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

BRIEF OF ALASKA MINERS ASSOCIATION, INC., ALASKA OIL AND GAS ASSOCIATION, ALASKA CHAMBER, ALASKA FOREST ASSOCIATION, ALASKA CONSERVATION TRUST, ALASKA SUPPORT INDUSTRY ALLIANCE, ASSOCIATED GENERAL CONTRACTORS OF ALASKA, COUNCIL OF ALASKA PRODUCERS, AND RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JOSEPH J. PERKINS, JR.
STOEL RIVES LLP
501 L Street,
Suite 500
Anchorage, AK 99501
(907) 277-1900
joseph.perkins@stoel.com

JASON T. MORGAN*
*Counsel of Record
STOEL RIVES LLP
600 University Street,
Suite 3600
Seattle, WA 98101
(206) 624-0900
jason.morgan@stoel.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Regulations

Other Authorities

INTERESTS OF *AMICI CURIAE*

Alaska Miners Association, Inc., Alaska Oil and Gas Association, Alaska Chamber, Alaska Forest Association, Alaska Conservation Trust, Alaska Support Industry Alliance, Associated General Contractors of Alaska, Council of Alaska Producers, and Resource Development Council for Alaska, Inc. hereby submit this *amici curiae* brief in support of the Petitioner John Sturgeon.[1]

More than any other state, Alaska's economy is dependent on the use and development of the state's natural resources. Fisheries, mining, oil and gas production, forestry, and tourism are the backbone of Alaska's economy. *Amici curiae* represent the industries that drive Alaska's economy through the development and use of Alaska's natural resources.

Alaska Miners Association, Inc. is a nonprofit corporation representing the mining industry in Alaska. It advocates for the development and use of Alaska's mineral resources to provide an economic base for the state. Mining provides jobs for thousands of Alaskans and millions of dollars of personal income throughout Alaska. Alaska's mining industry includes exploration, mine development, and mineral production. Alaska's mines produce gold, zinc, lead,

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[1] Pursuant to Supreme Court Rule 37(6), undersigned counsel certifies that (A) no party's counsel authored this brief, in whole or in part; (B) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (C) no person, other than the *amici curiae* or their members, contributed money that was intended to fund preparing or submitting this brief. The parties have consented to this motion.

silver, and coal, as well as construction materials, such as sand, gravel, and rock.

The Alaska Oil and Gas Association is a professional trade association whose mission is to foster the long-term viability of the oil and gas industry for the benefits of all Alaskans. It represents the majority of companies that are exploring, developing, producing, refining, or marketing oil and gas on the North Slope, in the Cook Inlet, and in the offshore areas of Alaska. On an annual average, the oil and gas industry in Alaska provides an average of 110,000 jobs and about $6 billion in total wages.

The Alaska Chamber is a nonprofit corporation dedicated to improving the business environment in Alaska. The Alaska Chamber represents hundreds of businesses from Ketchikan to Barrow that share a common goal: to make Alaska a viable and competitive place to do business. The Alaska Chamber was founded in 1952 prior to statehood, and has helped shape the policies impacting the development of the state's natural resources.

Alaska Forest Association is an industry trade association representing the timber industry of Alaska. Alaska Forest Association is dedicated to advancing the restoration, promotion and maintenance of a healthy, viable forest products industry, and contributing to economic and ecological health in Alaska's forests and communities. Alaska's forest products industry provides hundreds of jobs and contributes millions of dollars to Alaska's economy.

The Alaska Conservation Trust is a non-profit corporation working to ensure equal protection for

Alaska's people, businesses, and the environment. The Alaska Conservation Trust serves as a watchdog for Alaska's economy and environment, and works to foster strategic alliances to support the economic health of Alaska communities.

Alaska Support Industry Alliance is a nonprofit corporation that represents more than 500 members providing more than 50,000 Alaskan jobs related to the oil, gas, and mining industries. The Alaska Support Industry Alliance's mission is to advocate for safe, environmentally responsible development of Alaska's oil, gas, and mineral resources for the benefit of all Alaskans.

