No. 14-1209

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

BRIEF OF AMICI CURIAE ALASKA NATIVE SUBSISTENCE USERS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI[1]

Amici are federally recognized Alaska tribes, inter-tribal organizations and an individual Alaska Native who support federal jurisdiction to regulate navigable waters in conservation system units to protect the subsistence fishing way of life upon which rural Alaska Native people vitally depend.[2] "Subsistence uses" are defined as "the customary and traditional uses by rural Alaska residents of wild, renewable resources" of which fish are the most significant use. 16 U.S.C. 3113. "Approximately 40 million pounds of fish and wildlife are harvested annually by subsistence users, of which fish account for 60 percent." *Environmental Assessment, Modification of the Federal Subsistence Fisheries Management Program,* ch. III-1 (June 2, 1997), http://www.doi.gov/subsistence/library/ea/upload/EAModFSFMP.PDF.

Petitioner's arguments disclaim any intent to displace federal protection and management of subsistence fishing on rivers within federal conservation system units. But the sweeping nature of his (and his amici's) legal theories would directly jeopardize protective federal regulations which have been in place since 1999. Over the past 20 years, Amici tribes and tribal organizations have directly litigated or otherwise supported efforts to secure their federally-protected subsistence fishing rights on

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[1] The parties in this case have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than the amici made a monetary contribution to the preparation or submission of this brief.

[2] Amici are Mentasta Traditional Council, Village of Dot Lake, Tanana Chiefs Conference, Kenaitze Indian Tribe, The Organized Village of Saxman, Chugachmiut, and Nora John.

navigable waters in Alaska. While Amici agree that the Ninth Circuit's decision raises unnecessary issues regarding the regulation of Alaskan uplands, Amici support the judgment below because, without federal regulation of navigable waters within conservation system units (CSUs), the fishing rights Congress expressly protected in Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3111-3126, would become a nullity; and "[i]f their right to fish is destroyed, so too is their traditional way of life." *United States* v. *Alexander*, 938 F.2d 942, 945 (9th Cir. 1991) (Kozinski, J.).

Federal regulation of navigable waters under ANILCA is critical to protecting Native subsistence fishing rights. Congress conditioned statehood on Alaska's agreement not to interfere with Alaska Native aboriginal hunting and fishing rights. 1958 Statehood Act, Pub. L. No. 85-508, 4, 72 Stat. 339, 339 (1958) (providing the "State and its people do agree . . . [and] forever disclaim all right and title . . . to any lands or other property (including fishing rights)" belonging to Alaska Natives, authority over which "shall be and remain under the absolute jurisdiction and control of the United States"); see generally *Cohen's Handbook of Federal Indian law* 4.07[3][b][i] (Neil Jessup Newton ed., 2012). Recognizing that subsistence hunting and fishing are essential to the continued physical, economic, traditional and cultural existence of Alaska Natives, Congress had long provided statutory protections for those uses of fish and wildlife. See generally *id.* 4.07[3][c][i].

Following statehood and the transfer of responsibility for managing fish and game from the federal government to the State of Alaska, regulatory restrictions on Native subsistence harvests

proliferated. Regulatory bodies strongly influenced by the views of urban sport and commercial interests imposed these restrictions. David S. Case & David A. Voluck, *Alaska Natives and American Laws* 294-95 (3d ed. 2012) ("Case & Voluck"). For instance, many traditional upriver subsistence fisheries along the Copper River were shut down shortly after statehood in favor of downriver commercial fisheries. See *John* v. *Alaska*, No. A85-698-CV, slip op. at 2 (D. Alaska Jan. 19, 1990) (Order on Cross Motions for Summary Judgment). The Alaska Native Claims Settlement Act, 43 U.S.C. 1601-1629h (ANSCA), failed to solve this problem, despite congressional expectations to the contrary. See H.R. Rep. No. 92-746 (1971) (Conf. Rep.) (expressing expectation that "the Secretary and the State [would] take any action necessary to protect the subsistence needs of the Natives"). "Some nine years [after ANCSA] it was compellingly clear that neither the state nor the Secretary were likely to protect subsistence in the manner Congress had contemplated." Case & Voluck, *supra*, at 292. Urban and sporting interests continued to dominate state management of fish and wildlife, and state agencies remained unwilling to protect Native subsistence uses. *Id.* at 294-95.

