No. 13-562

In the
Supreme Court of the United States

STATE OF ALASKA,

Petitioner,

v.

SALLY JEWELL, Secretary of the United States Department of the Interior, et al.,

Respondents.

On Petition for 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

M. REED HOPPER
DANIEL A. HIMEBAUGH
Counsel of Record
Pacific Legal Foundation
10940 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
E-mail: dah@pacificlegal.org

ANTHONY L. FRANÇOIS
Of Counsel
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: alf@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTIONS PRESENTED

The State of Alaska seeks this Court's review of the Ninth Circuit's opinion upholding the federal Subsistence Management Regulations for Public Lands in Alaska. *John v. United States*, 720 F.3d 1214 (9th Cir. 2013); *see* 64 Fed. Reg. 1276 (Jan. 8, 1999, *codified at* 36 C.F.R. § 242 and 50 C.F.R. § 100). Those regulations—referred to here as the "subsistence rule"—are promulgated by the Respondents under the Alaska National Interest Lands Conservation Act (ANILCA), and control hunting and fishing down to the smallest detail on a vast network of waterways in Alaska. The subsistence rule represents a federal takeover of Alaska's waterways that interferes with the State's policies for managing fish and wildlife.

The subsistence rule rests on two shaky propositions: first, that ANILCA applies to State-owned waterways in Alaska; and second, that ANILCA impliedly reserved some water rights to the federal government, thereby allowing the Respondents to micro-manage Alaska's waterways. Conceding that neither premise is well-founded, the Ninth Circuit nevertheless upheld the subsistence rule. *John*, 720 F.3d at 1223.

The questions presented are:

(1) Whether the subsistence rule can be applied to State-owned waterways in Alaska, contrary to this Court's opinions, which explain that Congress must provide a plain statement of intent before federal regulations will be construed to encroach on matters traditionally reserved to State regulation.

(2) Whether the Ninth Circuit's decision to uphold the subsistence rule inappropriately broadened the

federal reserved water rights doctrine by finding that Congress had impliedly reserved water rights to the Respondents without any statutory basis, contrary to this Court's opinions in *Cappaert v. United States*, 426 U.S. 128 (1976), and *United States v. New Mexico*, 438 U.S. 696 (1978).

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 37.2(a), Pacific Legal Foundation (PLF) respectfully submits this amicus curiae brief in support of the Petitioner.[1]

PLF is the nation's most experienced public interest legal organization defending the constitutional principle of federalism in the arena of environmental law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases in this Court involving important issues of federal water 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).

This brief discusses the importance of applying the "plain statement rule" and cabining the federal reserved water rights doctrine, which is necessary to safeguard federalism and ensure public access to natural resources in Alaska and throughout the nation. This case is a matter of utmost significance for Alaska's residents, who are being prevented from accessing many of their State's waterways as a result of the subsistence rule.

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[1] All parties have been given timely notice of PLF's intent to participate in this case as amicus curiae, and all parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court. PLF affirms under Rule 37.6 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.

SUMMARY OF REASONS FOR GRANTING THE PETITION

Through the subsistence rule, the Respondents have asserted sweeping authority to regulate hunting and fishing on most of Alaska's waterways. This amounts to a federal takeover of wildlife management in Alaska. Yet the Ninth Circuit upheld the subsistence rule despite this Court's precedent, which clearly establishes three principles that should control here: (1) States retain primary authority over regulation of waterways and wildlife within their borders; (2) federal legislation will not be construed to displace the States' authority over regulation of waters and wildlife in the absence of a plain statement from Congress that such displacement is intended; and (3) courts will not find implied federal reserved water rights that allow for federal regulation of State-owned waterways without a clear statutory basis for establishing and quantifying those rights.

The decision below conflicts with all three rules. The Ninth Circuit upheld expansive federal regulation of Alaska's waterways without clear direction from Congress in the Alaska National Interest Lands Conservation Act (ANILCA), or any statutory basis for determining whether ANILCA reserved water rights to the Respondents. Now, as a result of the lower court's opinion upholding the subsistence rule, Alaska residents find that they no longer enjoy full access to their State's waterways, despite State laws which are designed to secure general public access to Alaska's natural resources. This case presents a crisis in federalism that demands this Court's attention.

REASONS FOR GRANTING THE PETITION

The authority to regulate hunting and fishing is among the most fundamental powers reserved to each State. *United States v. Alaska*, 521 U.S. 1, 5 (1997) (holding power to control fishing is "essential attribute of sovereignty"); *see Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (acknowledging State sovereignty over natural resources). The State of Alaska has traditionally managed the State's fish and game for the benefit of all Alaskans. *McDowell v. Alaska*, 785 P.2d 1, 5-9 (Alaska 1989). Indeed, the Alaska Constitution expressly protects equal, non-privileged access to public resources, such as fisheries. *Id*. (citing Alaska Const. art. VIII, §§ 3, 15, 17).