Associated General Contractors of Alaska is a nonprofit corporation representing the interests of the construction industry. Its members build the roads, bridges, pipelines, facilities, buildings, and other infrastructure that allow Alaska's businesses to use and develop Alaska's natural resources.

Council of Alaska Producers is a nonprofit corporation representing Alaska's large metal mining industry. Its members operate large-scale mining operations for gold, silver, zinc and lead. Mining is a growth industry in Alaska, with several promising projects in development, in addition to strong operating mines across the state that provide jobs that support Alaskan families.

Resource Development Council for Alaska, Inc. is a nonprofit corporation, comprised of individuals and companies involved in Alaska's oil and gas, mining, timber, tourism, and fisheries industries. Its membership includes Alaska Native Corporations, local

communities, organized labor, individuals, and industry support firms. The Resource Development Council's purpose is to encourage a strong, diversified private sector in Alaska and to expand the state's economic base through the responsible development of Alaska's natural resources.

The success of the businesses represented by these organizations in building Alaska's economy, and their ability to continue to do so in the future, is dependent on a series of promises made by Congress that provide access to these resources. These promises started with the Alaska Statehood Act of 1958 (the "Statehood Act"), continued with the Alaska Native Claims Settlement Act in 1971 ("ANCSA"), and culminated with the Alaska National Interest Lands Conservation Act in 1980 ("ANILCA"). These acts collectively allow the State of Alaska and Native Corporations to identify, select, and receive lands that provide the resources necessary to build the state's economy and serve the interests of Alaska's people. More than just confirming ownership, ANILCA Section 1110 ensures that the state, Native Corporations, and other private owners will have adequate and feasible access to their lands across federal lands. And ANILCA Section 103(c) ensures that any state, Native Corporation, or other private lands, including selected lands within reserved federal "conservation system units" (or "CSUs"), will not be treated as part of those units and will not "be subject to the regulations applicable solely to public lands within such units." 16 U.S.C. § 3103(c).

In the decision below, *Sturgeon v. Masica*, 768 F.3d 1066 (9th Cir. 2014), the Ninth Circuit undermines one of ANILCA's core protections. According to the Ninth

Circuit, the protection in Section 103(c) prohibits only those regulations that apply solely "in Alaska," such as Alaska specific National Park Regulations. Under *Sturgeon*, Section 103(c) does not prohibit the National Park Service from enforcing generally applicable regulations that apply to all National Parks to inholdings in Alaska. As a result, Alaska-specific regulations (like park-specific camping and hunting regulations) do not apply to inholdings in Alaska, but general Park regulations (such as those related to mining or oil and gas development that could prohibit economic development of the land) would apply to inholdings is Alaska. This renders the protection of Section 103(c) meaningless.

The Ninth Circuit's decision is contrary to the plain language of ANILCA, ignores the context under which Section 103(c) was enacted, undermines the Congressional promises of ANILCA, and will have wide ranging consequences for business interests that depend on the development and use of inholdings in Alaska. The Court should reverse.

SUMMARY OF ARGUMENT

Amici curiae endorse and support the arguments of the Petitioner demonstrating that the Ninth Circuit in *Sturgeon* erred in concluding that National Park Service regulations of "general applicability . . . may be enforced on both public and nonpublic lands alike within CSUs" in Alaska. 768 F.3d at 1078. This holding is contrary to the plain language of Section 103(c), which makes no distinction between Alaska-specific and general regulations, and is contrary to legislative history demonstrating that the proponents of Section 103(c) intended that provision to ensure that

inholdings would not be governed by the regulations applicable to the surrounding federal CSU.

Amici curiae complement that analysis by demonstrating how the Ninth Circuit's decision in *Sturgeon* is also inconsistent with the very purpose of ANILCA, which is to complete the promises made in the Statehood Act and ANCSA. Furthermore, *amici curiae* demonstrate that the Ninth Circuit's holding will have consequences well beyond recreation in the National Parks by paving the way for federal agencies to curtail development on inholdings in all CSUs in Alaska, in direct contravention of the purpose for which those lands were granted in the first place.

