No. 22-401

IN THE

Supreme Court of the United States

ALASKA,

Petitioner,

v.

DEB HAALAND, 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 IN OPPOSITION

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January 30, 2023

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

Whether the U.S. Fish and Wildlife Service's authority to administer and manage federal national wildlife refuges, "areas that are administered . . . for the conservation of fish and wildlife," 16 U.S.C. § 668dd(a)(1), regardless of conflicting State law, includes only the authority to restrict the area or time at which hunting may occur or also includes the authority to restrict hunting methods that threaten wildlife within the refuge.

RELATED PROCEEDINGS

To counsel's knowledge, there are no related proceedings beyond those included in petitioner's Rule 14.1(b)(iii) statement.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Alaska Wildlife Alliance, Alaskans for Wildlife, Center for Biological Diversity, Copper Country Alliance, Defenders of Wildlife, Denali Citizens Council, Friends of Alaska National Wildlife Refuges, Kachemak Bay Conservation Society, National Parks Conservation Association, National Wildlife Refuge Association, Northern Alaska Environmental Center, Sierra Club, the Humane Society of the United States, The Wilderness Society, and Wilderness Watch state they have no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States and that no publicly held corporation owns 10% or more of their stocks because they have never issued any stock or other security.

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioner urges this Court to view this case as raising a question about sweeping federal power, but its petition actually presents a much less interesting question. Petitioner recognizes, as it must, that Congress's directives regarding wildlife management control on federal lands. Pet. 19. It also recognizes that, when carrying out those directives, the U.S. Fish and Wildlife Service may restrict the times and places people can hunt on national wildlife refuges. It disputes only the Service's authority to restrict the

methods of hunting that take place on a refuge. Petitioner claims that it—not the Service—has ultimate authority over that issue. The decision below correctly rejected this contorted argument, and no further review is warranted.

This Nation's public lands—wildlife refuges, forests, and more—lie within state boundaries. States thus have a role in protecting those lands and the fish and wildlife on them, and state law governing wildlife can apply on those lands. *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976). But the Property Clause gives the federal government ultimate authority over federal lands. *See* U.S. Const., art. IV, § 3, cl. 2. And so when Congress exercises its power by protecting certain federal lands, describing how those lands should be managed, and instructing a federal agency to carry out those directives, that federal statute, and the agency's actions carrying it out, control—"state law not-withstanding." *Kleppe*, 426 U.S. at 546.

Petitioner says that things work differently within its borders. On those federal public lands, it says, Congress's directives and an agency's actions to implement those directives control only *sometimes*. Congress may restrict, or authorize an agency to restrict, when or where hunting occurs, but any restrictions on *how* hunting occurs are mere suggestions. That means that if petitioner disagrees with the Service's decision to prohibit a hunting method within a national wildlife refuge because it has determined that method threatens wildlife living in the refuge, then petitioner's rules govern on federal land, leaving the Service's rules null and void. If this sounds wrong, that is because it is.

As the unanimous panel explained, federal authority does not stop at the Alaskan border. Pet. App. 16. After becoming a state, petitioner enjoyed "the same

measure of administration and jurisdiction over fisheries and wildlife as . . . other States." *Metlakatla Indian Cmty. v. Egan*, 369 U.S. 45, 57 (1962). And the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371 (Dec. 2, 1980), left that status quo in place, preserving the federal government's ability "to protect—if need be, through expansive regulation" federal public lands in Alaska. *Sturgeon v. Frost*, 139 S. Ct. 1066, 1087 (2019). In this respect, Alaska is no different than the other states.

There is no need for this Court's review. No split of authority exists. Every court to consider a parallel argument raised by other states has rejected it. And the Service has a track record of cooperation: giving petitioner's views serious consideration, but departing from them where needed to carry out Congress's directives.

The petition should be denied.

STATEMENT

A. Statutory and Regulatory Background

When it comes to the respective authorities of the federal government and the states on federal public lands, "the law is clear." *Kleppe*, 426 U.S. at 543. States have "broad trustee and police powers over" fish and wildlife "within their jurisdictions." *Id.* at 545. But the Property Clause grants Congress "the power to protect [fish and] wildlife on the public lands" that lie within a State's boundaries, "state law notwithstanding." *Id.* at 546. If federal and state law protecting fish and wildlife on federal public lands conflict, the Supremacy Clause dictates that federal law "overrides" state law. *Id.* at 545.

When Alaska gained statehood, it did not immediately enjoy the same authority over fish and wildlife within its borders as other states. The Alaska Statehood Act set out a transition period during which the federal government would "retain[]" its authority to manage "the fish and wildlife resources of Alaska." Pub. L. No. 85-508, § 6(e), 72 Stat. 339, 340–341 (1958). The transition period would end after the Secretary of the Interior certified that Alaska had adequate measures in place to manage and protect those resources. *See id.* That occurred two years later. *See* Exec. Order No. 10,857, 25 Fed. Reg. 33, 33 (Jan. 5, 1960) (terminating "the functions performed by the United States in Alaska" under certain statutes).

As a result, Alaska gained "the same measure of administration and jurisdiction over fisheries and wildlife as possessed by other States." *Metlakatla*, 369 U.S. at 57. In other words, it can enact laws governing fish and wildlife, and those laws apply on federal public lands within the state. But if its decisions conflict with federal law, federal law controls on federal public lands. *See Kleppe*, 426 U.S. at 545.

The Statehood Act itself reinforced the federal government's primary responsibility over federal lands. It transferred federal property "specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska" to the new state. § 6(e), 72 Stat. 340. But the transfer did not extend to "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife," expressly preserving federal ownership and authority over those lands. *Id.*, 72 Stat. 341.

