No. 17-949

In The Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

BERT FROST, in His Official Capacity as Alaska Regional Director of the National Park Service, et al.,

Respondents.

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

AMICUS CURIAE BRIEF FOR AHTNA, INCORPORATED IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

This brief is submitted on behalf of *amicus curiae* Ahtna, Incorporated ("Ahtna"), which is an Alaska Native Regional Corporation created pursuant to the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§ 1601-1629.

Ahtna represents the interests of 2,021 Alaska Native shareholders and owns lands and resources located within conservation system units ("CSUs")[2] managed by various federal agencies. Ahtna is charged with advancing the interests of its shareholders, many of whom have limited incomes and live in remote locations. But Ahtna represents more than just a corporation.

The Ahtna Athabascan people have occupied east-central Alaska for more than 5,000 years. B.A. Potter, *Exploratory Models of Intersite Variability in Mid and Late Holocene Central Alaska*, 61(4) ARCTIC 407-25 (Dec. 2008). They thrived in this bountiful region by following the rhythm of the seasons: fishing in the lakes in the spring, fishing the mighty Copper River

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its shareholders, or its counsel made a monetary contribution to its preparation or submission.

[2] Conservation system units, or "CSUs," are defined to mean "any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument[.]" 16 U.S.C. § 3102(4).

(or "Atna" in the Ahtna language) for salmon in the summer, harvesting berries in the late summer and fall, and hunting for moose and caribou in the fall. Due to the long, cold winters, successful fishing, hunting, and gathering were crucial for survival. But it was not just about survival; these activities were the very fabric of the Ahtnans' social, political, and religious identity. What the federal government defines as "subsistence," is their customary and traditional way of life.

Unfortunately, since the 1898 Klondike Gold Rush, this customary and traditional way of life has been under constant threat. W.E. Simeone, Ph.D., *Ahtna, The People and Their History* 206 (Ahtna, Inc. 2018). Population booms, and the development of road access into the heart of the Ahtna region after World War II, created significant competition for hunting and fishing resources.[3] The competition over limited fish and game resources increased when the State of Alaska gained regulatory control over fish and game and arbitrarily restricted subsistence fishing in the region without consulting the Ahtna people. The results were disastrous. The State's restrictions eliminated traditional Ahtna fishing sites, eviscerated a crucial food source,

[3] Notably, there were 9,000 resident hunting licenses sold in 1946. By 1955/56, that number had increased to 31,500. Morgan Sherwood, *Big Game in Alaska: A History of Wildlife and People* 143 (Yale University Press 1981). Between 1960 and 1970, Salmon fishing permits on the Copper River increased a staggering 96 percent. W.E. Simeone, Ph.D. & J. Fall, *Patterns and Trends in the Subsistence Salmon Fisher of the Upper Copper River* 21-32 (2003).

and made it difficult to dry fish in the traditional manner. Simeone 206-07.

Since that time the Ahtna people have been forced to spend tremendous resources and energy litigating to protect their customary and traditional way of life. Even after the promises made in ANCSA and the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §§ 3101 *et seq.*, where Congress enacted a law designed to protect "the continuation of the opportunity for subsistence uses by rural residents of Alaska [because it] is essential to Native physical, economic, traditional, and cultural existence. . . .", *id.* at § 3111(1), the State of Alaska continued to unduly restrict access to Ahtna's fish and game resources. It was only with the landmark *Katie John*[4] decision that the Ahtna people began to secure meaningful protection for their customary and traditional way of life.

This case has extraordinary importance to Ahtna and its shareholders for two reasons.

First, a decision that undermines, directly or indirectly, subsistence rights will violate ANILCA and have devastating repercussions for Ahtna's customary and traditional way of life. Preservation of this way of life is of the utmost importance to Ahtna.

Second, a decision from this Court that expands federal authority beyond the powers granted to federal land management agencies (like the National Park

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[4] *State of Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995) ("*Katie John I*").

Service ("NPS")) will have deleterious effects on Ahtna's ability to develop its lands and resources for the benefit of its shareholders as promised in ANCSA and ANILCA.

Ahtna, therefore, asks this Court to strike a careful balance. Fortunately, this can be accomplished by harmonizing the relevant provisions of ANILCA.

SUMMARY OF ARGUMENT

Although the instant case does not involve Title VIII of ANILCA, the Ninth Circuit Court of Appeals implicated the subsistence priority by relying on *Katie John*, which is a decision that interpreted Title VIII, to construe the meaning of separate and distinct provisions of ANILCA. This Court should not follow the Ninth Circuit's lead but should, instead, issue a decision that acknowledges that (i) the extent of federal authority under Title VIII is separate and distinct from federal authority under the rest of ANILCA and (ii) case law applying Article VIII should not be relied on to define the scope of federal land management agencies' conservation-based regulations within CSUs.

In 1995, the Ninth Circuit adjudicated a case regarding the scope of "public lands" under Title VIII—specifically, whether the term "public lands" encompasses navigable waterways for purposes of the subsistence priority. *Katie John I*, 72 F.3d 698. Correctly recognizing the clear congressional intent to maintain a priority for subsistence fishing—most of which occurs

on navigable waterways—the Ninth Circuit held that navigable waterways in which the United States holds a reserved water right are "public lands" for purposes of Title VIII, and that the subsistence priority therefore applies to such waterways. *Id.* at 704; *see also id.* at 702 ("[W]e have no doubt that Congress intended that public lands include at least some navigable waters."). That decision was upheld by an *en banc* panel in 2001, *John v. United States*, 247 F.3d 1032 (9th Cir. 2001) ("*Katie John II*"), and the application of the subsistence priority to specific waters was finally resolved in a related suit decided in 2013, *John v. United States*, 720 F.3d 1214, 1218 (9th Cir. 2013) ("*Katie John III*").

In short, the *Katie John* trilogy resolved the hotly contested issue of which Alaskan waters qualify for the subsistence priority and who gets to manage subsistence rights over these waters.

