No. 22-401

In the
Supreme Court of the United States

STATE OF ALASKA,

Petitioner,

v.

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

Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

The Ninth Circuit limited Alaska's traditional authority over wildlife within her borders by granting the Secretary of the Interior plenary authority over wildlife management on public lands. Historically, federal agencies recognized States' authority over the methods and means of hunting, while the agencies claimed an overarching responsibility to conserve and protect wildlife populations. See Pet. 6 (discussing 43 C.F.R. § 24.1 (1971)). Congress, through the passage of the Alaska National Interest Lands Conservation Act (ANILCA), sought to preserve Alaska's authority when it withdrew vast swaths of the state for wildlife refuges and national preserves. The Ninth Circuit's decision did away with this division of authority. In doing so, the court ignored, finding irrelevant, Congress's recent legislation to protect a balance that the federal government has historically recognized. See Pub. L. No. 115-50, 131 Stat. 86 (2017).

The briefs in opposition (BIOs) do not offer sufficient justification for declining review. Although both oppositions invite Alaska to relitigate this issue in the D.C. Circuit in the hopes of obtaining a different result, neither opposition seriously argues that the Court should deny this petition over the lack of a circuit split when it raises an Alaska-specific dispute. The respondents' oppositions thus boil down to two

main arguments.[1] First, they claim the ruling is insignificant as it impacts only one form of hunting in one wildlife refuge. The Ninth Circuit held the Secretary has plenary authority to preempt state law on 76.8 million acres of refuge lands in Alaska. A district court has already extended this holding to an additional 20 million acres of national preserves under National Park Service management. Such broad authority to preempt state law is not insignificant. That is especially true here where Congress expressly sought to preserve Alaska's coordinate regulatory role. Second, the respondents argue that the ruling is correct. That would not justify denying certiorari even if true, given the importance of the question presented. But it is not true. The decision reads out ANILCA's savings clause, ignores recently enacted legislation reasserting Congress's intent to preserve Alaska's regulatory authority over hunting practices in the state, and cannot be salvaged by mischaracterizing Alaska's argument. The Court should grant the petition.

I. Review Of A Decision Shifting Traditional State Authority To A Federal Agency Is Warranted.

The decision below warrants review because it dramatically diminishes Alaska's traditional authority to regulate the methods and means of

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[1] Alaska collectively refers to the government and the environmental respondents as respondents. Safari Club International is also a respondent, but it filed a response in support of Alaska's petition.

hunting within her borders while granting plenary authority to the federal agency over refuges. Neither respondent disputes the significance to States of maintaining their historic police powers.

Both respondents argue the Court should deny review because there is no conflict among the circuits and because Alaska overstates the breadth of the Ninth Circuit's decision. Gov't BIO 13-14, 16; Envtl. Resp't BIO 18, 20. Both arguments lack merit.

First, there is no circuit split because this case raises an Alaska-specific dispute involving Alaska-specific statutes. The respondents nevertheless suggest a circuit split is possible by pointing out that Alaska could have brought this litigation in the D.C. Circuit. Gov't BIO 16; Envtl. Resp't BIO 20. While that may be true, the ability to choose between circuits at the outset of litigation does not necessarily result in final judgments from each circuit. See *Montana v. U.S.*, 440 U.S. 147, 152 (1979) (holding the United States was collaterally estopped from raising a constitutional question in federal district court after receiving an adverse decision from the Montana Supreme Court). Even assuming Alaska could accept the respondents' invitation to relitigate this issue in the D.C. Circuit, the lack of a circuit split does not carry the same weight when a State raises a state specific issue. This is not a situation where the Court can wait for different parties with different interests to pursue litigation in multiple circuits to help flesh out the issues. This case rests on three Alaska-specific statutes: the Alaska Statehood Act, ANILCA, and the 2017 legislation disapproving of an Alaska-specific

regulation. The Ninth Circuit resolved a dispute over Alaska's traditional management authority. There is simply no reason to wait. The respondents do not even attempt to argue that this case is a poor vehicle for resolving this important question.

