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

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 13 OTHER STATES IN SUPPORT OF PETITIONER

PATRICK MORRISEY
Attorney General
OFFICE OF THE WEST VIRGINIA ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
lindsay.s.see@wvago.gov
(304) 558-2021

LINDSAY S. SEE
Solicitor General
Counsel of Record

MICHAEL R. WILLIAMS
Senior Deputy Solicitor General

SPENCER J. DAVENPORT*
Special Assistant

MAX A. SCHREIBER**
Fellow

Counsel for Amicus Curiae *State of West Virginia*
[additional counsel listed after signature page]

QUESTION PRESENTED

Does the Department of the Interior have "plenary" authority to preempt a State's law and regulate hunting practices as it sees fit, where Congress passed laws that expressly sought to preserve the State's traditional powers over wildlife and even passed a joint resolution of disapproval in response to a similar agency effort to preempt the State's hunting regulations?

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

As creatures of statutes, agencies hold only the powers that Congress gives. So when Congress speaks, agencies must listen. And when an agency tries to override a State's laws—particularly in an area that the States traditionally control—the agency needs to act with even more care. It "literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Merck Sharp & Dohme Corp.* v. *Albrecht*, 139 S. Ct. 1668, 1679 (2019) (cleaned up).

This case shows what goes wrong when an agency forgets.

The problems stem from the Alaska National Interest Lands Conservation Act. Congress passed ANILCA to protect national interests in wildlife on federal lands in Alaska while preserving Alaska's own time-honored authority over wildlife management throughout its borders. Pet.9. Combined with other, earlier laws, ANILCA delegates limited power to manage animals on federal lands to the Department of the Interior. Pet.6-9. Interior administers that authority through both the Fish and Wildlife Service and the National Park Service.

But Interior has read its ANILCA authority too broadly. As Alaska's Petition explains, five years ago Congress was forced to step in through the Congressional Review Act: It disapproved a Fish and Wildlife regulation that banned bear-baiting in Alaskan federal wildlife refuges. Pet.14. The National Park Service got the

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[*] Under Supreme Court Rule 37.2(a), *amici* timely notified counsel of record of their intent to file this brief.

message, pulling back on a bear-baiting regulation covering National Park Preserves. Fish and Wildlife, on the other hand, has continued to cling to a separate regulation governing bear-baiting in the Kenai National Wildlife Refuge. Although Alaska state laws allow that kind of hunting, Fish and Wildlife won't give. So in the nearly two million acres of Alaskan land comprising the refuge, Interior is enforcing a bear-baiting ban that both Congress and Alaska have expressly rejected—and the Ninth Circuit said that was fine.

The Court should grant certiorari to reinvigorate two important constraints on agency power. First, the Congressional Review Act and the resolutions that flow from it have teeth. Yet as the decision below shows, courts have often found creative ways to avoid giving CRA resolutions any real effect. And second, a federal agency deserves little-to-no deference when it purports to preempt state law, particularly when its regulation intrudes into a traditional place of state power. Bureaucratic preferences should not count for much when co-sovereign interests are at stake.

The *Amici* States—the States of West Virginia, Alabama, Arkansas, Indiana, Kentucky, Louisiana, Montana, New Hampshire, Ohio, Oklahoma, South Carolina, Texas, Utah, and Wyoming—recognize that federal regulations sometimes prevail over contrary state law. But that result should only follow when Congress clearly intends it, and the circumstances here show nothing of the sort. The Court should therefore grant the Petition and reverse. It should remind Interior—all federal agencies, really—that preemption requires Congress's clear will.

SUMMARY OF ARGUMENT

I. Too often, courts undercut the Congressional Review Act. Many have signed off on questionable agency workarounds despite Congress's plainly expressed intent that the agency should not move forward. Here, the Ninth Circuit indulged Interior by amending the CRA's text on the fly. Some courts have gone as far as refusing the power to review agency actions for consistency with CRA joint resolutions at all. Either tactic turns the CRA into a right without a remedy. The Court should grant the Petition to restore the CRA to its intended purpose: ensuring all federal agencies remain accountable to the legislators who enabled them.

