No. 14-1209

In the
Supreme Court of the United States

JOHN STURGEON,

Petitioner,

v.

SUE MASICA, in Her 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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

The Alaska National Interest Lands Conservation Act (ANILCA) says state, Native, and private lands within the boundaries of Alaska's national parks are not part of the park system. These non-federal lands are free from regulations applicable "solely" to the "conservation system unit" in which they sit. "Conservation system unit" refers to various federally managed wilderness areas in Alaska, including national parks. Does ANILCA prohibit the application of National Park Service regulations to non-federal lands within Alaska's national parks?

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded in 1973 and is widely recognized as the most experienced nonprofit legal foundation of its kind.[1] Among other matters affecting the public interest, PLF defends the constitutional principle of federalism environmental law. PLF attorneys have participated as lead counsel or counsel for amici in several cases before this Court involving important issues of federal water and land use law. *E.g.*, *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013); *Sackett v. EPA*, 132 S. Ct. 1367 (2012); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009); *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

PLF urges the Court to uphold the principles of federalism honored by ANILCA and vital to our national structure. PLF also counsels against deference to the National Park Service because the statute does not leave room for agency discretion regarding authority to regulate non-federal lands, and because the National Park Service's interpretation cannot be reconciled with ANILCA's text.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, PLF affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than PLF, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

What began as a lone hunting trip has escalated into a battle over fundamental principles of federalism and the reach of the federal bureaucracy. In 2007, John Sturgeon boarded his hovercraft and struck out into the Alaskan wilderness along the Nation River. His plan to hunt moose fizzled when he bumped into three National Park Service officers. They insisted that national park regulations forbade the use of hovercrafts on the river. Sturgeon pointed out that the river ran through state land. He then learned that the National Park Service claims the power to impose its regulations on non-federal lands within Alaska's national parks. *Sturgeon v. Masica*, 768 F.3d 1066, 1069-70 (9th Cir. 2014).

Sturgeon believed that federal law sheltered these non-federal areas from the reach of national park regulations. Although non-federal enclaves within the park system in other states are subject to such national regulations, the federal government has taken a different course with respect to Alaska, out of a special sensitivity for Alaska's and its native peoples' autonomy. ANILCA shields state, Native, and private land within "conservation system units" from Service regulations applicable "solely" to such units. 16 U.S.C. § 3103(c). The statutory phrase "conservation system unit" encompasses a variety of federally administered parks, refuges, and preserves in Alaska. *See id.* § 3102(3).

Sturgeon sued to establish that, under ANILCA, national park regulations cannot extend to navigable waters within conservation units. But the district court and the Ninth Circuit, indifferent to the unique

state-federal balance which ANILCA brokers, held that all nationwide national park regulations apply to every pocket of non-federal land within conservation system units. *Sturgeon*, 768 F.3d at 1070-71, 1077-78.

That holding reaches far beyond a single hovercraft traversing the Alaskan wilds. Federal conservation system units sprawl across a massive proportion of Alaska's lands and waters. Many Alaskans live in and rely upon state, private, and Native land within these units. Upholding the lower courts' authorization of federal power over these non-federal lands will hurt the livelihoods and recreational pursuits of all Alaskans.

This Court should reverse. The text and context of ANILCA protect non-federal enclaves within conservation units from National Park Service control. The Service's contrary position, which no reasonable construction of ANILCA supports, merits no deference from this Court.

ARGUMENT

I

THE PLAIN LANGUAGE OF ANILCA PRESERVES ALASKA'S PRIMACY OVER LAND AND WATER USE BY LIMITING THE REACH OF NATIONAL PARK SERVICE REGULATIONS TO FEDERAL LANDS

Statutory interpretation begins with the plain language of the statute. This Court relies on text to "give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). Judges look to the

ordinary meaning of statutory text and do not resort to legislative history unless the statute is ambiguous. *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702, 1709 (2012); *Moskal v. United States*, 498 U.S. 103, 108 (1990).