Second, the respondents' attempt to dilute Alaska's concerns over the loss of its historic police power is unsupported and contrary to the facts on the ground. Both respondents argue that the decision is far narrower than Alaska suggests, contending that the court went no further than this Court's ruling in *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019). Gov't BIO 14; Envtl. Resp't BIO 16. This is inaccurate. In *Sturgeon*, this Court recognized that ANILCA vests the Secretary with broad authority to protect "the national interest in the scenic, natural, cultural and environmental values on public lands." *Sturgeon*, 139 S. Ct. at 1087 (internal quotation omitted). But the Court had no occasion to consider Congress's expressed intent to preserve Alaska's traditional management authority over wildlife, and how that express provision curbs the Secretary's authority. *See generally id.* (having no reason to discuss or even cite ANILCA's savings clause in 16 U.S.C. § 3202(a)). That issue remained open. Rather than follow this Court's directive to give "full effect to evidence that Congress considered, and sought to preserve, the States' coordinate regulatory role in our federal scheme," *California v. Fed. Energy Regulatory Comm'n*, 495 U.S. 490, 497 (1990), the Ninth Circuit abrogated Congress's careful delineation between state and federal power, and awarded Alaska's traditional

authority over wildlife management to the federal agency, App. 18.

Although the Ninth Circuit's decision is sweeping in the authority it usurps from Alaska and grants to the federal agency, the respondents contend that the agency will self-impose restrictions on this new grant of authority. The respondents claim the agency must tie the exercise of its authority to its statutory directive to protect the national interest in environmental values, narrowing the scope of the agency's power. Gov't BIO 10; Envtl. Resp't BIO 16. But that requirement is ministerial under the Ninth Circuit's reasoning. Hunting is the taking of animals; it will always have some level of impact on environmental values and wildlife populations. If a generic federal interest such as this is all the federal agency needs to preempt state law setting the methods and means of hunting, it is no limitation at all.

The government's suggestion that this Court look past the Ninth Circuit's reasoning because it "reviews judgments, not statements in opinions" is similarly unpersuasive. Gov't BIO 14 (quoting *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam)). First, the government cites the Court a case in which the *prevailing* party sought to review the lower court's reasoning. See *Rooney*, 483 U.S. at 311 (concluding the prevailing party could not appeal a favorable judgment to challenge the court's reasoning). Here, of course, Alaska is not the prevailing party. And the court's statement about the scope of the federal agency's authority is not "mere dicta" or merely a statement in an opinion. See

Camreta v. Greene, 563 U.S. 692, 704 (2011). It is a ruling that established controlling law and will have a significant future effect on Alaska's traditional authority. See *id.* Second, the Ninth Circuit's holding is already having on the ground impact.

The power the Ninth Circuit granted the Secretary may be far broader than the respondents wish to admit, but the significance of the decision is already being felt in Alaska. A district court recently relied on the Ninth Circuit's decision to remand a rule issued by the National Park Service. *Alaska Wildlife Alliance v. Haaland,* Case No. 3:20-cv-00209-SLG, 2022 WL 17422412 (D. Alaska Sept. 20, 2002). That rule, unlike the U.S. Fish and Wildlife Service's (Service's) Kenai Rule, did recognize Alaska's authority over the management of hunting and trapping. 85 Fed. Reg. 35,181 (June 9, 2020). It deferred to State management—permitting state authorized hunting practices such as brown bear baiting—and acknowledged that the Secretary retained only "limited closure authority" to "designate zones where and periods when no hunting, fishing, trapping, or entry may be permitted for reasons of public safety, administration, floral and faunal protection, or public use and enjoyment." *Id.* at 35,182-83; see also 16 U.S.C. § 3201 (same).

The environmental respondents are also the plaintiffs in the litigation over the National Park Service's rule and in that litigation they offered the district court a different interpretation of the Ninth Circuit's decision than they do here. Before the district court, they argued the Ninth Circuit *did* hold the

Service has plenary authority. Plaintiffs' Reply Brief, *Alaska Wildlife Alliance v. Haaland,* Case No. 3:20-cv-00209-SLG, Dkt. 83, at 23.[2] Whereas here, they argue the Ninth Circuit did not hold the Service has plenary authority to preempt state law regulating how people hunt. Envtl. Resp't BIO 20.