II. Likewise, the decision below furthers a concerning trend of rubber-stamping agencies' attempts to preempt state laws. Especially where, as here, a federal agency purports to preempt a law that falls in an area that States traditionally control, courts should uncompromisingly probe that effort. Many times, they don't. Instead, courts have applied agency-deference concepts to the exclusion of other central constitutional ideas, including the presumption against preemption and the need for a clear statement when upending the usual federalism balance. The Ninth Circuit here applied a form of silent deference that licenses Interior to impose its edict on millions of acres of Alaskan land with only the lightest respect for Alaska's own policies. Because preemption constitutes "a serious intrusion into state sovereignty," *Va. Uranium, Inc.* v. *Warren*, 139 S. Ct. 1894, 1904 (2019) (Gorsuch, J., concurring), Alaska deserves better. For that matter, all States do.

Agencies do not have power to trump Congress. Nor do they have unilateral power to trump States. Interior thinks it can do both, and the Ninth Circuit was content to

agree. The Court should grant the Petition and hold otherwise.

REASONS FOR GRANTING THE PETITION

I. The Court should grant the Petition to restore the Congressional Review Act.

The court below thought that the CRA presents no obstacle to agency regulation unless the agency issues a rule "substantively identical" to the one that Congress disapproved. Pet.App.20. That test rewrites the statute's language and produces absurd results. Other courts go a step further in refusing to hold agencies accountable to the CRA, concluding that the statute does not allow judicial review at all. But no matter how courts slice it, the outcome is wrong: By abdicating their role in enforcing the CRA, courts encourage agencies to ignore the law. This Court should intervene.

A. The CRA helps Congress oversee administrative agencies by allowing it to quickly review agency rules before they go into effect. See MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 1 (2021). Under the CRA, agencies must submit a new rule to Congress for review. 5 U.S.C. § 801(a)(1)(A). Congress then generally has 60 days to decide whether to nullify it through a joint resolution. *Id.* § 801(d). If it does, and the President signs the resolution, then the rule is invalidated. See *id.* § 801(a)(3)(B); see also 142 CONG. REC. S3,683 (1996); Michael J. Cole, *Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construe "Substantially the Same," and Decline to Defer*

to Agencies Under Chevron, 70 ADMIN. L. REV. 53, 56 (2018).

Without this process, Congress might otherwise face a "Hobson's choice." *INS* v. *Chadha*, 462 U.S. 919, 968 (1983) (White, J., dissenting). On the one hand, the legislature could "refrain from delegating the necessary authority" that makes the administrative state turn, "leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape." *Id.* On the other hand, it could "abdicate its law-making function to the executive branch and independent agencies." *Id.* Neither option is acceptable. So putting the CRA in place provided an important "check on administrative agencies' power to set policies and essentially legislate without Congressional oversight." *Tugaw Ranches, LLC* v. *U.S. Dep't of the Interior*, 362 F. Supp. 3d 879, 886 (D. Idaho 2019). The CRA even "short circuit[s]" some ordinary congressional norms—such as the committee process—to smooth speedy and effective review. Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2167-68 (2009).

And when Congress disapproves a rule through the CRA, that action reaches beyond the rule in front of it. An agency may not issue a new rule that is "substantially the same" as the one Congress annulled. 5 U.S.C. § 801(b)(2). This added reach is one of the CRA's most important aspects. Without it, the Act would become "merely a reassertion of authority Congress always had, albeit with a streamlined process." Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the "Substantially Similar" Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707, 709 (2011).

Trouble is, defining "substantially the same" in the CRA is difficult. The Act does not define it, and ordinary meaning provides little guidance, either. See Carey & Davis, *supra*, at 19. Agencies can't tell us what it means because defining "substantially the same" does not implicate any agency's expertise, and leaning on particular agencies' judgments could produce "different meanings depending on the agency involved." Cole, *supra*, at 96-97; see also *Kelley* v. *EPA*, 25 F.3d 1088, 1091 (D.C. Cir. 1994) (explaining that one of the benefits of agency deference is "a greater degree of national uniformity" in interpreting statutes). Legislative history is also no help. Such history is a dangerous place to look for answers under the best of circumstances. *Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019). And here that history suggests only that courts should look to vague factors like the degree of discretion an agency enjoys in a particular case. See Carey & Davis, *supra*, at 20; see also, *e.g.*, 142 CONG. REC. E577 (daily ed. Apr. 19, 1996) (statement of Rep. Henry Hyde). But see also, *e.g.*, Samantha Murray, *Transition Critical: What Can and Should Be Done with the Congressional Review Act in the Post-Trump Era?*, 48 ECOLOGY L.Q. 513, 535 (2021) (describing how Senator John McCain declined to vote for a CRA resolution disapproving of a methane rule because "he was concerned … the CRA would block the DOI from issuing any type of methane regulation in the future).