ANILCA is not ambiguous. It preserves the land-use rights of the many state, Native, and private landowners that reside within the vast reaches of land and waterways otherwise dedicated as "conservation system units" by the federal government. ANILCA's ordinary meaning exempts non-federal lands within conservation system units from National Park Service regulation. ANILCA provides that only *federal* lands within the boundaries of such conservation system units "shall be deemed to be included as a portion of such unit." 16 U.S.C. § 3103(c). In contrast, lands that belong to "the State, to any Native corporation, or to any private party [are not] subject to the regulations applicable solely to public lands within such units."[2] *Id.* ANILCA then defines a "conservation system unit" as "any unit in Alaska of the National Park System," as well as certain other federally managed wilderness areas. *See id.* § 3102(4).

By its plain terms, Section 3103 of ANILCA establishes three common sense principles. Foremost, non-federal land within Alaska's federal conservation units are not part of those units. Second, land that is not part of a conservation system unit is not regulated as if it were. And third, if the federal government wants to regulate such non-federal areas as if they

[2] These inholdings may, however, be conveyed to the federal government, after which "such lands shall become part" of the conservation system unit "and be administered accordingly." 16 U.S.C. § 3103(c).

were fully integrated into a conservation unit, then it must obtain title.

This basic framework protects non-federal land within these conservation system units from the normal Service regulatory regime. It also vindicates ANILCA's larger purpose of providing a unique, Alaska-specific framework for national parks. *See*, *e.g.*, 16 U.S.C. § 3101(d) ("This Act provides sufficient protection for . . . scenic, natural, cultural and environmental values . . . and at the same time . . . adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people").

II

CANONS OF STATUTORY CONSTRUCTION CONFIRM THAT ANILCA DOES NOT EXPAND NATIONAL PARK SERVICE REGULATIONS TO STATE, NATIVE, AND PRIVATE LAND

A. The Context of § 3103(c) Demonstrates That Congress Intended for Non-Federal Lands Encased in Conservation System Units To Remain Free of Default National Park Service Regulations

Context shapes language and eliminates candidate interpretations. *Utility Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2442 (2014). Context includes both the statutory section at issue and the larger enactment. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

Here, the immediate statutory context shows that, under ANILCA, the Service's default national park

regulations do not apply to non-federal property within conservation system units. The definition of "conservation system unit" is instructive. A "conservation system unit" is "*any* unit in Alaska of the National Park System." 16 U.S.C. § 3102(4) (emphasis added). Thus, any part of the National Park System is also part of a conservation system unit. ANILCA says that State, Native, and private lands are not part of any conservation system unit: they are not "deemed to be included as a portion of such unit" and "any such lands shall become part of the unit" only upon federal acquisition. 16 U.S.C. § 3103(c). Because non-federal lands are not part of the unit, they cannot be part of the national park system. Thus, national park regulations do not apply to them.

The broader context of the statutory scheme leads to the same conclusion. ANILCA placed over 100 million acres of Alaska within conservation system units. Andrea K. Hansen, *The Alaska National Interest Lands Conservation Act of 1980*, 22 J. Land Resources & Envtl. L. 435, 435 (2002). This unprecedented expansion of federal parks, preserves, and refuges presented a unique challenge to the federal-state balance of land management in Alaska. Because so much of Alaska's land and water is encased within these federal conservation areas, the fate of the state's many non-federal enclaves implicates the heart of the state's sovereignty.

ANILCA therefore remained solicitous of the interests of the state, Native corporations, and private property owners. Indeed, the law intended both to provide for the preservation of treasured landscapes and to protect Alaska's economy. ANILCA assures "adequate opportunity for satisfaction of the economic

and social needs of the State of Alaska and its people." 16 U.S.C. § 3101(d). For rural Alaskans, the Act offers the right to continue "a subsistence way of life." *Id.* § 3101(c). Contrary to Congress's intent, the Ninth Circuit's reading hollows out these promises by coating much of Alaska's non-federal land in layers of federal control.

