once acquired, such lands "become part of the unit" and are "administered accordingly." *Id.* § 3103(c). Congress would not have needed to authorize acquisition of these nonfederal lands if NPS already possessed plenary regulatory authority over them.

More fundamentally, NPS would extrapolate from Section 1301's oblique reference to potential regulation of privately-held land the unfettered authority to regulate all private, Native Corporation, and State-owned lands in contravention of Section 103(c). NPS thus ignores the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014). Congress contemplated that NPS could regulate nonfederal lands located in CSUs by acquiring them, entering into a cooperative agreement with the owner, issuing rules pursuant to a specific grant of authority, or through a combination of these approaches. But the

overall statutory scheme is designed to ensure nonfederal lands are not regulated as though they were part of the National Park System. NPS's interpretation of Section 1301 would render Sections 1302 and 103(c) surplusage and thus should be rejected. *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Indeed, NPS ignores key structural aspects of ANILCA that refute its interpretation. Section 103(c) does not stand alone as an unexplained statutory anomaly. It works in tandem with Section 906(o), which provides that ANCSA land withdrawals are part of a CSU and are "administered accordingly" unless they were conveyed to a Native Corporation before ANILCA's enactment, or unless they are later conveyed to the State. 43 U.S.C. § 1635(o)(1). Section 906(o)(2) provides that "Federal lands within the boundaries of a conservation system unit … shall be administered in accordance with the laws applicable to such unit" only "until conveyed" out of federal ownership. *Id*. § 1635(o)(2). Like Section 103(c), then, Section 906(o) draws a line between NPS management of federal and nonfederal lands. Br. 24-25. NPS makes no attempt to reconcile its argument with Section 906.

Last, NPS tries to downplay the importance of Section 103(c) by arguing that Congress would not have "buried" such a restriction in the law's Maps section. Resp. 41. This too is unpersuasive. Regardless of the section in which the restriction resides, it is federal law. The Court should decline NPS's invitation to assign less weight to statutory provisions based on their section headings or location. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Regardless, the Maps section is foundational. Br. 27 n.9. ANILCA is about geographic boundaries, and it relies on maps—rather than legal descriptions—to establish those boundaries. 16 U.S.C. § 3103(a) ("In the event of discrepancies between the acreages specified in this Act and those depicted on such maps, the maps shall be controlling."). Section 103 is ANILCA's third section, following only the preamble and the definitions. Even in the public law, the order of which differs in many ways from the codified version, Section 103 was third in line, following right after the sections discussing the nature and purpose of each new unit. ANILCA, Pub. L. 96-487, 94 Stat. 2371 (1980). The Maps section is thus far from "buried." It is difficult to imagine a more important and centrally-located provision than Section 103(c).

B. ANILCA's purpose and history confirm that NPS's interpretation of Section 103(c) is unsustainable.

ANILCA's purpose and history confirm Section 103(c)'s plain meaning. Br. 28-30. Like the Ninth Circuit, NPS attempts to rebut these arguments by focusing myopically on ANILCA's conservation goal and selectively examining the statute's legislative history.

NPS ignores that ANILCA balances *multiple* goals, including conservation, economic development, and self-sufficiency. For example, while purporting to list ANILCA's purposes, Resp. 7-8, NPS omits ANILCA's promotion of the "satisfaction of the economic and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d). Likewise, NPS downplays that ANILCA was an outgrowth of the Statehood Act and ANCSA—statutes

in which Congress sought to accommodate the unique needs of Alaskans—and that its "primary purpose was to complete the allocation of federal lands in the State of Alaska." *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 549 (1987).

Petitioner's interpretation, in contrast, balances conservation *and* Alaska's economic and social needs. Br. 30. ANILCA added over 100 million acres to CSUs, newly placing vast swaths of land under NPS control. At the same time, however, Congress declined to grant NPS authority over nonfederal lands within these new CSUs in order to remain faithful to the economic development purposes of the Statehood Act and ANCSA—statutes that granted these lands to the State and Native Corporations for their own use. Br. 19. ANILCA must be interpreted in a way that is most consistent with all of Congress's purposes, not just the one that advances NPS's regulatory agenda.