So left with vague-ish statutory language and few tools to construe it, neither courts nor commentators have been consistent. See Stephen Santulli, *Use of the Congressional Review Act at the Start of the Trump Administration: A Study of Two Vetoes*, 86 GEO. WASH. L. REV. 1373, 1378 (2018).

Some think the language is "broader," encompassing "a similar result on the same issue of substantive policy." *Pub. Emps. for Env't Resp.* v. *Nat'l Park Serv.*, No. CV 19-3629 (RC), 2022 WL 1657013, at *13 (D.D.C. May 24, 2022). Viewed this way, a CRA resolution "salts the earth" on an issue. David Zaring, *The Federal Deregulation of Insurance*, 97 TEX. L. REV. 125, 134 (2018); accord Alex Reed, *Conciliation Obfuscation*, 24 N.Y.U. J. LEGIS. & PUB. POL'Y 417, 452 (2022) (examining a particular CRA disapproval resolution and concluding that, "while the [agency] retains the discretion to issue a new rule, it is effectively precluded from doing so given the expansive effect of the CRA's 'substantially similar' provision").

The Ninth Circuit's decision is an example of the narrower view. Under that understanding, a disapproved rule must be "identical" to a non-disapproved rule for the CRA's bar to apply. Pet.App.20; see also Finkel & Sullivan, *supra*, at 734-37 (describing potential narrower constructions of "substantially similar").

No consensus view has emerged. And this definitional variety does not just hamper courts, it also flummoxes agencies. They "have no way of knowing where the line between 'different, but not *substantially* different' and 'permissibly different' might lie." Eric Dude, *The Conflicting Mandate: Agency Paralysis Through the Congressional Review Act's Resubmit Provision*, 30 COLO. NAT. RES., ENERGY & ENV'T L. REV. 115, 121-22 (2019) (emphasis in original).

B. This is the right time to solve the puzzle. The decision below deepened the confusion at a time when congressional disapprovals have become increasingly more common—the issue will keep rearing up. Before President Trump took office, Congress had disapproved only one regulation. See Bethany A. Davis Noll & Richard

L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 7 (2019). "In contrast, early in the Trump administration, fourteen regulations suffered this fate." *Id.* at 8; see also Bridget C.E. Dooling, *Into the Void: The GAO's Role in the Regulatory State*, 70 AM. U. L. REV. 387, 399 (2020) ("CRA disapprovals have sharply increased."). And some are pressing for Congress to use the Act even more. See, *e.g.*, Jody Freeman & Matthew C. Stephenson, *The Untapped Potential of the Congressional Review Act*, 59 HARV. J. ON LEGIS. 279, 326-27 (2022). So the issue is not going away for the lower courts in future agency cases.

The Court should also take up the Petition because the Ninth Circuit's cramped understanding of "substantially the same," Pet.App.20, does not work.

Just look at the text. The statute lists two distinct things that the agency may not do after a joint resolution of disapproval: "reissue[] [a rule] in substantially the same form" or issue "a new rule that is substantially the same." 5 U.S.C. § 801(b)(2). The Ninth Circuit's approach blends these two provisions into one; an "identical" rule is a "reissued" rule in the "same form." Yet that approach "defies [the Court']s usual presumption that differences in language like this convey differences in meaning." *Ysleta Del Sur Pueblo* v. *Texas*, 142 S. Ct. 1929, 1939 (2022) (cleaned up).

The Ninth Circuit's revision flips Congress's intent in other ways, too. Finding a lack of "sameness" whenever a new rule has a more limited geographic reach than the disapproved action means that agencies can still eat the elephant through a series of smaller actions that add up to a substantively equivalent state of affairs. The Ninth Circuit's reasoning, for instance, would let Fish and Wildlife reconstruct the voided Refuges Rule by

promulgating separate Kenai-style rules for each of Alaska's refuges. The Court tries to avoid "absurd results" like these. *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

A too-narrow spin on "substantially the same" can also produce internally inconsistent results. Here, for example, the CRA resolution forced Interior to "rever[t] to the text of the regulations in effect immediately prior to the effective date of the [invalidated] rule." *Effectuating Congressional Nullification of the Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska Under the Congressional Review Act*, 82 Fed. Reg. 52,009, 52,009 (Nov. 9, 2017). But those prior regulations said that bear "baiting is authorized in accordance with State regulations on national wildlife refuges in Alaska." 85 Fed. Reg. at 52,010. That language conflicts with the same agency's Kenai Rule that the Ninth Circuit upheld. See 50 C.F.R. § 36.39(*i*)(5)(ii).