The district court agreed with the broader interpretation the environmental respondents offered and remanded the National Park Service's rule. It held that the agency "incorrectly described its authority to regulate hunting on Federal lands in Alaska as limited and deferential to the State, b[ecause] the [Ninth] Circuit has since held that the Federal government maintains plenary power over these lands and the authority to preempt conflicting State law." *Alaska Wildlife Alliance v. Haaland,* Case No. 3:20-cv-00209-SLG, 2022 WL 17422412, *14 (citing App. 10, 16-17). This Court should reject the respondents' attempt to secure broad authority going forward by minimizing the significance of the Ninth Circuit's decision here.

In an attempt to show that the federal agency will not use the broad authority granted to it, the respondents turn to a memorandum of understanding entered by Alaska and the Service in 1982. Gov't BIO 18; Envtl. Resp't BIO 7. Notably, the Ninth Circuit's decision does not even mention this memorandum. The government argues the framework of that

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[2] The federal government did not respond to the plaintiffs' motion for summary judgment.

memorandum "exemplifies" cooperative federalism. Gov't BIO 18. It suggests that "given that tradition of collaboration, there is no basis for this Court's intervention in this isolated dispute over a specific hunting practice occurring on a particular federal refuge." *Ibid.* The environmental respondents follow suit, going so far as to argue that the Service has "[kept] its end of the bargain" and "cooperated with Alaska to manage the Kenai Refuge." Envtl. Resp't BIO 7. Alaska disagrees.

The respondents' reliance on cherrypicked provisions of the memorandum of understanding to undermine the significance of the question presented is unpersuasive for two reasons. First, as evidenced by this litigation, Alaska disagrees with any suggestion that the Service "kept its end of the bargain." Second, contrary to the Service's suggestion, Alaska did not agree to cede to the Service its authority over the methods and means of hunting. In the memorandum, the Service agreed to "recognize the [Alaska] Department [of Fish & Game] as the agency with *primary* responsibility to manage fish and resident wildlife within the State of Alaska." CA 3-ER-431 (emphasis added). But now, relying on the Ninth Circuit's decision, the government questions whether the Alaska Statehood Act even transferred concurrent management authority within refuges to Alaska. Gov't BIO 12 ("[*T*]*o the extent that* Alaska has concurrent authority to regulate wildlife on federal refuge lands in the State, standard preemption principles [apply]." (emphasis added)). In short, review of the court's decision remains urgent because the 1982 memorandum simply does not protect Alaska's ability

to exercise its traditional authority over hunting on federal lands. That document is particularly meaningless now, when the government is unwilling to fully endorse the agreement in its entirety and is now hedging on whether Congress has ever granted Alaska cooperative management authority over wildlife on refuges.

II. The Ninth Circuit's Decision Is Wrong.

The respondents' main tact when defending the merits of the Ninth Circuit's decision is to overstate Alaska's position. Contrary to the respondents' suggestion otherwise, Gov't BIO 12, Envtl. Resp't BIO 2, Alaska recognizes *Congress's* plenary power via the Property Clause to pass legislation concerning federal land (including wildlife on that land). Pet. 19. The question here is how much of that authority did Congress delegate to the federal *agency* and how much did it preserve for Alaska. See *Wyoming v. United States*, 279 F.3d 1214, 1230 (10th Cir. 2002) (recognizing that under the Property Clause Congress could choose to "share management authority over federal lands with the States" or "preserve to its fullest extent the States' historical role in the management of wildlife within their respective borders").

The starting point for determining the extent of Alaska's preserved authority over wildlife management is the Alaska Statehood Act. Pet. 4-5. Both respondents concede that Alaska complied with the terms of that Act, and the environmental respondents properly recognize that post statehood, Alaska "enjoyed 'the same measure of administration

and jurisdiction over fisheries and wildlife as . . . other States.' " Envtl. Resp't BIO 3 (quoting *Metlakatla Indian Cmty. v. Egan*, 369 U.S. 45, 57 (1962)). And, ANILCA left in place the "status quo," meaning the traditional division of authority between the state and federal governments. Envtl. Resp't BIO 3. The government takes an alternative approach. Regarding the extent of Alaska's authority, the government appears to adopt the most harmful reading of the Ninth Circuit decision, suggesting that Alaska's authority over refuges was somehow limited compared to its authority elsewhere and as compared to other States. Gov't's BIO 12. As the amicus brief of the Alaska Professional Hunters Association thoroughly explains, to the extent this was the Ninth Circuit's holding, it was seriously flawed and the government's adoption of this holding is therefore unsustainable.[3]