In its rush to seize self-authorized regulatory authority, NPS refuses even to acknowledge ANCSA and recognize how it bears on the proper interpretation of ANILCA. Over 18 million acres of ANCSA land selections lie within CSUs. Br. of Arctic Slope Reg'l Corp. et al. as Amici Curiae 8 ("ASRC"); Br. of Doyon, Ltd. et al. as Amici Curiae 3 ("Doyon"). The revenues from these lands are essential to Native Corporations' economic health and to ensuring their native shareholders' self-sufficiency. ASRC 14. Restrictive NPS regulation on Native Corporation lands thus would contradict ANCSA's purposes and could be financially catastrophic. Commercial activity and scientific research would be subject to federal control, impeding any efforts by ANCSA shareholders

to productively utilize their lands—whether for mineral development, oil and gas exploration, nature lodges, trail construction, or building camping sites. *Id.* 12-14; Doyon Br. 4.

The social and practical ramifications would be significant as well. Building construction, hunting, fishing, gathering berries, and access via air and water would all require federal approval; even public meetings would be subject to a federal permitting process. ASRC 11-12. And the takeover of these lands has already begun: relying on the decision below, NPS proposed regulations extending federal oil and gas permitting regulations to previously exempt ANCSA lands in CSUs. *Id.* 13; Doyon 5-6.

NPS's approach to ANILCA's history is equally flawed, which overwhelmingly supports Petitioner's interpretation of the statute. Br. 28-29. All NPS can point to in support of its characterization of Section 103(c) as a "minor technical correction" that had no "substantive" impact is a partial quotation from Representative Udall. Resp. 43. Even if this quotation were accurate and probative, it would still fail to reconcile NPS's interpretation with the overall context that led to the introduction and inclusion of the language that became Section 103(c). "The central issue of [ANILCA's] floor debates was the appropriate balance between exploitation of natural resources, particularly energy resources, and dedication of land to conservation units." *Amoco Prod.*, 480 U.S. at 553.

But NPS omits important aspects of Representative Udall's statements. As one of the law's sponsors, Mr. Udall had explained that ANILCA's inclusion of ANCSA lands

within CSU boundaries would not subject them to federal regulation. 125 Cong. Rec. 9,905 (1979); Br. 7-8. When H.R. 452 (the concurrent resolution that reinserted Section 103(c)) was introduced, Representative Udall reassured Congress that the resolution would not materially change ANILCA—including, presumably, protection of ANCSA and other nonfederal lands from federal regulation. To be sure, Representative Udall characterized H.R. 452 as containing changes that were "technical or perfecting in nature." 126 Cong. Rec. 30,498 (1980). But NPS omits that Representative Udall also described other statutory changes as "more extensive." *Id.*[1]

C. NPS's strained interpretation is not entitled to *Chevron* deference.

NPS's plea for agency deference should be rejected. Br. 30-32. The statute is unambiguous. NPS continues to advocate for an interpretation of Section 103(c) that is contrary to its text, relies on circular logic, and ignores Congress's clear commitment to ensuring that nonfederal lands within CSUs would not be regulated as though they were part of the National Park System. Further, NPS's interpretation would lead to absurd results, Br. 31-32, and would not only undermine Congress's goals in passing ANILCA, but would undermine ANCSA and the Statehood Act. In short, NPS's interpretation of Section 103(c) is unreasonable.