C. This case is an excellent vehicle to resolve a related question, too: Even as CRA-related challenges have become more common, some courts have allowed agencies to run amuck by concluding that the CRA does not permit judicial review under *any* standard. This mistaken view is at odds with our system of checks and balances. The Court should take up the Petition to dispel it.

The confusion traces to a snip of CRA text providing that "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review." 5 U.S.C. § 805. Some courts have read this language to preclude them from deciding any issue arising under the CRA. See, *e.g.*, *Montanans for Multiple Use* v. *Barbouletos*, 568 F.3d 225, 229 (D.C. Cir. 2009); *Kan. Nat. Res. Coal.* v. *U.S. Dep't of Interior*, 971 F.3d 1222, 1230

(10th Cir. 2020); *United States* v. *Carlson*, No. 12-305, 2013 WL 5125434 (D. Minn. Sept. 12, 2013). Not all courts adopt this view—the Ninth Circuit at least assumed that it could review the CRA question, Pet.App.19-21—but the division is pronounced. See also *Tugaw Ranches*, 362 F. Supp. 3d at 884-85 (surveying cases on either side of the split).

Like the Ninth Circuit's "substantially the same" error, an aggressive reading of the CRA's limit on judicial review ignores the Act's text. *United States* v. *S. Ind. Gas & Electric Co.*, No. IP99–1692, 2002 WL 31427523, at *5 (S.D. Ind. Oct. 24, 2002). Section 805 precludes judicial review of a "determination, finding, action, or omission *under this chapter*." 5 U.S.C. § 805 (emphasis added). And "[a]gencies do not make findings and determinations under this chapter"; Congress does. *S. Ind. Gas*, 2002 WL 31427523, at *5. Reading this provision broadly also frustrates the CRA's goal of preventing agencies from "essentially legislat[ing] without Congressional oversight." *Id.* The better reading, then, is that Section 805 bars "judicial review only of congressional 'determinations, findings, actions, or omissions'—as opposed to findings or determinations made *by an agency* that a reissued rule is not substantially the same." Cole, *supra*, at 67 (emphasis in original).

Two other sections in the CRA back up the notion that Congress expected courts to review agencies' efforts. Consider again first Section 801(b)(2)'s "substantially the same" language. Because Congress did not define that phrase, someone else must. Unless agencies have entirely free rein, courts are the only ones that make sense: After all, Congress can strike down new rules for whatever reason—"substantially the same" or not. Cole, *supra*, at 68. Second, Section 806(b) says that "[i]f any provision of

this chapter or the application of any provision of this chapter to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this chapter, shall not be affected thereby." 5 U.S.C. § 806(b). This section shows that Congress expected at least *some* judicial review. Otherwise, "it would make little sense to include a provision addressing the situation in which a court decided that the text or application of the Act is 'invalid.'" Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187, 229 (2018).

Finally, common sense confirms that courts can review agency actions for consistency with the CRA. It would be illogical for Congress to pass the CRA to curb agency missteps, but then effectively immunize from judicial review agencies that might try to sidestep Congress's rebuke. That understanding would not just render the CRA toothless, but would also conflict with the "well-settled and strong presumption" of "judicial review" over "executive determinations." *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1069 (2020) (cleaned up). Keeping judicial review available is a "necessary condition … of a system of administrative power which purports to be legitimate, or legally valid." LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320 (1965). So under the best reading of Section 805, Congress precluded judicial review of its *own* actions under the statute, not agencies' compliance (or not) with the consequences of a CRA resolution. Larkin, *supra*, at 222.