Since then, federal laws have not disturbed this balance of authority. Enacted in 1980, ANILCA "set aside 104 million acres of federally owned land in

Alaska for preservation purposes," *Sturgeon*, 139 S. Ct. at 1075, as national forests, monuments, reserves, and wildlife refuges. Congress acted to ensure that these areas "that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values" will be "preserve[d] for the benefit, use, education, and inspiration of present and future generations." 16 U.S.C. § 3101(a).

In ANILCA, Congress authorized the Secretary of the Interior, through the U.S. Fish and Wildlife Service, to manage refuges. *See* ANILCA § 304(a), 94 Stat. 2393; 16 U.S.C. § 668dd(a)(1). She does so "in accordance with the laws governing the administration of units of the National Wildlife Refuge System and" ANILCA. ANILCA § 304(a), 94 Stat. 2393. These laws create a unified system "to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats . . . for the benefit of present and future generations of Americans." 16 U.S.C. § 668dd(a)(2).

The Service must manage each refuge "to fulfill the mission of the System" and "the specific purposes for which that refuge was established." *Id.* § 668dd(a)(3)(A). The Service may not allow any "use" of a refuge that is not "compatible with the purposes of the refuge" and "shall prescribe such regulations and impose such terms and conditions as may be necessary and appropriate to ensure that activities . . . are so compatible." ANILCA § 304(b), 94 Stat. 2393. If a "wildlife-dependent recreational use"—such as hunting—is "a compatible use within a refuge," it "should be facilitated, subject to such restrictions or regulations as may be necessary, reasonable, and appropriate."

16 U.S.C. § 668dd(a)(3)(D); *see also id.* § 668dd(a)(4)(K) (referring to hunting as a "wildlife-dependent recreational use"); *id.* § 668dd(d) (setting out process for compatibility determinations).

ANILCA and the general statutes governing refuges provide the states with a consultative, but not determinative, role. *See id.* § 3191(d) (requiring the Service to permit state officials "to the extent practicable, . . . to participate" in the development of management plans); *see also id.* § 668dd(a)(4)(E) (directing Service to "ensure effective coordination, interaction, and cooperation" with states); *id.* § 668dd(m) (Service hunting and fishing regulations to be consistent with state regulations "to extent practicable").

In Section 1314, ANILCA expressly preserved the respective authorities of the Secretary and petitioner over fish and wildlife as they existed before the Act. It did not "enlarge or diminish [Alaska's] responsibility and authority . . . for management of fish and wildlife on the public lands" (except as stated in ANILCA's provisions governing subsistence uses). *Id.* § 3202(a). And "[e]xcept as specifically provided" in ANILCA, it did not "enlarge or diminish the responsibility and authority of the Secretary over the management of the public lands." *Id.* § 3202(b). Thus, "[t]he taking of fish and wildlife" in areas governed by ANILCA "shall be carried out in accordance with the provisions of [ANILCA] and other applicable State and Federal law." *Id.* § 3202(c).

B. Procedural History

1. The Kenai National Wildlife Refuge is one of the areas ANILCA protects. Congress created the refuge by expanding what was then the Kenai National Moose Range and making it part of the National

Wildlife Refuge System. ANILCA § 303(4), 94 Stat. 2389, 2391. The Refuge's primary purpose is "to conserve fish and wildlife populations and habitats in their natural diversity." *Id.* § 303(4)(B)(i), 94 Stat. 2391. It also provides, "consistent with" that purpose, "opportunities for scientific research, interpretation, environmental education, and land management training." *Id.* § 303(4)(B)(i), (iii), 94 Stat. 2391. And if it can be accomplished "consistent with these purposes," the Refuge should also provide "opportunities for fish and wildlife-oriented recreation." *Id.* § 303(4)(B)(iv), 94 Stat. 2391.

Shortly after ANILCA's enactment, the Service and Alaska's Department of Fish and Game entered into an agreement relating to the management of refuges. Master Mem. of Understanding (Mar. 13, 1982), 3 Record Excerpts 430, *Alaska v. Haaland*, No. 21-35035 (9th Cir.), Dkt. 31-4. The Department recognized that the Service has "the responsibility . . . on Service lands in Alaska to conserve fish and wildlife and their habitats and regulate human use." *Id.* at 2, 3 Record Excerpts 431. The Service reciprocally recognized that the Department has "primary responsibility to manage fish and resident wildlife within the State of Alaska" and agreed to coordinate with the Department when making refuge management plans. *Id.*, 3 Record Excerpts 431–432. Both agreed that "hunting . . . on Service lands . . . is authorized in accordance with applicable State and Federal law unless State regulations are found to be incompatible with documented Refuge goals, objectives, or management plans." *Id.* at 3, 3 Record Excerpts 432.

Keeping its end of the bargain, the Service has cooperated with Alaska to manage the Kenai Refuge. For example, the Service worked with Alaska to

develop the first management plan for the Refuge. Pet. App. 59. That plan left the Refuge open to hunting, with two exceptions: areas that present public safety concerns—campgrounds, for example—and the Skilak Wildlife Recreation Area which would be managed "to provide enhanced opportunities for wildlife viewing." *Id.* at 60 (quotation omitted). The Service and Alaska then jointly issued regulations that limited hunting in the Skilak Area to an annual moose hunt and taking small game by archery. *Id.*

The Service and Alaska have sometimes disagreed about how the Kenai Refuge should be managed. In 2005, for example, the Alaska Board of Game changed course on hunting within the Skilak Area and allowed the use of firearms to hunt small game and furbearers (bears, foxes, wolves, and the like). *See* U.S. Fish & Wildlife Serv., Draft Management Plan and Environmental Assessment 4 (Oct. 2006), *available at* bit.ly/3FbePdW. At the Service's request, Alaska stayed its action, "supporting efforts of the [Service] to" create a management plan for the Skilak Area. *Id.* After giving Alaska's views serious consideration, the Service ultimately determined that Alaska's preferred approach was not compatible with the purposes for which the Kenai Refuge was established. To carry out its statutory obligation to ensure that activities in the Refuge are compatible with the purposes for which the Refuge was established, the Service opened the Skilak Area for an annual youth hunt of small game using firearms but did not open it to hunting furbearers. *See* U.S. Fish & Wildlife Serv., Revised Management Plan 58 (May 2007), *available at* bit.ly/3GPrcxz.[1]