For its part, the Ninth Circuit lost sight of context when it homed in on the word "solely" in Section 3103(c): "No lands which [belong] to the State, to any Native Corporation, or to any private party shall be subject to the regulations applicable solely to public lands within such units." 16 U.S.C. § 3103(c); *Sturgeon v. Masica*, 768 F.3d at1077-79. "Solely," said the Ninth Circuit, means that non-federal lands are freed only from the regulations that are specific to the Alaskan conservation system units. *Id.* at 1077-78. Nationwide national park regulations still hold sway. *Id.*

This reading ignores the rest of Section 3103(c). Non-federal lands inside conservation system units are not part of the national park system. Under the lower court's reading, non-federal lands within a conservation system unit become an uncertain hybrid—they are not part of the conservation system unit yet somehow remain within the national park system. This defies ANILCA's clear dictate that these non-federal lands are not part of the conservation system unit in which they sit. They therefore cannot be regulated as if they are. Thus, the Ninth Circuit's fixation on this single word "solely" violates the canon that courts should harmonize all parts of a statute. *See Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973).

But another reading of "solely" reconciles the

language in Section 3103(c): the word clarifies that Congress did not intend to exempt these pockets of non-federal land from all generally applicable federal laws, such as the Clean Water Act. In other words, Congress inserted the word "solely" to ensure that non-federal enclaves within conservation units would still be subject to the United States' general legislative jurisdiction. This reading, unlike the Ninth Circuit's, does not elevate a single word over the rest of the text.

The plain language of ANILCA says non-federal lands inside national parks are not part of the park system. This includes waters that run through such lands where non-federal parties own title to the submerged land. These lands and waters are free from all national park regulations.[3]

B. ANILCA Lacks Any Clear Statement of Intent To Trespass upon Alaska's Supremacy over Management of Non-Federal Land and Water

This Court protects federalism by presuming that Congress does not intend to alter it absent a plain statement. "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v.*

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[3] Below, the Service argued that all navigable waters within conservation units are themselves public lands subject to full Service regulation under ANILCA because of federal reserved water rights in Alaska waters. However, ANILCA's definition of "public lands" excludes waters in which the federal government does not hold title. *See* 16 U.S.C. § 3102. And for the reasons stated in the Petitioner's brief on the merits, no federal interest in any of those waters is sufficient to qualify them as federal lands under ANILCA.

Bass, 404 U.S. 336, 349 (1971). Primary jurisdiction over land and water belongs to the sovereign states. *See e.g.*, *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994); *United States v. Alaska*, 521 U.S. 1, 5 (1997). Although national park regulations often apply to inholdings in other states, Alaska's sovereignty faces unique peril because of the staggering size of regions tagged as federal conservation areas. *See* Hansen, *supra* at 435 (ANILCA added "more than 100 million acres of conservation system units . . . more than doubling the size of the national park system, almost tripling the size of the wildlife refuge system, and nearly quadrupling the size of the national wilderness preservation system."). Congress would not commit matters of such political significance to agency hands with winks and nods.

Courts should presume that Congress does not intend to meddle with Alaska's sovereign interests in land and water regulation unless it speaks clearly. Under the Ninth Circuit's counter-intuitive reasoning, language that appears to preserve the federal-state balance brokered by ANILCA in fact tilts the scale toward federal control.

In fact, the Ninth Circuit beats ANILCA's ploughshare back into a sword by refashioning language designed to preserve a balanced federalism into a weapon that assaults the federalism embodied by the statute's compromise. "[I]n the absence of a clearer direction from Congress," this Court should read ANILCA as a modest recognition of Alaska's sovereignty over land and water. *Bass*, 404 U.S. at 339.

III

EVEN IF ANILCA IS AMBIGUOUS, THIS COURT SHOULD NOT DEFER TO THE NATIONAL PARK SERVICE'S INTERPRETATION

The National Park Service's interpretation of ANILCA subjecting non-federal lands and waters to federal control contradicts the statute and does not deserve this Court's deference. The National Park Service's views on its authority over non-federal enclaves have vacillated. In 1983, soon after ANILCA's passage, the National Park Service said that its regulations did not reach "privately owned lands and waters (including Indian lands and waters . . .) within the boundaries of a park area." 48 Fed. Reg. 30,252, 30,261 (June 30, 1983). This rule admitted of one exception for "regulations relating specifically to privately owned lands and waters under the legislative jurisdiction of the United States." *Id.* A 1987 revision affirmed and clarified the agency's position. The revision that said park regulations "do not apply on non-federally owned lands and waters or on Indian lands and waters owned individually or tribally within the boundaries of a park area." 52 Fed. Reg. 35,238, 35,239 (Sept. 18, 1987).