* * * *

The decision below is part of a troubling push to erase the CRA. In each of these two ways, courts have allowed agencies to "evade the [statute's] strictures." *S. Ind. Gas*, 2002 WL 31427523, at *5. And the lower courts' confusion

and failures are particularly troubling because the CRA is not self-enforcing. Although the CRA requires agencies to submit a rule to Congress, Congress has no way to make them do so. Larkin, *supra*, at 230. The data bears this out: Between 1999 and 2009, agencies failed to take even the basic ministerial step of submitting their rules to Congress in more than 1,000 cases. See CURTIS COPELAND, CONG. RSCH. SERV., CONGRESSIONAL REVIEW ACT: MANY RECENT FINAL RULES WERE NOT SUBMITTED TO GAO AND CONGRESS 15 (2014). More recent estimates are worse. See MAJORITY STAFF OF H.R. COMM. ON OVERSIGHT & GOV'T REFORM, 115TH CONG., SHINING LIGHT ON REGULATORY DARK MATTER 10 (2018) ("[O]f the more than 13,000 guidance documents identified, agencies sent only 189 to Congress and GAO in accordance with the CRA."); Phillip A. Wallach & Nicholas W. Zeppos, *How Powerful is the Congressional Review Act?*, BROOKINGS INST. (Apr. 4, 2017), http://bit.ly/3u3Bt1D (finding that, as of 2017, agencies had failed to submit 348 significant rules).

Whatever the exact numbers, agencies seem to have little concern for the CRA. So courts' willingness to hold the line matters. And without guidance from *this* Court, things will only get worse. The Court should grant the Petition, re-affirm that courts can and must review agency actions for consistency with the CRA, and clarify that "substantially the same" is a real limit on agency power.

II. The Court should grant the Petition to end undue deference to agency preemption efforts.

The decision below also runs into the lower courts' confusion over the circumstances in which agency regulations can preempt state laws. Like several other courts, the Ninth Circuit failed to scrutinize the agency's

purported preemption power. Deference in cases like this robs the States of their voice and subjects them to an unaccountable and unconstrained regulatory regime. This Court should grant review to resolve this important question, too.

A. Starting on common ground: The Ninth Circuit got it right when it said that, under "standard principles of conflict preemption," "federal hunting regulations" will "control" over conflicting "Alaska state law." Pet.App.17. That "rule of priority" flows right from the Constitution's Supremacy Clause. *Va. Uranium*, 139 S. Ct. at 1901; see also U.S. CONST. art. VI, cl. 2. Under it, "an agency regulation *with the force of law* can pre-empt conflicting state requirements." *Wyeth* v. *Levine*, 555 U.S. 555, 576 (2009) (emphasis added).

But the Ninth Circuit assumed an important premise—that Congress gave Interior power to issue preemptive regulations and thus imbued those regulations with the "force of law." Agencies can preempt state law "only when and if" they act "within the scope of [their] congressionally delegated authority." *New York* v. *FERC*, 535 U.S. 1, 18 (2002). And this statute-to-regulation matchup is no small matter, as an agency's actions are "ultra vires" if Congress's approval doesn't back them. *City of Arlington* v. *FCC*, 569 U.S. 290, 297 (2013).

Here, the Ninth Circuit scarcely even bothered with that question. Its preemption analysis was so thin that it evidently rested on unstated deference. But if that's the case, the Ninth Circuit cast itself into the briar patch of agency deference principles: When an agency makes a preemption call, courts seem lost how to handle it.

The lower courts are at least "unanimous" that *Chevron* deference should not apply to an agency's implied

preemption construction. *Grosso* v. *Surface Transp. Bd.*, 804 F.3d 110, 116 (1st Cir. 2015); see also Pet.App.10. But there's not much certainty beyond that. One circuit merely requires a "reasonable" preemption explanation for the regulation to pass muster. See *Wachovia Bank, N.A.* v. *Burke*, 414 F.3d 305, 319 (2d Cir. 2005). Other circuits weigh "federal interests"—separate from the relevant statute's text—before deferring to an agency's choice to preempt traditional state fields. See *Bell* v. *Blue Cross & Blue Shield of Okla.*, 823 F.3d 1198, 1202-04 (8th Cir. 2016); *Helfrich* v. *Blue Cross & Blue Shield Ass'n*, 804 F.3d 1090, 1105-06. (10th Cir. 2015); *In re Vehicle Carrier Servs. Antitrust Litig.*, 846 F.3d 71, 84 (3d Cir. 2017). The Ninth Circuit adds to the mess with its passing-shot, deference-heavy review that lets the agency's preemptive result stand so long as the court finds some plausible textual hook.