[1] Alaska later allowed the use of falconry to take small game in 2012, which the Service accommodated. *See* Kenai Rule,

In 2013, another disagreement arose when the Alaska Board of Game proposed a change to its regulations that would allow brown bear baiting on the Kenai Peninsula. Pet. App. 65. Bear baiting involves setting up a bait station, for example, with "sweet stuff" like "syrup, honey, molasses, [or] doughnuts," to lure a bear. Alaska Dep't of Fish & Game, Location and Bait Choice (accessed Nov. 28, 2022), *available at* bit.ly/3XFbrPG. Doing so creates "the opportunity for good shot placement at close range." Alaska Dep't of Fish & Game, Shooting (accessed Nov. 28, 2022), *available at* bit.ly/3OLYbVf.

Though the Service objected, the Board adopted the proposal, which "became effective . . . on the Kenai Peninsula." Pet. App. 65–66.[2] The Service then "blocked . . . brown bear baiting in the Kenai [Refuge]" and began work on a regulation to address the issue. *Id.* at 66. After that, the Board's decision was in effect on non-Refuge lands on the Peninsula. *Id.*

The Service then proposed, and later finalized, the regulation at issue here, referred to as the Kenai Rule. *See* Refuge-Specific Regulations; Public Use; Kenai National Wildlife Refuge, 81 Fed. Reg. 27,030 (May 5, 2016). The rule codified the state of affairs before Alaska's change in policy on brown bear baiting. It

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81 Fed. Reg. 27,030, 27,038 (May 5, 2016); 50 C.F.R. § 36.39(i)(6)(iv)(A).

[2] The Board also adopted, again over the Service's objection, regulations that opened the Skilak Area to the hunting of wolves, coyote, and lynx in late fall and winter. Pet. App. 65–66. In response, the Service closed the Area to hunting and trapping and then, in the Kenai Rule, kept the Area closed, subject to certain historical exceptions. *Id.* at 71–72. Petitioner has dropped its challenge to this part of the rule, Pet. 12 n.6, so this brief does not discuss it further.

prohibited hunting of all animals by baiting, with the exception of black bears. Pet. App. 72.[3] The Service concluded that allowing the hunting of brown bears over bait was not compatible with the Kenai National Wildlife Refuge's conservation and wildlife-oriented recreational purposes.

As to conservation, the Service concluded that baiting had the "potential to result in overharvest of this species, with accompanying population-level impacts." Kenai Rule, 81 Fed. Reg. 27,036. This was "due to its high degree of effectiveness as a harvest method and the species' low reproductive potential." *Id.* at 27,037. Brown bears "have one of the lowest reproductive potentials of any North American mammal" and the bears on the Kenai Peninsula are "a relatively small population . . . that is highly sensitive to adult female and overall human-caused mortality levels." *Id.* Alaska's allowance of brown bear baiting on lands surrounding the refuge quickly resulted in a declining population. *Id.*

As to wildlife-oriented recreation, the Service concluded that hunting brown bears over bait created

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[3] Since the 1980s, the Service had allowed hunting black bears over bait within the Kenai Refuge, subject to a special-use permit "to ensure compatibility of this activity" with the purposes of the Refuge. Kenai Rule, 81 Fed. Reg. 27,035; *see also* U.S. Dep't of the Interior, Kenai National Wildlife Refuge, Compatibility Determination for Bear Baiting (Aug. 14, 2007), 3 Record Excerpts 404 (noting that the Service regulated baiting of black bears "more stringently than State of Alaska regulations to ensure compatibility"). The Service explained that this longstanding practice was compatible with the purposes of the Refuge because black bears "occur in much higher densities than brown bears . . ., have higher reproductive potential than brown bears, and as such can support higher harvest levels and are less susceptible to overharvest." Kenai Rule, 81 Fed. Reg. 27,037.

public safety risks. *Id.* After brown bear baiting was allowed elsewhere on the Kenai Peninsula in 2013, the number of bait stations increased substantially, from 300 to 400. *Id*. The link between food-conditioning of bears and public safety risks is "well documented," and the Service's policy is to "promote[] food storage and other practices aimed specifically at reducing the potential for human-bear conflicts." *Id.*

Three months later, the Service issued a separate rule, known as the Refuges Rule, that applied to all Alaska refuges. *See* Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska, 81 Fed. Reg. 52,248 (Aug. 5, 2016).[4] This rule responded to Alaska's decision to "authorize[] measures . . . that potentially increase the take of predators to a degree that disrupts natural processes and wildlife interactions." *Id.* at 52,251. To address that potential for disruption, the Refuges Rule (1) defined "natural diversity," which ANILCA requires the Service to protect; (2) defined and prohibited "predator control" in all refuges in Alaska, subject to certain exceptions; and (3) prohibited certain practices for taking wildlife in refuges in Alaska, including "[t]aking black or brown bear cubs or sows with cubs," subject to certain exceptions, "[t]aking brown bears over bait," and "[t]aking wolves and coyotes during the denning season." *Id.* at 52,252. The Refuges Rule also "update[d] procedures for implementing closures or restrictions on refuges . . . to more effectively engage and inform the public" and to

[4] The Service proposed the Refuges Rule seven months after it proposed the Kenai Rule and finalized it three months after it finalized the Kenai Rule. *See* Kenai Rule, 81 Fed. Reg. 27031 (proposed May 21, 2015); Refuge Rule, 81 Fed. Reg. 52248 (proposed on January 8, 2016).

make those procedures consistent with other notification procedures. *Id.* at 52,253.