The National Park Service switched positions a decade later. A 1996 amendment extended national park regulations to "waters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters and the areas within their ordinary reach . . . and without regard to the ownership of submerged lands, tidelands, or lowlands." 61 Fed. Reg. 35,133, 35,136 (July 5, 1996). The Service's interpretation differs

from the Ninth Circuit's. Whereas the Ninth Circuit held here that national park regulations apply across all non-federal inholdings, the Service's interpretation applies its regulations only to navigable waters within pockets of non-federal land.

Although the Service's interpretation is not as onerous as the Ninth Circuit's, it does not merit deference. ANILCA unambiguously shields Sturgeon and all Alaskans on all non-federal lands and waters from the reach of default national park regulations. Even without ANILCA's straightforward language, the regulation is an unreasonable interpretation.

A. The National Park Service's Patchwork Approach To Regulating Non-Federal Land and Water Is Not a Permissible Reading of the Statute

Chevron deference applies to "an agency's reasonable interpretation of an ambiguity in a statute that the agency administers." *Michigan v. EPA*, 135 S. Ct. 2699, 2701 (2015). A *Chevron* analysis poses two questions: (1) is the agency interpreting an ambiguous text?; and if so, (2) is the agency's interpretation reasonable? *Utility Air Regulatory Grp.*, 134 S. Ct. at 2439.

As discussed above, ANILCA's plain language is unambiguous. Non-federal lands shall not "be subject to the regulations applicable solely to public lands within such units." 16 U.S.C. § 3103(c). This phrase leaves no room for interpretive legerdemain.

Assuming arguendo that the language were ambiguous, the National Park Service's interpretation of ANILCA could not fit into any fair reading of the statute. Even under the deferential standard of

Chevron, courts must reject an unreasonable agency interpretation. *See Michigan v. EPA*, 135 S. Ct. at 2707.

The National Park Service's interpretation is unreasonable because it applies a non-uniform rule to a statute establishing a uniform standard for non-federal enclaves. Under the agency's interpretation, national park regulations apply to navigable waters within park boundaries "without regard to the ownership of submerged lands, tidelands, or lowlands." 36 C.F.R. § 1.2(a)(3). Otherwise, the agency recognizes that its regulations only reach "federally owned lands and waters administered by the National Park Service." *Id.* at § 1.2(a)(1). This means that some parts of non-federal enclaves are subject to park regulation and other parts are not.

The statute does not support this checkerboard interpretation. Rather, ANILCA contemplates uniform treatment of all non-federal lands and waters within conservation system units. Non-federal lands, which are not part of the surrounding conservation system unit, are exempt from regulations "applicable solely to public lands within such units." 16 U.S.C. § 3103. ANILCA explicitly defines "land" to mean both lands and waters. *Id.* § 3102(1). Thus, Congress intended that this exemption should apply to land *and* water within non-federal enclaves.

Even if Section 3103 were ambiguous regarding what regulations apply to non-federal lands and waters, the statute still would unambiguously apply the same rule to both non-federal lands and waters. In other words, nationwide park regulations either apply to all non-federal lands and waters within conservation units (as the Ninth Circuit held), or to none of them (as

Sturgeon contends). The lands and waters stand or fall together.

Yet the Service's interpretation treats land and water differently. *See* 36 C.F.R. § 1.2(a). The Service applies nationwide park regulations to water on non-federal land, but not to the rest of the enclave. The National Park Service's regulation that claims authority to regulate waters within conservation system units regardless of ownership of the submerged and surrounding land cannot be squared with any permissible reading of ANILCA.

