No. 17-949

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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Alaska National Interest Lands Conservation Act prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private land physically located within the boundaries of the National Park System in Alaska.

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 37.3(a), Pacific Legal Foundation (PLF) respectfully submits this amicus curiae brief in support of the Petitioner.[1]

PLF is the nation's most experienced public interest legal organization defending the constitutional principle of federalism in the arena of environmental law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases in this Court involving important issues of federalism, water law, and environmental regulation. *See*, *e.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018); *United States Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013); *Sackett v. EPA*, 566 U.S. 120 (2012); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009); *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cty. v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001).

This brief discusses the importance of cabining the federal reserved water rights doctrine and applying the "plain statement rule," to safeguard federalism and ensure public access to natural resources in Alaska and throughout the nation. This case is a matter of utmost significance for Alaska's

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[1] All parties have been given timely notice of PLF's intent to participate in this case as amicus curiae, and all parties have consented to the filing of this brief. PLF affirms under Rule 37.6 that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than PLF, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

residents, who are prevented from accessing many of their State's waterways with effective craft such as hovercraft, as a result of the decision below. More broadly, the decision below is applicable nationally insofar as it holds, in reliance on an erroneous Ninth Circuit precedent, that National Parks generally have appurtenant implied reserved water rights resulting from those Parks' conservation purposes.

SUMMARY OF ARGUMENT

As a result of the Ninth Circuit's decision in this case and its prior erroneous decision in *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995), the Park Service has been granted implied federal reserved water rights, not just in Alaska but effectively nationwide, for protection of the conservation purposes of the National Parks. This will disrupt use of State-owned navigable waterways wherever they transit National Parks and potentially other federal enclaves, upending Congress' normal respect for and restraint toward state regulation of natural resources and use of waters. The harm in this particular case will certainly spread to all National Parks in the lower 48. Here, the Park Service has asserted sweeping authority to regulate hovercraft travel for any purpose, including recreational and subsistence hunting and fishing, on most of Alaska's waterways. Given the importance of river travel in Alaska's many remote areas, and the role of hovercraft in that task, this amounts to a federal takeover of transportation management in much of Alaska. The Ninth Circuit upheld the Park Service's prohibition on traveling with a hovercraft on the Nation River despite this Court's precedent, which clearly establishes three principles that should control here: (1) States retain

primary authority over regulation of waterways within their borders; (2) federal legislation will not be construed to displace the States' authority over regulation of waters in the absence of a plain statement from Congress that such displacement is intended; and (3) courts will not find implied federal reserved water rights that allow for federal regulation of State-owned waterways without a clear statutory basis for establishing and quantifying those rights.

The decision below conflicts with all three rules. The Ninth Circuit upheld expansive federal regulation of the use of hovercraft on Alaska's waterways without clear direction from Congress in the Alaska National Interest Lands Conservation Act (ANILCA), or any statutory basis for determining whether ANILCA reserved water rights to the Park Service. Now, as a result of the lower court's opinion, Alaska residents find that they no longer enjoy full access to their State's waterways, despite State laws allowing such access. By extension, similar crises will migrate to all the units of the National Park system, nationwide. The crisis in federalism presented in this case demands this Court's action to restore balance.

In addition to reversing the decision below, this Court should abrogate the Ninth Circuit's decision in *Alaska v. Babbitt*, which is the source of the mischief in this case on the issue of federal reserved water rights.

ARGUMENT

The authority to regulate navigable waters is among the most fundamental powers reserved to each State. *United States v. Alaska*, 521 U.S. 1, 5 (1997) (holding power to control navigation is "essential

attribute of sovereignty"); *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (acknowledging State sovereignty over natural resources).

Since the passage of ANILCA, however, the federal government has loomed large over Alaska's natural resources. 16 U.S.C. § 3101, et seq. *See*, *e.g.*, *John v. United States*, 720 F.3d 1214, 1223 (9th Cir. 2013) (upholding subsistence hunting and fishing regulations under ANILCA). The regulation at issue is being applied to prevent Alaskans from accessing non-federal land in either side of federal enclaves via State-owned waterways. The Ninth Circuit's holding that the existence of a federal reserved water right under ANILCA in the Nation River allows such regulation is applicable to all Alaska navigable waterways that transit National Parks and other federal enclaves established by ANILCA. The hovercraft regulation thus impacts travel on all navigable and non-navigable waters within and appurtenant to 34 federal areas in Alaska, accounting for a large portion of the State. But such waters should fall only under the regulatory purview of the State of Alaska. It is well-established that the State owns the land underlying those waters. *Alaska*, 521 U.S. at 5 ("[N]ew States are admitted to the Union on an 'equal footing' with the original 13 Colonies and succeed to the United States' title to the beds of navigable waters within their boundaries."). And, as this Court has held, a State's authority to govern the use of its navigable waters is a fundamental aspect of sovereignty. *Id.*; *United States v. Oregon*, 295 U.S. 1, 14 (1935); *Coyle v. Smith*, 221 U.S. 559, 573 (1911). The Ninth Circuit, however, concluded that ANILCA supersedes Alaska's authority over its own navigable

