No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

States "unquestionably" have "broad trustee and police powers over wild animals within their jurisdictions." *Kleppe* v. *New Mexico*, 426 U.S. 529, 545 (1976). In 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3101 *et seq.*, where it sought to protect national interests in wildlife, *id.* § 3101(d), while at the same time preserving Alaska's traditional management authority, *id.* § 3202(a).

Nothing within ANILCA gives federal agencies clear authority to regulate *how* people hunt, although it may limit *where* and *when* hunting can occur. During the waning days of the Obama administration, the Department of the Interior issued three regulations to ban certain state-authorized hunting practices. Congress disapproved of the agency's broadest regulation—which applied statewide to all national wildlife refuges—and in 2017 passed a law abrogating it. Yet the agency continues to preempt the same state law in the Kenai National Wildlife Refuge. The Ninth Circuit upheld the agency's action, finding the 2017 legislation irrelevant and concluding the agency has "plenary authority" over wildlife on national wildlife refuges in Alaska. App. 18. The question presented is:

Does ANILCA, which sought to preserve the State's traditional police powers over wildlife, grant federal agencies plenary authority to preempt state law regulating how people hunt?

PARTIES TO THE PROCEEDING

The State of Alaska is the petitioner in this case; it was a plaintiff in the district court and an appellant in the court of appeals.

Respondents who were defendants in the district court and appellees in the court of appeals are Debra Haaland, in her official capacity as Secretary of the Interior; Mitch Ellis, in his official capacity as Chief of Refuges for the Alaska Region of the U.S. Fish and Wildlife Service; Sara Boario, in her official capacity as Alaska Regional Director, U.S. Fish and Wildlife Service; Martha Williams, in her official capacity as Director of the U.S. Fish and Wildlife Service; Bert Frost, in his official capacity as Alaska Regional Director, National Park Service; Charles F. Sams, III, in his official capacity as Director of the National Park Service; U.S. Fish and Wildlife Service; National Park Service; and U.S. Department of the Interior.

Respondents who were intervenor-defendants in the district court and intervenor-appellees in the court of appeals are Alaska Wildlife Alliance, Alaskans for Wildlife, Friends of Alaska National Wildlife Refuges, Denali Citizens Council, Copper Country Alliance, Kachemak Bay Conservation Society, Northern Alaska Environmental Center, Defenders of Wildlife, National Parks Conservation Association, National Wildlife Refuge Association, The Wilderness Society, Wilderness Watch, Sierra Club, Center for Biological Diversity, and The Humane Society of the United States.

Respondent Safari Club International was a plaintiff in the district court and an appellant in the court of appeals.

RELATED PROCEEDINGS

United States District Court (D. Alaska):

State of Alaska v. *David Bernhardt, et al.,* No. 3:17-cv-00013-SLG (D. Alaska) consolidated with *Safari Club International* v. *David Bernhardt, et al.*, No. 3:17-cv-00014-SLG.

United States Court of Appeals (9th Cir.):

Safari Club International, et al. v. *Debra Haaland, et al.* No. 21-35030 consolidated with *State of Alaska, et al.* v. *Debra Haaland, et al.*, No. 21-35035 (9th Cir.), pet'n for rehearing en banc denied, July 29, 2022.

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PETITION FOR WRIT OF CERTIORARI

The court below concluded that Congress delegated its "plenary authority" under the Property Clause to the U.S. Fish and Wildlife Service, giving the agency unbridled power to preempt State law in an area traditionally considered within the States' police powers. If that were true, Congress's grant of plenary power to a federal agency unanswerable to the electorate would raise a non-delegation question. *Gundy* v. *United States*, 139 S. Ct. 2116, 2123 (2016) (recognizing that had Congress granted "plenary power" to the Attorney General, "we would face a nondelegation question" (internal quotation omitted)); see also *City of Arlington, Tex.* v. *F.C.C.*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) ("Although the Constitution empowers the President to keep federal officers accountable, administrative agencies enjoy in practice a significant degree of independence.").

But the decision below is wrong. Congress did not divest Alaska of its traditional authority. Congress preserved it. 16 U.S.C. § 3202(a) ("Nothing within [ANILCA] is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on public lands . . . ."). And Congress did not delegate all its authority under the Property Clause to the federal agency; it transferred to the agency the responsibility "to conserve fish and wildlife populations and habitats in their natural diversity." Pub. L. No. 96-487 (ANILCA), § 303(4)(B)(i). This includes the authority to limit *where* and *when* hunting can occur, but not *how* Alaskans (and visitors to Alaska) hunt.

The Ninth Circuit's interpretation of 16 U.S.C. § 3202(a) alone warrants this Court's attention because it is inconsistent with statutory text, it significantly alters the balance of state-federal power, and it disregards important principles of federalism. But there is more. The Ninth Circuit concluded that Congress delegated its plenary authority to the agency *after* Congress passed legislation in 2017 to reject that very notion. See Pub. L. No. 115-50, 131 Stat. 86 (2017). The 2017 legislation instead reaffirmed Congress's intent to preserve the State's traditional police powers as granted to it by the Alaska Statehood Act. See Pub. L. No. 84-508, § 6(e), 72 Stat. 341 (1958).

The events leading Congress to protect Alaska from unlawful federal regulation occurred at the end of the Obama administration, when the Department of the Interior promulgated a series of three regulations to preempt State law. The agency claimed its "legal mandate" under ANILCA required all three regulations. And in all three regulations, the agency banned state-authorized hunting practices that it had identified as "predator control."