Unfortunately, in the opinion below the Ninth Circuit failed to appreciate the uniqueness of Title VIII. Instead of acknowledging Congress's special emphasis on the subsistence priority, the court bootstrapped the *Katie John* decisions onto the instant dispute—even though the present litigation does not involve subsistence priority issues. In doing so, the Ninth Circuit simply assumed that "public lands" has the same meaning under Title VIII as it does throughout the rest of ANILCA.

This reasoning is erroneous. As a threshold matter, it ignores the *Katie John I* court's explanation that its interpretation of the "definition of public lands is

necessary to give meaning to [Title VIII's] purpose of providing an opportunity for a subsistence way of life" and that its "interpretation of the term public lands in this case will not allow the United States to usurp state power over navigable waters elsewhere." *Katie John I*, 72 F.3d at 702 n.9.

More importantly, the opinion below violates "the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) (quotation omitted). Even though ANILCA does not define "public lands" differently in Title VIII as compared to the rest of the statute, this Court has recognized that the "ordinar[y]" presumption that "identical words used in different parts of the same [statute] are intended to have the same meaning" "readily yields to context, and a statutory term—even one defined in the statute—may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014) (quotation omitted).

Thus, an analysis of the meaning of "public lands" under various provisions of ANILCA is incomplete if it fails to consider that Congress exercised different authority to achieve the subsistence priority than it did to achieve the rest of ANILCA's goals. Regardless of how this Court interprets "public lands" for purposes of adjudicating whether the NPS has the authority to enforce a hovercraft ban on navigable waterways,

"public lands" should not be deemed to categorically exclude navigable waterways for purposes of Title VIII. A ruling to the contrary would run afoul of congressional intent and established principles of statutory interpretation, *see Burwell*, 135 S. Ct. at 2492, and disturb the hard fought compromise that gave meaning to Title VIII.

BACKGROUND

The Ninth Circuit's decision below found that the NPS can exercise regulatory control over the water column flowing over private lands (*i.e.*, the State and Alaska Native Corporation owned lands) located within the boundaries of the National Park System in Alaska. *Sturgeon v. Frost*, 872 F.3d 927, 934-35 (9th Cir. 2017). The court empowered the NPS to control access and use of navigable waters in Alaska by extending the reach of *Katie John I*, which is grounded in Title VIII of ANILCA and addresses distinct issues related to subsistence rights. The outcome of this case may, therefore, turn on how this Court construes *Katie John*. But to properly understand *Katie John*, it is necessary to discuss (i) the historic relationship between the United States, Alaska, and Alaska Natives, and (ii) how Congress resolved Native land claims and aboriginal rights.

Federal Oversight of Alaska: 1867 to 1958

The Russian Governor of Alaska, Alexander Baranof, reportedly said that "God is in Heaven and St. Petersburg is far away." Substitute Washington, D.C. for St. Petersburg and this is largely the epitome of the United States' relationship to Alaska and Alaskans until Statehood.

The United States purchased Alaska from Russia on March 30, 1867. *Sturgeon v. Frost*, 136 S. Ct. 1061, 1064 (2016). The 1867 Treaty of Cession did little to create a functioning government and provided scant guidance on what rights Alaska Natives retained; the Treaty merely provides that "[t]he uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to the aboriginal tribes of that country." Treaty Concerning the Cession of the Russian Possessions in North America, Mar. 30, 1867, 15 Stat. 539.

After acquiring Alaska, the federal government exhibited little interest in the new territory for the first 17 years. Ernest Gruening, *The State of Alaska* 33-43 (Random House 1968). Federal oversight essentially amounted to an "era of total neglect" for citizens and Alaska Natives alike. Gruening at 33-43. Natives, "who constituted an overwhelming majority of its approximately thirty thousand souls, were as devoid of attention, or even mention, as was the population as a whole." Gruening at 355; *see also Tlingit and Haida Indians of Alaska v. United States*, 177 F. Supp. 452, 456-59, 464-67 (Fed. Cl. 1959).

The passage of the Organic Act of Alaska, 23 Stat. 24 ("Organic Act") in 1884 nudged the federal government's oversight from "total neglect" to "flagrant neglect." Gruening at 47-78. The Organic Act created a civil government and provided some governing authority by making Alaska a civil and judicial district controlled by the general laws of the State of Oregon "so far as they may be applicable," and also "not in conflict with the provisions of this act or the laws of the United States." 23 Stat. 24, 26.

With respect to Alaska Natives, the Organic Act was the first effort by Congress to enact laws intended to protect them "in the possession of any lands actually in their use or occupation." David S. Case & David A. Voluck, *Alaska Natives and American Laws* 24 (University of Alaska Press, 3d ed. 2012); *id.* at 114-15 (based on this law, judicial decisions upheld possessory rights and expanded the scope of Native title). The Organic Act specifically provided "[t]hat the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."[5] 23 Stat.

[5] Section 12 also provided that the Secretary of the Interior should investigate "the condition of the Indians of the Territory and for the making of a report on them and what lands, if any, were to be reserved for their use[.]" *Tlingit and Haida Indians of Alaska*, 177 F. Supp. at 465. In 1885, the Secretary issued a report and recommended that Natives "should have deeds to the land they actually used and occupied and that they should be secured in the use of their fishing sites. The Report also recommended that

24, 26. But ultimately during this period little effort was expended on resolving aboriginal rights. Gruening 353-56.

Alaska finally gained attention when, prompted by the first major discovery of gold in the 1880s, Congress enacted a series of laws to cope with the gold rush. Gruening at 63-75. The issue of aboriginal rights, however, continued to be largely ignored. *See United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1015 (D. Alaska 1977) ("Under these laws, appropriate administrative officials authorized entries on, and disposition of, Alaska lands without regard to aboriginal title claims of Natives."); Gruening at 355-63.