waterways through the federal implied reserved water rights doctrine. *Sturgeon v. Frost*, 872 F.3d 927, 932-35 (9th Cir. 2017) (Ninth Circuit bound by its prior decision in *Alaska v. Babbitt* to recognize federal reserved water right in Nation River arising under ANILCA).

This case involves two supremely important questions of law that affect the balance of State and federal authority: may the federal government intrude on traditional State sovereign rights without a plain statement from Congress that such intrusion is intended; and does the federal reserved water rights doctrine award unlimited authority to federal agencies to regulate State resources?

I

CONSTRUING ANILCA TO TAKE OVER ALASKA'S WATERWAYS CONFLICTS WITH THIS COURT'S OPINIONS REGARDING CONGRESSIONAL INTENT

The hovercraft rule infringes on Alaska's traditional authority to regulate navigation on the State's waters. But it is not clear that Congress intended ANILCA and the hovercraft rule to apply to State-owned waterways at all. Moreover, this Court has on many occasions held that States retain authority to regulate the use of navigable waters, unless Congress enacts laws that plainly demonstrate an intent to supersede State regulation. *Solid Waste Agency*, 531 U.S. at 172-74; *Montana v. United States*, 450 U.S. 544, 552 (1981); *see Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); *United States v. Bass*, 404 U.S. 336, 349-50 (1971); cf. *John v. United States*, 247

F.3d 1032, 1044 (9th Cir. 2001) (en banc) (Kozinski, J., dissenting). The Ninth Circuit's opinion upholding the hovercraft rule conflicts with this Court's opinions applying the plain statement doctrine where federal regulations threaten to upset the distribution of power between State and federal authorities.

In *Solid Waste Agency*, this Court explained that it will not afford deference to a federal agency's interpretation of a statute when that interpretation "alters the federal-state framework by permitting federal encroachment upon a traditional state power." 531 U.S. at 173 ("'[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.'") (quoting Bass, 404 U.S. at 349). *Solid Waste Agency* involved the Army Corps of Engineers' attempt to extend federal Clean Water Act jurisdiction to non-navigable, isolated, intrastate waters through a policy called the "migratory bird rule." 531 U.S. at 164. Applying the plain statement doctrine, the Court rejected the migratory bird rule, because it was not clear that the text of the Clean Water Act encompassed such a rule, and the rule would "result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174 (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)).

The Court reaffirmed the *Solid Waste Agency* principle in a unanimous opinion in *Tarrant Regional Water District v. Herrmann*, 133 S. Ct. 2120 (2013). There, the Court held that "ownership of submerged land, and the accompanying power to control navigation, fishing, and other public uses of water, 'is an essential attribute of sovereignty' " for each State.

Id. at 2132 (quoting *Alaska*, 521 U.S. at 5). The Court thus ruled that a "strong presumption" applies against defeat of State regulation of navigable waters. *Id.* (quoting *Montana*, 450 U.S. at 552).

Applying the plain statement rule in this case demonstrates that the Court should reverse the lower court's opinion. Whether ANILCA applies to Alaska's waterways is not plainly discernable from the statute. *Babbitt*, 72 F.3d at 701-02. ANILCA does not address navigable waters; instead, the statute focuses on "public lands." 16 U.S.C. § 3102. The Ninth Circuit has held that "public lands [under ANILCA] are lands, waters, and interests therein, the title to which is in the United States." *Babbitt*, 72 F.3d at 702 (emphasis added). But the Ninth Circuit's *Babbitt* definition only muddies the waters. As Judge Kozinski wrote in dissent in *John v. United States*, 247 F.3d at 1047, ANILCA does not clearly create any interest in which the United States holds "title." In fact, even if ANILCA did reserve some water rights to the federal government—a disputed contention here—the government's interest in those rights is only usufructuary; it does not give the United States title to anything, and, therefore, does not mean the hovercraft rule applies to State-owned waterways. "[T]he United States cannot hold title to . . . reserved water rights." *Totemoff v. Alaska*, 905 P.2d 954, 965 (Alaska 1995) (contrasting property interests in which title can be held with other interests in property).