The National Park Service acted first in 2015, with a rule that prohibited "activities or management actions involving predator reduction efforts" on National Park Preserves. 80 Fed. Reg. 64,325, 64,327 (Oct. 23, 2015). The U.S. Fish and Wildlife Service (the Service) followed suit with two regulations. The agency started by promulgating a refuge-specific regulation for the Kenai National Wildlife Refuge in May 2016. 81 Fed. Reg. 27,030 (May 5, 2016). Among other limitations, the "Kenai Rule" banned the take of

brown bears over bait within the refuge. Later that same year, the Service issued the third and most far-reaching regulation. The "Statewide Refuge Rule" "prohibit[ed] predator control on refuges in Alaska," unless it was determined necessary to meet refuge purposes. 81 Fed. Reg. 52,248, 52,252 (Aug. 5, 2016). The agency defined "predator control" as the "intention to reduce the population of predators for the benefit of prey species" and then went on to prohibit specific hunting practices, including the take of brown bears over bait. *Ibid.*

Congress responded in 2017 by using the Congressional Review Act to nullify the Statewide Refuge Rule. See Pub. L. No. 115-50, 131 Stat. 86 (2017). By disapproving of this expansive agency action, Congress rejected the agency's interpretation of its "legal mandate," effectively amending (or clarifying) the agency's statutory authority under ANILCA.

To conclude that Congress delegated its plenary power under the Property Clause to a federal agency—a momentous result on its own—the Ninth Circuit disregarded a recent (and clear) statement by Congress denying delegation of that power. When the administrative state "wields [such] vast power and touches almost every aspect of daily life," *Free Enter. Fund* v. *Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010), a congressional action indicating that an agency has gone too far is of particular import. This is especially true when the agency is moving into areas where state authority has traditionally predominated. The Ninth Circuit's decision not only brushes up

against the limits of the non-delegation doctrine, it exceeds the limits of the Supremacy Clause. The petition should be granted.

OPINIONS BELOW

The Ninth Circuit's opinion (App. 1-43) is reported at 31 F.4th 1157. The order of the en banc court denying rehearing (App. 136-37) is not reported. The district court's opinion (App. 55-135) is reported at 500 F. Supp. 3d 889.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2022. App. 1-43. The Ninth Circuit denied a timely petition for rehearing en banc on July 29, 2022. App. 136-37. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions appear at App. 138-45.

STATEMENT

1. The Alaska Statehood Act of 1958 required the federal government to transfer "the administration and management of the fish and wildlife resources of Alaska" to the State of Alaska once the State "made adequate provision for the administration, management, and conservation of said resources in the broad national interest." Pub. Law No. 84-508, § 6(e), 72 Stat. 341. To meet the Section 6(e)

requirement, the Alaska Legislature enacted House Bill 201 in April 1959. 1959 Alaska Sess. Laws ch. 94, art.I, § 1–art. IV, § 3. The bill gave state agencies the authority to, among other things, "establish[] open and closed seasons and areas for fish and game," "establish[] the means and methods employed in the pursuit, capture, and transport of fish and game," and "investigat[e] and determin[e] the extent and effect of predation and competition among fish and game in Alaska and exercise such control measures as are deemed necessary to resources of the State." *Id.* ch. 94, art. I, § 6.

The same month the Alaska Legislature enacted House Bill 201, the Secretary of the Interior certified that Alaska's state law met the required standard and the federal government transferred management authority over fish and wildlife resources on all lands within Alaska to the State on January 1, 1960. Executive Order 10875 (Dec. 29, 1959); 25 Fed. Reg. 33 (Jan. 5, 1960). For over 60 years, the State has managed fish and wildlife within Alaska pursuant to its "administration, management, and conservation" provisions recognized by the Secretary of the Interior as adequate to protect the "broad national interest." See Alaska Statehood Act, Pub. Law No. 84-508, § 6(e). The foundation for the State's management is contained within the Alaska Constitution; "Alaska was the first state to have a constitutional article devoted to natural resources, and it is the only state to have a constitutional provision addressing the principle of sustained yield." *West* v. *State, Bd. of Game*, 248 P.3d 689, 692 (Alaska 2010). "Sustained yield" for wildlife management purposes is defined by

statute as "the achievement and maintenance in perpetuity of the ability to support a high level of human harvest of game, subject to preferences among beneficial uses, on an annual or periodic basis." ALASKA STAT. § 16.05.255(k)(5).

2. When the Federal government transferred management authority to the State in 1960, it transferred management authority over fish and wildlife anywhere in Alaska, including fish and wildlife within federally owned and managed wildlife refuges. The Department of the Interior has recognized States' traditional authority over wildlife on federal land in regulations dating back to 1971. At that time, the agency recognized 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" while Congress authorized and directed various agencies "certain responsibilities for the conservation and development of fish and wildlife resources and their habitat." 36 Fed. Reg. 21,034, 21,035 (Nov. 3, 1971) (43 C.F.R. § 24.2 (1971)).

This regulation was amended in 1983, but the Department of the Interior continued to recognize the States' role in wildlife management. The agency explained: "Federal authority exists for specified purposes while State authority regarding fish and resident wildlife remains the comprehensive backdrop applicable in the absence of specific overriding Federal law." 48 Fed. Reg. 11,642 (March 18, 1983) (43 C.F.R. § 24.1(a)).