Since the passage of ANILCA, however, the federal government has loomed large over Alaska's natural resources. 16 U.S.C. § 3101 *et seq*. Two ANILCA provisions are pertinent here: the law created or enlarged thirteen national parks in Alaska, thereby "federalizing" millions of acres; and it established a priority for the taking of fish and wildlife on public lands for "subsistence uses," which ANILCA defines as "customary and traditional uses by *rural* Alaska residents." 16 U.S.C. §§ 3113-3114 (emphasis added); *see* Deborah Williams, *ANILCA: A Different Legal Framework for Managing the Extraordinary National Park Units of the Last Frontier*, 74 Denv. U. L. Rev. 859, 860-63 (1997). ANILCA's subsistence priority thus creates two classes of Alaskans for the purpose of determining who may take fish and game on public lands—those who are "rural," and those who are

not.[2] *See* Miranda Strong, *Alaska National Interest Lands Conservation Act Compliance & Nonsubsistence Areas: How Can Alaska Thaw Out Rural & Alaska Native Subsistence Rights?*, 30 Alaska L. Rev. 71, 73-78 (2013) (explaining ANILCA's rural subsistence priority).

The subsistence rule extensively regulates hunting and fishing on all navigable and non-navigable waters within and appurtenant to 34 federal areas in Alaska that account for a large portion of the State.[3] *See* 64 Fed. Reg. at 1286-87. The comprehensive subsistence rule determines eligibility for subsistence use; sets up processes for obtaining harvest licenses and permits; prescribes fishing and hunting equipment that may be used; charters a supervising Federal Subsistence Board with regulatory authority over public lands; grants the Board authority to close lands; and establishes penalties for violations, among other things. *See* 64 Fed. Reg. at 1288-1313.

Crucially, the subsistence rule purports to extend to State-owned navigable waterways on public lands. *See* 64 Fed. Reg. at 1286-87. Such waters should fall under the regulatory purview of the State of Alaska. It is well-established that the State owns the land underlying those waters. *Alaska*, 521 U.S. at 5 ("[N]ew States are admitted to the Union on an 'equal footing'

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[2] This classification violates Alaska's constitution. *McDowell*, 785 P.2d at 9.

[3] Federal land currently makes up about two-thirds of the entire land area of Alaska. Western States Tourism Policy Council, *Federal Land in the West*, www.commerce.state.ak.us/wstpc/Publications/FedLandWest.htm (last visited Nov. 27, 2013). The areas covered under ANILCA are listed at 36 C.F.R. § 242.3 and 50 C.F.R. § 100.3.

with the original 13 Colonies and succeed to the United States' title to the beds of navigable waters within their boundaries."). And, as this Court has held, a State's authority to govern the use of its navigable waters is a fundamental aspect of sovereignty. *Id.*; *United States v. Oregon*, 295 U.S. 1, 14 (1935); *Coyle v. Smith*, 221 U.S. 559, 573 (1911). The Ninth Circuit, however, concluded that ANILCA supersedes Alaska's authority over hunting and fishing—even on State-owned waterways—through the federal implied reserved water rights doctrine. *John v. United States*, 720 F.3d 1214, 1223 (9th Cir. 2013).

This case involves two supremely important questions of law that affect the balance of State and federal authority: may the federal government intrude on traditional State sovereign rights without a plain statement from Congress that such intrusion is intended; and does the federal reserved water rights doctrine award unlimited authority to federal agencies to regulate State resources?

I

CONSTRUING ANILCA TO TAKE OVER ALASKA'S WATERWAYS CONFLICTS WITH THIS COURT'S OPINIONS REGARDING CONGRESSIONAL INTENT

The subsistence rule infringes on Alaska's traditional authority to regulate fishing and hunting on the State's waters. But it is not clear that Congress intended ANILCA and the subsistence rule to apply to State-owned waterways at all. Moreover, this Court has on many occasions held that States retain authority to regulate the use of navigable waters, unless Congress enacts laws that plainly demonstrate an intent to supersede State regulation. *Solid Waste Agency*, 531 U.S. at 172-74; *Montana v. United States*, 450 U.S. 544, 552 (1981); *see Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); *United States v. Bass*, 404 U.S. 336, 349-50 (1971); *cf. John v. United States*, 247 F.3d 1032, 1044 (9th Cir. 2001) (en banc) (Kozinski, J., dissenting). The Ninth Circuit's opinion upholding the subsistence rule conflicts with this Court's opinions applying the plain statement doctrine where federal regulations threaten to upset the distribution of power between State and federal authorities.

In *Solid Waste Agency*, this Court explained that it will not afford deference to a federal agency's interpretation of a statute when that interpretation "alters the federal-state framework by permitting federal encroachment upon a traditional state power." 531 U.S. at 173 (" '[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.' ") (quoting *Bass*, 404 U.S. at 349). *Solid Waste Agency* involved the Army Corps of Engineers' attempt to

extend federal Clean Water Act jurisdiction to non-navigable, isolated, intrastate waters through a policy called the "migratory bird rule." 531 U.S. at 164. Applying the plain statement doctrine, the Court rejected the migratory bird rule, because it was not clear that the text of the Clean Water Act encompassed such a rule, and the rule would "result in a significant impingement of the States' traditional and primary power over land and water use." *Id*. at 174 (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)).