This state of neglect did not significantly change until 1904, when President Roosevelt acknowledged the need for the federal government to take on a more energetic role in Alaska. In his State of the Union address, President Roosevelt observed that Alaska had "outgrown its present laws, while in others those laws have been found to be inadequate." President's Annual Message, 39 Cong. Rec. 10, 18 (Dec. 6, 1904) (President Theodore Roosevelt). President Roosevelt specifically stated that the federal government must do more to address the issues facing Alaska Natives. He remarked that for Alaska Natives "[t]heir country is being overrun by strangers, the game slaughtered and driven away, the streams depleted of fish, and hitherto unknown and fatal diseases brought to them, all of which

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the [Natives] be given the same right to acquire land as the white people had." *Id.* at 465-66.

combine to produce a state of abject poverty and want which must result in their extinction. Action in their interest is demanded by every consideration of justice and humanity." *Id.*

To address the deprivations and injustice facing Native Alaskans, President Roosevelt asked Congress to establish hospitals "so that contagious diseases that are brought to them continually by incoming whites may be localized and not allowed to become epidemic, to spread death and destitution over great areas." *Id.* And President Roosevelt requested that Alaska's Governor be provided "with the means and the power to protect and advise the native people, to furnish medical treatment in time of epidemics, and to extend material relief in periods of famine and extreme destitution." *Id.*

Most importantly for the instant case, President Roosevelt requested that the "Alaskan natives should be given the right to acquire, hold, and dispose of property upon the same conditions as given other inhabitants; and the privilege of citizenship should be given to such as may be able to meet certain definite requirements." *Id.*

Consistent with President Roosevelt's State of the Union address, the legislative and executive branches of the federal government undertook periodic efforts to protect Native hunting and fishing rights and allowed for the acquisition of property: In 1906, Congress enacted the Alaska Native Allotment Act, which was intended to significantly increase Native land ownership. 34 Stat. 197. In 1908, Congress amended Alaska's

first game law, 35 Stat. 102, allowing for Natives to take game animals. And in 1942, the Department of the Interior issued an opinion concluding that Natives have broad aboriginal fishing rights, which have "been construed to include the occupancy of water and land under water as well as land above water." Aboriginal Fishing Rights in Alaska, 57 Interior Dec. 461, 474 (Feb. 13, 1942).[6]

Efforts were also made to provide Alaska Natives with civil rights. For example, in 1915, the Territorial legislature granted some Alaska Natives the right to become citizens and, in 1924, Congress passed legislation, 43 Stat. 253, extending citizenship to all Natives. Gruening at 363; *see also Atlantic Richfield Co.*, 435 F. Supp. at 1013-18 (providing overview of federal treatment of Natives prior to Statehood).

But Alaska Natives would have to wait until 1971 for Congress to address their aboriginal rights in a more meaningful manner.

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[6] *See generally Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918) (United States filed suit to enjoin a commercial fishing operation from operating in a reservation established to protect Natives' fishing rights); *United States v. Libby*, *McNeil & Libby*, 107 F. Supp. 697 (D. Alaska 1952) (discussing the federal efforts to reserve fishing rights for Natives); *Tlingit and Haida Indians of Alaska v. United States*, 177 F. Supp. 452 (Fed. Cl. 1959) (discussing Native land claims and federal efforts to protect hunting and fishing); *Metlakatla Indian Cmty., Annette Islands Reserve v. Egan*, 369 U.S. 45 (1962) (discussing federal efforts to protect Native fishing rights).

Native Alaskans' Socio-Economic Struggle

The failure to adequately address aboriginal rights, including fishing and hunting rights, had dire consequences for many Alaska Natives. A 1954 health survey report on Alaska Natives prepared for the Department of the Interior ("Parran Report") noted that "the indigenous peoples of Native Alaska are the victims of sickness, crippling conditions and premature death to a degree exceeded in very few parts of the world." Thomas Parran et al., Alaska's Health: A Survey Report to the United States Department of the Interior 143 (1954), *available at* http://www.dhss.alaska.gov/Commissioner/Documents/PDF/Parran_Report.pdf. "It is easy to understand why these people, once among the hardiest of the northern races, now are noticeably depressed in the autumn and dread the winter—not because of the coming of the long twilight and the harsh cold, but because of the certain lack of food[.]" *Id.* at 49. The Parran Report stated that approximately 35,000 Natives lived at a "marginal or sub-marginal subsistence level." *Id.* at 16. And at Statehood, the infant mortality rate for Natives was among the highest in the world and life expectancy was 34.7 years, "while his fellow Alaskan who happened to be white could expect to live for 70 years." Gruening at 544.

The Parran Report concluded that the deplorable conditions facing Alaska Natives were caused by three main factors: (i) the federal government's mismanagement of Alaska; (ii) "the great proportion of its industry owned by non-residents uninterested in the development of the Territory"; and (iii) the country's indifference

to the plight of Native Alaskans.[7] *Id.* at 12-15, 22-23. The Parran Report advised that the conditions could be remedied if the federal government addressed, among other things, unemployment and protected hunting and fishing rights. *Id.* at 16-17, 22-23, 49.

Statehood Act Preserves the Status Quo

During the debates over Alaska Statehood, Congress considered Native fishing to be "of vital importance to Indians in Alaska" and noted that the "existence of aboriginal fishing rights was affirmed by the Interior Department's Solicitor in 1942." *Organized Village of Kake v. Egan*, 369 U.S. 60, 66 (1962).

Yet, consistent with the long history of neglecting aboriginal rights, Congress failed to settle the Native land claims in the Alaska Statehood Act. Instead, Congress opted to preserve the status quo. Section 4 of the Statehood Act provides:

> As a compact with the United States said State [Alaska] and its people do agree and declare that they forever disclaim all right and title to any lands or other property not

[7] "It seems incongruous that Americans, who have been critical during the past hundred years of the deficiencies in colonial policies of other nations, have been oblivious of the destitution, demoralization and death among the native peoples of Alaska, which has been an American responsibility since 1867. . . . Every good American should applaud the action of the Congress in authorizing $300 million for famine relief in other countries. But, in all honor, this charity should begin with the relief of native Americans in our own Territory." Parran Report at 49, 312.