ANILCA does not clearly establish that the hovercraft rule applies to State-owned waterways in Alaska. In such circumstances, this Court has instructed lower courts to construe federal statutes so as not to invade State sovereignty. The Ninth Circuit

did the opposite by construing ANILCA to apply to Alaska's waterways. That decision conflicts with this Court's opinions applying the plain statement rule, and the Court should therefore reverse.

II

CONSTRUING ANILCA TO TAKE OVER ALASKA'S WATERWAYS IMPERMISSIBLY EXPANDS THE IMPLIED RESERVED WATER RIGHTS DOCTRINE

The Ninth Circuit upheld the hovercraft rule based on the notion that the implied reserved water rights doctrine allows the Respondents to control Alaskan waters where they run through or next to federal areas created by ANILCA. *Sturgeon*, 872 F.3d at 932-35. However, the lower court's decision conflicts with this Court's opinions on the reserved water rights doctrine in two fundamental respects: this Court has never applied the doctrine in the absence of a clear statutory basis for identifying and quantifying federal water rights; and this Court has never implied the reservation of a federal water right by applying *Chevron*[2] deference to an agency's interpretation of the applicable statute, as the Ninth Circuit did in its prior decision in *Alaska v. Babbitt*, which the panel below insisted it was bound by.

The federal reserved water rights doctrine is based on the principle that Congress, when granting a federal agency "the power to reserve portions of the federal domain for specific federal purposes,"

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[2] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).

authorizes the reservation of rights to appurtenant water "'to the extent needed to accomplish the purpose of the reservation.'" *United States v. New Mexico*, 438 U.S. 696, 700 (1978) (quoting *Cappaert v. United States*, 426 U.S. 128, 138 (1976)). The doctrine is subject to important limits. Critically, this Court has explicitly held that courts may find implied federal reserved water rights only upon careful examination of the statutory text and legislative history of the act that set aside the federal land in question. *New Mexico*, 438 U.S. at 700-02; *Cappaert*, 426 U.S. at 139-41. And there is no basis in this Court's jurisprudence for relying on or even considering a federal agency's interpretation of such legislation when determining whether federal water rights have been reserved. *New Mexico*, 438 U.S. at 715 (a federal reserved water right will not be implied when statutory text and legislative history are unclear). Quite the opposite: for *Chevron* deference to apply, the interpreted statute must be ambiguous, which automatically defeats the federal government's claim of an implied reserved water right. The moment the Ninth Circuit found itself, in *Alaska v. Babbitt*, discussing the views of the administering bureaucracy, it should have stopped and ruled against the government as to implied reserved water rights.

In *Cappaert*, the federal government sought to enjoin groundwater pumping by private parties on land near the Devil's Hole National Monument in Nevada, on the basis that the pumping impaired an implied federal reserved water right that was necessary to protect the endangered pupfish, which lives in a subterranean pool within the Monument. 426 U.S. at 135. In resolving the claim in favor of the United States, the Court examined the proclamation

reserving Devil's Hole itself, without reference to any agency interpretation of the proclamation or related statutes. *Id.* at 139-40. The Court held that the implied reserved water rights doctrine only extends to the "amount of water necessary to fulfill the purpose of the reservation, no more." *Id.* at 141 (citing *Arizona v. California*, 373 U.S. 546, 600-01 (1963)). The Court also examined the entire proclamation to determine that the amount of water reserved was the amount necessary to preserve the pupfish, and that the pool could be allowed to drop to just above that level without impairing the federal water right. *Cappaert*, 426 U.S. at 141.

In *New Mexico*, the Court affirmed a decision of the New Mexico Supreme Court that denied the United States Forest Service's claim to implied reserved water rights in the Gila National Forest for recreation, aesthetics, wildlife preservation, and cattle grazing. 438 U.S. at 697. The Court recalled that in all prior implied reserved rights cases where such a right was recognized, it had "carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated." *Id.* at 700 (footnote omitted; emphasis added). "Careful examination" was necessary for two reasons: the claimed right was implied by the statute, rather than expressed therein, and there is a strong and near invariable history of congressional deference to state water law. *Id.* at 701-02. The Court reemphasized its caution that the implied reserved water rights "doctrine [is] built on implication and is an exception to Congress' explicit deference to state water law in other areas. Without legislative history to the

contrary, we are led to conclude that Congress did not intend . . . to reserve water . . . ." *Id.* at 715 (footnote omitted).