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1. Section 103(c) also was not an unimportant last-minute addition. Resp. 43. The language traces back to one of the earliest versions of ANILCA. Br. 9-10 & n.2. It had dropped out during reconciliation, but was restored by H.R. 452. *Id.*

None of NPS's arguments alters this conclusion. Even though Section 103(c) is designed to *limit* NPS's authority over nonfederal land, NPS interprets it to impose no limit on federal authority to regulate nonfederal lands within CSUs. NPS insists that its claim for expansive authority is not "pervasive" because the agency may impose only those regulations "'necessary or proper' for use or management of the parks." Resp. 55 (quoting 54 U.S.C. § 100751(a)). But that is just another way of saying that NPS believes that Congress gave it a blank jurisdictional check, and that ANILCA imposes *no* limit beyond that imposed by the Organic Act over the "System units" themselves. 54 U.S.C. § 100751(a). Any construction of Section 103(c) permitting NPS to regulate nonfederal lands in CSUs as though they were part of the National Park System is, by definition, unreasonable. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26 (1982) ("The challenged Regulation is not a reasonable statutory interpretation unless it harmonizes with the statute's origin and purpose.").

Thus, when NPS insists that its authority over Alaska nonfederal lands is "narrow," Resp. 23, 47-50, 52, 57, or applicable in "certain specific circumstances," Resp. 50, it means only that the agency believes that it has chosen to exercise the vast authority it claims for itself in that fashion. NPS identifies no limiting principle on the exercise of its claimed regulatory authority other than its own assurance that it will use its nearly unfettered discretion wisely. But NPS's self-serving assurance that it will use its power judiciously is not what ANILCA requires. Congress, quite correctly, understood that Alaskans have exceptional economic, social, and transportation needs, and that subjugating nonfederal lands to pervasive NPS management would hinder the State's ability to meet these needs.

This case illustrates the point. NPS has not sought to prohibit state-licensed hovercraft on nonfederal lands in Alaska CSUs "to protect *public* lands within the Parks" from "potentially hazardous or polluting activity." Resp. 55. NPS banned them because, in its view, hovercraft utilize "'motorized equipment'" that is "'by sight or sound … generally inappropriate.'" Resp. 17 n.6 (quoting General Regulation for Areas Administered by the National Park Service, 48 Fed. Reg. 30,252, 30,258 (1983)). Subject to the constraints of the Organic Act, NPS was free to draw that conclusion for the National Park System. But the point of Section 103(c) was to ensure that this kind of routine policy choice would be made by the State—not NPS—when it came to nonfederal lands. Br. of Alaska as Amicus Curiae at 8-22.

Moreover, NPS's promise to exercise restraint in regulating nonfederal lands is belied by its recent actions. Less than a year after the decision below, NPS invoked it to restrict oil and gas development rights to nonfederal land in Alaska. Br. 31. Nor is NPS the only agency seizing on the ruling. Department of the Interior Fish and Wildlife Service, Management of Non-Federal Oil and Gas Rights, Proposed Rule, 80 Fed. Reg. 77,200 (Dec. 11, 2015). These attempts to impose the entirety of the NPS oil and gas regime on nonfederal land in Alaska CSUs is far from the kind of "narrow" power NPS claims to need. There is little doubt that, if left unchecked, NPS will wield its newfound power over nonfederal land in Alaska CSUs to the maximum possible extent.

Finally, NPS points to solid waste regulations from two decades ago to characterize its reading of Section 103(c) as "longstanding." Resp. 54-55. However, an

impermissible interpretation does not become reasonable because it has been around for 20 years. The rationale NPS offered there is the same circular interpretation that NPS offers here. It adds nothing to this case.[2]

Regardless, the solid waste regulations are irrelevant to Section 103(c) as they were issued pursuant to specific congressional authorization passed *after* ANILCA. In 1984, Congress expressly prohibited solid waste sites "within the boundary of any unit of the National Park System." 16 U.S.C. §§ 460l-22(c). In 1994, NPS acknowledged that it was acting under authority created by this statute. Solid Waste Sites in Units of the National Park System, 59 Fed. Reg. 65,948 (Dec. 22, 1994). To the extent, then, that these rules are a proper exercise of NPS's authority under this more recent statute—a subject on which Petitioner takes no position—the regulations in no way bolster NPS's claim of agency deference here.