ARGUMENT

I. The Primary Purpose of ANILCA is to Complete the Promises Made by the Statehood Act and ANCSA

The Court construes the plain language of a statute "with reference to the statutory context in which it is found and in a manner consistent with the [statute's] purpose." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001). In addition, the Court "look[s] to the statute's language, structure, subject matter, context, and history—factors that typically help courts determine a statute's objectives and thereby illuminate its text." *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998).

The Court in *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531 (1987), explained that "ANILCA's primary purpose was to complete the allocation of federal lands in the State of Alaska, a process begun with the Statehood Act in 1958 and

continued in 1971 in ANCSA." *Id*. at 549 (footnote omitted). Accordingly, the Court in *Amoco* looked to these "predecessor statutes" to give context to the plain language of ANILCA and to interpret the phrases "public lands" and "in Alaska" as used in Section 810 of ANILCA. *Id*. at 552.

Here too, the Statehood Act and ANCSA provide critical context to understanding the plain meaning of ANILCA Section 103(c). The Statehood Act in 1958 was intended to provide Alaska and its people the opportunity to develop the resources of the state. Under the Statehood Act, Alaska was promised 800,000 acres of public lands "for the purposes of furthering the development and expansion of communities" and further promised that it could select another 102,550,000 acres of land that were "vacant, unappropriated and unreserved." Pub. L. No. 85-508, § 6(a)-(b), 72 Stat. 339, 340 (1958). This land was to be patented to the state and included all mineral rights. *Id.* § 6(g), (i), 72 Stat. at 342. The "purpose of the land grants under" the Statehood Act is "to serve Alaska's overall economic and social well-being." *Udall v. Kalerak*, 396 F.2d 746, 749 (9th Cir. 1968).

The need for these large land grants was driven by aggressive federal policies setting aside the most valuable potential development areas in Alaska as reserves. Prior to statehood, Alaska faced the "peculiar problem" that "[o]ver 99 percent of the land area of Alaska is owned by the federal government." H.R. Rep. No. 85-624 (1957), *reprinted in* 1958 U.S.C.C.A.N. 2933, 2937. Although numerous laws existed authorizing disposition of federal lands to private individuals, those laws were being thwarted to "a large

degree by the federal policies . . . withdrawing from public use many of the more valuable resources of the territory." *Id*. These "tremendous federal reservations" were "for the furtherance of the programs of the various federal agencies." *Id*. Prior to statehood these reservations embraced "a preponderance of the more valuable resources" of the territory, with the remaining unreserved areas consisting of "glaciers, mountains, and worthless tundra." *Id*. at 2938.

The Statehood Act was intended to "alter the present distorted landownership pattern in Alaska." *Id*. To achieve that result, Alaska needed the opportunity to "select lands containing real values instead of millions of acres of barren tundra." *Id.* at 2939. The Statehood Act affords the state the opportunity to "select lands known or believe[d] to be mineral in character." *Id*. The intent was to provide the "valuable resources needed by the new state to develop flourishing industries with which to support itself and its people." *Id*. at 2938.

The efforts to implement the promises of the Statehood Act quickly ran into complications when Native groups asserted aboriginal rights to lands selected by the state. *See* H.R. Rep. No. 92-523 (1971), *reprinted in* 1971 U.S.C.C.A.N. 2192, 2193-94. Congress passed ANCSA "to provide an equitable solution to the claims made by the Natives of Alaska" while at the same time protecting the promises of the Statehood Act for lands "regarded as essential to the economic viability of the State." *Id*.

ANCSA, like the Statehood Act, used land grants as the primary mechanism for economic independence. Native Corporations were authorized to select over 40

million acres of land in Alaska. *Id*. at 2195. Of those millions of acres, "most of it will be selected for its economic potential." *Id*. This land was to serve "as a form of capital for economic development." *Id*. Thus, ANCSA, like the Statehood Act, focused on granting lands to drive Alaska's economy.