Title VIII of ANILCA was crafted to end this situation. Congress prefaced Title VIII with a declaration that "the 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). Title VIII provides that "the taking on public lands of *fish* and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." 16 U.S.C. 3114 (emphasis added). The statute directs the Secretary

of the Interior to establish an administrative structure necessary to implement the statute. 16 U.S.C. 3115(a)–(c).

This subsistence management regime was originally conceived to operate within the framework of cooperative federalism. "Pursuant to 805(d) of ANILCA, 16 U.S.C. § 3115(d), Congress gave the state authority to implement the rural subsistence preference by enacting laws of general applicability consistent with ANILCA's operative provisions," and the State initially did so. *Alaska* v. *Babbitt*, 72 F.3d 698, 700-01 (9th Cir. 1995), *adhered to sub nom. John* v. *United States*, 247 F.3d 1032 (9th Cir. 2001). But "Congress could not have anticipated the next chain of events. In 1989, the Alaska Supreme Court struck down the state act granting the rural subsistence preference as contrary to the Alaska state constitution. *McDowell v. Alaska,* 785 P.2d 1 (Alaska 1989)." *Id.* After the Alaska legislature failed to take curative steps, "[i]n 1990, the federal government withdrew Alaska's certification and took over implementation of Title VIII." *Id.*

In the long-running "*Katie John*" litigation, the Ninth Circuit upheld the United States' determination, through notice and comment rulemaking, that certain navigable waters within CSUs are "public lands" as defined in Title VIII of ANILCA, because the United States owns federally-reserved water rights in those waters that are necessary to carry out the purposes of the CSUs. *John* v. *United States*, 720 F.3d 1214, 1224 (9th Cir. 2013), *cert. denied sub nom. Alaska* v. *Jewell*, 134 S. Ct. 1759 (2014). The Circuit thus upheld federal subsistence fishing regulations covering those waters. *Id.* Accordingly, since 1999, the federal government has managed subsistence fishing by rural residents

on roughly 60 percent of Alaska's rivers, including the Nation River. Given Alaska's inability to implement the subsistence priority, federal management over subsistence fishing rights on rivers in rural areas is essential to fulfilling Congress's manifest intent in Title VIII of ANILCA.

Two Amici, the Mentasta Traditional Council and the Village of Dot Lake, are federally recognized tribes and are the home Villages of the plaintiffs in the "*Katie John*" litigation. Nora John is Katie John's daughter and representative for the John family who seek to preserve the *Katie John* judgment. The Kenaitze Indian Tribe and the Organized Village of Saxman are federally recognized tribes that enjoy the protections that Title VIII accords its traditional subsistence hunting and fishing activities. The Tanana Chiefs Conference and Chugachmiut are non-profit inter-tribal consortia formed to serve 46 tribal villages located respectively in the Interior and Prince William Sound regions of Alaska. Most of the tribal members in these villages are both subsistence users and also shareholders in Alaska Native Corporations formed pursuant to ANCSA.

The only issue presented here concerns federal jurisdiction to enforce hovercraft regulations on navigable waters within an Alaska CSU. Amici therefore urge the Court to uphold the judgment of the Court of Appeals, but on narrow grounds that leave extraneous issues regarding the outer reaches of federal jurisdiction over Native Corporation and state lands either for administrative rulemaking or for litigation that actually involves the application of federal rules to such lands. Alternatively, the Court should remand this case to the Ninth Circuit to consider whether the hovercraft regulation should be

upheld based upon the federal government's reserved water rights in the Nation River.

SUMMARY OF ARGUMENT

This case presents a direct challenge to indisputable and historic federal authority to regulate navigable *waters* under the Commerce and Property Clauses of the Constitution. The Park Service regulation at issue, 36 C.F.R. 2.17(e), precludes the use of hovercraft on lakes and rivers in National Parks and Preserves. It was authorized in 1976 by an amendment to the Park Service's organic act. Contrary to the arguments of several of Petitioner's amici, this case does *not* involve federal regulation of Alaska Native Corporation lands within National Parks and Preserves, nor the regulation of the State of Alaska's lands. Petitioner's claims should be rejected without reaching the complex hypothetical questions presented by Petitioner and his supporting amici because those questions simply are not presented under the facts of this case. In other words, the lower court judgment can be affirmed without reaching the broad grounds asserted below, or by Petitioner's formulation of the question presented.

