No. 22-401

In The Supreme Court of the United States

STATE OF ALASKA,

Petitioner,

v.

DEB HAALAND, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT SAFARI CLUB INTERNATIONAL IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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November 30, 2022

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QUESTION PRESENTED

When a federal agency preempts state law in an area of traditional state regulation, some Congressional action must provide a "clear indication that Congress intended that result." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–72 (2002). In the Alaska National Interest Lands Conservation Act ("ANILCA"), Congress did not provide such an authorization; rather, Congress expressly preserved the State of Alaska's "responsibility and authority" for "management of fish and wildlife on the public lands." 16 U.S.C. § 3202(a).

Despite this provision of ANILCA, the U.S. Fish and Wildlife Service ("Service") claimed authority to preempt the State's management of brown bears and the regulation of the hunting of brown bears on the Kenai National Wildlife Refuge in a 2016 regulation that prohibited one method of harvest (hunting bears over bait). The U.S. District Court for the District of Alaska and the Ninth Circuit Court of Appeals upheld the Service's action. The Ninth Circuit held that the Service properly exercised its "plenary authority" to "manage[ ] the public lands" in Alaska and to adopt regulations as part of that management. Petitioner's Appendix ("Pet. App.") 16–17 (citing 16 U.S.C. § 3202(b) & (c)). The Ninth Circuit distinguished a 2017 Congressional resolution which voided a similar restriction on the hunting of bears over bait on refuges across the State. Pet. App. 20. The effect of the Ninth Circuit's ruling is the

QUESTION PRESENTED—Continued

diminishment of State wildlife management authority—without clear statutory authority to do so, and in spite of contrary statutory authority reserving wildlife management to the State.

The question presented is:

Does the Alaska National Interest Lands Conservation Act include a clear statement from Congress granting the Service the authority to preempt State regulation of the method and means of hunting?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Safari Club International submits the following Corporate Disclosure Statement:

Safari Club International is a nonprofit corporation incorporated in the State of Arizona, operating under § 501(c)(4) of the Internal Revenue Code. Safari Club International is not publicly traded and has no parent corporation. No stock is issued, thus no publicly held corporation owns 10 percent or more of its stock.

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INTRODUCTION

This case challenges the U.S. Fish and Wildlife Service's ("Service") actions to upset the careful balance between state and federal authority with respect to wildlife management on federal lands in Alaska. In 2016, the Service adopted a regulation that preempted the State of Alaska's authorization of the hunting of brown bears over bait on the Kenai National Wildlife Refuge ("Kenai Refuge") in Alaska. 81 Fed. Reg. 27030 (May 5, 2016) ("Kenai Rule"). The U.S. District Court for the District of Alaska upheld the Service's actions, and the Ninth Circuit Court of Appeals affirmed. Pet. App. 55–135 (district court opinion), 1–43 (Ninth Circuit opinion).

The Ninth Circuit adopted a position of extreme deference to federal authority. That position runs counter to statute and precedent. State trustee responsibility for conservation and management of natural resources, including wildlife, exists for all states and is only diminished by specific acts of Congress. The Ninth Circuit's holding that the Service exercises "plenary authority" over management of public lands in Alaska, and that plenary authority allows the Service to preempt State of Alaska regulations which sought to manage wildlife through hunting (Pet. App. 16–17), is unsupported. In the Alaska National Interest Lands Conservation Act ("ANILCA"), Congress preserved the State's "responsibility and authority . . . for management of fish and wildlife on public lands." 16 U.S.C. § 3202(a). Although ANILCA's language is clear, the Ninth Circuit has read an ambiguity into it. But

legislative history confirms the clear statement of Congress' intent to leave the management of wildlife with the State on all lands, including public lands.

Moreover, Congress recently reaffirmed its intent to protect the State's traditional authority to manage wildlife on all lands within its borders. In 2017, under authority of the Congressional Review Act ("CRA"), Congress nullified a Service regulation that prohibited the hunting of brown bears over bait on National Wildlife Refuges in Alaska. Again, while Congress' intent was clear, legislative history again confirms Congress' intent to preserve the balance between state and federal authority in Alaska, in which the State manages wildlife and the federal government manages habitat.