The circuits on the other side of the line get it right, recognizing a presumption against agency preemption in areas of traditional state authority. Those courts insist that only a "clear statement" in the text can overcome that presumption, no matter what the agency might have to say. *Tennessee* v. *FCC*, 832 F.3d 597, 610-12 (6th Cir. 2016); *Comm'ns Imp. Exp. S.A.* v. *Republic of the Congo*, 757 F.3d 321, 326-28, 333 (D.C. Cir. 2014); see also *California* v. *ARC Am. Corp.*, 490 U.S. 93, 101 (1989). For these circuits, when "field[s] which the States have traditionally occupied" are at risk from agency rulemaking, *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), the statutory text—not the agency's argument—is dispositive, *Wyeth*, 555 U.S. at 583 (Thomas, J., concurring). At most, they apply relatively weak *Skidmore*-style deference.

This second approach makes sense. When Congress acts *directly*, the Court expects a "clear statement" before construing a statute to shake up the "usual constitutional balance of federal and state powers." *Bond* v. *United States*, 572 U.S. 844, 858 (2014) (citations omitted); accord *Rice*, 331 U.S. at 230 (explaining that Congress must express its "clear and manifest purpose" to "supersede[]" the "historic police powers of the States"). Looking for that kind of language lets courts be "certain of Congress' intent" before upsetting the constitutional apple cart. *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) (cleaned up); accord *State* v. *Arnariak*, 941 P.2d 154, 158 (Alaska 1997) (finding that Alaskan law was not preempted where "Congress ha[d] not manifested in the [federal law] in clear and definite language a desire to displace the State's ability to [regulate] certain activities in state wildlife sanctuaries"). That rule should apply with double force when agencies claim delegated power on Congress's behalf. What is true for the greater is true for the lesser, and an "agency's regulation cannot operate independently of the statute that authorized it." *FEC* v. *Cruz*, 142 S. Ct. 1638, 1649 (2022) (cleaned up). And if anything, it should apply triply in circumstances like these, where the agency purports to preempt state law after Congress said that a substantially similar regulation went too far.

So where statutes—and the "administrative interpretation[s]" that spring from them—"alter[] the federal-state framework by permitting federal encroachment upon a traditional state power," Congress must announce that alteration clearly. *Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001). The Court should grant the Petition to clear the lower courts' deference-preemption confusion and say as much.

B. Applying similar rules to regulatory and statutory preemption shows where the lower court went wrong—and why it matters to set this case right and provide guidance for those to come.

1. To begin, there should be little question that the clear-statement rule applies because the Fish and Wildlife regulations here seized control over a type of hunting, an area that the States traditionally regulate. States "[u]nquestionably" have "broad trustee and police powers over wild animals within their jurisdictions." *Kleppe* v. *New Mexico*, 426 U.S. 529, 545 (1976). These broad powers reflect "the legitimate state concerns for conservation and protection of wild animals." *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979). The "tradition of state level management of wildlife was in place by the late 1800s," and "federal law" has "generally respect[ed]" it since then. Karrigan Börk, *Guest Species: Rethinking Our Approach to Biodiversity in the Anthropocene*, 2018 UTAH L. REV. 169, 195-96 (2018).

The traditional state-federal balance carries over to most federal lands, too. Even there, Congress has long "deferred to state oversight on hunting and trapping." Robert B. Keiter, *Grizzlies, Wolves, and Law in the Greater Yellowstone Ecosystem: Wildlife Management Amidst Jurisdictional Complexity and Tension*, 22 WYO. L. REV. 303, 313-14 (2022). As Interior itself explained, Congress has "reaffirmed the basic responsibility and authority of the States to manage fish and resident wildlife on Federal lands." 43 C.F.R. § 24.3(b). So "hunting" has "traditionally been the subject of state regulation," not pervasive federal action. *Wisconsin* v. *EPA*, 266 F.3d 741, 747 (7th Cir. 2001); see also Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part i): Applying Principles of Sovereignty to Protect Imperiled*

Wildlife Populations, 37 IDAHO L. REV. 1, 76 (2000) ("[T]he states assume a traditionally prominent role in regulating wildlife as a result of their reserved police power under the Tenth Amendment of the Constitution.").

That's especially so in Alaska. See, *e.g.*, Doug Vincent-Lang, *Alaska Must Reject Feds' Claim to Control Hunting in Preserves and Refuges*, ALASKA DISPATCH NEWS (June 26, 2016), https://perma.cc/2F3L-VGYN. But not just there. While some of the regulations and statutes in play here are Alaska-specific, the concepts they implicate are not. Hunting is so important to the States that at least nineteen of them enshrined a right to hunt in their constitutions. See Ann M. Lousin, *Justice Brennan's Call to Arms—What Has Happened Since 1977?*, 77 OHIO ST. L.J. 387, 395 (2016). And the "extensive power" that States hold "over wild animals" affords them the right to "establish a variety of wildlife laws and regulations, such as hunting season timing, bag limits, and license requirements." Arthur D. Middleton, et al., *The Role of Private Lands in Conserving Yellowstone's Wildlife in the Twenty-First Century*, 22 WYO. L. REV. 237, 262 (2022). It even gives them the "latitude" to endorse "non-traditional hunting practices" like the ones here. *Id.* at 265.