As with the Statehood Act, in passing ANCSA Congress intended that these lands be patented and passed out of federal ownership and control. 43 U.S.C. §§ 1611, 1613. ANCSA recognized the "interest of all of the people of the Nation in the wise use of the public lands," but made "a judgment about how much of the public lands in Alaska should be transferred to private ownership, and how much should be retained in the public domain." H.R. Rep. No. 92-523, *reprinted in* 1971 U.S.C.C.A.N. at 2194. The settlement in ANCSA represented a judgment "of what would be fair to the Natives, fair to the State of Alaska, and fair to all of the people of the United States." *Id*. at 2195. To that end ANCSA also authorized the Secretary of the Interior to set aside up to 80 million acres of unreserved federal land for public use. 43 U.S.C. § 1616(d)(2).

Implementation of these competing selections continued to prove problematic. *See* Petitioner's Opening Brief at 4-5. By 1979, the land grants under the Statehood Act were only 30 percent complete and grants under ANCSA were only one-eighth complete. *Amoco,* 480 U.S. at 549 n.18. Meanwhile, federal withdrawals continued at a rapid pace. Petitioner's Opening Brief at 4-5.

Congress, through ANILCA, sought to resolve these competing selections and withdrawal interests.

ANILCA designated over 100 million acres as federal CSUs[2] while ensuring "satisfaction of the economic and social needs of the State of Alaska." 16 U.S.C. § 3101(d). ANILCA concluded that these federal reservations were sufficient to protect "the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska" and that the need for future federal withdrawals "has been obviated." *Id.*; *see also* 16 U.S.C. § 3213 (severely restricting future executive withdrawals).

To ensure full "satisfaction" of the promises of the Statehood Act and ANCSA, Congress included Section 103(c) in ANILCA:

> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. No lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such

[2] "Conservation system unit" is defined as "any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument." 16 U.S.C. § 3102(4).

> lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c). These provisions confirm the promises of the Statehood Act and ANCSA; state and Native Corporation lands selected would not be "deemed to be included as a portion" of the National Park, National Monument, U.S. Forest Service Monument, Wildlife Refuge, or other CSU, and would not be regulated as such. Instead, those lands could be developed to utilize their promised economic potential.

Not only did Congress ensure that these lands within CSUs could still be developed, but Congress further guaranteed "adequate and feasible" access to such lands. Specifically, ANILCA Section 1110(b) provides:

> Notwithstanding any other provisions of this Act or other law, in any case in which State owned or privately owned land, including subsurface rights of such owners underlying public lands, or a valid mining claim or other valid occupancy is within or is effectively surrounded by one or more conservation system units, national recreation areas, national conservation areas, or those public lands designated as wilderness study, the State or private owner or occupier shall be given by the Secretary such rights as may be necessary to assure adequate and feasible access for economic and other purposes to the concerned land by such State or private owner or occupier and their successors in interest. Such rights shall be subject to reasonable regulations issued by the

> Secretary to protect the natural and other values of such lands.

16 U.S.C. § 3170(b). Simply put, "ANILCA provides access rights for inholders." *Hale v. Norton*, 476 F.3d 694, 699 (9th Cir. 2007).

In sum, ANILCA completes the promises made in the Statehood Act and ANCSA by ensuring that properties within the expansive CSU will not be subject to regulation as part of the CSU, and that property owners will have the access necessary to develop those lands.

II. The Ninth Circuit's Interpretation of Section 103(c) Conflicts with the Plain Language and Primary Purpose of ANILCA

A. The plain language of Section 103(c) precludes the application of all National Park Service regulations to inholdings in Alaska

Notwithstanding the fact that "ANILCA's primary purpose was to complete the allocation of federal lands in the State of Alaska" that began with the Statehood Act and ANCSA, *Amoco,* 480 U.S. at 549, the Ninth Circuit's decision in *Sturgeon* never mentions either predecessor statute.

Instead, the Ninth Circuit read the second sentence of Section 103(c) in isolation to conclude: "The plain text of § 103(c) only exempts nonfederal land from 'regulations applicable *solely* to public lands within [CSUs].'" *Sturgeon*, 768 F.3d at 1077 (brackets and emphasis in original) (quoting 16 U.S.C. § 3103(c)). The Ninth Circuit reasoned that the word "solely" was

used to indicate regulations that applied solely "in Alaska," and did not apply to regulations that applied to CSUs nationwide. *Id*. Because the regulation at issue banning hovercraft use applies to all National Park units, and not solely to the Yukon–Charley CSU in Alaska, the Ninth Circuit concluded that the regulation was not barred by Section 103(c). *Id*.