ANILCA recognizes that the federal government may step in to protect the conservation of species on the Kenai Refuge (as well as to protect the subsistence priority, but that is not at issue in this case). ANILCA, Pub. L. No. 96-487, § 303(4) (Dec. 2, 1980). But in adopting the Kenai Rule, and restricting only one method of harvest, the Service lacked any such conservation basis.

The Ninth Circuit's opinion ignores the clear statement of Congress and empowers federal agencies in Alaska to unprecedented levels of overreach simply because the agency staff disagrees with a State wildlife management decision. That is not the system established by Congress in ANILCA. This Court should grant the State of Alaska's petition for writ of certiorari and,

once again, correct the Ninth Circuit's erroneous interpretation of ANILCA.[1]

STATEMENT OF THE CASE

1. In 1941, President Franklin Roosevelt set aside 1.68 million acres as the Kenai National Moose Range to "protect[] the natural breeding and feeding range of the giant Kenai moose on the Kenai Peninsula. . . ." 6 Fed. Reg. 6471 (Dec. 18, 1941). In 1980, ANILCA renamed the moose range as the Kenai National Wildlife Refuge ("Kenai Refuge") and expanded its size by almost 240,000 acres. ANILCA also added further purposes for the Refuge. In ANILCA, Congress expanded or created 16 National Wildlife Refuges in Alaska; for the Kenai Refuge alone, Congress included a specific purpose to provide "opportunities for fish and wildlife-oriented recreation." ANILCA, § 303(4)(B)(v).

2. Under Alaska law, the Board of Game ("Board") has responsibility and authority to manage wildlife resources. The Board's duties include to "provide for the conservation and development [of wildlife]" and to regulate hunting of wildlife. Alaska Stat. §§ 16.05.221(b), 16.05.255.

3. The Board adopts regulations for hunting and wildlife management through a participatory process

[1] This Court has recently overturned two Ninth Circuit decisions related to the interpretation of ANILCA and the authority the law provides to federal agencies: *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019); *Sturgeon v. Frost*, 577 U.S. 424 (2016).

which includes at least one annual meeting, proposals from the public, public comment, and scientific data and input from the Alaska Department of Fish and Game. Alaska Stat. §§ 16.05.255, 16.05.300.[2]

4. Prior to 2010, the Kenai Peninsula brown bear population was estimated at 250–300 bears. C.A. 3-ER-344. In 2010, the Kenai Refuge conducted a field study of the brown bear population and prepared an estimate of the Kenai Peninsula brown bear population. Based on sampling and modeling, the study estimated a population of at least 582 bears, with an annual growth rate of 3%.[3] C.A. 3-ER-307, 3-ER-344, 3-ER-346, 3-ER-381 (noting a population estimate of 624 brown bears); *see also* 81 Fed. Reg. at 27036. In 2012 and 2013, the Board received proposals to increase the harvest limit for brown bears on the Kenai Peninsula and to permit the hunting of brown bears over bait. These proposals were motivated by concerns about rising human-bear conflicts. *E.g.*, C.A. 3-ER-316 (the Board heard testimony from 54 citizens in support of reducing the brown bear population through hunting in order to mitigate

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[2] Information about the Board is also publicly available on its official website, of which this Court may take judicial notice: https://www.adfg.alaska.gov/index.cfm?adfg=gameboard.main. *See* Fed. R. Evid. 201; *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010) (holding it "appropriate to take judicial notice" of information "made publicly available by government entities").

[3] By the time the study results were released in 2013, the brown bear population likely grew by another 60 animals, assuming a growth rate of 3% per year. C.A. 3-ER-346 (noting 617 bears in 2012).

human-bear conflicts). After considering these data and input from the Alaska Department of Fish and Game and taking public comment, the Board raised the quota for brown bear in the Game Management Units on the Kenai Peninsula and broadened the methods of harvest to include hunting brown bears over bait. C.A. 3-ER-307–10, 3-ER-344; *see also* 81 Fed. Reg. at 27038. After two years, when the initial objective of reducing the bear population to a more conservative level was achieved, the Board reduced the harvest quota and added a secondary quota on the number of female brown bears that could be hunted. C.A. 3-ER-310–11; *see also* 81 Fed. Reg. at 27036.[4]

5. The Service opposed the 2013 change in regulations for brown bear hunting. It adopted a temporary closure of the Kenai Refuge to brown bear hunting. In May 2016, the Service published the Kenai Rule, which prohibits the hunting of brown bears over bait on the Kenai Refuge. 81 Fed. Reg. at 27030.