3. Congress enacted ANILCA in 1980. "ANILCA sought to 'balance' two goals, often thought conflicting." *Sturgeon* v. *Frost*, 139 S. Ct. 1066, 1075 (2019) (quoting 16 U.S.C. § 3101(d)). "The Act was designed to 'provide[] sufficient protection for the national interest in the scenic, natural, cultural and environmental values of the public lands in Alaska.'" *Ibid.* (quoting 16 U.S.C. § 3101(d) (alteration in original)). "'[A]nd at the same time,' the Act was framed to 'provide[] adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people.'" *Ibid* (quoting 16 U.S.C. § 3101(d) (alterations in original)).

To further the Act's first goal, ANILCA redesignated the Kenai National Moose Range—established in 1941 by President Roosevelt[1]—as the Kenai National Wildlife Refuge and added 240,000 acres to the unit. Pub. L. No. 96-487 (ANILCA), § 303(4)(A), 94 Stat. 2,371, 2,391 (Dec. 2, 1980). In addition to changing the name and increasing the size of the refuge, Congress refined the Kenai Refuge's purposes. Relevant here, the purposes include "conserv[ing] fish and wildlife populations and habitats in their natural diversity" and "providing, in a manner compatible with these purposes,

[1] *See* Executive Order 8979 (Dec. 17, 1941); 6 Fed. Reg. 6,471 (Dec. 18, 1941).

opportunities for fish and wildlife-oriented recreation," including hunting.[2] ANILCA, § 303(4)(B).

But just as Congress worked to further its first goal in ANILCA—protection of the national interest in the scenic, natural, cultural, and environmental values of the public lands in Alaska—it also furthered its second goal—satisfaction of the economic and social needs of the State of Alaska and its people. The Service has long recognized that ANILCA makes Alaska the exception not the rule when it comes to hunting on national refuges. Where wildlife refuges outside of Alaska are "closed until open," Alaska Refuges are "open until closed." See 86 Fed. Reg. 23,794 (May 4, 2021) (explaining that the National Wildlife Refuge System Administration Act, 16 U.S.C. §§ 668dd-668ee, as amended, "closes [national wildlife refuges] in all States except Alaska to all uses until opened"). In 1981, the Service's regulations provided that "[t]he taking of fish and wildlife [in Alaska] for sport hunting, trapping, and sport fishing is authorized in accordance with applicable State and Federal law." 46 Fed. Reg. 31,818 (June 17, 1981) (50 C.F.R. § 36.32). Then, in 1993, the Service excluded Alaska from nationwide refuge-specific hunting and fishing regulations, 58 Fed. Reg. 5,064 (Jan. 19, 1993); it explained that "Alaska refuges are opened to hunting, fishing and trapping pursuant to [ANILCA]," *id.* at 5,069.

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[2] The Kenai Refuge is the only refuge where Congress specifically designated fish and wildlife-oriented recreation as a refuge purpose. See Pub. L. No. 96-487, 94 Stat. 2,371 (Dec. 2, 1980).

Importantly, when setting Alaska refuges apart, Congress also expressly preserved Alaska's authority to manage fish and wildlife within its borders. Specifically, Section 1314(a) of ANILCA provides:

> Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on public lands except as may be provided in subchapter II of this Act, or to amend the Alaska Constitution.[3]

16 U.S.C. § 3202(a).

While recognizing Alaska's primary authority to manage the taking of fish and wildlife, Congress also preserved the federal government's primary control over federal land:

> Except as specifically provided otherwise by this Act, nothing in this Act is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of public lands.

Id. § 3202(b).

Putting these two provisions together, Congress then directs "[t]he taking of fish and wildlife in all conservation system units . . . shall be carried out in

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[3] Subchapter II protects opportunities for rural residents of Alaska to continue subsistence practices, see ANILCA, § 3111, and is not at issue here.

accordance with the provisions of this Act and other applicable State and Federal law."[4] *Id.* § 3202(c).

4. Until recently, Alaska and the Service successfully worked together to fulfill ANILCA's dual goals when managing the Kenai Refuge. Conflict arose in 2013, after Alaska adopted new regulations allowing the take of brown bears over registered black bear baiting stations in an area that included the Kenai Refuge, in addition to other actions. 81 Fed. Reg. at 27,038; see also 5 ALASKA ADMIN. CODE tit. 5, § 92.044(a)-(b) (2012); *id.* § 92.085(4) (2012). Brown bear baiting could occur at registered black bear stations because Alaska already authorized black bear baiting, including in the Kenai Refuge. C.A. 3-ER-398-405. And the Service recognized the State's authority to allow for such a practice: "The 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."). 50 C.F.R. § 32.2(h).

Under State management, the Kenai brown bear population had increased over a period of 20 years. In 1998, the State classified this population of brown bears as a "population of special concern" due to concerns over population status, habitat loss, and

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[4] A "conservation system unit" includes 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).

increasing levels of human-caused mortality. C.A. 3-ER-343. The State responded by managing the Kenai brown bear population conservatively through 2011. C.A. 3-ER-343-44. As a result of the State's management—as recognized by the Service—the Kenai brown bear population increased at an average rate of 3% per year between 1998 and 2010. *Ibid.* At this time, the Service and the State agreed that the population had increased and could support additional hunting opportunities and harvest. C.A. 3-ER-344, 355.