Even when read in isolation, this interpretation cannot possibly stand. Section 103(c) prohibits "regulations applicable *solely to public lands* within such units." 16 U.S.C. § 3103(c) (emphasis added). The word "solely" modifies the phrase "public lands." Thus the appropriate inquiry is whether the regulation applies "solely to public lands," not whether, as the Ninth Circuit held, the regulation applies solely "in Alaska."

The obvious intent of the inclusion of the phrase "regulations applicable solely to public lands within such units" was to target *all* public land regulations (i.e., National Park Service or U.S. Fish and Wildlife Service regulations) that would be applicable to that unit. This language gives effect to the first sentence of Section 103(c) that only federal lands "within the boundaries of any conservation system unit . . . shall be deemed to be included as a portion of such unit." *Id.* At the same time, the language avoids, as Petitioner explains, any arguments that Congress was trying to exempt these inholdings from all applicable federal regulations that would impact development such as the Clean Water Act or the Clean Air Act. Petitioner's Opening Brief at 29 (citing Alaska National Interest Lands, Report of the Committee on Energy and

Natural Resources, U.S. Senate, S. Rep. No. 96-413, at 303 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5070, 5247).

Moreover, the Ninth Circuit's conclusion that Congress intended Section 103(c) to exempt an inholding from land management regulations applicable *only* in Alaska makes little sense. Section 203 of ANILCA instructs the National Park Service to "administer" CSUs in Alaska as "new areas of the National Park System," in accordance with the National Park Service Organic Act. 16 U.S.C. § 410hh-2.[3] The only Alaska-specific regulations contemplated in ANILCA for these units are for things like permitting the continued use of aircraft in some areas (Section 201(6), (10)), authorizing motorized snow travel (Section 201(2)), or authorizing hunting (Section 203).

There is no logical reason why Congress would want to *exclude* private inholdings from the *benefit* of these Alaska-specific regulations (which are largely related to recreation and subsistence), but *include* private inholdings within the scope of general regulations that could preclude the very uses for which these lands were conveyed by the federal government. This illogical

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[3] The same reasoning applies to other CSUs in Alaska. Under ANILCA Section 304, the U.S. Fish and Wildlife Service is to manage Wildlife Refuges "in accordance with the laws governing the administration of units of the National Wildlife Refuge System, and this Act." Pub. L. No. 96-487, § 304(a), 94 Stat. 2371; *see also id.* § 402(a) (Bureau of Land Management "shall administer" CSU "pursuant to the applicable provisions of the Federal Land Policy and Management Act"); *id.* § 503(c) ("[T]he National Forest Monuments . . . shall be managed by the Secretary of Agriculture as units of the National Forest System . . . .").

result cannot stand. *W. Air Lines, Inc. v. Bd. of Equalization of S.D.*, 480 U.S. 123, 133 (1987) ("The illogical results of applying such an interpretation, however, argue strongly against the conclusion that Congress intended these results . . . .").

B. The Ninth Circuit's interpretation of Section 103(c) undermines the purpose of ANILCA

The context under which ANILCA was passed fully confirms this commonsense reading that Section 103(c) exempts nonfederal land inside CSUs from being subject to the federal land management regulations applicable to a National Park, Monument, or Wildlife Refuge. As discussed above, the primary purposes of the Statehood Act and ANCSA are to provide the state and the Native Corporations with the lands that could be developed to support a vital economy. The plain intent of Section 103(c) is to exempt these selected lands, which happen to be within a federal CSU, from public land regulations that might restrict the development of state and private land. The people of Alaska were promised that their selections would be for "valuable resources . . . to develop flourishing industries" not "worthless tundra." H.R. Rep. No. 85-624, *reprinted in* 1958 U.S.C.C.A.N. at 2938.

But the Ninth Circuit's decision immediately puts the decision for the development of any state or Native selection within the various CSUs right back into the hands of the National Park Service, the U.S. Fish and Wildlife Service, the Bureau of Land Management, or the U.S. Forest Service. Congress sought to exempt selected land (with exceptions) from the reach of these federal agencies. Unless the Court reverses, these

agencies will get to decide whether a selection within a CSU is developed for "valuable resources" or remains "worthless tundra."