By contrast, the hovercraft regulation was not issued pursuant to any specific subsequent congressional grant of authority. As NPS acknowledges, it was issued pursuant to NPS's general management authority under the Organic Act. Resp. 17. For all the reasons set forth above and in the opening brief, that regulation therefore relies upon an impermissible construction of Section 103(c) and is not in accordance with law.

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2. The explanations also were not offered or otherwise incorporated into this rulemaking. NPS is not entitled to deference based on a rationale that was not articulated when the regulations were issued. *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

II. ANILCA Does Not Grant NPS Plenary Authority Over Navigable Waters Located Within CSU Boundaries.

Even though the Ninth Circuit assumed "the waters of and lands beneath the Nation River have been 'conveyed to the State' for purposes of § 103(c)," Petition Appendix 26a, NPS asks this Court to decide the issue in the first instance. NPS's construction of the statute is untenable in any event. First, navigable waters are not "public lands" because the United States does not hold "title" to them; they were "conveyed" to Alaska and are therefore insulated from NPS regulation by Section 103(c). Even if this question were close, the clear statement rule would foreclose NPS's interpretation. Second, the reserved water rights doctrine, assuming it has any role to play, does not confer on NPS plenary regulatory authority over Alaska navigable waters based on an amorphous "conservation" rationale.

A. Navigable waters are not "public lands" under ANILCA as they have been "conveyed" to the State of Alaska.

1. ANILCA's plain meaning and this Court's precedent foreclose NPS's interpretation of ANILCA.

NPS incorrectly contends that navigable waters are beyond Section 103(c)'s purview because they are "public lands" under ANILCA. Resp. 29-33. ANILCA defines "public lands" to mean "Federal lands" and defines "Federal lands" to mean, in turn, "lands the *title* to which is in the United States after December 2, 1980." 16 U.S.C.

§§ 3102(2)-(3) (emphasis added). NPS's argument thus fails at the outset because the United States does not hold title to these navigable waters. Br. 33-38.

"In 1842, the Court declared that for the 13 original States, the people of each State, based on principles of sovereignty, *hold the absolute right to all their navigable waters* and the soils under them, subject only to rights surrendered and powers granted by the Constitution to the Federal Government." *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1227 (2012) (citation omitted) (emphasis added). The Court eventually extended "the same principle" to the "States later admitted to the Union, because the States in the Union are coequal sovereigns under the Constitution." *Id.* Given this precedent, NPS's assertion that any federal regulatory authority it might possess eclipses Alaska's claim to title fails as a matter of original understanding. Resp. 28-29.

But even if Alaska does not hold title to the navigable waters themselves, the United States certainly does not. Alaska has indisputable title to the submerged lands beneath them. Br. 35-38. The Submerged Lands Act grants States "title to and ownership of the submerged *lands and waters*," including "the right and power to manage, administer, lease, develop, and use them." *United States v. California*, 436 U.S. 32, 40 (1978) (citation omitted) (emphasis added); *United States v. Alaska*, 521 U.S. 1, 5 (1997); *Totemoff v. State*, 905 P.2d 954, 964 (Alaska 1995). Accordingly, NPS is doubly wrong. Not only does the United States lack title to these navigable waters, but Alaska's title to the submerged lands pursuant to the Submerged Lands Act means that these are "lands granted to" Alaska "under any other provision of Federal

law." 16 U.S.C. § 3102(3)(A); *id.* § 3102(1) ("The term 'land' means lands, waters, and interests therein.").

NPS counters that the hovercraft regulation does not violate Section 103(c) because navigable waters have never been "conveyed" to Alaska regardless of the dispute over who (if anyone) holds title. Resp. 26-28. That argument fails for the same reasons. NPS concedes, as it must, that the submerged lands were conveyed to Alaska. Resp. 27. NPS's novel attempt to sever Alaska's submerged lands from the navigable waters flowing above them has no foundation in ANILCA, which, as noted above, defines "land" to include "waters." Br. 35-37.