Congress invalidated the Refuges Rule through the procedures of the Congressional Review Act. *See* Pub. L. No. 115-20, 131 Stat. 86 (2017) (stating that Congress "disapprove[d]" the Refuges Rule and provided that it "shall have no force or effect"). That Act requires a federal agency to submit a summary of a new rule to Congress. *See* 5 U.S.C. § 801(a)(1)(A). The Act creates a streamlined, time-limited process for Congress to enact a joint resolution to disapprove a rule. *See id.* § 802. If Congress does so, and if the President signs the resolution, the rule "shall not take effect (or continue)." *Id.* § 801(b)(1). The agency may not reissue the disapproved rule "in substantially the same form" or issue "a new rule that is substantially the same" as the disapproved rule, "unless . . . specifically authorized by a [later-enacted] law." *Id.* § 801(b)(2).[5]

2. Petitioner sued the Service and challenged the Kenai Rule.[6] Its suit sought to invalidate the rule's prohibition on hunting brown bears through baiting within the Kenai National Wildlife Refuge. Pet. App. 74, 76. In support, it argued that Section 1314(a) of ANILCA gave petitioner final authority over fish and wildlife management in the Refuge and that the

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[5] The Service submitted the Kenai Rule to Congress as required by the Act. *See* Gen. Accounting Office, Refuge-Specific Regulations; Public Use; Kenai National Wildlife Refuge; FWS-R7-NWRS-2014-0003 (accessed Nov. 28, 2022), *available at* bit.ly/3ua8OYy. Congress did not disapprove the Kenai Rule.

[6] Safari Club International also challenged the Kenai Rule, raising similar claims and seeking the same relief. Pet. App. 56. Its case was consolidated with petitioner's. *Id.* at 74. Safari Club International did not seek certiorari.

Service had "take[n] over" that authority to issue the Kenai Rule. Pet. App. 95–96.[7]

The district court rejected that claim. It explained that petitioner's argument relied on reading Section 1314(a)'s reference to petitioner's authority "for management of fish and wildlife on the public lands," 16 U.S.C. § 3202(a), in isolation. The rest of Section 1314 was "at odds" with petitioner's reading. Pet. App. 103. When addressing hunting, the provision states 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 and Federal law." 16 U.S.C. § 3202(c). It thus "specifically contemplates that federal law will apply to [refuges], and where there is a clear conflict between federal and state law, the federal law controls." Pet. App. 103. The district court also noted that its reading aligned with the relevant statutory history, *Id.* at 104, and petitioner's own express agreement, dating back to 1982, that state law governing hunting applied within a refuge "unless" it is "found to be incompatible with documented Refuge goals, objectives, or management plans." *Id.* at 105 (quotation omitted).

3. A unanimous Ninth Circuit panel affirmed. *Id.* at 43.

The panel first addressed petitioner's argument that the Service has no authority to regulate hunting on federal public lands within the Kenai Refuge. Petitioner relied on Section 6(e) of the Alaska Statehood Act and

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[7] Petitioner raised other challenges to the Kenai Rule's brown bear baiting provisions, including under the Administrative Procedure Act and the National Environmental Policy Act. Pet. App. 77–94, 107–134. Petitioner no longer presses these arguments.

Section 1314 of ANILCA. *Id*. at 16. The panel rejected petitioner's interpretation as foreclosed by the text of those two provisions, the text of ANILCA as a whole, and common sense.

As to the Statehood Act, the panel explained that it did not abdicate federal authority over federal public lands. The Act transferred federal property used for wildlife administration to petitioner. *See* § 6(e), 72 Stat. at 340–341. 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 (quoting Statehood Act § 6(e), 72 Stat. at 341)). On those lands, as on all federal lands, Congress retained its authority under the Property Clause "'to regulate and protect the wildlife living there.'" Pet. App. 16 (quoting *Kleppe*, 426 U.S. at 541).[8]

In ANILCA, Congress exercised its Property Clause authority and directed the Secretary of the Interior (through the Service) to manage Alaska refuges. Pet. App. 16–17. That "delegated statutory authority to manage federal lands" includes the authority to regulate "hunting within the Kenai Refuge." *Id.* at 17. If the Service's hunting rules and "Alaska state law" conflict, the federal law controls "under standard principles of conflict preemption." *Id.*

Petitioner's reliance on Section 1314 of ANILCA was misplaced, the panel explained, because that provision

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[8] Amici hunting groups devise a strawman to fight, claiming that the panel held that petitioner possesses no authority over wildlife on federal refuges. Hunters' Br. 2. The panel found no such thing. Pet. App. 17 (referring to "ANILCA's general recognition of the State's concurrent authority to manage wildlife on public lands"). Nor did any party make that claim below.

did not strip the Service of its authority to manage federal public lands by regulating hunting on those lands. The provision includes two status-quo preserving clauses. The first states that "[n]othing in the Act . . . englarge[s] or diminishe[s] the responsibility or authority" of "Alaska for management of fish and wildlife on the public lands" (except as stated in ANILCA's provisions governing subsistence uses) or "amend[s] the Alaska constitution." 16 U.S.C. § 3202(a). The second states that "[e]xcept as specifically provided" in ANILCA, the statute did not "enlarge or diminish the responsibility and authority of the Secretary over the management of the public lands." *Id.* § 3202(b). Section 1314 then states that "[t]he taking of fish and wildlife" on federal public lands—that is, hunting—"shall be carried out *in accordance with the provisions of this Act* and other applicable State *and Federal law*." *Id.* § 3202(c) (emphasis added). This clarifies that "hunting within the Kenai Refuge is subject to federal law, including any regulations" the Service issues under ANILCA. Pet. App. 17.