In stark contrast to *Cappaert* and *New Mexico*, the Ninth Circuit's opinion in *Alaska v. Babbitt*, relied upon in the opinion below, conceded that there is no clear statutory basis for a federal reservation of water rights in ANILCA, but then deferred to the federal Respondents' assertion that ANILCA impliedly reserved an indeterminate amount of water to the federal government. *Alaska v. Babbitt*, 72 F.3d at 702, *id.* at 703-04; *see also John v. United States*, 720 F.3d at 1221. Furthermore, in another case relying on *Alaska v. Babbitt*'s reserved water right holding, the Ninth Circuit left it up to the Park Service to quantify those rights. *John v. United States*, 720 F.3d at 1222. Yet this Court's opinions foreclose federal agencies from asserting reserved water rights where statutory text and legislative history do not clearly establish congressional intent to reserve such rights. *New Mexico*, 438 U.S. at 715.[3]

Alaska v. Babbitt also conflicts with state court decisions analyzing the scope of the federal reserved water rights doctrine. In *Potlatch Corp. v. United States*, 12 P.3d 1260 (Idaho 2000), the Idaho Supreme Court held that various congressional acts reserving wilderness areas in the State of Idaho did not

[3] The Ninth Circuit has gone so far as to significantly recast this Court's test for implied reservations of water rights, *i.e.*, that the water use in question be "necessary" to prevent the complete frustration of the reservation's purpose, to merely whether the reservation "envisions the use of water." *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 849 F.3d 1262, 1268-70 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 468 (2017).

impliedly reserve any water rights to the federal government. *Id.* at 1268. The court expressly limited its examination to the relevant statutory text and legislative history. *Id*. at 1266, 1268. The *Potlatch* court also considered the absence of any "standard by which quantification of the amount of water could be determined" as indicative that no water was impliedly reserved. *Id*. at 1266. *Alaska v. Babbitt* directly conflicts with *Potlatch* by finding an implied reserved right where the Ninth Circuit conceded that the statute and legislative history alone did not support such a finding. *John*, 720 F.3d at 1221 n.41 (citing *Babbitt*, 72 F.3d at 702). *Alaska v. Babbitt* also contradicts *Potlatch* by finding an implied reserved right in the absence of any statutory basis for quantifying the right. *John*, 720 F.3d at 1222 (holding federal agencies responsible to identify scope of waters subject to implied reserved right).

Potlatch also demonstrates why an implied reservation of water rights in the Nation River is not necessary for the conservation purposes of the Yukon-Charley National Park or other federal conservation units. *Potlatch* holds that because the Wilderness Act itself regulates, and largely outright prevents, the land uses that are necessary to divert and convey water in order to appropriate water rights from sources within designated wilderness areas, no reservation of water is necessary to avoid the frustration of any wilderness area's primary purpose. 12 P.3d at 1266-67. This principle applies equally to the supposed federal reserved water right in this case. The purposes of the land reservation which the Ninth Circuit relied upon below are for conservation of the natural resources within the Park units. *Sturgeon*, 872 F.3d at 934 (citing ANILCA's purpose of

protecting scenic, natural, cultural and environmental values). Given the Park Service's broad ability to regulate the construction of new diversion works and rights of way through the National Parks it regulates, *San Juan County, Utah v. United States*, 754 F.3d 787, 791 (10th Cir. 2014) (reservation of Canyonlands National Park prevented new rights of way across Park), no reservation of water is necessary to prevent significant water diversions from frustrating ANILCA's scenic, natural, cultural, and environmental purposes.

Alaska v. Babbitt is also at odds with the decision of the Colorado Supreme Court in *United States v. Jesse*, which ruled that the United States Forest Service was not foreclosed by *New Mexico* from trying to prove its claim for implied reserved water rights for the Pike and San Isabel National Forests, based upon the primary purpose of the Forest Service Organic Act. 744 P.2d 491, 494 (Colo. 1987). The Colorado Supreme Court, sitting in review of a lower court grant of summary judgment against the Forest Service, remanded the case to the state's water court with clear instructions that such a claim was subject to "strict scrutiny" of the statutory purposes of the reservation. *Id.* at 503 (citing *New Mexico*, 438 U.S. at 700). *Jesse*, relying on *New Mexico*, also required that any implied reserved water right must be strictly limited to the amount necessary to prevent the entire defeat of the forest reservation. *Jesse*, 744 P.2d at 503. *Alaska v. Babbitt* and its progeny fall well short of either "strict scrutiny" or "careful examination" in finding implied reserved water rights in ANILCA. Rather than conducting any such searching inquiry, *Alaska v. Babbitt* simply asserts that ANILCA does the job, and any holes in the required analysis should

be filled in with judicial deference to agency interpretation. *Babbitt*, 72 F.3d at 703; *John*, 720 F.3d at 1221-22.

CONCLUSION

The Court should abrogate *Alaska v. Babbitt*'s holding as to implied reserved water rights, and reverse the decision below.

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Respectfully submitted,

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