Having found no solid footing in the statute's text, NPS turns to purpose. Specifically, NPS claims that Petitioner's interpretation of ANILCA contravenes Congress's stated purpose of protecting rivers. Resp. 33-34. But "vague notions of a statute's 'basic purpose' are … inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993). In addition, NPS continues to ignore that ANILCA serves multiple purposes, including Alaska's right to control its land and water, and that Alaska—like NPS—has an interest in safeguarding natural resources. ANILCA must be construed to harmonize all of Congress's purposes. *Supra* at 6-7. There is nothing dissonant about ANILCA protecting federal waters and watersheds, while simultaneously preserving Alaska's sovereignty over its navigable waters.

NPS also incorrectly claims that a textual approach to Section 103(c) is inconsistent with statutory provisions directed at certain boating and fishing activities that

can occur on navigable waters. Resp. 36-37. But those other provisions still apply to federal waters, to navigable waters where the submerged lands were conveyed to the United States, or where the State has agreed to federal management. Furthermore, these provisions may apply in pre-statehood withdrawals, such as the McKinley (now Denali), Glacier Bay, and Katmai National Parks, where in some circumstances the federal government retains an interest in submerged lands. *Alaska*, 521 U.S. at 56-57. The fact that these statutory provisions do not have the sweeping reach NPS would prefer does not mean that enforcing ANILCA's plain meaning would lead to an anomaly.[3]

NPS's claim that respecting Alaska's authority over its navigable waters would create an unworkable jurisdictional "patchwork" also is unpersuasive. Resp.

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3. NPS's claim that Congress ratified its interpretation of ANILCA fails too. Resp. 46-47. Congress imposed a series of moratoria on federal management of subsistence to allow Alaska time to consider enacting its own subsistence regime. But Congress was careful not to weigh in on this matter. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, § 336, 110 Stat. 1321 (1996) ("None of the funds made available to the Department of the Interior or the Department of Agriculture by this or any other Act may be used to issue or implement final regulations, rules, or policies pursuant to Title VIII of [ANILCA] to assert jurisdiction, management, or control over navigable waters transferred to the State of Alaska pursuant to the Submerged Lands Act of 1953 or the Alaska Statehood Act of 1959."); Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. 105-277, § 339(d), 112 Stat 2681 (1998) ("Nothing in this section invalidates, validates, or in any other way affects any claim of the State of Alaska to title to any tidal or submerged land in Alaska.").

38. ANILCA's exclusion of private, Native Corporation, and State lands and waters from CSUs, and thus from NPS jurisdiction, expressly creates this "patchwork." This is hardly a unique issue. A map of Alaska, or any state, reveals lands and waters of varying ownership and jurisdictional status. This is the inherent nature of the federal system and private ownership of property. This type of jurisdictional "patchwork" often occurs, for example, under the Wild and Scenic Rivers Act because, among other reasons, only designated portions of rivers qualify for inclusion under that statute. 16 U.S.C. § 1274. It also is a function of the fact that navigability must be determined on a "segment by segment basis." *PPL Montana*, 132 S. Ct. at 1229. Fully aware of these issues, Congress delegated NPS authority to acquire nonfederal land through voluntary sale. 16 U.S.C. § 3192. Such authority would be unnecessary if NPS's regulatory power in CSUs were uniform.[4]

At base, NPS's reasoning turns on a mistaken premise. NPS bristles at the idea that Petitioner seeks to "strip the Park Service of its power to regulate navigable waters." Resp. 35. But that has never been Petitioner's position. NPS may regulate navigable waters under

4. NPS also misunderstands the Act more generally. NPS suggests that ANILCA's designation of certain Alaskan rivers under that statute proves that Alaska's navigable waters are "public lands" and thus beyond the reach of Section 103(c). Resp. 35-36. But the statute acknowledges and protects State ownership rights in submerged lands, 16 U.S.C. § 1284(f), and preserves State authority over fish and wildlife, *id.* § 1284(a). Further, Section 606(a) amended the Act to specify that, in Alaska, the acreage included with the designation cannot include either "private lands" or "lands owned by the State." *Id.* § 1285b.