The panel explained that this reading of ANILCA's savings clause aligned with the rest of the statute, which contains other provisions that contemplate federal regulation of hunting on federal public lands in Alaska. Pet. App. 18. For example, Section 304(a) of ANILCA directs the Secretary to manage refuges like Kenai "in accordance with the laws governing the . . . National Wildlife Refuge System" and ANILCA. 94 Stat. 2393. Those laws, in turn, require the Secretary to "provide for the conservation of fish, wildlife, and plants, and their habitats" and to "ensure that the biological integrity, diversity, and environmental health of the System are maintained." 16 U.S.C. § 668dd(a)(4)(A)-(B).

Finally, the panel noted that this plain-text reading also aligns with "common sense." Pet. App. 18. Congress designated federal public lands in Alaska to "benefit the entire country." *Id.* It is no surprise, then, that Congress gave "[t]he federal government, and not a single state" final say over those "federal lands." *Id.* This Court recognized as much in *Sturgeon*, stating " 'that ANILCA vests the Secretary of the Interior with plenary authority to protect—if need be, through expansive regulation—the national interest in the scenic, natural, cultural and environmental values on the public lands.' " *Id.* (quoting *Sturgeon*, 139 S. Ct. at 1087).

The panel then turned to an argument petitioner raised for the first time on appeal. Petitioner claimed that Congress's disapproval of the Refuges Rule under the Congressional Review Act amounted to an implied amendment of ANILCA "such that it voided" the earlier-promulgated Kenai Rule. Pet. App. 19. The panel rejected this argument as "unsupported by the law," based on the plain text of the Act. *Id.*

The panel explained that the Act specifies the consequences that follow a resolution disapproving a rule, and none of them apply to the Kenai Rule.

As relevant, if a rule is disapproved, "a *new* rule that is substantially the same as such a rule may not be issued." 5 U.S.C. § 801(b)(2) (emphasis added). As petitioner admits, Pet. 13, the Service finalized the Kenai Rule three months before it issued Refuges Rule. The Kenai Rule is not a "new rule" that the Service issued after the Refuges Rule. *Id.* at 20.[9]

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[9] The panel also noted that a disapproved rule does not take (or continue in) effect. *See* 5 U.S.C. § 801(b). The Refuges Rule—the rule Congress disapproved—is not in effect. Pet. App. 20.

The panel explained that petitioner's argument was wrong for other reasons. Along with being an *old* rule, the Kenai Rule was also not "substantially the same" as the Refuges Rule. *Id.* at. 13. The Kenai Rule is narrower than the Refuges Rule in both geographic reach and subject matter. The Kenai Rule applies only on the Refuge; the Refuges Rule applied to all refuges in Alaska. *Id.* at. 20–21. The Kenai Rule addresses only "baiting of brown bears in the Kenai Refuge" and "hunting of coyotes, lynx, and wolves within the Skilak [Wildlife Recreation Area]" in the Refuge; the Refuges Rule addressed a range of administrative and substantive issues—including public notification procedures and "the baiting of brown bears and State predator control programs." *Id.* at 20. The panel also noted that petitioner's argument conflicted with the Act's directive about how to interpret congressional action under the Act. *Id.*

4. Petitioner sought rehearing en banc. No judge requested a vote on the rehearing petition, and it was denied. *Id.* at 136. This petition followed.

REASONS FOR DENYING THE PETITION

The question petitioner presents does not warrant this Court's review. Petitioner mischaracterizes the decision below, painting it as a sweeping endorsement of plenary power held by a federal agency. But ultimately this petition poses a much narrower question: When implementing its statutory mandates under ANILCA, may the Service restrict how people hunt on a national wildlife refuge in Alaska? There is no circuit split on this issue; instead, courts have consistently upheld the Service's authority to restrict hunting on national wildlife refuges to protect wildlife on those refuges. The panel decision correctly followed

the text of the relevant statutes and this Court's precedents to uphold the regulation at issue.

Petitioner also claims review is warranted to address its Congressional Review Act argument. But it does not allege a circuit split on that issue, which no other court has addressed. And the panel correctly rejected its argument based on the plain text of the statute.

Neither the narrow question actually presented or the novel Congressional Review Act issue in this case merit this Court's attention.

I. The Question Presented Does Not Warrant Certiorari.

1. The question presented rests on petitioner's mischaracterization of the decision below. The petition asks this Court to decide whether the Service has "plenary authority to preempt state law regulating how people hunt." Pet. i. But the panel did not make that holding. If this Court takes this petition to answer that question, it will be rendering an advisory opinion.

The panel did not hold that the Service has "plenary authority" to preempt state hunting laws; indeed, that issue was not before it. Below, petitioner argued that Congress surrendered the federal government's authority to restrict how hunting takes place on federal public lands in Alaska to the State. The question before the panel was binary: Does the Service have congressionally delegated authority to restrict hunting on national wildlife refuges to implement ANILCA and the other statutes that govern refuge management, or not? The panel held that it does. The panel had no reason to—and did not—discuss the various procedural and substantive limitations that Congress has

placed on the Service's authority, much less hold that the Service's authority is plenary.

There is no reasonable way to read the panel opinion as holding that the Service has unbounded authority. The panel recognized that the Secretary must follow ANILCA's management directives when carrying out her delegated duties. Pet. App. 18 (citing 16 U.S.C. § 3101(a)-(b)). The panel did not use the phrase "plenary authority" to mean that the Service has "unbridled power." Pet. 1. Rather, it followed this Court's lead in recognizing that the *federal government* has the final say when deciding what measures are needed to protect fish and wildlife in national wildlife refuges. *See* Pet. App. 18 (noting *Sturgeon*'s recognition that ANILCA gives the Secretary of the Interior "plenary authority 'to protect—if need be, through expansive regulation the national interest in the scenic, natural, cultural and environmental values on the public lands.' " quoting *Sturgeon*, 139 S. Ct. at 1087)); *id.* at 10 (noting that "ANILCA preserves the federal government's plenary power over public lands in Alaska"); *see also Kleppe*, 426 U.S. at 540–541 ("the 'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there").