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[4] This history is also summarized in a draft Environmental Assessment ("EA") prepared in connection with a proposed rule to withdraw the restriction on hunting brown bears over bait. 85 Fed. Reg. 35628 (June 11, 2020); Docket No. FWS-R7-NWRS-2017-0058 (available on regulations.gov). The Court may take judicial notice that the proposed rule and draft EA exist, as they are government documents on official government websites. *Daniels-Hall*, 629 F.3d at 998–99. As reported in the draft EA, both hunting and non-hunting mortality declined since 2014; notably, the number of female brown bears killed (both hunting and non-hunting causes) has declined to an average of five per year from 2015 to 2018. Brown bear harvest data are published on the Alaska Department of Fish and Game official website, https://www.adfg.alaska.gov/index.cfm?adfg=brownbearhunting.harvest.

6. On August 5, 2016, the Service published a separate rule which prohibited certain hunting on all 16 National Wildlife Refuges in Alaska. 81 Fed. Reg. 52247 ("Refuges Rule"). Among other things, the Refuges Rule banned the hunting of brown bears over bait. 81 Fed. Reg. at 52252.

7. In 2017, Congress used its authority in the CRA to invalidate the Refuges Rule. The CRA "was designed to give Congress an expedited procedure to review and disapprove federal regulations" by passing a joint resolution within a certain 60-day period. *Ctr. for Bio. Diversity v. Bernhardt*, 946 F.3d 553, 556 (9th Cir. 2019) (citations omitted). "Once an agency's rule has been disapproved by joint resolution, the agency may not reissue the same rule 'in substantially the same form,' and may not issue 'a new rule that is substantially the same' as the disapproved rule. . . ." *Id.* at 556–57 (citation omitted). In 2017, Congress passed a joint resolution directing that the Refuges Rule has "no force or effect." *See* Pub. L. No. 115-50 (Apr. 3, 2017) ("CRA Resolution"). The Ninth Circuit upheld the CRA Resolution and held that Congress "validly amended [the Service's] authority to manage national wildlife refuges in Alaska." *Ctr. for Bio. Diversity*, 946 F.3d at 558.

8. On October 2, 2017, in light of the CRA Resolution, the Service published a notice of its intent "to initiate a rulemaking process that will consider changes to [the Kenai Rule]." 82 Fed. Reg. 45793. On June 11, 2020, the Service published a proposed rule that would have withdrawn the prohibition on hunting brown

bears over bait. 85 Fed. Reg. 35628. As part of this proposed rulemaking, the Service made publicly available a draft Environmental Assessment analyzing the environmental impacts of this alternative, which is available at Docket FWS-R7-NWRS-2017-0058 on www.regulations.gov.[5]

9. Respondent Safari Club International ("Safari Club") and Petitioner State of Alaska challenged the Kenai Rule (as well as the Refuges Rule and a third rule adopted by the National Park Service) in federal district court in Alaska. On November 13, 2020, the district court granted summary judgment in favor of Safari Club and the State in part and in favor of the Service in part. Pet. App. 134. Safari Club and the State appealed the district court's negative rulings to the Ninth Circuit, which affirmed in full. Pet. App. 10.

10. The State submitted a petition for certiorari to this Court which was placed on the docket on October 31, 2022.

[5] The Court may take judicial notice of this Draft EA under Fed. R. Evid. 201.

REASONS FOR GRANTING THE PETITION

I. ANILCA does not contain a clear statement of Congressional intent to subordinate the State's management of wildlife to the Service.

The Ninth Circuit's interpretation of ANILCA is not based on the statute's text and improperly credits the Service's regulations over Congress' words.