States guard their traditional right to manage their own wildlife because they understand that local management better accounts for the unique needs of their ecosystems and communities. Millions of Americans hunt. They hunt different species, in different places, with different tools and techniques, and for different reasons. Because a one-size-fits-all approach does not work, state control over hunting is important in the wilds of Alaska, West Virginia, and everywhere in between.

Actions like Fish and Wildlife's, however, push all that aside. "If the agency's interpretation … is truly the situation intended by Congress, then 'dual sovereignty' in the context of wildlife management" is gone. Stanley Fields, *Leaving Wildlife Out of National Wildlife Refuges: The Irony of* Wyoming *v.* United States, 34 N.M. L. REV. 217, 237 (2004). Left standing, the decision below will cast States in the Ninth Circuit—and others that adopt similar approaches—in a supporting role in what should be an area of robust state control.

2. This toppling of the traditional balance provides another reason that the questions presented are important enough to warrant review. It also confirms that the Ninth Circuit should have looked for a clear statement from Congress that it wanted ANILCA to preempt Alaska's hunting laws. See Lane Kisonak, *Fish and Wildlife Management on Federal Lands: The Authorities and Responsibilities of State Fish and Wildlife Agencies*, 50 ENV'T L. 935, 948 (2020) ("The tension between the Supremacy and Property Clauses on one hand, and the Tenth Amendment on the other, often resolves in favor of federal law—but only where Congress expresses its clear and manifest intent for this to occur."). The Ninth Circuit never did that work. If it had, it would not have found one.

The best candidate for a clear statement is a provision of ANILCA that empowers Interior to manage public lands in Alaska "in accordance with the provisions of this Act and other applicable State and Federal law." 16 U.S.C. § 3202(c). Nothing in that vague statement clearly upends the federal-state dichotomy governing hunting and wildlife regulation. At best, the text is indefinite. At worse (for the Ninth Circuit's approach, anyway), its reference to state law shows that Congress wanted state regulation to *continue* on Alaskan federal lands. As

Alaska explains in greater detail, the language "preserved—rather than displaced—local control over how hunting will occur in Alaska, while providing [Fish and Wildlife] with the ability to protect the broad national interest in wildlife populations." Pet.27. No clear statement exists that Congress wanted Fish and Wildlife to wield "plenary power," as the Ninth Circuit found. Pet.App.10.

Other parts of ANILCA and related laws drive the nail in deeper. See, for example, the provision stressing that "[n]othing" in the Act was "intended to … diminish the responsibility and authority of Alaska for management of fish and wildlife on the public lands." 16 U.S.C. § 3202(a). See too the Act's language stressing that Interior must manage game species "in a manner that respects States' management authority over wildlife resources." *Id.* § 7901(a)(2)(A). Or consider the other federal statutes that say federal land management should not "diminish[] the responsibility and authority of the States for management of fish and resident wildlife." 43 U.S.C. § 1732(b); see also, *e.g.*, 16 U.S.C. § 668dd(m) (providing that the National Wildlife Refuge System Administration Act should not "affect[] the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate" wildlife within the System, and directing federal regulations to be "consistent" with state laws). Each of these provisions undercuts the idea of a pro-preemption clear statement. Rather, they "self-evidently place[] the responsibility and authority for state wildlife management precisely where Congress has traditionally placed it, in the hands of the states." *Defs. of Wildlife* v. *Andrus*, 627 F.2d 1238, 1249-50 (D.C. Cir. 1980) (cleaned up).

3. Holding that cases like this require clear textual support will not only bring clarity to an important area of

state-federal relations, but will also resolve critical problems from the Ninth Circuit's pseudo-*Chevron* approach.