specific grants of authority such as the Clean Water Act. Br. 26-27. Congress also possesses "significant authority to regulate activities" in navigable waters "by virtue of [the United States'] dominant navigational servitude, other aspects of the Commerce Clause, and even the treaty power." *Alaska v. United States*, 545 U.S. 75, 116-17 (2005) (Scalia, J., concurring in part and dissenting in part). What Petitioner challenges is NPS's claim of delegated authority over State-owned waters under its generic management authority. ANILCA forecloses that expansive claim of NPS's authority. "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." *Alaska v. Babbitt*, 72 F.3d 698, 703 (9th Cir. 1995).

2. The clear statement rule forecloses NPS's interpretation of ANILCA.

Even if ANILCA were ambiguous, NPS's interpretation would still be impermissible. As the Court has explained, "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citation omitted). The clear statement rule requires that any impingement on state sovereignty be "plain to anyone reading the [statute]." *Id.* at 467. In so doing, the rule upholds a foundational principle: "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461.

The clear statement rule plainly applies here. "Due to the public importance of navigable waterways, ownership of the land underlying such waters is strongly identified with the sovereign power of government." *Idaho v. United States*, 533 U.S. 262, 272 (2001) (citation omitted). As the Court has explained, a State's control of its navigable waters is "an essential attribute of sovereignty" because it affects "the sovereign's ability to control navigation, fishing, and other … activity on rivers and lakes." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997) (explaining "navigable waters uniquely implicate sovereign interests").

NPS's interpretation of ANILCA cannot overcome the clear statement rule. Resp. 44-46. ANILCA clearly supports Petitioner's reading. Even if it did not, however, it certainly would not be "plain to anyone reading the statute" that navigable waters either are "public lands" or were not "conveyed" to Alaska when it joined the Union. Accordingly, there is no basis for deferring to the agency. The Court will not "extend *Chevron* deference" where, as here, the "administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power" without "a clear statement from Congress." *Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-74 (2001).

B. NPS does not have plenary authority over all navigable waters based on any reserved water rights it might possess.

NPS argues that navigable waters are "public lands" based on "substantial 'interests' in those waters by

virtue of its reserved water rights." Resp. 29. But that cannot be correct. The reserved water rights doctrine does not confer "title." As NPS acknowledges, Resp. 27, it establishes a non-possessory *use* right. *Totemoff*, 905 P.2d at 965 ("Reserved water rights give the federal government the right to prevent others from appropriating water or to use a certain volume of water, not to possess a body of water."); *Katie John v. United States ("Katie John II")*, 247 F.3d 1032, 1047 (9th Cir. 2001) (en banc) (Kozinski, J., dissenting) (explaining that "a usufructuary right does not give the United States *title* to the waters or the lands beneath those waters") (emphasis in original). Federal reserved water rights exist only "to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976). Accordingly, this Court has approved such reservations only in situations involving a specific need to access and use nonfederal waters for a particular purpose. *Id.* at 136; *see, e.g.*, *Arizona v. California*, 373 U.S. 546, 595-99 (1963); *Winters v. United States*, 207 U.S. 564, 575-76 (1908).

Here, NPS does not claim the need to *use* any waters in Alaska, but rather seeks the power to exercise pervasive control over them for amorphous "conservation" purposes that may not be related at all to water use. Resp. 33. This claim stretches the doctrine of reserved water rights beyond its breaking point. NPS has not established that "without the water the purposes of the reservation would be *entirely defeated*." *United States v. New Mexico*, 438 U.S. 696, 700 (1978). That is because there is no claim of water scarcity within ANILCA's CSUs. *Katie John v. United States ("Katie John III"),* 720 F.3d 1214, 1238 (9th Cir. 2013) ("[T]here is no suggestion that any federal reservation along any Alaskan waters risks being turned into a 'barren waste' as in *Winters*, or as a substantially diminished pool, as in *Cappaert*."). Nor does NPS even

attempt to connect such a rationale to the regulation of hovercraft. *Supra* at 11.