> granted or confirmed to the State . . . under the authority of this Act, the right or title to which is held by the United States . . . and to any lands or other property (including fishing rights), the right or title to which *may be held* by any Indians, Eskimos, or Aleuts (hereinafter called natives) or held by the United States in trust for said natives. . . ."

72 Stat. 39 § 4 (emphasis added). Thus, Section 4 requires the State to disclaim right and title to Native property; the United States retains "absolute jurisdiction and control" over it for the benefit of Alaska Natives; and the State may not tax it. *Organized Village of Kake v. Egan*, 369 U.S. 60, 62 (1962).

After Statehood, tensions rose over the State's decision to select lands occupied and used by Alaska Natives. *See, e.g.*, *State of Alaska v. Udall*, 420 F.2d 938 (9th Cir. 1969); *Atlantic Richfield Co.*, 435 F. Supp. at 1015-18. The conflict was intensified by the State of Alaska's management of fish and game. Upon assuming responsibility for fish and wildlife, the State enacted laws that did not provide any preference for subsistence fishing and closed traditional subsistence fisheries, including in the Ahtna region where Katie John and her ancestors had fished for generations. *Katie John I*, 72 F.3d at 701; *John v. United States*, 1994 WL 487830 at *10 (D. Alaska March 30, 1994).

The failure to address aboriginal rights after Statehood exacerbated the haunting plight of Alaska Natives. In 1968, the President of the Alaska Federation of Natives, Emil Notti, testified before Congress

that "the human needs, the suffering and deprivations that exist in the villages are beyond description and are as bad as the worst conditions anywhere in the world. The native people in many areas face a daily crisis just to exist." *Hearings Before the Committee on Interior and Insular Affairs*, United States Senate on S. 2906, 90th Cong. 31 (Feb. 8-10, 1968) (statement of Emil Notti, President, AFN). Notti added: "Controls by the Federal agencies over the resources and lives of native people in Alaska has not met with any success though the reasons can always be rationalized away by those responsible for the failures." *Id*. at 33.

As Notti explained, there was "a strong feeling among the native people in Alaska that they want to have control of their own destiny." *Id*. To do so, Natives needed title to their lands and resources. "We feel we have the ability to make our own way and once we get a fair settlement for our lands, it will enable us to operate our businesses. . . . [I]f we had title to the land we would no longer be a starving people; we would have an economy." *Id*. at 50-51.

ANCSA Settles Land Claims & Extinguishes Aboriginal Fishing Rights

Attempts to resolve Native land claims did not gain traction until the discovery of the Prudhoe Bay oil field in the late 1960s. Just as the gold rush prompted Congress to establish land laws, the rush for oil forced Congress to resolve the Native land claims. *See United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1017-18 (D. Alaska 1977).

In 1971, Congress enacted the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601 *et seq.*, to settle, through grants of a combination of land and money, all "claims by Natives of Alaska." To administer this land and money, Alaska was divided into twelve geographic regions, and the Natives within each region became shareholders in a regional corporation organized under Alaska law. 43 U.S.C. § 1606.

Congress contemplated that land granted under ANCSA would be put primarily to three uses: subsistence, village expansion, and economic development. *See Koniag, Inc. v. Koncor Forest Resource*, 39 F.3d 991, 996 (9th Cir. 1994). "Of these potential uses, Congress clearly expected economic development would be the most significant" and expected that most of the lands selected by Natives would create opportunities and jobs. *Id.*

But ANCSA also extinguished "any aboriginal hunting or fishing rights that may exist." 43 U.S.C. § 1603(b). Natives gave up these rights because they were led to believe that these rights would be protected by the State and federal agencies. Indeed, Congress also believed that there would be little incentive for Natives to select lands for subsistence use because it was believed that Natives would continue their present subsistence uses regardless of whether the lands were in Federal or State ownership. *Id.*; *see also Chugach Natives, Inc. v. Doyon, Ltd.*, 588 F.2d 723, 731 (9th Cir. 1978); *Katie John I* at 700 ("Congress expected that

the state and the federal agencies would protect subsistence hunting and fishing.").

These uncodified promises were, however, unfulfilled.[8]

ANILCA Restores and Codifies Subsistence Rights

After ANCSA, it became evident that two major issues still needed resolution: federal protection for subsistence and classifying the federal government's massive land holdings.[9]

ANILCA, therefore, has three overarching objectives: (i) establish land classifications for federal lands; (ii) preserve economic development rights on State and Native lands located within conservation system units;

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[8] "In the conference report, accompanying ANCSA . . . Congress expressed the clear intention that Alaska Native subsistence interests . . . should be protected by the Secretary of the Interior and the state of Alaska. Neither the Secretary nor the state lived up to these expectations, so it became increasingly obvious that other steps were necessary to protect Alaska Native subsistence." Case & Voluck, *Alaska Natives and American Laws* 291.

[9] *See Katie John I*, 72 F.3d at 700 (discussing subsistence issues as a driving force behind ANILCA); *City of Angoon v. Marsh* 749 F.2d 1413, 1415 (9th Cir. 1984) ("Sometime after the passage of ANCSA, Congress became aware of the need for a legislative means of maintaining the proper balance between the designation of national conservation areas and the necessary disposition of public lands for more intensive private use.").

and (iii) protect subsistence rights. *See Sturgeon*, 136 S. Ct. at 1065; *Katie John III*, 720 F.3d at 1218.