Although this case arises in the context of navigable waters and recreation, the National Park Service has not limited its interpretation of Section 103(c) to these areas. One primary example is the National Park Service regulations governing solid waste disposal sites for mines. *See* 36 C.F.R. pt. 6. Under 36 C.F.R. § 6.7(d), no one can "establish or operate a new solid waste disposal site within a unit" of any National Park. This restriction applies to "all lands and waters within the . . . units of the National Park System, whether federally or nonfederally owned." 36 C.F.R. § 6.2(a).

The preamble to the regulations at 36 C.F.R. part 6 explains, unequivocally, that these regulations will apply to inholding in CSUs in Alaska:

> It is the Service's opinion that the language of section 103(c) does not render the final rule at 36 CFR part 6 inapplicable to nonfederal lands in units of the National Park System in Alaska because of the presence of the word "solely."

59 Fed. Reg. 65948, 65950 (Dec. 22, 1994). The National Park Service reached that result by applying the same reasoning it put forward in *Sturgeon*: "neither the law[] nor its regulations appl[ies] 'solely' to public lands within the units." *Id*.

This regulation, if applied to Alaska under the reasoning urged by the National Park Service and endorsed by the Ninth Circuit, effectively forecloses mining on lands selected by the state or Native

Corporations under the Statehood Act and ANCSA within National Park Service CSUs. That is so because almost all large-scale mines must dispose on-site the overburden, waste rock, tailings, and other solid waste generated by their mining and mineral recovery and beneficiation processes. Any other approach is not practical or economic. Therefore, the prohibition in 36 C.F.R. § 6.7(d) eliminates any new mining operation on selected lands inside National Park Service CSUs.

These concerns are not theoretical. Ahtna, Incorporated, a Native regional corporation incorporated pursuant to ANCSA, has ANCSA selected lands inside the Wrangell-Saint Elias National Park, a CSU created by Section 201(9) of ANILCA. Those selections have significant potential for copper, gold, and other minerals[4] and could be developed (as intended by Congress in granting those lands) consistent with Title XI of ANILCA and laws of general applicability to mining.

Indeed, Congress expressly promised in Section 204 of ANILCA that "[v]alid Native Corporation selections . . . within the boundaries of the Wrangell-Saint Elias National Park and Preserve . . . shall be honored." 16 U.S.C. § 410hh-3. But the Ninth Circuit's decision in *Sturgeon* authorizes the National Park Service to break that promise through the application of its nationally applicable regulations at 36 C.F.R. § 6.7(d). This is plainly contrary to congressional intent. *See Koniag, Inc. v. Koncor Forest Res.*, 39 F.3d 991, 997 (9th Cir. 1994) ("[W]e conclude that Congress did not intend to

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[4] Ahtna, http://ahtna-inc.com/lands/resources/ (last visited Nov. 17, 2015).

grant Koncor land [under ANCSA] whose value could be reduced to zero by fiat . . . .").

The National Park Service has also overreached into nonfederal lands in Alaska with respect to oil and gas development. *See* 36 C.F.R. pt. 9, subpt. B. The National Park Service has issued a suite of regulations governing nonfederal oil and gas rights within parks and has made the regulations applicable to private lands. *See* 36 C.F.R. § 9.30(a) (applying requirements of subpart B where "the land is owned in fee"). Subpart B of part 9 imposes significant restrictions on oil and gas operations, requires a National Park Service plan of operation, and gives the National Park Service broad discretion to deny oil and gas operations. *Id*. §§ 9.36, 9.37.

Equally troubling, the National Park Service is currently proposing to amend part 9, subpart B, to provide even more stringent restrictions on oil and gas operations. 80 Fed. Reg. 65572, 65572 (Oct. 26, 2015).[5] In that proposal, the National Park Service explains that it is relying on the Ninth Circuit's decision in *Sturgeon* to extend these restrictions to Alaska: "We also note that because these regulations are generally applicable to NPS units nationwide and to non-federal interests in those units," the restrictions would apply in Alaska "and thus are not affected by Section 103(c)

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[5] The existing regulations apply only to nonfederal oil and gas interests where access across federal lands is required. The proposed regulations would apply to all oil and gas operations on private land regardless of whether access across federal lands is required. 80 Fed. Reg. at 65575.

of ANILCA." *Id*. at 65573 (citing *Sturgeon*, 768 F.3d at 1077-78).