The next step in the analysis is to determine the extent of Alaska's traditional management authority. Both respondents argue that nothing within the text of ANILCA supports Alaska's argument that it manages how people hunt while the federal agency maintains the authority to limit where and when hunting may occur. Gov't BIO 13; Envtl. Resp't BIO 22. But remember, ANILCA maintained the "status

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[3] The environmental respondents argue strenuously against this interpretation of the decision. They contend the Ninth Circuit did not go so far as to limit, when compared to other States, Alaska's authority within refuges. Envtl. Resp't BIO 14 n.8.

quo." See 16 U.S.C. § 3202(a). The "status quo" was explained in a federal regulation that existed at the time of ANILCA's adoption.

In 1971, nine years prior to the passage of ANILCA, the Secretary promulgated a regulation defining States' traditional management authority. 36 Fed. Reg. 21,034, 21,034-35 (Nov. 3, 1971) (43 C.F.R. § 24.2 (1971)). In doing so, it recognized the same division of labor that Alaska advocates for here. Specifically, the regulation provided that the "States have the authority to control and regulate the capturing, taking, and possession of fish and resident wildlife by the public within State boundaries" and that "Congress, through the Secretary of the Interior, has authorized and directed to various Interior agencies certain responsibilities for the conservation and development of fish and wildlife resources and their habitat." *Ibid*. This regulation remained in place through the passage of ANILCA in 1980 and was amended in 1983. 48 Fed. Reg. 11,642 (March 18, 1983). Even today, the regulation points to State management as "the comprehensive backdrop applicable in the absence of specific, overriding Federal law." 43 C.F.R. § 24.1(a). The respondents did not address these regulations in their oppositions.

Another notable omission from the respondents' oppositions was any discussion of the regulation that specifically defers to Alaska law on the issue of baiting as an authorized hunting practice. 50 C.F.R. § 32.2(h). That regulation provides that "[t]he unauthorized distribution of bait and the hunting over bait is prohibited on wildlife refuge areas. (Baiting is

authorized in accordance with *State* regulations on national wildlife refuges in Alaska)." *Id.* (emphasis added). Congress disapproved of the Service's attempt to remove the Alaska exception through the 2017 legislation passed via the Congressional Review Act. Pet. 14.

The Ninth Circuit, similar to the respondents here, did not even mention these regulations or try to meaningfully consider the extent of Alaska's traditional authority prior to ANILCA. Instead, the court, like the respondents, made this case about Congress's authority under the Property Clause, something Alaska does not even dispute. See App. 16, 18. For these reasons, the respondents' reliance on the Tenth Circuit's decision in *Wyoming v. United States*, 279 F.3d 1214 (2002), is misplaced. Alaska is not alleging that Congress cannot preempt its "inherent sovereign authority" to manage wildlife within its borders. See *id.* at 1123. The question here is whether ANILCA did so, and if it did, to what extent. If there is a conflict between ANILCA and the National Wildlife Refuge System Improvement Act, ANILCA controls. App. 21-22 (citing Pub. L. No. 105-57 § 9(b), 111 Stat. 1252 (1997)).

Last, both respondents attack Alaska's reliance on legislation enacted by Congress to disapprove of the regulation that banned brown bear baiting and other methods of hunting statewide. Alaska's petition, and the multi-state amicus brief authored by West Virginia, cover the national significance of this legislation and the significant issues with the Ninth Circuit's interpretation of the Congressional Review

Act. There is one additional point to be made. The legislative history of the Congressional Review Act provides that "a court or agency must give effect to the intent of the Congress when such a resolution is enacted and becomes the law of the land." 142 Cong. Rec. S3683, S3686 (1996). The 2017 legislation disapproved of the Service's attempt to preempt state law regulating the methods and means of hunting. That legislation became the "law of the land," see also *Ctr. For Biological Div. v. Bernhardt*, 946 F.3d 553, 562 (9th Cir. 2019) (same), and the Ninth Circuit was wrong when it refused to give it the effect Congress intended.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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