Regarding subsistence, Congress found that Alaska Natives' ability to continue engaging in customary and traditional use of resources was being threatened by Alaska's increasing population. 16 U.S.C. § 3111(3). Congress also acknowledged that "in most cases, no practical alternative means are available to replace the . . . fish and wildlife which supply rural residents dependent on subsistence uses[.]"[10] 16 U.S.C. § 3111(2).[11]

Thus, one of Congress' primary aims in passing ANILCA was to codify the promises made during ANCSA that Native subsistence rights would be protected. Specifically, Congress sought to ensure "the continuation of the opportunity for subsistence uses by rural residents of Alaska." *Id.* § 3111(1). As is evident throughout ANILCA, "Congress places great emphasis on providing rural residents of Alaska with the opportunity to maintain a subsistence way of life." *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1192 (9th Cir. 2000) (citing 16 U.S.C. §§ 3101(c), 3111–3112, 3114); *id.* at 1189 (ANILCA was enacted "to protect the viability of subsistence living"); *United States*

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[10] "[Fifty] percent of the food for three-quarters of the Native families in Alaska's small and medium villages is acquired through subsistence uses, and 40 percent of such families spend an average of 6 to 7 months of the year in subsistence activities." H.R.Rep. No. 1045, 95th Cong., 2d Sess., at 181 (1978).

[11] *See generally* Miranda Strong, *Alaska National Interest Lands Conservation Act Compliance & Nonsubsistence Areas: How Can Alaska Thaw Out Rural & Alaska Native Subsistence Rights?*, 30 Alaska Law Review 71-94 (2013).

v. Alexander, 938 F.2d 942, 945 (9th Cir. 1991) ("Many Alaska natives who are not fully part of the modern economy rely on fishing for subsistence. If their right to fish is destroyed, so too is their traditional way of life.").

To effectuate these objectives, Title VIII of ANILCA requires that "subsistence uses" be given priority over the taking of fish and wildlife for other purposes. 16 U.S.C. § 3114; Case & Voluck, *Alaska Natives and American Laws* 296-301 (providing a comprehensive overview of Title VIII and discussing how it "is intended to carry out the subsistence-related policies and fulfill the purposes of ANCSA").

But, of course, Congress had additional reasons for enacting ANILCA. *See Sturgeon*, 136 S. Ct. at 1065; *Amoco Production Company v. Village of Gambell, Alaska*, 480 U.S. 531, 549 (1987) (ANILCA's "primary purpose [was] to complete the allocation of federal lands in the State of Alaska."). In ANILCA's statement of purpose Congress declares as a goal to "preserve wilderness resource values and related recreational opportunities[.]" 16 U.S.C. § 3101(b). Conservation is another goal: "It is the intent of Congress in this Act . . . to provide for the maintenance of sound populations of, and habitat for, wildlife species of inestimable value to the citizens of Alaska and the Nation[.]" *Id.*

Finally, Congress was also aware of the need to safeguard State and Native lands located within conservation system units or CSUs. Thus, Congress wanted to ensure that federal agencies would not use

their new powers to stifle economic development on lands conveyed to the State in the Statehood Act, and Native Corporations in ANCSA. *See Sturgeon*, 136 S. Ct. at 1066; *City of Angoon v. Marsh*, 749 F.2d 1413, 1417 (9th Cir. 1984) ("the drafters of ANILCA never intended the mere location of boundary lines on maps delineating the overall conservation system to indicate that private lands conveyed to Native Corporations were to be treated as public lands").

The Battle Over State and Federal Management of Subsistence Rights

Title VIII of ANILCA required that rural Alaska residents be accorded a priority for subsistence hunting and fishing on public lands. 16 U.S.C. §§ 3113, 3114. Pursuant to § 805(d) of ANILCA, Congress gave the State authority to implement the rural subsistence preference by enacting laws of general applicability consistent with ANILCA's operative provisions. In anticipation of ANILCA's passage, the State enacted laws consistent with Title VIII which gave rural residents a subsistence priority. In 1982, after Congress enacted ANILCA, the Secretary of the Interior certified the State to manage subsistence hunting and fishing on public lands.

Once the State began managing for subsistence, Alaskans spent years fighting over the subsistence preference.[12] In *Native Village of Quinhagak v. United*

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[12] *See, e.g.*, *Madison v. Alaska Dep't of Fish & Game*, 696 P.2d 168 (Alaska 1985); *Amoco Production Co. v. Village of Gambell*,

States, 35 F.3d 388 (9th Cir. 1994), tribes filed suit challenging the State's decision to prohibit subsistence fishing in and around subsistence fishing villages. Under the State's regulations, tribal members—in one of the poorest regions in the country—were subject to an absolute ban on taking rainbow trout for subsistence uses and could be prosecuted for subsistence fishing in navigable waters. Meanwhile, the State authorized sport rainbow trout fishers in these same rivers. *Id.* at 390.

The battle reached a new level when, in 1989, the Alaska Supreme Court ruled that Alaska's subsistence program violated the Alaska constitution because, as required by ANILCA, it provided for a rural preference while the Alaska constitution forbids residency requirements. *McDowell v. State*, 785 P.2d 1 (Alaska 1989). The State's inability to comply with ANILCA required the federal government to take over the subsistence program. And, despite repeated efforts throughout the 1990s, the State was never able to come into compliance with ANILCA.[13]

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480 U.S. 531 (1987); *Kenaitze Indian Tribe v. State of Alaska*, 860 F.2d 312 (9th Cir. 1988); *Ninilchik Traditional Council v. United States*, 227 F.3d 1186 (9th Cir. 2000). *See generally* Case & Voluck, *Alaska Natives and American Laws* 291-310 (collecting cases).

[13] *Alaska Native Subsistence and Fishing Rights*, Committee on Indian Affairs United States Senate, 107th Congress, S. HRG. 107–456 (April 17, 2002) (discussing at length the subsistence battles and the State's inability to comply with ANILCA).