Consistent with the available evidence, the State took steps in 2012 to provide additional hunting and harvest opportunities. Among those steps was allowing the taking of brown bears at registered black bear bait stations starting in 2013.[5]

5. The Service immediately objected to the State's actions. In correspondence with the State, the Service repeatedly characterized the State's actions as

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[5] The additional changes included replacing a limited entry draw permit hunt with an unlimited entry registration hunt. C.A. 3-ER-344. The State also increased the harvest season length and allowed hunters to take one bear per regulatory year, rather than one bear every four years. *Ibid.* The harvest cap was also increased to 70 bears per year regardless of age or sex. *Ibid.* The 70-bear harvest cap was first applied in 2014; there was no harvest cap in 2013. *Ibid.* Prior to 2013, the State closed hunting seasons (or did not open them) on the Kenai Peninsula once 10 adult reproductive-age human-caused mortalities (both hunting and non-hunting) occurred. *Ibid.* In March 2014, Alaska reduced the harvest cap from 70 bears to no more than 17 reproductive-age female bears. *Ibid.*

"predator control." C.A. 3-ER-354. The State responded by explaining that providing additional hunting opportunities is not predator control. Wildlife populations are managed through harvest quotas and once a harvest quota is met then the season is closed and no more animals may be taken. The Service responded by closing the Kenai Refuge to brown bear hunting generally in 2013 and 2014 because of alleged concerns over declining brown bear numbers. C.A. 3-ER-343-50; SER-184, 220. Then, in May 2015, the Service proposed the Kenai Rule to prohibit the taking of brown bears over bait within the refuge. 80 Fed. Reg. 29,279 (May 21, 2015). It would also preempt the State's attempt to open a limited hunting season for wolf, coyote, and lynx within the Skilak Wildlife Recreation Area, a small area within the Kenai Refuge.[6] *Id.* at 29,279-29,280.

Despite receiving comments from the State and others opposing the Kenai Rule and clarifying that the allowed use was not a predator control program, the Service published a final rule in May 2016. 81 Fed. Reg. at 27,030 (50 C.F.R. § 36.39). The Service explained that it considered this regulation "necessary to meet[] [its] mandates under ANILCA to conserve healthy populations of wildlife in their natural diversity on the Refuge, to meet its Wilderness purposes, and to meet its purpose for providing compatible wildlife-oriented recreational

[6] The State and Safari Club International also challenged the Service's authority to close the Skilak Wildlife Recreation Area to additional hunting opportunities. The State is not raising that issue within this petition.

opportunities, which include both consumptive and non-consumptive activities." *Id.* at 27,033. It concluded that hunting brown bear over bait was inconsistent with its ANILCA mandates "due to its potential to result in overharvest of this species, with accompanying population-level impacts, due to its high degree of effectiveness as a harvest method and the species' low reproductive potential." *Id*. at 27,036. The Service further explained that banning this practice was needed to counter "several [other] changes that substantially liberalized State regulations for sport hunting of brown bears on the Kenai Peninsula beginning in 2012." *Ibid.*

6. In August 2016, the Service promulgated another rule, this time focusing exclusively on state-authorized hunting practices and what the Service considered to be "predator control." 81 Fed. Reg. 52,248 (August 2016). This regulation (Statewide Refuge Rule) applied on all national wildlife refuges in Alaska. *Ibid*. As it had done in the Kenai Rule, the later-adopted Statewide Refuge Rule emphasized the need to maintain "natural diversity" of all refuges in Alaska. *Id*. at 52,252. To accomplish this objective, the Service concluded that it needed to prohibit "predator control" unless it was determined necessary to meet a refuge objective. It specifically identified the taking of brown bears over bait to be one of the predator control practices prohibited by the rule. *Ibid*.

To support the need for this statewide regulation, the Service pointed to Alaska's actions "liberaliz[ing] the State's regulatory frameworks for general hunting and trapping of wolves, bears, and coyotes." 81 Fed.

Reg. at 52,251. It further explained that it prohibited "harvesting brown bears over bait due to the potential to reduce their population by significantly increased harvest rates." *Id.* at 52,261.

Congress subsequently invalidated the Statewide Refuge Rule through a joint resolution passed via the Congressional Review Act. See Pub. L. No. 115-50, 131 Stat. 86 (2017). The Congressional Review Act gives Congress an expedited procedure to review and disapprove of federal regulations. 5 U.S.C. §§ 801–808. Once an agency's rule has been disapproved of by a joint resolution, the agency may not reissue the same rule "in substantially the same form." *Id.* § 801(b)(2). The Act also prohibits the agency from issuing "a new rule that is substantially the same" as the disapproved rule unless there is a subsequent change in the relevant law. *Ibid.*

At the time Congress invalidated the Statewide Refuge Rule, it could not use the Congressional Review Act to also invalidate the Kenai Rule. This is because Congress has a limited period to enact a joint resolution to disapprove of a regulation. 5 U.S.C. § 802(a). Typically, Congress has 60 days, "but if an agency submits a rule to Congress during the final 60 days of a congressional session, or submits a rule when Congress is not in session, the 60-day clock does not start to run until the 15th day of the subsequent congressional session." *Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 557 (9th Cir. 2019) (citing 5 U.S.C. § 801(d)(1)–(2)(A)).