These concerns regarding the applicability of 36 C.F.R. part 9, subpart B, to Alaska parks are also not theoretical. Koniag, Inc., a Native regional corporation incorporated pursuant to ANCSA, received conveyance under ANCSA of subsurface estate potentially valuable for oil and gas[6] that is now within the Aniakchak National Monument. Here too, the Ninth Circuit's decision in *Sturgeon* authorizes the Parks to defeat the development potential of inholdings in Alaska through the application of general regulations.

These concerns are also not limited to CSUs under the National Park Service's authority. There are inholdings in many other CSUs that are either currently being developed or have significant future development potential. For example, Greens Creek mine is one of the largest silver mines in the world and is currently operating on private land in the Admiralty Island National Monument CSU, under the jurisdiction of the U.S. Forest Service.[7]

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[6] This conveyance was made pursuant to § 15 of the Act of January 2, 1976, Pub. L. No. 94-204, 89 Stat. 1145, 1154-55.

[7] The Green Creek mine comprises patented federal mining claims (in some of which a full fee simple estate was conveyed, while in others only a mineral fee estate was conveyed), other fee simple land, and various unpatented federal mining claims and dependent mill sites. *See* Alaska Department of Natural Resources, Greens Creek Mine, http://dnr.alaska.gov/mlw/mining/largemine/greenscreek/ (last visited Nov. 17, 2015).

There are many other examples. Significant hardrock mineral exploration is occurring on Native Corporation land within the Alaska Peninsula National Wildlife Refuge managed by the U.S. Fish and Wildlife Service. Numerous active placer mining operations exist within the Fortymile Wild and Scenic River CSU, under jurisdiction of the Bureau of Land Management.[8] Finally, lodges, camps, and recreational facilities are operated on private lands within many of the CSUs, including but not limited to Denali National Park and Preserve, Wrangell-St. Elias National Park and Preserve, Kodiak Island National Wildlife Refuge, and Admiralty Island National Monument.[9]

The Ninth Circuit in *Sturgeon* has provided these federal land managing agencies in Alaska with a road map to regulate these activities (and those that might develop in the future) out of existence and thereby subvert the purposes of ANILCA. Under the Ninth Circuit's holding, a federal land management agency can halt operations on inholdings in Alaska by putting restrictions on inholdings in a nationwide rule, even if the real impact is predominantly, if not exclusively, in Alaska. Even narrower, they could simply produce regulations that apply to inholdings in Alaska and *one other park unit outside Alaska*. In either case, the

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[8] *See* Alaska Department of Natural Resources, Upper Yukon Area Plan (February 2003), http://dnr.alaska.gov/mlw/planning/areaplans/up_yukon/pdf/uyap_full_plan.pdf (last visited Nov. 17, 2015).

[9] *See, e.g.,* Camp Denali Lodge, http://campdenali.com/live/page/about (last visited Nov. 17, 2015).

regulation would no longer be "solely" applicable to a CSU in Alaska under *Sturgeon*.

The result of that interpretation is that the *value* of Congress's promises to the state, Native Corporations, and other private land owners made in the Statehood Act, ANCSA and ANILCA for land and access to that land "could be reduced to zero by fiat." *Koniag,* 39 F.3d at 997. This result cannot be squared with the language and intent of ANILCA and its predecessor statutes.

C. The National Park Service reads the purpose of ANILCA too narrowly

The National Park Service's brief in opposition to certiorari attempts to justify the Ninth Circuit's decision by explaining that its ability to regulate state-owned rivers and lakes that are within its CSUs is essential. The National Park Service points to the purposes of individual CSUs that address the environmental integrity of streams and lakes, and argues that denying it the right to regulate those waters is "completely dissonant with the statute's stated purpose." Brief For The Respondents In Opposition at 17. This argument has a number of flaws.