Section 103 of ANILCA was intended to carve out upland inholdings owned by Alaska Native Corporations and the State of Alaska from at least some Park Service regulations otherwise applicable within CSUs. But it was never intended to preclude federal regulation of navigable rivers and lakes within National Parks and Preserves. Indeed, it would be absurd to suppose Congress simultaneously passed a statute setting aside the Yukon-Charley *Rivers* National Preserve, and then wrote its legislation in a manner that barred the Park Service

from regulating uses of those very rivers to protect the purposes for which the Preserve was set aside in the first place. After all, Congress created the Preserve to "maintain the environmental integrity of the entire Charley River basin, including streams, lakes and other natural features, in its undeveloped natural condition for public benefit and scientific study; to protect habitat for, and populations of, fish and wildlife." 16 U.S.C. 410hh(10). Under Petitioner's reading of ANILCA, however, Congress established the Preserve, together with 29 other conservation areas containing navigable rivers, and yet, in an obscure subsection of a provision captioned 'Maps,' Congress intended to quietly nullify all federal regulations adopted to protect those very rivers. This Court should reject a reading of section 103 that contravenes its plain text and produces such untenable results.

Regardless of how one reads section 103, the federal reserved water rights doctrine provides an alternative basis for affirming the judgment below because (as Petitioner concedes) such rights are a federal "interest" in waters such that the Nation River is indisputably "public land" as defined in ANILCA. But because this question was never reached by the lower courts, this Court should remand to those courts for further consideration if it declines to adopt the narrow grounds set forth below as the basis for affirming the judgment below.

ARGUMENT

I. CONGRESS PROPERLY AUTHORIZED THE NATIONAL PARK SERVICE TO REGULATE NAVIGABLE WATERS WITHIN ALASKA CONSERVATION SYSTEM UNITS.

Congress indisputably enjoys the constitutional power to authorize the Park Service to regulate navigable waters of the United States within National Parks and Preserves, and did so through the 1976 amendments to the National Parks' organic act. Congress did not curtail that authority in section 103 of ANILCA, which protects Alaska Native Corporation and State inholdings from at least some Park Service regulations within CSUs in Alaska. Amici do not address the question whether general Park Service regulations, as opposed to Alaska-specific regulations, are applicable to Native Corporation and State lands within CSU units because resolution of that question is not necessary to affirm the judgment below. Indeed, that question is not properly presented in the first place, because this case strictly concerns the application of a federal regulation *to waters*, not to lands.

A. Congress Validly Exercised Its Broad Power To Regulate Navigable Waters.

No party disputes the Nation River's status as a navigable river for purposes of federal law. Petitioner challenges a Park Service regulation that states "[t]he operation or use of hovercraft [in National Parks] is prohibited." 36 C.F.R. 2.17(e). Congress authorized that regulation in 1976, when it provided that "[t]he Secretary, under such terms and conditions as the Secretary considers advisable, may prescribe regulations . . . concerning boating and other activities on or relating to water located within

System units, including *water subject to the jurisdiction of the United States*." 54 U.S.C. 100751 (emphasis added). Because Congress's powers over navigable waters under the Commerce Clause, U.S. Const. art. I, 8, cl. 3, and the Property Clause, U.S. Const. art. IV, 3, cl. 2, are extremely broad, there is no doubt that federal authority to regulate extends to navigable waters within National Parks and Preserves. See *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976); A. Dan Tarlock, *Law of Water Rights and Resources* 9.6 (2015) ("Federal jurisdiction over waters now extends to all activities subject to the full Commerce Clause.").

Contrary to Petitioner's view (Pet. Br. at 36), navigable waters within the Yukon-Charley Rivers National Preserve are not "owned" by the State, and were never "conveyed" to the State. To be sure, the State owns the submerged lands pursuant to the equal footing doctrine. *Utah Div. of State Lands* v. *United States*, 482 U.S. 193, 196 (1987) ("Because all subsequently admitted States enter the Union on an 'equal footing' with the original 13 States, they too hold title to the land under navigable waters within their boundaries upon entry into the Union."). But the actual water is not owned by any private or governmental entity. *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913) ("Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable."). See also *United States* v. *Twin City Power Co.,* 350 U.S. 222, 226 (1956) (federal navigational servitude can preempt any use rights granted by a State to a private party, so that compensation under the Fifth Amendment is not required for taking such interests).