Following enactment of the joint resolution, the Service rescinded the Statewide Refuge Rule and reverted "to the text of the regulations in effect immediately prior to the" refuges rule. 82 Fed. Reg. 52,009, 52,009 (Nov. 9, 2017). This restored the original regulation regarding bear baiting, which provided that "[b]aiting is authorized in accordance with State regulations on national wildlife refuges in Alaska." 50 C.F.R. § 32.2(h).

The Ninth Circuit upheld the joint resolution in December 2019. In *Center for Biological Diversity v. Bernhardt*, the court held, "[w]hen Congress enacts legislation that directs an agency to issue a particular rule, 'Congress has amended the law.'" 946 F.3d 553, 562 (9th Cir. 2019) (quoting *Alliance for the Wild Rockies* v. *Salazar*, 672 F.3d 1170, 1174 (9th Cir. 2012)). It went on to conclude that, "[b]y enacting the Joint Resolution, Congress amended the substantive environmental law and deprived the Refuges Rule of any force or effect." *Ibid*. "Accordingly, the Joint Resolution is enforceable as a change to substantive law, even though it did not state that it constituted an amendment to the National Wildlife Refuge System Administration Act, the National Wildlife Refuge System Improvement Act, or ANILCA." *Ibid*.

7. After the Service failed to take action to withdraw the Kenai Rule, Alaska, along with its co-plaintiff Safari Club International, continued with its legal challenge. The district court granted summary judgment in favor of the Service. App. 55-135 It relied on 16 U.S.C. § 3202(c) to conclude that the Service has the authority to manage fish and wildlife on federal

land and the ability to preempt state law. App. 103. The district court did not discuss the impact of the 2017 legislation on the Service's authority. See App. 55-135.

The Ninth Circuit affirmed. App. 1-43. The court concluded that Congress delegated to the Service "plenary authority" over Alaska's wildlife refuges. App. 18. In doing so, the court found irrelevant the most recent statement of congressional intent—the 2017 legislation disapproving of the Statewide Refuge Rule. App. 19-21. It incorrectly relied on a provision of the Congressional Review Act to conclude that the 2017 legislation did not apply because "it does not mention the Kenai Rule." App. 20 (citing 5 U.S.C. § 801(g) ("If the Congress does not enact a joint resolution of disapproval [] respecting a rule, [then] no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule.")). And then, citing another provision of the Congressional Review Act, the court concluded that the Kenai Rule and the Statewide Refuge Rule are not "substantively identical" because the Statewide Refuge Rule "blanketly excluded the baiting of brown bears and State predator control programs from all national wildlife refuges in Alaska" whereas the Kenai Rule "only forbid[] baiting of brown bears in the Kenai Refuge." *Ibid.* citing 5 U.S.C. § 801(b)(1)-(2)).

The Ninth Circuit denied the State's petition for rehearing en banc. App. 136-37.

8. While the Fish and Wildlife Service doubled down on its purported authority to regulate how people hunt bears, the National Park Service took a different approach with its regulation, one of the three Obama-era regulations restricting hunting in Alaska. In 2015, the Park Service—like the Fish and Wildlife Service—concluded that specific state-authorized hunting practices—including brown bear baiting—manipulated wildlife populations or altered natural wildlife behaviors to benefit human harvest and were not consistent with the Organic Act, 54 U.S.C. § 100101 *et seq.*, ANILCA, or Park Service policies. 80 Fed. Reg. 64,325, 64,326 (Oct. 23, 2015). However, unlike the Fish and Wildlife Service, the Park Service considered Congress's response to the Statewide Refuge Rule and reviewed its own regulation in 2020. 85 Fed. Reg. 35,181 (June 9, 2020). In the 2020 rule, the Park Service recognized Congress's statement of disapproval and promulgated a regulation that "complement[ed] State regulations by more closely aligning harvest opportunities in national preserves with harvest opportunities in surrounding lands." *Id.* at 35,182. The agency recognized that ANILCA "mandate[s]" that it defer to "State laws, regulations, and management of hunting and trapping, other than for subsistence uses by rural Alaska residents under Federal regulations, in national preserves since their establishment in 1980." *Ibid.* It also acknowledged that it retained only "limited closure authority" to "designate zones [in the national preserves of Alaska] 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 35,183.

Several nongovernmental organizations sued to challenge the National Park Service's 2020 regulation. See *Alaska Wildlife Alliance* v. *Haaland*, Case No. 3:20-cv-00209-SLG. Relying on the Ninth Circuit decision at issue here, the district court recently remanded the rule to the agency, concluding that it had misstated its statutory authority. Rather than having limited authority as Congress intended, the district court cited the Ninth Circuit's decision to conclude that the National Park Service has "plenary power over these lands and the authority to preempt conflicting State law." See *Alaska Wildlife Alliance* v. *Haaland*, Case No. 3:20-cv-00209-SLG, Order Re Mot. for Summ. J., 41-42 (Sept. 30, 2022).

9. Also relevant here, Congress passed the John D. Dingell, Jr. Conservation, Management, and Recreation Act (Dingell Act) in 2019, Pub. L. No. 116-9, 155 Stat. 580. Here it "declare[d] that it is the policy of the United States and Federal Departments and agencies," in accordance with their missions and applicable law, "to conserve and enhance . . . the management of game species . . . on Federal land, including through hunting and fishing, in a manner that respects State management authority over wildlife resources." 16 U.S.C. § 7901(a)(2)(A).