By 1994, it was widely believed that the conflict between equal access to Alaska's fish and game versus preserving the subsistence priority was "likely to continue indefinitely, no matter what courts or legislators may do to resolve the subsistence preference issue." Thomas A. Morehouse and Marybeth Holleman, *When Values Conflict: Accommodating Native Subsistence* 1 (1994).

Perhaps worse, the subsistence wars in the 1980s and 1990s were ugly. Writing in the *Anchorage Times* immediately after *McDowell*, one political activist "compared the Alaska Supreme Court not only to southern segregationist judges of another era but also to George Armstrong Custer." *When Values Conflict: Accommodating Native Subsistence* 4. On the other side of the debate, a former official of the Alaska Department of Fish and Game wrote in the *Anchorage Daily News* in 1990 that he was "not interested . . . in having the equal protection articles of either the U.S. or Alaska's constitution abridged in order to preserve elements of a 'Stone Age culture.'" *When Values Conflict: Accommodating Native Subsistence* 6.

Katie John **and the Resolution of the Subsistence Wars**

The most significant litigation over subsistence rights involved the State's failure to provide Ahtna shareholders, including Katie John, with an opportunity to pursue their traditional fishing activities at a site known in Athabascan as *Nataełde*, or "Roasted

Salmon Place."[14] In 1985, Katie John filed suit in federal court, seeking enforcement of her subsistence rights.[15] She prevailed.

On appeal, the Ninth Circuit considered the scope of ANILCA's Title VIII in a trilogy of cases between 1995 and 2013. In *Katie John I*, the court grappled with the definition of "public lands" to which the Title VIII subsistence priority applies. 72 F.3d at 701-04. Rejecting the district court's holding that the subsistence priority applies to all Alaskan waters subject to the federal navigational servitude, the Ninth Circuit held that the subsistence priority applies only to "navigable waters in which the United States has reserved water rights." *Id.* at 700. As for identifying the waters in which the United States has reserved water rights, the court held that that task belongs to the federal agencies that administer the subsistence priority. *Id.*

After the district court entered its judgment pursuant to the Ninth Circuit's mandate in *Katie John I*, the judgment was appealed. The Ninth Circuit heard the appeal *en banc* and issued a *per curiam* opinion

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[14] In 1984, Katie John and Doris Charles submitted a proposal to the Alaska State Board of Fisheries requesting that the *Nataełde*, or Batzulnetas, area be opened to subsistence fishing. The proposal was denied.

[15] *Katie John v. State of Alaska*, No. A85–0698–CV (D. Alaska). Congress expressly provided for federal jurisdiction over the State regarding its implementation of ANILCA. ANILCA Section 807(a). Katie John was forced to repeatedly return to court because the State failed to abide by its obligations. For instance, in 1989, Katie John sought preliminary relief from the regulation that limited fishing. Order, June 6, 1989 (No. A85–0698–CV).

affirming the district court's judgment, thereby leaving *Katie John I* in place. *John v. United States*, 247 F.3d 1032 (9th Cir. 2001) ("*Katie John II*").

In a concurring opinion, three judges argued for a broader definition of "public lands" than that set forth in *Katie John I*. Citing Title VIII's emphasis on subsistence fishing—most of which takes place on navigable waters—the concurrence argued that "Congress clearly established a subsistence priority that applies to all navigable waters in the State of Alaska, not just those waters in which the United States has a reserved water right." *Id.* at 1044 (Tallman, J., concurring). Judge Tallman explained:

> Given the crucial role that navigable waters play in traditional subsistence fishing, it defies common sense to conclude that, when Congress indicated an intent to protect traditional subsistence fishing, it meant only the limited subsistence fishing that occurs in non-navigable waters. Reading the statute to exclude navigable waters frustrates Congress's express purpose of protecting traditional subsistence fishing for all rural Alaskans by establishing subsistence fishing as a priority use of Alaska's natural resources. We must not interpret federal statutes to negate their own stated purposes. . . . [*W*]*e cannot presume that Congress intended to protect traditional subsistence fishing with one hand, while reducing it to a veritable nullity with the other*.

Id. at 1036-37 (quotations and citations omitted) (emphasis added).

Following *Katie John I*, the Secretary of the Interior and the Secretary of Agriculture in 1999 issued regulations ("1999 Rules") identifying which navigable waters in Alaska qualify as "public lands" to which Title VIII's subsistence priority applies. *See Katie John III*, 720 F.3d at 1218. Litigation again ensued. A number of environmental and tribal organizations argued that the 1999 Rules fell short by failing to properly designate certain waters for the subsistence priority. *Id.* The State of Alaska argued that the 1999 Rules went too far by applying a subsistence priority to waters that are not "public lands." *Id.* Applying the reserved water rights doctrine set forth in *Katie John I* and preserved in *Katie John II*, the Ninth Circuit rejected both sets of arguments and held that the federal agencies had properly designated each of the waters at issue. *Id.* at 1245.

After *Katie John*, the subsistence wars largely subsided. A fragile equilibrium was finally established among the United States, the State of Alaska, and Alaska Natives regarding the scope of Title VIII's subsistence priority. Decades of turmoil and uncertainty have been replaced with some stability. And because the instant suit does not involve Title VIII's subsistence priority, there is no basis for disrupting this equilibrium. *See Katie John I*, 72 F.3d at 702 n.9 (limiting its holding to those portions of ANILCA "necessary to give meaning to [ANILCA's] purpose of providing an opportunity for a subsistence way of life"); State Brief at 17 n.3 ("Alaska supports the subsistence regulations.").

ARGUMENT

The Ninth Circuit's decision to justify the NPS's regulatory authority—using a doctrine established specifically to interpret and apply ANILCA's Title VIII subsistence priority—pulled subsistence interests and the fragile equilibrium crafted by the *Katie John* trilogy into the present case. Thus, this Court's decision will have broad implications not only for the scope of federal authority within CSUs, but for the Alaska Natives who depend on the subsistence priority for their livelihoods.