The fact that the States do not "own" the water column is illustrated by the federal reserved water rights doctrine. Federal reserved rights to waters are established "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, [and] the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976). In *Arizona* v. *California*, 373 U.S. 546, 597-98 (1963), this Court rejected the state ownership theory of navigable waters when it concluded that even after statehood there is no "doubt about the power of the United States under [the Commerce Clause and Property Clause] to reserve water rights for its reservations and its property."

Nor does the Submerged Lands Act (SLA) insulate navigable waters from federal regulation, or eliminate federal interests in those waters. Pet. Br. at 36. Congress enacted the SLA in 1953 to reverse several decisions of this Court holding that the United States, and not the States, held title to the marginal sea. "In the wake of the U.S. Supreme Court's decision in *United States v. California*, Congress . . . 'correct[ed]' the Court's holding by 'returning' the first three miles of ocean submerged lands to the coastal States." Robin Kundis Craig, *Treating Offshore Submerged Lands As Public Lands: A Historical Perspective*, 34 Pub. Land & Resources L. Rev. 51, 69-70 (2013) (footnotes omitted). The language of the SLA bears out Congress's recognition of state ownership of submerged lands, but not of any water. Compare 43 U.S.C. 1311(a)(1) (confirming title and ownership of submerged lands), with 43 U.S.C. 1311(a)(2) (confirming state rights to regulate land

and water related resources). As demonstrated by the language of the statute and *Arizona* v. *California*, 373 U.S. 546, states do not "own" the water column by virtue of having regulatory authority (unless preempted by federal law) over use of the waters. See U.S. Br. at 27-29.

As Justice Scalia explained in a case involving a National Park in Alaska, state ownership of submerged lands has little effect on federal authority to regulate activities in navigable waters.

> If title to submerged lands passed to Alaska, the Federal Government would still retain significant authority to regulate activities in the waters of Glacier Bay by virtue of its dominant navigational servitude, other aspects of the Commerce Clause, and even the treaty power. See, e.g., 43 U.S.C. § 1314(a) (under the Submerged Lands Act, the United States retains "powers of regulation and control of ... navigable waters for the constitutional purposes of commerce [and] navigation"); * * *United States* v. *California*, 436 U.S. 32, 41, and n. 18, 98 S.Ct. 1662, 56 L.Ed.2d 94 (1978) (noting that the United States retained "its navigational servitude" even when California took the "proprietary and administrative interests" in submerged lands surrounding islands in a national monument); * * * It is thus unsurprising that States own submerged lands in other federal water parks, such as the California Coastal National Monument and the Boundary Waters Canoe Area in Minnesota.

Alaska v. *United States*, 545 U.S. 75, 116-18 (2005) (Scalia, J., concurring in part and dissenting in part). See also *United States* v. *Rands*, 389 U.S. 121, 127 (1967) (concluding that the SLA "left congressional

power over commerce . . . precisely where it found [it]").

The Park Service regulation at issue here is a classic example of the exercise of federal power over the use of navigable waters. Congress authorized the Park Service to set the terms for the use of navigable waterways by private citizens and others in National Parks and refuges. Such regulation is the bread and butter of the federal commerce power over navigable waters. *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 426-27 (1940) ("The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government."). By their very nature, navigable waters are instruments of commerce subject to federal regulations related to their use.

In sum, a State may have authority to regulate water use within its boundaries if not preempted by federal law, but that "power" is not ownership. See Thompson, Leshy & Abrams, *Legal Control of Water Resources* 588 (5th ed. 2013) ("[T]he most distinctive legal feature of water is its status as a public resource that cannot be privatized in the ordinary way."). And as this Court has noted, whatever the extent of the State's power, it is subject to "the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce." *PPL Montana, LLC* v. *Montana*, 132 S. Ct. 1215, 1228 (2012). Thus, the Nation River itself is not private property, nor is it owned by the State of Alaska. It remains fully subject to Congress's constitutional authority over navigable waters, and as explained in the next section, nothing in section 103 of ANILCA discloses any congressional intent to relinquish that authority.