REASONS FOR GRANTING THE PETITION

I. The petition raises a question of exceptional importance to the States.

Because a circuit split is not possible on this issue, the key consideration for purposes of certiorari is

whether the petition raises an important federal question. It is difficult to conceive of an issue of greater importance to Alaska—as well as the other States—than maintaining the delicate balance of power between federal and state sovereigns. See *Tafflin* v. *Levitt*, 493 U.S. 455, 458 (1990) ("[T]he States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.").

Of course, "[a]s long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). And there is no question the authority granted to Congress over public lands via the Property Clause "necessarily includes the power to regulate and protect the wildlife living there." *Kleppe* v. *New Mexico*, 426 U.S. 529, 541 (1976). But, "[w]ith respect to federal laws . . . the Supremacy Clause gives 'supreme' status only to those that are 'made in Pursuance' of '[t]his Constitution.'" *Wyeth* v. *Levin*, 555 U.S. 555, 585 (2009) (Thomas, J., concurring in judgment) (quoting Art. VI, cl. 2).

Federal laws "made in Pursuance" of the Constitution must at least comply with the set of procedures that Congress and the President are required to follow to enact "Laws of the United States." *Id.* at 586 (citing *INS* v. *Chadha*, 462 U.S. 919, 945-46 (1983)). "The Supremacy Clause thus requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was

produced through the constitutionally required bicameral and presentment procedures." *Ibid.*

So too, just as Congress has only the authority granted to it in the Constitution, federal agencies have only the authority granted them by Congress. As such, a "federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority." *New York* v. *FERC,* 535 U.S. 1, 18 (2002) (internal quotation marks omitted). This is because "an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." *Ibid.* (internal quotations omitted).

This case concerns the "delicate balance" of power between federal and state sovereigns required by our constitution. See *Gregory*, 501 U.S. at 460. It is especially significant to Alaska because it concerns ANILCA, which, as this Court is aware, was Congress's attempt to resolve years of conflict between the federal government and Alaskans, "who (for better or worse) sought greater independence from federal control." *Sturgeon* v. *Frost*, 139 S. Ct. 1066, 1073 (2019). When balancing its two competing goals, *id.* at 1075, Congress sought to preserve the national interest in wildlife populations, ANILCA § 303(4)(B)(i), while at the same time maintaining the State's traditional police power over hunting and wildlife management, 16 U.S.C. § 3202(a).[7]

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[7] In responding to the State's argument about its traditional police powers, the Ninth Circuit acknowledged that the "Alaska

The Ninth Circuit's decision does more than tip the scales of the delicate balance in the federal government's favor, it completely removes the State's interests from the equation. When applied properly, ANILCA grants the Service the authority to protect national interests in wildlife populations facing a conservation concern by designating *where* and establishing periods *when* hunting may not occur. 50 C.F.R. § 36.42. This is exactly what the Service did in 2013 and 2014, when it closed the Kenai Refuge to brown bear hunting generally because of concerns over declining brown bear numbers.[8] C.A. 3-ER-343-

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Statehood Act transferred administration of wildlife from Congress to the State," but stated that this "'transfer [did] not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife' like the Kenai Refuge, which remain[ed] under federal control." App. 16 (quoting Pub. Law No. 84-508, § 6(e), 72 Stat. 341 (1958)). The State recognizes Congress's power via the Property Clause to regulate and protect wildlife on public lands, see p. 19, *supra.,* but to the extent the Ninth Circuit concluded Congress never transferred administration of wildlife on National Wildlife Refuges to the State, that is neither accurate nor the Service's position. See p. 6, *supra.*

[8] It is not relevant to the issue raised here, but Alaska does not concede that the Service met the necessary showing for a complete closure in 2013 and 2014, and it believes that it is unlikely the Service would be able to meet the required showing in the future. The State is constitutionally mandated to manage and conserve all natural resources, including fish and wildlife, "for the maximum benefit of its people." ALASKA CONST., Art. 8, § 2. The Alaska Constitution also requires that fish and wildlife "be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses." *Id.*, Art. 8, § 4. Alaska takes its constitutional mandates seriously. In 2014,

50; SER-184, 220. Remaining with the State is the authority to determine *how* hunters hunt. 16 U.S.C. § 3202(a). The Ninth Circuit's decision allows the Service to write the State completely out of the equation by giving the federal agency all the power. Now the Service not only has the authority to close an area to hunting or to limit the time period during which hunting or trapping may occur, it has the ability to impose a national standard on an issue that is prototypically a local concern.

To be sure, not everyone supports bear baiting, even in Alaska. Nevertheless, this is a local issue Alaskans resolved on their own. In 2004, Alaskans voted on a ballot initiative that would have made it "illegal for a person to bait or intentionally feed a bear to hunt, photograph, or view a bear." 2004 Alaska Laws Initiative Meas. 3. This initiative failed by a vote of 171,338 to 130,648. See Alaska Division of Elections, Initiative Petition List, available at https://bit.ly/3DpIDme (last visited Oct. 24, 2022).

The Ninth Circuit's decision grants the Service the authority to ignore this local, democratic process and impose a bear baiting ban through a regulation that was not subject to bicameral review and presentment.