2. The question this petition actually implicates—whether the Service's decision that a hunting method is incompatible with the purposes of a national wildlife refuge in Alaska will control over conflicting state law—does not warrant review. The panel decision does not conflict with any decision of this Court. *See* Sup. Ct. R. 10(c). And it does not implicate any disagreement among the courts of appeals (or among federal and state courts within Alaska) on the question. *See id. at* 10(a).

Petitioner states that "a circuit split is not possible on this issue." Pet. 18. But ANILCA claims can generate a circuit split, as petitioner should know. *See* 28 U.S.C. § 1391(e)(1) (allowing venue where a defendant is located); *see also Alaska v. United States Dep't of Agric.*, 273 F. Supp. 3d 102, 124 (D.D.C. 2017) (discussing petitioner's complaint in the U.S. District Court for the District of Columbia alleging that a rule was in "violation of ANILCA"). That aside, in this area, courts are in full agreement.

When other states have made the same argument that petitioner raises here, relying on a statutory provision that parallels Section 1314 of ANILCA, courts have uniformly rejected it.

The Tenth Circuit went first in *Wyoming v. United States*, 279 F.3d 1214 (10th Cir. 2002). In the 1980s, Wyoming began to vaccinate elk on state-owned land in the Yellowstone area against a disease. *Id.* at 1220. Wyoming asked the Service to vaccinate elk in the National Elk Refuge, which is part of the National Wildlife Refuge System. *Id.* at 1221. The Service declined, based on its view that the vaccine was not safe and effective, and Wyoming sued. *Id.* at 1221–1222.

Wyoming argued that the Service had to yield to its view, relying on a saving provision in the National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. §§ 668dd–668ee. The provision states that the Act shall not "be construed as affecting the authority, jurisdiction, or responsibility of the several states to manage, control, or regulate fish and resident wildlife under state law or regulations in any area within the System." *Id.* § 668dd(m). It goes on to state that "[r]egulations permitting hunting or fishing of fish and resident wildlife within the System shall be, to the

extent practicable, consistent with State fish and wildlife laws, regulations, and management plans." *Id.*

The Tenth Circuit rejected Wyoming's claim that it has final say over wildlife management on federal refuges as "not feasible in light of established rules of construction." *Wyoming*, 279 F.3d at 1231. The Act directs the Service to manage refuges and to consult with states only " 'to the extent practicable.' " *Id.* (quoting 16 U.S.C. § 668dd(e)(1)(A)(iii), (e)(3)). Similarly, the saving provision states that hunting regulations should be consistent with state law " 'to the extent practicable.' " *Id.* (quoting 16 U.S.C. § 668dd(m)). These textual clues supported the intuitive point that Wyoming's reading "would be inconsistent with" the creation of a nationwide system for administering refuges, as it would allow the State to "to manage and regulate . . . in a manner the [Service] deemed incompatible with the [refuge's] purpose." *Id.* at 1234. The court thus concluded that state laws governing fish and wildlife management must give way when they "conflict" with federal law or "stand as an obstacle" to it. *Id.*

The Ninth Circuit followed suit in *National Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835 (9th Cir. 2002). There, California banned the use of certain animal traps. *See id.* at 844. A group challenged the ban, arguing that the Improvement Act preempted the ban's application in national wildlife refuges. *See id.* at 854. Agreeing with the Tenth Circuit, the court explained that "Congress has the authority under the Property Clause to preempt state action with respect to [refuge] management and" did "so through the [Improvement Act]." *Id.* The ban was thus preempted to the extent that it applied on refuges. *See id.*

These decisions line up exactly with the decision of the panel. All three cases addressed a provision that preserved state authority over fish and wildlife management on federal public lands. All three declined to read that provision in isolation. All three instead read the statute as a whole and concluded that Congress authorized the Service to manage fish and wildlife on federal public lands, allowed state law to apply on those lands, and required federal law to control in the event of a conflict.

3. The panel's decision is correct.

Congress directed the Service to manage wildlife refuges in Alaska. *See* ANILCA § 304(a), 94 Stat. 2393; 16 U.S.C. § 668dd(a)(1). Under that authority, the Service prepares the management plans for refuges. *See* ANILCA § 304(g)(1), 94 Stat. 2394. When doing so, the Service must "specify the programs for conserving fish and wildlife" in each area of the refuge and "the uses within each such area which may be compatible with the major purposes of the refuge." *Id.* § 304(g)(3)(A)(ii)-(iii), 94 Stat. 2395.

Congress set out a cooperative role for petitioner in this process. For example, the Service must "consult with the appropriate State agencies" when making management plans. *Id.* § 304(g)(4), 94 Stat. 2395. And ANILCA "and other applicable State and Federal law" govern "[t]he taking of fish and wildlife" on refuges. 16 U.S.C. § 3202(c).

But nothing in ANILCA gives petitioner the authority to override the Service's decisions about how to manage refuges. Petitioner relies on Section 1314(a) of ANILCA. But that is a saving provision that neither "enlarge[]s or disminish[es]" petitioner's

authority. 16 U.S.C. § 3202(a). In other words, the provision retains the status quo.

This Court's precedents have already defined that status quo. Petitioner has the same authority on federal public lands within its boundaries as other states within their boundaries. *See supra* p. 4, 14–15. State law regulating hunting can apply on federal public lands. *See Kleppe*, 426 U.S. at 545. But Congress can exercise its Property Clause authority to enact laws regulating hunting, and, if it does, federal law "overrides" any conflicting state law. *Id.*

Petitioner's contrary arguments are misplaced. It argues that Section 1314(a) gives petitioner "general authority over the methods and means of hunting" whereas Section 1314(b) gives the Service authority only over "access and use of public lands." Pet. 26. Petitioner thus concedes that the Service may decide *where* hunting occurs (it can limit hunting to certain areas in a refuge) or *when* it occurs (it can limit hunting in a refuge to certain times). Pet. 21. But it draws the line at restricting *how* hunting is conducted. *Id.* Even if this line were administrable, there is no textual basis for it: The words "methods," "means," "access," and "use" do not appear in Section 1314. And again, by its terms, Section 1314 merely preserves authority; it does not grant it.