"Unquestionably the States have broad trustee and police powers over wild animals within their jurisdictions." *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976). Although "Congress may legislate in areas traditionally regulated by the States, . . . [t]his is an extraordinary power in a federalist system," and thus "a power that . . . Congress does not exercise lightly." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Where a federal agency seeks to regulate in areas of traditional state authority, there must be a "clear indication that Congress intended that result." *Solid Waste Agency*, 531 U.S. at 172–72 (holding that this Court assumes that Congress does not "casually authorize" administrative agencies to "alter[ ] the federal-state framework" through "federal encroachment upon a traditional state power").

The Ninth Circuit concluded that the Service has "plenary authority" to regulate the taking of wildlife on federal lands under the Property Clause of the U.S. Constitution. Pet. App. 16–17. But Congress did not delegate all of its Property Clause authority to the Service; Congress delegated its authority over wildlife

management to the State, even on federal lands. Section 1314(a) of ANILCA, titled "Taking of Fish and Wildlife," preserves "the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in [Title VIII]," the subsistence chapter. ANILCA, § 1314(a), codified at 16 U.S.C. § 3202(a).[6] It then confirms the federal government's "responsibility and authority . . . over the management of the public lands." ANILCA, § 1314(b), codified at 16 U.S.C. § 3202(b). The Ninth Circuit interpreted ANILCA to "give[ ] the State primary responsibility for the administration of its wildlife, but [the Service] manages federal lands in Alaska and regulates human activities therein." Pet. App. 10. Yet the statute says nothing about giving the Service authority to regulate human activities involving wildlife on public lands. In short, nothing in ANILCA provides a clear indication of Congressional intent to displace state law with respect to the State's traditional role as wildlife manager. Instead, ANILCA makes clear that it is the State, not the federal agency, which has authority to regulate the taking of wildlife.

Relying on Section 1314(c), which provides that "[t]he taking of fish and wildlife in all conservation system units . . . shall be carried out in accordance with the provisions of this Act and other applicable State

[6] Section 1314(a) of ANILCA provides one exception in which federal agencies may regulate the taking of wildlife: to protect the subsistence priority created in Title VIII of ANILCA, which is not at issue in this case. Section 1314(a) demonstrates that Congress knew how to provide a "clear indication" of its intent, and thus did not need to rely on the vague expression in Section 1314(c).

and Federal law," the Ninth Circuit held that "hunting within the Kenai Refuge is subject to federal law, including any regulations imposed by the Secretary of the Interior under its delegated statutory authority to manage federal lands." Pet. App. 17. Given the reservation of State authority in Section 1314(a), it seems *generally* applicable laws, like the Endangered Species Act, are what was meant.[7] To read this provision as Congress giving the Service authority to preempt state hunting regulations in favor of federal hunting regulations is circular. The Ninth Circuit erred because a court should not "rubber-stamp . . . administrative decisions that . . . [are] inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Nat. Res. Def. Council v. Pritzker*, 828 F.3d 1125, 1139 (9th Cir. 2016).

The Ninth Circuit's reading also ignores ANILCA's reference to "applicable State and Federal law" in Section 1314(c). If Congress meant for Section 1314(c) to authorize the Service to adopt its own hunting regulations and to preempt state regulations, why refer to State law in this final clause? The Ninth

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[7] As this Court noted in *Sturgeon*, legislative history for ANILCA "notes that state, Native, and private lands in the new Alaskan parks would be subject to '[f]ederal laws and regulations of general applicability,' such as 'the Clean Air Act, the Water Pollution Control Act, [and] U.S. Army Corps of Engineers wetlands regulations.' S. Rep. No. 96-413, p. 303 (1980)." 139 S. Ct. at 1085. Similarly, when President Carter signed ANILCA into law, he highlighted his Administration's environmental achievements, including strengthening the Clean Air and Clean Water Acts and the Coastal Zone Management Act.