First, holding the line against improper preemption matters is especially important in the regulatory context. The traditional justifications for deferring to agency determinations do not apply to preemption questions—although agencies are thought to have expertise in the areas they regulate, they have no special knowledge on federalism concerns. The costs, by contrast, are high. Federal agency action is "considerably more threatening to state autonomy than [congressional] legislation." Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 869 (2008). Agency preemption cuts off States' ability to govern, strips regulated parties of state remedies, and destroys the "laboratory" of democracy. *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1152-55 (2012). Here, for instance, Alaska's government is closest to "citizen involvement in democratic processes," *Gregory*, 501 U.S. at 458, and the citizens of Alaska decided the bear-baiting question by plebiscite, Pet.22. Yet though "administrative agencies are clearly not designed to represent the interests of States," *Watters* v. *Wachovia Bank, N.A.*, 550 U.S. 1, 41 (2007) (Stevens, J., dissenting), the Ninth Circuit asked for little proof of delegated power before letting Fish and Wildlife overturn Alaska's decision.

Second, the Ninth Circuit's rationale turns all the ordinary understandings of preemption upside down. The Court has long recognized a "presumption *against* finding pre-emption of state law in areas traditionally regulated by the States." *ARC Am. Corp.*, 490 U.S. at 101 (emphasis

added); see also *Wyeth*, 555 U.S. at 574-75. That presumption is "crucial when the pre-emptive effect of an administrative regulation is at issue," as it operates as a "bridge" across the "political accountability gap between States and administrative agencies." *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 908 (2000) (Stevens, J., dissenting). By ignoring that context, the Ninth Circuit's approach treats the agency's preemption finding as assumedly correct.

The lower court's fixation on the Property Clause—using it to give the agency a near-automatic win—does not justify flipping the presumption. Pet.App.16-17 (discussing U.S. CONST. art. IV, § 3, cl. 2). The "Clause itself does not automatically conflict with all state regulation of federal land." *Cal. Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. 572, 580 (1987). Instead, even when the Property Clause is involved preemption requires specific legislation. *Id.* And worse still for the lower court, the case for preemption is "particularly weak" because Congress "indicated its awareness of the operation of state law in a field of federal interest, and … nonetheless [stood] by both concepts." *Wyeth*, 555 U.S. at 575. ANICLA called out Congress's awareness of state and local law. See 16 U.S.C. § 3202(b) (management of Alaskan refuges should be carried out "in accordance with" "other applicable State … law"). Yet the Ninth Circuit cited that provision as a reason to think that Congress *intended* preemption. See Pet.App.17 (citing 16 U.S.C. § 3202(b)). That result does not follow, and the Court should say so.

* * * *

The decision below—which does not offer a "thorough[]" or "persuasive[]" case for preemption, *Wyeth*, 555 U.S. at 576-78—threatens more "vital issues of

state sovereignty," *Sturgeon* v. *Frost*, 577 U.S. 424, 441 (2016), than brown-bear baiting in Alaska. Yet Congress cannot step in and save States' rights routinely, as "the sheer amount of law … made by agencies" has become overwhelming. *Chadha*, 462 U.S. at 985-86 (White, J., dissenting). And in a case like this, where Alaska is "the exception, not the rule," *Sturgeon*, 577 U.S. at 440, it seems more unlikely still that out-of-state legislators will race to correct the agency's overreach. Pet.App.10. So the Court should grant review to place regulatory preemption back within its appropriate limits.

CONCLUSION

The Court should grant the State of Alaska's Petition.

Respectfully submitted.

PATRICK MORRISEY
Attorney General

OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
lindsay.s.see@wvago.gov
(304) 558-2021

LINDSAY S. SEE
Solicitor General
Counsel of Record

MICHAEL R. WILLIAMS
Senior Deputy Solicitor General

SPENCER J. DAVENPORT*
Special Assistant

MAX A. SCHREIBER**
Fellow

*admitted in the District of Columbia; practicing under supervision of West Virginia attorneys

**admitted in Indiana; practicing under supervision of West Virginia attorneys

Counsel for Amicus Curiae *State of West Virginia*

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

LESLIE RUTLEDGE
Attorney General
State of Arkansas

TODD ROKITA
Attorney General
State of Indiana

DANIEL CAMERON
Attorney General
State of Kentucky

JEFF LANDRY
Attorney General
State of Louisiana

AUSTIN KNUDSEN
Attorney General
State of Montana

JOHN FORMELLA
Attorney General
State of New Hampshire

DAVE YOST
Attorney General
State of Ohio

JOHN M. O'CONNOR
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South Carolina

KEN PAXTON
Attorney General
State of Texas

SEAN D. REYES
Attorney General
State of Utah

BRIDGET HILL
Attorney General
State of Wyoming