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after an initial increase in the number of brown bears taken on the Kenai Peninsula, the State reduced the harvest cap to no more than 17 reproductive-age female bears. C.A. 3-ER-344. And in September 2022, the State's wildlife management agency issued an emergency order to close the Kenai Peninsula brown bear hunting season because the number of bears taken had exceeded the maximum number allowed. See *Hunting and Trapping,* Emergency Order 02-05-22, effective Sept. 30, 2022, available at https://bit.ly/3eWN7HH (last visited Oct. 24, 2022).

And, even more troubling, it allows the Service to ignore express congressional intent disapproving of the same agency action, even when that statement of congressional intent complied with the Constitution's bicameralism and presentment requirements. *Ctr. for Biological Diversity* v. *Bernhardt*, 946 F.3d 553, 562 (9th Cir. 2019) ("Congress complied with the process of bicameralism and presentment in enacting the Joint Resolution.").

The court's decision is significant for another reason—the sheer volume of land involved. Alaska voters rejected a statewide ban through the electoral process, but if this decision stands, federal agencies may successfully impose a brown bear baiting ban over nearly a quarter of the state, a remarkable deed considering Alaska houses 425.8 million acres.

The National Wildlife Refuge System includes 95 million acres of land across the United States. Of those 95 million acres, 76.8 million acres are in Alaska. The acreage set aside for wildlife refuges in Alaska exceeds the acreage of all but four states.[9] It also exceeds the combined acreage of the following ten states—Rhode Island, Delaware, New Jersey, New Hampshire, Vermont, Massachusetts, Hawaii, Maryland, West Virginia, and South Carolina. If the Ninth Circuit's reasoning extends to the National Park Service's authority over national preserves—as a district court already concluded it did—federal agencies are now

[9] The four states with more acreage are Texas, California, Montana, and New Mexico.

exercising Congress's "plenary authority" under the Property Clause over 98.6 million acres in Alaska.

"Admittedly, lawmaking under our Constitution can be difficult." *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring). Congress overcame this difficulty and passed ANILCA, where it stated an intent to preserve Alaska's traditional management authority over wildlife. It overcame this difficulty again in 2017 when it passed the joint resolution to rein in an agency that overstepped its authority. The Ninth Circuit "dash[ed] [this] whole scheme," however, when it concluded that Congress delegated its Property Clause power—without limitation—to the Executive Branch. *Ibid.* (internal quotation marks omitted); App. 17 (Congress "delegated its authority under the Property Clause to manage the federal wildlife refuges in Alaska to the [Department of the Interior]." (internal quotation marks omitted)). There is no longer room for lawmaking by the State, a government "more local and more accountable than a distant federal" authority. *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 536 (2012) (plurality opinion). Instead, Alaska's sovereign management authority is left to "the will of unelected officials barely responsive to [the President]." *West Virginia* v. *EPA*, 142 S. Ct. at 2618 (Gorsuch, J., concurring). Such a broad delegation stretches the limits of Congress's ability to intentionally delegate its legislative powers to unelected officials. It also exceeds the limits of the Supremacy Clause. The Ninth Circuit's decision warrants this Court's attention.

II. The Ninth Circuit's decision is unsustainable on the merits.

A. Congress preserved Alaska's authority to manage the methods and means of hunting.

"States have broad trustee and police powers over wildlife within their jurisdictions." *Kleppe* v. *New Mexico*, 426 U.S. 529, 545 (1976). This includes fish and wildlife found on Federal lands within a state. 43 C.F.R. § 24.3(a) (1983). In its briefing to the Ninth Circuit, the Service argued that "ANILCA generally indicates that Congress did not intend to *displace entirely* Alaska's concurrent authority to manage wildlife on federal lands." Gov't C.A. Br. 27 (Emphasis added). Unsatisfied with the agency's broad claim of authority, the Ninth Circuit went further and held that Congress delegated all its power under the Property Clause to the agency.

The Ninth Circuit's interpretation of ANILCA, even without the 2017 amendment, is wrong. Section 1314, titled "Taking of fish and wildlife," divides general management authority vis-à-vis the state and federal government. 16 U.S.C. § 3202. Subsection (a) preserves the State's general management authority over fish and wildlife, and subsection (b) preserves the Service's general management authority over public land, except as specifically provided in ANILCA. *Id.* § 3202(a) & (b). Nowhere in these provisions does Congress grant the Service the authority to override local control of hunting. The Ninth Circuit gets there by relying on subsection (c), reasoning that because

Congress said that hunting on wildlife refuges must be carried out in accordance with state *and* federal law, Congress surely granted the Service broad authority to manage hunting. App. 17.

The Ninth Circuit failed to read ANILCA, and specifically this section, as a whole rather than as individual subsections. See *Territory of Guam* v. *United States*, 141 S. Ct. 1608, 1613 (2021) (stating statutes must be read as a whole). According to 16 U.S.C. § 3202(c), a hunter in Alaska must comply with state law (which has general authority over the methods and means of hunting) and federal law (which has general authority over access and use of public lands). Subsection (c) is not a source of *additional* authority to preempt the State's management of hunting practices.

The Service's authority does not come from 16 U.S.C. § 3202(c); it stems from Congress's statement of purposes for the Kenai Refuge. Congress gave the Service an overarching obligation to "conserve fish and wildlife populations and habitats in their natural diversity," ANILCA, § 303(4)(B)(i), but that responsibility does not allow the Service to infringe on the State's authority to manage the methods and means of hunting, nor does it allow the Service to establish harvest quotas or bag limits. Instead, it allows the Service to act only when hunting is causing a valid and demonstrated conservation concern and only by "clos[ing] an area or restrict[ing] an activity"—that is, limiting *where* and *when* hunting may occur. 50 C.F.R. § 36.42(a), (b).