Circuit's construction of ANILCA is "implausible" and produces a "topsy-turvy" result. *See Sturgeon*, 577 U.S. at 440. This Court should grant the State's petition for certiorari to correct the Ninth Circuit's misinterpretation of ANILCA.[8]

The Ninth Circuit's reasoning is also "topsy-turvy" in construing the scope of the CRA Resolution. Congress voided the Refuges Rule, which prohibited the hunting of brown bears over bait on all National Wildlife Refuges in Alaska. But for the Kenai Rule being a separate document, the prohibition on hunting of brown bears over bait at issue would also be void pursuant to the CRA Resolution. The Ninth Circuit's holding that the Kenai Rule and the Refuges Rule are not "substantively identical," because "[t]he Refuges Rule blanketly excluded the baiting of brown bears and

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[8] This Court should also review—and reject—the Ninth Circuit's reliance on the Alaska Statehood Act because it would produce a "topsy-turvy" result as well. The Ninth Circuit conceded that the Alaska Statehood Act "transferred administration of wildlife from Congress to the State," but stated that "this 'transfer [did] not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife' like the Kenai Refuge, which remain under federal control." Pet. App. 16. But at the time of statehood, the "Kenai Refuge" did not exist. The Kenai Moose Range, which was 240,000 acres smaller than the current Kenai Refuge, would be the only land "set apart as [a] refuge[ ]." ANILCA both expanded the size and the purposes of the Moose Range. If Congress had really intended to reserve plenary authority over the several refuges designated at the time of statehood, then that reservation would exist only as to the original Kenai Moose Range acreage. Reserving plenary authority as to part but not all of the Kenai Refuge would be nonsensical and extremely difficult to administer—an "implausible" outcome.

State predator control programs from all national wildlife refuges in Alaska," and the Kenai Rule "only forbids baiting of brown bears in the Kenai Refuge," Pet. App. 20, elevates form over substance. The fact that the Refuges Rule enacted the same substantive prohibition generally, and the Kenai Rule did it specifically, does not change Congress' intent in invalidating the agency action. In essence, the Ninth Circuit has held that Congress only disapproved of how the regulation was formulated, not what it does. That result is, again, "implausible."

Finally, the Ninth Circuit prioritized administrative interpretations of ANILCA over the statute itself. The court stated that "ANILCA operates such that the taking of wildlife on federal lands in Alaska is governed by state law unless it is further limited by federal law, 50 C.F.R. § 36.32(c)(1)(i), or 'incompatible with documented Refuge goals, objectives, or management plans.' 81 Fed. Reg. 27030, 27033 (May 5, 2016)." Pet. App. 10. Those citations are to Service regulations and the Kenai Rule itself—not the words of Congress. Relying on the challenged rule to justify the rule is a fundamental error. In addition to upsetting the balance struck in ANILCA, the Ninth Circuit erroneously empowers federal agencies to preempt state laws without a clear statement from Congress. The holding would allow the Service to upset the state-federal balance just because it claims that it can—not because Congress authorized it to do so. Given the incredible

amount of federal land in Alaska,[9] this Court should protect the State's wildlife management authority and the intent of Congress and correct the Ninth Circuit's erroneous ruling.

II. Through ANILCA and the CRA Resolution, Congress expressed a clear intent to preserve the State's wildlife management authority.

Although the Court need not resort to legislative history because the plain language of Section 1314(a) is clear, the Ninth Circuit's strained reading has muddled Congress' intent. But Congress' intent was clear in contemporaneous statements and has since been confirmed by Congressional action.

Congress spent years debating the law that became ANILCA. Several precursors were introduced in the mid-1970s before the first "Alaska National Interest Lands Conservation Act" (HR 39) was introduced in 1977. Throughout most of 1977, hearings were held in major cities in the "Lower 48" States and Alaska to take public input on the bill. Numerous amendments and compromises were considered and adopted before

[9] There are 16 refuges totaling over 76 million acres in Alaska, in addition to National Preserves, National Parks, national forests, and additional federal lands governed by the Bureau of Land Management and other agencies. *See*, *e.g.*, https://www.fws.gov/about/region/alaska.

the final bill was passed by the House in November 1980.[10]

The Ninth Circuit's holding that the Service has "plenary authority" on the Kenai Refuge ignores ANILCA's historical context, which sheds light on the Congressional intent behind Section 1314. Congress enacted ANILCA after months of public meetings, which instilled a deep understanding of the importance of natural resources to the "Alaskan life-style." 126 Cong. Rec. 29023 (1980). Thus, ANILCA reflects a negotiated compromise between preserving natural landscapes and wildlife in Alaska and giving Alaskans the opportunity for economic development and use of natural resources, including for hunting. Pub. L. No. 96-487, § 101(b), (d). The Ninth Circuit's finding that Congress retained and then delegated "plenary authority" over wildlife management in Alaska disregards that "carefully drawn balance." *Sturgeon*, 139 S. Ct. at 1084.