B. Section 103 of ANILCA Does Not Remove Rivers from Park Service Jurisdiction.

No statute, including ANILCA, limits the authority of the federal government to regulate waters within National Parks and Preserves. See 16 U.S.C. 3207 ("Nothing in this Act shall be construed . . . as superseding, modifying, or repealing, except as specifically set forth in this Act, existing laws applicable to the various Federal agencies which are authorized to . . . exercise licensing or regulatory functions in relation thereto."). See also 43 U.S.C. 1314(a) (under the SLA, the United States retains "powers of regulation and control of . . . navigable waters for the constitutional purposes of commerce [and] navigation").

Petitioner and his amici argue that the first sentence of section 103(c) precludes applying the statute and regulation to the waters here in question – by providing that "only those lands . . . which are public lands . . . shall be deemed to be included as a portion of such unit." 16 U.S.C. 3103(c). Ignoring the purpose of the section, they say the next sentence gives meaning to the first by explicitly exempting Alaska Native Corporation lands and State lands from the Units: "No lands which, before, on, or after [December 2, 1980], are conveyed 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." *Id.* But as explained above, the navigable waters of the Nation River have never been "conveyed to" the State, let alone to a Native Corporation or private party. While the State holds title to the submerged lands beneath the River, title was never conveyed to the water column; those waters remain part of the National

Parks and Preserves in Alaska and the United States retains its constitutional authority over that water.

As Petitioner acknowledges, Congress enacted section 103(c) to protect State and Native Corporation *lands* from some federal regulation, not to exempt entire federal water bodies from federal regulation. Pet. Br. at 7. If the navigable waters within the Yukon-Charley Rivers National Preserve were deemed immune from such regulation, a primary purpose of establishing the Park and Preserve would be defeated. Congress set the Preserve aside in the following terms.

> The preserve shall be managed for the following purposes, among others: *To maintain the environmental integrity of the entire Charley River basin, including streams, lakes* and other natural features, in its undeveloped natural condition for public benefit and scientific study; to protect habitat for, and populations of, fish and wildlife . . . .

16 U.S.C. 410hh(10) (emphasis added). It would be absurd to read ANILCA as setting aside for permanent protection an entire river basin to be managed by the Park Service, and then to deny the agency any authority to protect the river.

It is particularly inconceivable that Congress would establish a National *Rivers* Preserve in one section of ANILCA, and then (tucked into a section dealing with maps) exclude that very river from inclusion in the unit. As this Court reiterated just last term, statutes must be construed as a whole, and isolated sections must be considered in their context, with an eye toward accomplishing the broad objectives of the statute. *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015). "[W]hen deciding whether the language is

plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *Id.* (quoting *FDA* v. *Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000)). The Court's "duty, after all, is 'to construe statutes, not isolated provisions.'" *Id.* (quoting *Graham Cty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson,* 559 U.S. 280, 290 (2010)).

Regulations concerning navigable rivers do not affect Native Corporation lands (which of course are not "public lands" under section 102 of ANILCA). The regulation of hovercraft on navigable waters likewise does not implicate state property interests in submerged lands. In short, the Park Service regulation at issue here does not touch any of the areas within Preserve boundaries that are protected from some or all Park Service regulation by section 103(c)'s carve-out for non-federal inholdings. This is the most sensible reading of the statute because it preserves the status of Nation River as a part of the CSU that was expressly created for the river's protection, while recognizing that section 103 carves out for special protection State and Native Corporation lands. The judgment below can therefore be affirmed without ever reaching how to construe section 103 in circumstances, unlike those presented here, where that section actually applies.

II. IF THE COURT DISAGREES WITH THE COURT OF APPEALS' INTERPRETATION OF SECTION 103(C) AND WITH AMICI'S NARROWER CONSTRUCTION, THE CASE SHOULD BE REMANDED TO ASSESS WHETHER THE HOVERCRAFT REGULATION CAN BE UPHELD BASED UPON THE FEDERAL GOVERNMENT'S RESERVED WATER RIGHTS.