Alaskans endured over twenty years of bitter acrimony before achieving the relative calm on subsistence rights made possible by the *Katie John* decisions. If those decisions are disturbed, Alaskans will be forced to relitigate the ugly subsistence wars of the 1980s and 1990s.

A. ANILCA Struck a Balance Between Competing Interests.

In ANILCA, Congress struck a balance between three competing concerns: (i) conserving large land areas; (ii) vindicating the promises the federal government made in the Statehood Act and ANCSA to enable the State and Alaska Natives to manage, control, and use their lands within CSUs; and (iii) preserving a subsistence priority for rural Alaskans. These goals are in tension, and there has been substantial litigation to define the scope of the second two goals with respect to the first.

Despite ANCSA's clear intent that the land conveyed to Alaska Native corporations should be used for economic development, Native corporations were nonetheless forced to litigate to defend their ability to put their inholdings within CSUs to economic use. In *City of Angoon v. Marsh*, the Ninth Circuit rejected an attempt by environmentalists to block a Native corporation from harvesting timber on its lands within a National Forest Monument included in one of the CSUs. 749 F.2d 1413 (1984). Shee Atika, the Native corporation seeking to exercise its timber rights in that case, obtained the land at issue under ANCSA "in order to settle and extinguish their aboriginal claims with certainty and in conformity with the real economic and social needs of the Natives." *Id.* at 1418. Notwithstanding ANILCA's general prohibition on logging within National Forest Monuments, the court explained that, given the "stated purpose" of ANCSA's land conveyance to Shee Atika, "it is inconceivable that Congress would have extinguished their aboriginal claims and insured their economic wellbeing by forbidding the only real economic use of the lands so conveyed." *Id.* The Court concluded that when the pertinent sections of ANILCA are read "harmoniously," "it becomes clear that Congress intended that the private status of the lands conveyed to Shee Atika is to remain unaffected by their inclusion within the exterior boundaries of the conservation system unit." *Id.*

Alaska Natives have had to fight even harder to defend their subsistence rights. In addition to the *Katie John* trilogy discussed above, Native groups were

forced to litigate frequently to protect their customary and traditional way of life. *See, e.g.*, *Ninilchik Traditional Council*, 227 F.3d at 1193 (holding that rural subsistence users must be given a "meaningful use preference"); *Kenaitze Indian Tribe*, 860 F.2d at 318 (holding that Alaska's definition of "rural" violated ANILCA's subsistence preference).

As evidenced by the extensive litigation ANILCA has spawned, the balance Congress struck in ANILCA is difficult to manage. Nevertheless, when the provisions of ANILCA are properly understood and harmonized, all three of ANILCA's goals can be achieved. To wit, the Act balances federal authority and economic development by providing federal land managers with regulatory authority over public lands—lands to which the federal government has title—and cannot use this authority to interfere with activities on State or Native corporation lands. In 1984 the Ninth Circuit recognized and explained this limitation on federal authority: "section 103(c) was added to ANILCA . . . for the express purpose of specifying that only public lands (and not State owned or private lands) are to be subject to the conservation system unit regulations applying to public lands and to make clear that other particular provisions of the bill apply only to public lands." *Angoon*, 749 F.2d at 1417 (quotations omitted)).

Yet the balance between federal authority and economic development must also accommodate subsistence. Consistent with the State of Alaska's sovereign rights, Congress intended that the State manage the

subsistence preference and established standards in Title VIII that the State must achieve to take on the responsibility. When the State could not comply, federal land managers properly assumed the authority, which in turn diminished State authority over fish and game. And, in *Katie John I*, the Ninth Circuit clarified that federal authority to enforce the subsistence priority extended to some navigable waters. This was necessary, as the Ninth Circuit recognized, because the subsistence priority would be effectively meaningless if it did not apply to fishing in navigable streams, 72 F.3d at 702, given that (i) "ANILCA's language and legislative history . . . clearly indicate that subsistence uses include fishing" (16 U.S.C. § 3113) and (ii) subsistence fishing has traditionally taken place in navigable waters. *Id.* Accordingly, there can be no debate that federal management authority over navigable waters must extend as far as necessary to effectuate the subsistence preference in Title VIII.

B. The *Katie John* Doctrine Effectuates the ANILCA Balance and Should Not Be Disturbed.

1. No Party Seeks to Overturn *Katie John* and its Progeny.

Critically, no party to the instant litigation seeks to overturn the *Katie John* trilogy. The Federal Respondents, of course, maintain that it is good law that supports the NPS's broader regulatory authority. Br. in Opp. 16. Sturgeon explains, however, that *Katie John* and its progeny are specific to Title VIII, a title not

implicated by the NPS's hovercraft ban, and one with markedly different statutory authority. *See* Sturgeon Br. at 19, 44. Thus, because it is not at issue in this appeal, any decision by this Court should leave undisturbed the subsistence priority established by the *Katie John* decisions.

2. The *Katie John* Doctrine is Restricted to ANILCA's Subsistence Preference.

The *Katie John* cases were specifically restricted to interpreting the application of the Title VIII rural subsistence priority. *See Katie John I*, 72 F.3d at 700 ("Specifically, the parties dispute whether navigable waters fall within the statutory definition of public lands and are thus subject to federal management *to implement ANILCA's subsistence priority*.") (emphasis added); *Katie John II*, 247 F.3d at 1035-37; *Katie John III*, 720 F.3d at 1218. They did not address the extent of federal control over navigable waters for purposes separate from the subsistence priority. Thus, if this Court reverses the Ninth Circuit's decision on appeal, it need not vacate the *Katie John* decisions—the holding in *Katie John* has not been challenged and the underlying rationale for the decisions should be left in place.