The words that do appear in Section 1314 confirm that the Service's management authority includes the authority to regulate hunting. It preserves "the responsibility and authority of the Secretary over the management of the public land." 16 U.S.C. § 3202(b). That includes the responsibility to "administer[]" refuges under ANILCA and other statutes governing the National Wildlife Refuge System. ANILCA § 304(a), 94 Stat. 2393. These statutes require the

Service to specify which uses of the refuge (such as hunting) are compatible with the purposes for which the refuge was established and to regulate any uses (such as by restricting hunting) that are not compatible. *See supra* p. 5–6, 22; *see also Trustees for Alaska v. Watt*, 524 F. Supp. 1303, 1308 (D. Alaska 1981) ("wildlife management is concerned with the effect of human activities on wildlife, and the wildlife manager's job is to control human beings and institutions in order to protect the wildlife population"), *aff'd*, 690 F.2d 1279 (9th Cir. 1982).

Petitioner's theory also cannot be squared with the statutory structure Congress enacted to govern national wildlife refuges. The National Wildlife Refuge System exists "to administer a national network" of refuges "for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats . . . ." 16 U.S.C. § 668dd(a)(2). The Service is required to manage "each refuge . . . to fulfill the mission of the System" and "the specific purposes for which that refuge was established." *Id.* § 668dd(a)(3)(A). Congress's decision to create a national network of refuges to be managed under a uniform set of principles by the Service would be nullified if a state can veto the Service's decisions about how to manage fish and wildlife resources in a refuge based on its own policy views.

Petitioner's amici ask this Court to invent a clear statement rule in favor of state authority over federal lands, but that makes little sense. Safari Club Int'l Br. 8; States' Br. 15. As this Court has explained, on *federal* lands, states' powers "exist only in so far as their exercise may be not incompatible with, or restrained by," federal law. *Kleppe*, 426 U.S. at 545 (quotation omitted). Congress does not need to do

anything more than legislate—as it did in ANILCA and other laws governing refuges—to carry out its Property Clause power on federal land.

In any event, it is hard to see how Congress could have been clearer. It set up a national system of federal wildlife refuges to be administered by a single federal agency, subject to a uniform set of congressional management directives. And it required that agency to consult with states, but nowhere directed it to defer to states. *See supra* p. 6–7, 22. That is enough: Congress does not need to "incant magic words in order to speak clearly." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013).

4. Nor, in any event, does the petition implicate any question so important that review is warranted without any disagreement between courts. *See* Sup. Ct. R. 10(c). Petitioner worries that acknowledging that the Service may regulate hunting could spur the Service to restrict hunting left and right, Pet. 22, but its concerns are unfounded. The panel merely recognized the status quo, under which the Service works with petitioner to manage wildlife on refuges but overrides state policies if they conflict with Congress's directives about how such lands must be managed. Petitioner itself has accepted this allocation of authority for going on four decades now. *See supra* p. 7–8, 13.

The Service's practice when managing the Kenai Refuge confirms that petitioner's concerns have no basis in reality. The Service has left nearly all of the Refuge open to nearly all forms of hunting. *See supra* p. 7–8. It has generally agreed with petitioner's decisions governing hunting, declining to override those decisions. *See supra* p. 7–9. And where the Service has drawn a line, it has thoroughly explained

why petitioner's laws cannot be applied on the Refuge consistent with Congress's directive to manage the Refuge to meet its congressionally defined purposes. *See supra* p. 8–11.

Even if the hypothetical petitioner poses comes to pass, it can be addressed then. Congress has often enacted specific legislation to respond to land-management issues that arise in Alaska. The Congressional Review Act offers a streamlined path to disapprove any future rule, as the Refuges Rule shows. *See supra* p. 12. And petitioner can challenge any future rule in court (on theories similar to those raised below but abandoned here, Pet. App. 21–42).

Nor has petitioner explained why the Service's authority to regulate hunting on a federal refuge when it is incompatible with the purpose for which Congress created the refuge is an issue of exceptional importance. It suggests that deciding the hunting methods that will be allowed within the Kenai Refuge is a "local issue" that the Service has intruded on. Pet. 22. Its efforts to paint this case as implicating some federalism concern lack support in logic. The Refuge is a *national* wildlife refuge, after all. They also run headlong into precedent. This Court has already rejected the claim that federal management of fish and wildlife on federal lands is "prototypically a local concern, *id.*, as "without merit." *Kleppe*, 426 U.S. at 541 (referring to the claim that allowing federal law to govern the killing of animals on federal public lands would be an "impermissible intrusion on the sovereignty, legislative authority, and police power of the State").

Finally, the panel decision does not implicate any separation of powers concern. Petitioner repeatedly states that the panel held that the Service has "plenary

authority"—which petitioner deems synonymous with "unbridled power"—under ANILCA to regulate hunting. Pet. i, 1, 2, 3, 16, 24. As explained, the panel did not. *See supra* p. 13–16, 18–19.