A provision protecting a State's traditional management authority must have meaning. Read as a whole, Congress preserved—rather than displaced—local control over how hunting will occur in Alaska, while providing the Service the ability to protect the broad national interest in wildlife populations. The Ninth Circuit brushed over the cooperative nature of ANILCA and invited the federal management agencies to preempt State law at their will. This is an extraordinary shift in the "delicate balance" underlying our federalist system, where courts normally assume "Congress d[id] not exercise lightly" its power to legislate in areas traditionally regulated by the States. *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991).

B. Congress amended the Service's ANILCA mandate.

The Ninth Circuit gave short shrift to the 2017 legislation. It concluded that the "joint resolution does not indicate congressional intent concerning the Kenai Rule" because it "does not mention the Kenai Rule." App. 20. It then suggested that legislation enacted via the streamlined process authorized by the Congressional Review Act does not actually amend the agency's underlying statutory authority. Instead, the court held that legislation enacted through the Congressional Review Act only prevents the agency from enacting a regulation that is "substantively identical." *Id.* at 20.

"If a court, employing traditional tools of statutory construction, ascertains that Congress had an

intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, U.S.A., Inc.* v. *Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Here, Congress expressed clear intention on the precise question—it rejected the Service's interpretation that ANILCA required it to ban predator control, including brown bear baiting.[10] The Service offered that same rejected interpretation to support its ban of brown bear baiting on the Kenai Rule. *Compare* 81 Fed. Reg. at 52,252 *with* 81 Fed. Reg. at 27,033 (justifying preemption as necessary to meet its "legal mandates"). With both rules resting on the same justification, it follows that an action by Congress disapproving of one rule must be given effect when considering the legality of the other rule. And let us not forget that Congress declared a "national policy" in 2019 to "conserve and enhance" the management of game species on Federal land, including through hunting and fishing, in a manner that "respects State management authority over wildlife resources." 16 U.S.C. § 7901(a)(2)(A).

To sidestep the clear import of the joint resolution, the Ninth Circuit misconstrued the Congressional Review Act. The Act provides that "[i]f the Congress does not enact a joint resolution of disapproval . . . respecting a rule, [then] no court or agency may infer any intent of Congress from any action or inaction of

[10] The State does not concede that any of the methods of hunting banned by the Service qualify as predator control. All forms of hunting affect wildlife populations. Wildlife populations are not managed by how people hunt, they are managed through harvest quotas and limiting the number of animals people can take.

the Congress . . . with regard to such rule." 5 U.S.C. § 801(g). All this means is that courts cannot read any intent into the fact that Congress did not disapprove of the Kenai Rule. Put differently, if Congress had not acted and a court were considering the validity of the Statewide Refuge Rule, the court could not point to Congress's inaction on the Kenai Rule to support a conclusion that Congress blessed the statewide ban. This makes sense because, as this Court has recognized, "failed legislative proposals are 'particularly dangerous ground on which to rest an interpretation of a . . . statute.'" *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (quoting *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990)). But here, Congress acted affirmatively. The 114th Congress may not have disapproved of the Kenai Rule, but the 115th Congress *did* invalidate the Statewide Refuge Rule.[11] That was a legislative action that resulted in a substantive amendment that the federal agency must follow. *New York* v. *FERC,* 535 U.S. 1, 18 (2002) (stating that an agency has no power to act unless Congress confers power upon it).

The Ninth Circuit also misapplied 5 U.S.C. § 801(b)(1) and (2). Together these provisions provide that once Congress disapproves of an agency rule, the agency may not reissue the invalidated rule in "substantially the same form" or issue a new rule "that

[11] Due to the time constraints imposed by the Congressional Review Act, the 115th Congress could not use that procedural process to invalidate the Kenai Rule. See 5 U.S.C. § 801(a) & (d)(1)–(2)(a).

is substantially the same" unless authorized by a later enacted law. Notably, the court's decision rewrites the text of the statute and heightens the standard required for this provision to apply. Rather than the new rule being "in substantially the same form," the panel requires the new rule to be "substantively identical." App. 20

The consequence of the panel's conclusion is a complete evisceration of Congress's 2017 legislation. If the decision below is allowed to stand, the Service could easily circumvent Congress's statement of disapproval merely by prohibiting the same activity through refuge specific regulations, just as the Service did for the Kenai Refuge. Applying the court's reasoning, a new regulation banning brown bear baiting in the Togiak National Wildlife Refuge would not be "substantively identical" to the abrogated Statewide Refuge Rule because it would only ban brown bear baiting in the Togiak Refuge and not statewide. The court invited the Service to take the same action in each of the other 15 National Wildlife Refuges in Alaska to reach the same result as the Statewide Refuge Rule.

The Congressional Review Act provides a straightforward process to preserve the separation of powers and invalidate regulations that exceed the agency's statutory mandate. The Ninth Circuit misapplied this Act by giving more meaning to Congress's inaction on the Kenai Rule than it did Congress's affirmative action on the Statewide Refuge Rule. In doing so, the court undermined an important system of checks and balances and disregarded

principles of federalism. There is no basis for interpreting ANILCA to defeat Congress's objective to preserve state authority. And this is especially true here, when there is a clear (and recent) statement from Congress rejecting that interpretation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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