3. ANILCA's Use of "Public Lands" Was Employed in Different Parts of the Act with Different Intent.

The Ninth Circuit reasoned in the decision on appeal that "ANILCA's definition of 'public lands' applies throughout the statute" and found that it would be "anomalous" to treat the definition of "public lands" used in the *Katie John* decisions as using a "different construction of 'public lands' than applicable elsewhere in ANILCA." Pet.App.13a.

What the Ninth Circuit failed to consider, however, is that the provision of ANILCA interpreted in the *Katie John* decisions stands apart from the rest of ANILCA. As noted by Sturgeon (Pet. Br. 43-44), Congress invoked its Commerce Clause authority *only* for Title VIII. 16 U.S.C. § 3111(4). This separate and distinct constitutional authority should have prompted the Ninth Circuit to examine why Congress intended to exercise its authority over navigable waters only in Title VIII (but not to effectuate the other goals of the Act), and whether it was proper to leverage the subsistence authority to justify broader federal control.

Moreover, because ANILCA "is far from a *chef d'oeuvre* of legislative draftsmanship" no court should presume that "identical words used in different parts of the same statute are intended to have the same meaning[.]" *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441-42 (2014). This Court has recognized that this presumption "readily yields to context, and a statutory term—even one defined in the statute—may

take on distinct characteristics from association with distinct statutory objects calling for different implementation strategies." *Id.* at 2441 (quotations omitted). After all—

> Although we presume that the same term has the same meaning when it occurs here and there in a single statute. . . . We also understand that most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section. Thus, the natural presumption that identical words used in different parts of the same act are intended to have the same meaning is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent. A given term in the same statute may take on distinct characters from association with distinct statutory objects calling for different implementation strategies. The point is the same even when the terms share a common statutory definition. . . .

Environmental Defense v. Duke Energy Corporation, 549 U.S. 561, 574 (2007) (quotations and citations omitted).

Put simply, courts "must do [their] best, bearing in mind the 'fundamental canon of statutory construction that the words of a statute must be read in their

context and with a view to their place in the overall statutory scheme.'" *Util. Air Regulatory Group*, 134 S. Ct. at 2441 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

For example, in *King v. Burwell*, 135 S. Ct. 2480 (2015), this Court held that tax credits are available in each state regardless of whether the state creates its own insurance exchange or has a federal exchange. Notably, a straightforward reading of the critical text pointed toward a conclusion that the credits are available only for state exchanges. As Justice Scalia explained in his dissent: "The Court holds that when the Patient Protection and Affordable Care Act says 'Exchange established by the State' it means 'Exchange established by the State or the Federal Government.'" *Id.* at 2496. Although Justice Scalia viewed this outcome as "quite absurd," *id.*, the majority relied on "the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," *id.* at 2492 (emphasis added). After concluding that the phrase "[e]xchange established by the State" was ambiguous, the Court "turn[ed] to the broader structure of the Act." Because limiting tax credits to state exchanges "would destabilize the individual insurance market in any State with a Federal Exchange"—which would run counter to the ACA's purpose—the Court held that tax credits are available for both state and federal exchanges. *Id.*

Similarly, the title-based definition of "public lands" applicable elsewhere in ANILCA must yield to Title VIII's unequivocal purpose of codifying the

promises made to Alaska Natives that their customary and traditional way of life would be protected in exchange for the elimination of their aboriginal hunting and fishing rights.[16] Applying a consistent definition of "public lands" would render an entire section of ANILCA effectively meaningless. *Katie John I*, 72 F.3d at 704 ("If we were to adopt the state's position, that public lands exclude navigable waters, we would give meaning to the term 'title' in the definition of the phrase 'public lands.' But we would undermine congressional intent to protect and provide the opportunity for subsistence fishing."); *Katie John II*, 247 F.3d at 1036 (reading "public lands" in Title VIII "to exclude navigable waters frustrates Congress's express purpose of protecting traditional subsistence fishing for all rural Alaskans") (Tallman, J., concurring).

Finally, even if the term "public lands" is interpreted the same way throughout the Act, it does not follow that federal general regulatory authority should be co-extensive with federal authority to enforce the subsistence priority. Given Congress's clear desire to protect subsistence rights and the obvious reality that the protection would be substantially diminished if federal land managers did not have the authority to

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[16] The entire purpose of Title VIII is to protect the subsistence preference. "[T]he continuation of the opportunity for subsistence uses by rural residents of Alaska . . . is *essential to Native* physical, economic, traditional, and *cultural existence*. . . ." 16 U.S.C. § 3111(1) (emphasis added); *Ninilchik Traditional Council*, 227 F.3d at 1192 ("As is evident throughout ANILCA, Congress places great emphasis on providing rural residents of Alaska with the opportunity to maintain a subsistence way of life.").

enforce the subsistence priority in navigable waters, it is reasonable to interpret federal authority to achieve that end, as the Ninth Circuit did in the *Katie John* decisions. However, the same concerns about preserving federal control over navigable waters are not present in other sections of ANILCA. To the contrary, the legislative history clearly demonstrates that Section 103(a) was added specifically to preserve State, Native, and private control over lands within areas included in CSUs. The decision on appeal failed to address the clear differences in Congress's intentions for federal regulation of navigable waters vis-à-vis the subsistence priority as opposed to the conservation goals within the broadly defined CSUs. This failure is a critical error because, by invoking the *Katie John* doctrine without addressing these significant differences in statutory context, the Ninth Circuit did not give effect to the most important purpose of ANILCA—the careful balance it crafted among competing goals.

CONCLUSION

Consistent with ANILCA's goal of balancing competing interests, Ahtna urges the Court to be mindful of the impacts a decision adjudicating the conservation and sovereign interests raised below would have on Congress's undisputed goal of protecting Ahtna shareholders' subsistence priority. A decision that eliminated all federal control over navigable waters—without recognizing Congress's special attention to meaningfully preserving Native customary and traditional

ways of life—would defeat the plain purposes of ANCSA and ANILCA and plunge Alaska back into the subsistence wars.

Respectfully submitted,

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