NPS's generic conservation purposes are just too broad to form the basis for a specified reserved water right. In *Cappaert*, for example, the proclamation adding Devil's Hole to Death Valley National Monument authorized NPS to manage the Monument. 426 U.S. at 140-41. This Court noted that the Organic Act provided "the 'fundamental purpose of the said parks monuments, and reservations' is 'to conserve the scenery and the natural and historic objects and the wild life therein.'" *Id* (citation omitted). But the Court hastened to add that the implied reservation did not stem from this broad purpose; rather, the reservation was limited to the water necessary to fulfill the specific purpose of the Devil's Hole reservation. *Id.* at 141. The Court therefore reviewed the relevant proclamation, which noted the "outstanding scientific importance" of a pool within Devil's Hole, and determined that "the purpose of reserving Devil's Hole Monument is preservation of the pool." *Id.* Notably, despite its finding that pool preservation was paramount, the Court did not forbid *all* uses of the pool; the Court held that "the level of the pool may be permitted to drop" so long as it remained able to sustain its unique and scientifically valuable fish population. *Id.*

In other words, the specific purpose of the narrowly-defined reservation controlled, not the broad unspecified "conservation" purposes behind creation of the National Park System. Where reservation of water is not necessary to fulfill the primary purpose of the federal reservation, the United States must acquire the water from the State—even if controlling the water would be "beneficial in the administration and public use of the national parks and

monuments." *New Mexico*, 438 U.S. at 702-03. Congress has appropriated NPS funds for such purposes, *id.* (citing 16 U.S.C. § 17j-2), and has specifically authorized NPS to purchase State-owned lands under ANILCA. Again, such statutory authorizations would be unnecessary if the "conservation" purposes behind reservations of parkland were sufficient to trigger federal reserved water rights. *Supra* at 4, 17.

Finally, NPS seeks to leverage the Ninth Circuit's *Katie John* decisions in support of its atextual interpretation of ANILCA. Resp. 34-35. Aside from the fact that those decisions are not binding on this Court, they provide no support for the conclusion that NPS may assert plenary authority over Alaska navigable waters under the banner of reserved water rights. In fact, the Ninth Circuit—in the same ruling upon which NPS principally relies—disavowed any interpretation of the statute that would grant NPS the power it seeks here and concluded that any reserved water rights under ANILCA must be limited to subsistence issues. *Alaska v. Babbitt ("Katie John I")*, 72 F.3d 698, 704 (9th Cir. 1995).

Accordingly, the Court need not disturb the *Katie John* line of cases to reject NPS's argument. Regardless of whether it has merit, the Ninth Circuit's *Katie John* rationale was borne of a belief that the subsistence context of those cases gave the court's ultimate conclusion some minimal foothold in the statute. The subsistence provisions, which occupy Title VIII of ANILCA, address that concern in a manner that is far more specific than the amorphous conservation interest NPS relies on here. In particular, Title VIII has its own preamble and is the only section of ANILCA in which Congress invoked its authority under the Commerce and Property Clauses. 16 U.S.C. § 3111(4).

At the end of the day, the Ninth Circuit's approach was, admittedly, "a problematic solution to a complex problem" involving "rural subsistence priority under ANILCA." *Katie John III*, 720 F.3d at 1245. But it provides no basis to extend the reserved water rights doctrine across the rest of ANILCA—or to the many other federal laws that employ the same definition of "public land." Nothing in the *Katie John* line suggests that NPS is entitled to assert sweeping control over navigable waters in CSUs in contravention of Section 103(c).

CONCLUSION

The Court should reverse the decision of the Ninth Circuit.

Respectfully submitted,

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