Initially, at least one other federal agency that has addressed this issue has disagreed. The Secretary of Agriculture, under ANILCA, manages National Forest units of the National Wild and Scenic Rivers System, National Trails System, and National Wilderness Preservation System, and National Forest Monuments. In issuing regulations in 2003, the Secretary expressly agreed with comments from the State of Alaska that

pursuant to ANILCA Section 103(c) the new "regulations would not apply to State-owned lands and waters, including navigable waters, shore lands, tidelands, and submerged lands within the boundaries of national forests in Alaska," and the State of Alaska would continue to manage these waters. 68 Fed. Reg. 35116, 35117 (June 11, 2003). This is in direct contrast to the National Park Service's claim that it must manage the waters within a unit to fulfill the intent of ANILCA.

Equally important, the National Park Service's identified values in protecting "the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska" are only one part of ANILCA's purpose. 16 U.S.C. § 3101(d). The other purpose of ANILCA is ensuring "satisfaction of the economic and social needs of the State of Alaska." *Id*. As this Court explained, completing the selections of the Statehood Act and ANCSA is the "primary purpose" of ANILCA. *Amoco*, 480 U.S. at 549.

The state's ownership of the bed and banks of navigable waters is an express and important part of the promise of the Statehood Act. Pub. L. No. 85-508, § 6(m), 72 Stat. at 343 (granting title to the state through the Submerged Lands Act). The bed and banks on state waters are an important source of Alaska's economic development. Placer mining in streams and rivers and along portions of Alaska's coast, fueled Alaska's gold rushes and continues to be a multimillion-dollar industry in Alaska, with over 600

permitted mines.[10] Some of these placer mines occur in CSUs including, significantly, in various components of the Fortymile Wild and Scenic River CSU designated by Section 603 of ANILCA.

Likewise, the bed and banks of navigable waters (including not only lands underlying inland navigable waters but also tidelands and submerged lands along the coasts of Alaska) are important for oil and gas leasing, and an important source of state revenue. The state has leased submerged lands for oil and gas throughout Alaska.[11]

When Alaska achieved statehood, some of these important submerged lands areas had already been expressly reserved by unilateral executive action, including key submerged lands in the National Petroleum Reserve. *See United States v. Alaska*, 521 U.S. 1, 36 (1997) (reservation included submerged lands). The Statehood Act was intended to halt this policy of creating "tremendous federal reservations" to serve "the programs of the various federal agencies," and give the state the properties, including submerged lands, necessary for it to build an economic base. H.R. Rep. No. 85-624, *reprinted in* 1958 U.S.C.C.A.N. at 2937. Excluding the remaining submerged lands from the reach of federal land managers is therefore entirely

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[10] *See* McDowell Group, The Economic Impacts of Placer Mining in Alaska (Oct. 2014), http://alaskaminers.org/placer-mining/.

[11] *See, e.g.,* North Slope Units Map (showing state owned submerged oil and gas leases on the North Slope, http://dog.dnr.alaska.gov/Units/Documents/UnitMaps/NorthSlope/NorthSlopeUnitsMap-201509.pdf (last visited Nov. 17, 2015).

consistent with purpose of ANILCA, and the National Park Service's arguments must fail.

CONCLUSION

The decision of the Ninth Circuit is contrary to the plain language and purpose of ANILCA and the Court should reverse.

Respectfully submitted,

JASON T. MORGAN*
*Counsel of Record
STOEL RIVES LLP
600 University Street,
Suite 3600
Seattle, WA 98101
(206) 624-0900
jason.morgan@stoel.com

JOSEPH J. PERKINS, JR.
STOEL RIVES LLP
501 L Street,
Suite 500
Anchorage, AK 99501
(907) 277-1900
joseph.perkins@stoel.com

Counsel for Amici Curiae Alaska Miners Association, Inc., Alaska Oil and Gas Association, Alaska Chamber, Alaska Forest Association, Alaska Conservation Trust, Alaska Support Industry Alliance, Associated General Contractors of Alaska, Council of Alaska Producers, and Resource Development Council for Alaska, Inc.