The legislative history reflects Congress' understanding of this balance and Congress' intent that wildlife management authority remain with the State. For example, the Senate Report on Section 1314 of ANILCA states: "This section . . . preserves the status quo with regard to the responsibility and authority of the State to manage fish and wildlife, and reconciles this authority with the Act, including the subsistence

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[10] *See* Seiberling Chronology, available in the papers of Rep. John Seiberling through the Denver Public Library; S. Rep. No. 96-413, 134, 1980 U.S.C.C.A.N. 5070, 5078–79 (dated Nov. 14, 1979, a year before the final bill was passed).

title. At the same time, the section confirms the status quo with regard to the authority of the Secretary to manage the wildlife habitat on federal lands." S. Rep. 96-413, 308, 1980 U.S.C.C.A.N. 5070, 5252. Thus, Congress intended the Service to have authority to manage habitat—not methods of hunting.

Congress had already agreed that hunting would unquestionably be permitted throughout the newly designated conservation system units, and the State would retain its traditional authority to regulate that hunting. During one exchange, Rep. Hughes from New Jersey questioned Rep. Young from Alaska about an amendment that could potentially be read to suggest that federal agencies had authority to regulate hunting guides. Rep. Young made clear that he would "not offer the amendment," and the purpose of this was to ensure that guided hunting remained open:

> The take, the method, the bag limit, and the season are supervised by the State of Alaska, as other states do, also. The problem we have here is that it is permissive [for the Department of the Interior to allow guided hunting] . . . This is an attempt to not give the Secretary the discretion to say, "No, you cannot hunt in there anymore," regardless of whether the state itself says it is all right.

Hearing on H.R. 2219 before the Subcomm. on Fisheries and Wildlife Conservation and the Environment, 96th Cong. 12 (Mar. 29, 1979) (Rep. Young).

As another example, during a hearing in 1979, House Subcommittee Chair Seiberling declared that ANILCA, "not only protect[s] the State of Alaska's right to manage fish and game but will be the first time in history that any statute has actually preserved those rights which traditionally existed as a matter of practice and custom rather than being in any Federal statute." Hearing on Alaska National Interest Lands Conservation Act of 1979 before the Comm. on Interior and Insular Affairs, 96th Cong. 427 (Feb. 8, 1979) (Rep. Seiberling). And in a list of amendments needed in the House version of ANILCA to align it with the Senate version, Alaska Sen. Ted Stevens stated that "protection of the 'Alaskan Lifestyle,'" and "maintenance of the present division of responsibility between State and Federal governments for management of fish and wildlife," were important additions. 126 Cong. Rec. at 29023.

Decades after adoption of ANILCA, the legislative history of the 2017 CRA Resolution confirms, not only Congress' understanding of the division of authority in ANILCA, but Congress' desire to maintain the division of authority between the Service and the State. For example, Rep. Young of Alaska began debates reminding the House that:

> This House created the State of Alaska in 1959, under the Statehood Act. It clearly granted Alaska full authority to manage fish and game on all lands in the State of Alaska, including all Federal lands. The Alaska National Lands Conservation Act in 1980

> further, in fact, verified what the Statehood Act did: protecting the right of the State to manage fish and game.

163 Cong. Rec. H1259, H1260 (daily ed. Feb. 16, 2017). Likewise, introducing the Resolution in the Senate, Sen. Sullivan of Alaska noted that "[t]he Alaska Statehood Act . . . specifically grant[ed] Alaska the authority to manage fish and wildlife on not only State lands but on Federal lands, unless Congress passes a law to the contrary. . . ." 163 Cong. Rec. S1864 (daily ed. Mar. 21, 2017). Turning to ANILCA, Sen. Sullivan noted that:

> Many Alaskans didn't like this bill. Several saw this as a massive Federal usurpation of our land, but our congressional delegation fought to include explicit provisions in this Federal law that made it abundantly clear that the State of Alaska still had primacy in managing fish and game throughout the entire State—State lands and Federal lands.
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> When that act was passed, it explicitly stated: "Nothing in this act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for the management of fish and wildlife on public lands. . . ."
>
> That is pretty clear language, and it is very important language to Alaskans.