B. This Court Should Not Defer to the National Park Service's Interpretation Because Other Federal Agencies Also Manage Conservation System Units Under ANILCA

Where multiple agencies share in administration of a statute, this Court should not defer to a single agency's interpretation. *See Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 642 n.30 (1986); *see also Proffitt v. FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000). "Any other conclusion would produce an intolerable situation in which different agencies could adopt inconsistent interpretations of [a statute] and substantially complicate the administration of the Act." *Public Citizen Health Res. Grp. v. FDA*, 704 F.2d 1280, 1287 (D.C. Cir. 1983).

The National Park Service interpretation does not merit deference because other agencies also administer conservation system units in Alaska, and interpret Section 3103 differently. For example, the United States Fish and Wildlife Service manages National Wildlife Refuges in Alaska, which are included within

the definition of "conservation system unit." *See* 50 C.F.R. § 36.1; 16 U.S.C. § 3102(4). The Department of Agriculture and Forest Service also have imposed subsistence management regulations pursuant to ANILCA with regard to Alaska's conservation system units. *See* 36 C.F.R §§ 242.1-242.28.

The concurrent management of conservation system units in Alaska allows for diverging and even contradictory interpretations of ANILCA. Indeed, the United States Fish and Wildlife Service employs a different interpretation of its authority over non-federal land within conservation system units under its domain. That agency interprets its authority to extend only to "federally-owned lands within the boundaries of any Alaska National Wildlife Refuge." 50 C.F.R. § 36.1(b). The Fish and Wildlife Service thus leaves non-federal islands within wildlife refuges alone, while the National Park Service seeks to expand its authority to navigable waters on non-federal lands. Under such circumstances, a court should not favor any one agency and instead lean on its own judgment.

C. The Agency's Flip-Flop in Its Interpretation of ANILCA Extinguishes Any Remaining Persuasive Power

If *Chevron* does not apply, an agency regulation may sometimes enjoy persuasive power under the *Skidmore* deference: "We consider that the rulings, interpretations and opinions of [an agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944). However, the agency's

shifting interpretation weakens its persuasive grip.

The space afforded under *Chevron*'s discretion theory allows for changes in policy if the agency remains within the confines of its discretion. *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980-81 (2005). But, under *Skidmore*, policy changes undermine the level of deference due to the agency's interpretation.

This Court has frequently applied more scrutiny to agency interpretations because of policy shifts. Respect for agency interpretations under *Skidmore* depends upon whether the agency's position represents a "longstanding, consistently maintained interpretation." *Alaska Dep't of Envt'l Conservation v. E.P.A.*, 540 U.S. 461, 487 (2004). "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (internal quotation marks omitted); *see also Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993). Moreover, deference diminishes with the span of time between the statute's enactment and the subsequent agency interpretation. *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 463 n.12 (1989); *see also Good Samaritan*, 508 U.S. at 414.

Here, the National Park Service has changed its position regarding the reach of national park regulations. The agency's 1981 interim guidance provided that national park regulations "would not apply to activities occurring on State lands [or] activities occurring on Native or any other non-federally owned land interests located within park area

boundaries." 46 Fed. Reg. 31,836, 31,843 (June 17, 1981). The Service clarified again in 1987 that its regulations "do not apply on non-federally owned lands and waters or on Indian lands and waters owned individually or tribally within the boundaries of a park area." 52 Fed. Reg. at 35,239.

The agency then upgraded its own regulatory power in 1996. The new policy extended national park regulations to waters inside park boundaries "without regard to the ownership of submerged lands, tidelands, or lowlands." 61 Fed. Reg. at 35,136.

This shift in position blunts the agency's persuasive power. If any agency interpretation ought to persuade this Court, it is the interpretation closest in time to enactment. That interpretation said that the National Park Service cannot impose its regulations on non-federal lands within Alaska's national parks. This earlier policy also accords with ANILCA's plain language.

CONCLUSION

ANILCA offers a balance between federal conservation and Alaskans' autonomy. This compromise acknowledges the great national interest in Alaska's natural treasures, while also acknowledging the special solicitude that should accompany such national interest. The National Park Service seeks to disrupt that balance by subjecting the many islands of non-federal land within Alaska's national parks to its full regulatory jurisdiction. But ANILCA dictates that such lands should remain just as free of federal control as lands far from any national park boundary. The National Park Service cannot unilaterally deem it otherwise.

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