In the event this Court disagrees with the Court of Appeals' interpretation of section 103 and with Amici's alternative argument, the judgment below should be vacated and the matter remanded for an assessment of the Secretary's authority to enforce hovercraft regulations on navigable waters of the United States in which the government owns reserved water rights.

The *Katie John* ruling upheld a comprehensive 1999 federal rule in which the government asserted reserved water rights in rivers within and adjacent to each conservation system unit in Alaska. *John*, 720 F.3d at 1229. In its Rule identifying which waters are public lands due to the reserved water rights doctrine, the federal government included the waters of the Yukon-Charley Rivers National Preserve, including the Nation River. See 64 Fed. Reg. 1276, 1286-87 (Jan. 8, 1999) (codified at 36 C.F.R. 242.3(c)(28)). The administrative record contains the specific findings underlying the Secretaries' legal determinations. *Issue Paper and Recommendations of the Alaska Policy Group* 5 & app. 4 (June 15, 1995). That document identifies each class of "conservation system units" under ANILCA and the legislation

relied upon to support the Secretaries' determination that federal reserved water rights exist.[3]

For the past 16 years the Secretaries of Interior and Agriculture have administered the ANILCA Title VIII federal subsistence priority for Amici and other rural residents on waters within and adjacent to CSUs. Petitioner agrees that the Nation River is "public land" under the foregoing precedents, but asserts this is only the case for purposes of Title VIII of ANILCA. Pet. Br. at 38. Petitioner's amici likewise agree with the *Katie John* rulings. *See* Br. of United States Senators Sullivan and Murkowski and Representative Young as Amicus Curiae in Support of Petitioner Sturgeon at 3 n.4 ("Amici are not asking this Court to overturn or revisit the Ninth Circuit's "Katie John" decisions."); Br. of Doyon, Ltd., *et al*., at 32-35 (same); Br. of State of Alaska at 13-14 n.4 (*Katie John* rule not implicated in this case). Given

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[3] Congress expressly acquiesced in the federal agencies' regulations. After the Secretaries issued a 1996 Advance Notice of Proposed Rulemaking announcing their intent to develop subsistence fishing regulations based upon the government's ownership of reserved waters in the Alaska CSUs, *see* 61 Fed. Reg. 15014 (Apr. 4, 1996), Congress imposed a series of moratoria on the effective date of the proposed rules. Congress did so to give Alaska time and incentive to amend its laws and thus regain authority to manage subsistence uses on all lands and waters in Alaska, as originally anticipated by 16 U.S.C. 1315(d). *See, e.g.*, Pub. L. No. 104-208, § 317, 110 Stat 3009, 3009-222 (1996). After the State repeatedly failed to act, in late 1999 Congress permitted the rules to take effect. *See* 16 U.S.C. 3102 (historical note); *Tex. Dep't of Hous. & Cmty. Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2519-20 (2015) (congressional awareness of uniform interpretation of statute is proof of ratification of interpretation); *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 600-01 (1983) ("It is hardly conceivable that Congress—and in this setting, any Member of Congress—was not abundantly aware of what was going on.").

ANILCA's structure, it is difficult to conceive how the Court of Appeals' prior interpretation of Title I's definition of "public lands" would not apply equally to all titles of ANILCA. After all, the opening sentence to ANILCA's definitional section declares that, but for Titles IX and XIV, ANILCA's Title I definitions apply to the entire Act. 16 U.S.C. 1302. See U.S. Br. at 31-32. Nonetheless, this is an issue which neither the Court of Appeals nor the District Court below had any opportunity to consider.

Amici therefore respectfully suggest that in the event this Court disagrees with both the argument made in section I of this Brief regarding navigable waters, and the Court of Appeals' interpretation of section 103(c) of ANILCA, the Court should remand this case for an assessment of whether the Secretary's hovercraft regulations nonetheless lawfully apply to Petitioner's activities *on the Nation River* as a result of the status of that river as federal "public lands" under Title I of ANILCA.

CONCLUSION

If the Court does not affirm the judgment below on the basis of the Court of Appeals' decision, it should either affirm the judgment because section 103 of ANILCA does not protect activities on navigable waters within CSUs from Park Service regulations, or remand the case for resolution of the question whether the Nation River is "public land" because of the United States' interest in the river under the reserved rights doctrine.

Respectfully submitted,

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