Id. Such sentiments were echoed throughout the House and the Senate during debates. *See*, *e.g.*, 163 Cong. Rec. at H1261 (statement of Rep. Duncan, representing the Congressional Sportsmen's Caucus: "[the rule] violated the clear letter of the Alaska Statehood Act, the

Alaska National Interest Lands Conservation Act, and the National Wildlife Refuge System Improvement Act"); 163 Cong. Rec. at H1262 (statement of Rep. McClintock, Chair of the Subcommittee on Federal Lands: "As part of [ANILCA], the State agreed to several national wildlife refuges within its borders. In exchange for the Federal Government assuming control of these lands, Alaska was given explicit authority to manage its wildlife populations"); 163 Cong. Rec. at S1868 (statement of Sen. Murkowski: "Alaska holds legal authority to manage the fish and wildlife within its borders. This is clear. This is unambiguous. Congress explicitly provided that authority specifically to our State in not one, not two, but three separate laws.").

In sum, the Ninth Circuit's holding, which allowed a federal agency to overreach the State's authority to manage wildlife, contradicts the intent of Congress during both the debate over ANILCA, and Congress' intent in invalidating the Refuges Rule. This Court should grant the State's petition for certiorari to safeguard the intent of Congress and the State's traditional authority to manage wildlife. The Court's review is critical because the federal district court in Alaska has applied the Ninth Circuit's erroneous ruling to improperly limit the State's authority. *Alaska Wildlife All. v. Haaland*, No. 3:20-CV-209, Dkt. 103 (Sept. 30, 2022). Unless this Court again corrects the Ninth Circuit's misunderstanding of ANILCA, the statute will be far more limited than Congress intended.

III. The Court should grant the State's petition to preserve the State's use of an important method of harvest.

Hunting is an important tool to manage wildlife, including large predator species like bears. State wildlife managers use hunting to help keep predator and prey populations in balance and reduce human-wildlife conflicts.

Hunting over bait is used to both enhance hunting's role as a management tool and to allow more certainty in the hunted animal. The use of bait allows a hunter more time to observe the animal. This can, at times, make the hunt more effective, but it also allows the hunt to be more selective about the size, age, and sex of the bear being targeted.[11] Research has found that the use of bait can assist in targeting "nuisance" bears, and potentially reduce human-bear conflicts. "Particularly where hunters use bait to attract bears, a general hunting season can be biased to some degree towards the same bears who are, at other times of year, most attracted to baits and indifferent to or conditioned to human activity [i.e., "problem" bears]."[12] These facts help explain why the Board chose to authorize the hunting of brown bears at black bear

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[11] *E.g.*, Hristienko & McDonald, Going into the 21st century: a perspective on trends and controversies in the management of the American black bear, Urus 18(1):72-88 (2007).

[12] International Association for Bear Research and Management, Hunting as a Tool in Management of American Bear Populations (Mar. 20, 2017), available at https://www.bearbiology.org/iba-publications/iba-letters-statements/.

baiting stations on the Kenai Peninsula, and how the use of bait helps the State achieve its wildlife management objectives. Notably, however, the use of bait is a method of harvest; it does not change the actual hunting quota set by the Board, which is the limit on the number of bears that can be harvested and represents the State's ultimate management goals.

This Court should grant the State's petition because the Ninth Circuit's ruling allows federal land managers to obstruct state harvest management, simply because they disagree with the method of harvest being employed by the State. The Service conceded in the Court below that it could not change the State's harvest quota for brown bears. The Service characterizes the use of bait as controversial,[13] which is a value judgment, not a scientific one. The Kenai Rule represents an unsupported federal overreach of state wildlife management authority, simply because the Service did not like how the State chose to achieve its management objectives.

[13] *E.g.*, C.A. 1-ER-36 (citing 3-ER-342, 3-ER-339), 3-ER-351.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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