II. Petitioner's Congressional Review Act Argument Does Not Warrant Review.

1. Petitioner does not allege a split of authority on its Congressional Review Act argument, and none exists. Respondents are not aware of any other litigant raising the theory petitioner advances here: that Congress's disapproval of one rule under the Act can somehow impliedly repeal a separate rule that was issued *before* the disapproved rule and that Congress did not disapprove. The panel is, in any event, the only court to have addressed it.[10]

Petitioner's amici prove the point. Like petitioner, they do not allege a split of authority over whether the disapproval of a regulation under the Congressional Review Act can impliedly repeal a prior regulation. (They do not acknowledge the issue at all.) Instead,

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[10] Respondents have found only one other decision that addresses the effect of a disapproval beyond invalidating the rule itself, and it did not address earlier-promulgated rules. The Department of Labor issued a rule that granted certain state-run retirement programs an exemption that treated them as falling outside the Employee Retirement Income Security Act (ERISA). *See Howard Jarvis Taxpayers Ass'n v. California Secure Choice Ret. Sav. Program*, 997 F.3d 848, 856 (9th Cir. 2021). Congress disapproved the rule. *See id.* In a challenge to California's state-managed retirement account program, the Ninth Circuit examined the rule and held that its disapproval meant that the program could not be treated as "automatically exempt" from ERISA preemption. *Id.* at 857. The court thus decided the preemption question itself, based on the text of ERISA. *See id.* This Court declined to review that decision. 142 S. Ct. 1204 (2022).

they claim courts have not "been consistent," States' Br. 6, on a separate question under the Act: what it means for a new regulation to be "substantially the same" as a disapproved rule, 5 U.S.C. § 801(b)(1). Their proof? A single, unpublished district court opinion that referenced the Act while resolving a claim that an agency decision had not been properly ratified after a violation of the *Federal Vacancies Reform Act*. *See* States' Br. 7 (citing *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)).

2. The panel correctly held that the plain text of the Congressional Review Act forecloses petitioner's argument that the disapproval of the Refuges Rule impliedly repealed the separate, earlier Kenai Rule.

The Act's plain text dictated the panel's holding that the disapproval of the Refuges Rule did not impliedly repeal or invalidate the Kenai Rule. If a rule is disapproved, the Act limits the agency's discretion *going forward*. As relevant, the agency cannot "reissue[]" a disapproved rule "in substantially the same form" or issue "a new rule that is substantially the same" as a disapproved rule (unless Congress authorizes it to do so). 5 U.S.C. § 801(b)(1). A disapproval thus affects what kinds of "new" rules an agency can issue, but it does not affect *old* rules that issued before the disapproved rule. *See University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. 338, 353 (2013) ("Congress' choice of words is presumed to be deliberate."). "The Kenai Rule is not a 'new rule' relative to the Refuges Rule because the Kenai Rule is the older of the two rules, a fact the State admits." Pet. App. 20. So, as found by the panel, the disapproval "of the Refuges Rule does not void the Kenai Rule." *Id.* at 21.

Petitioner does not attempt to overcome this plain text. Instead, it argues that the Refuges Rule's disapproval "must be given effect when considering" the Kenai Rule because it reflects a "clear intention" with respect to brown bear baiting. Pet. 28. That intent is not at all clear; indeed, one could imagine scores of explanations for the Refuges Rule's disapproval. One congressperson may have disagreed with the Service's decision to impose a statewide policy in the Refuges Rule. Another might have disagreed with the decision to revise the processes governing giving notice of refuge closures. Another might have disagreed with the provisions restricting hunting of wolves and coyotes. *See supra* p. 11–12. In any event, "vague invocations of statutory purpose" must give way to "the words Congress chose." *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1792–1793 (2022).

Petitioner's reading does not just violate the plain text of the Act, it makes little sense. If a disapproval of a rule can have an effect on earlier-issued rules, that risks chaos. An agency would have to identify existing rules that are "substantially the same"—an undefined term—as the disapproved rule. Until it does so, regulated entities would be left without guidance as to which rules remain good law. And even after it does, its conclusions might be challenged, creating a new wave of uncertainty.

Tellingly, not even petitioner's amici endorse its interpretation. They spend nine pages accusing the panel of "amending the CRA's text on the fly." States' Br. at 3–12. But they do not so much as acknowledge that the Kenai Rule was issued before the disapproved Refuges Rule, much less attempt to grapple with the Act's text, which sets out just two, forward-looking consequences for a disapproved rule. Their choice to

ignore this defect in petitioner's interpretation, which was the basis for the decision below, suggests that even they recognize it is indefensible.

3. This issue is not important. One reason no other court has addressed petitioner's theory is because Congressional Review Act disapprovals are rare. Since the Act was enacted 26 years ago, Congress has disapproved just 20 regulations. *See* Cong. Research Serv., The Congressional Review Act (CRA): Frequently Asked Questions (Nov. 2021), *available at* bit.ly/3ubTXwI. There is no need for this Court to address an issue that is unlikely to recur.

Petitioner's attack on an additional reason the panel gave for rejecting its Congressional Review Act argument does not support review. Not only was the Kenai Rule not a "new rule," 5 U.S.C. § 801(b)(1), but it also was not "substantially the same," *id.*, as the Refuges Rule. Pet. App. 20–21. Petitioner and its amici criticize the panel for stating that the Act prevents an agency from issuing a "substantively identical" new rule. Pet. 30 (quoting Pet. App. 20). Even assuming that "substantively identical" was not judicial shorthand for "substantially the same," it makes no difference here. For one thing, this part of the panel's Congressional Review Act discussion is dicta given its conclusion that the Kenai Rule is not a "new rule." For another, the narrower Kenai Rule is not "substantially the same" as the broader Refuges Rule under any interpretation of that phrase.

Petitioner's amici urge this Court to take this petition "to dispel" the idea that the Congressional Review Act precludes all judicial review. States' Br. 9. But that would not change the outcome below. The panel did not "assume[]" the Act permits review, *id.* at 10; it reviewed petitioner's claim head-on, found it

"unsupported by the law," and "reject[ed] it." Pet. App. 19. Nor do the cases these amici provide show that courts are reading the Act to "preclude" review of "any issue arising under the" Act. States' Br. 9. Instead, each held only that the statement that "[n]o determination, finding, action, or *omission* under [5 U.S.C. § 805] shall be subject to judicial review," (emphasis added), means that courts cannot "void rules on the basis of" an agency's failure to submit a rule to Congress. *Montanans For Multiple Use v. Barbouletos*, 568 F.3d 225, 229 (D.C. Cir. 2009) (Kavanaugh, J.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 30, 2023