The Court reaffirmed the *Solid Waste Agency* principle in a unanimous opinion last Term in *Tarrant Regional Water District v. Herrmann*, 133 S. Ct. 2120 (2013). There, the Court held that "ownership of submerged land, and the accompanying power to control navigation, fishing, and other public uses of water, 'is an essential attribute of sovereignty' " for each State. *Id*. at 2132 (quoting *Alaska*, 521 U.S. at 5). The Court thus ruled that a "strong presumption" applies against defeat of State regulation of navigable waters. *Id*. (quoting *Montana*, 450 U.S. at 552).

Applying the plain statement rule in this case demonstrates that the Court should review the lower court's opinion. Whether ANILCA applies to Alaska's waterways is not plainly discernable from the statute.[4] *Alaska v. Babbitt*, 72 F.3d 698, 701-02 (9th Cir. 1995). ANILCA does not address navigable waters; instead, the statute focuses on "public lands." 16 U.S.C. § 3102.

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[4] In fact, there is a strong argument that ANILCA expressly *exempts* State-owned waterways, based on 16 U.S.C. § 3103(c), which excludes all "lands which, before, on, or after December 2, 1980, are conveyed to the State" from inclusion in any "conservation system unit."

The Ninth Circuit has held that "public lands [under ANILCA] are lands, waters, and interests therein, the *title* to which is in the United States." *Babbitt*, 72 F.3d at 702 (emphasis added). But the Ninth Circuit's *Babbitt* definition only muddies the waters. As Chief Judge Kozinski wrote in dissent in *John v. United States*, 247 F.3d at 1047, ANILCA does not clearly create any interest in which the United States holds "title." In fact, even if ANILCA reserves some water rights to the federal government—a contention the parties here dispute—the government's interest in those rights is only usufructuary; it does not give the United States title to anything, and, therefore, does not mean the subsistence rule applies to State-owned waterways. "[T]he United States cannot hold title to . . . reserved water rights." *Totemoff v. Alaska*, 905 P.2d 954, 965 (Alaska 1995) (contrasting property interests in which title can be held with other interests in property).

ANILCA does not clearly establish that the subsistence rule applies to State-owned waterways in Alaska. In such circumstances, this Court has instructed lower courts to construe federal statutes so as not to invade State sovereignty. The Ninth Circuit did the opposite by construing ANILCA to apply to Alaska's waterways. That decision conflicts with this Court's opinions applying the plain statement rule, and the Court should therefore grant the Petition and address the State of Alaska's significant concerns about ANILCA's application to the State's waters.

II

CONSTRUING ANILCA TO TAKE OVER ALASKA'S WATERWAYS UNDERMINES THE IMPLIED RESERVED WATER RIGHTS DOCTRINE

The Ninth Circuit upheld the subsistence rule based on the notion that the implied reserved water rights doctrine allows the Respondents to control Alaskan waters where they run through or next to federal areas created by ANILCA. *John*, 720 F.3d at 1221-22. However, the lower court's decision conflicts with this Court's opinions on the reserved water rights doctrine in two fundamental respects: this Court has never applied the doctrine in the absence of a clear statutory basis for identifying and quantifying federal water rights; and this Court has never implied the reservation of a federal water right by applying *Chevron*[5] deference to an agency's interpretation of the applicable statute, as the Ninth Circuit did here.

The federal reserved water rights doctrine is based on the principle that Congress, when granting a federal agency "the power to reserve portions of the federal domain for specific purposes," authorizes the reservation of rights to appurtenant water " 'to the extent needed to accomplish the purpose of the reservation.' " *New Mexico*, 438 U.S. at 700 (quoting *Cappaert*, 426 U.S. at 138). The doctrine is subject to important limits. Critically, this Court has explicitly held that courts may find implied federal reserved water rights only upon careful examination of the statutory text and legislative history of the Act that set

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[5] *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

aside the federal land in question. *New Mexico*, 438 U.S. at 700-02; *Cappaert*, 426 U.S. at 139-41. And there is no basis in this Court's jurisprudence for relying on or even considering a federal agency's interpretation of such legislation when determining whether federal water rights have been reserved. *New Mexico*, 438 U.S. at 715 (a federal reserved water right will not be implied when statutory text and legislative history are unclear).

In *Cappaert*, the federal government sought to enjoin groundwater pumping by private parties on land near the Devil's Hole National Monument in Nevada, on the basis that the pumping impaired an implied federal reserved water right that was necessary to protect the endangered pupfish, which lives in a subterranean pool within the Monument. 426 U.S. at 135. In resolving the claim in favor of the United States, the Court examined the proclamation reserving Devil's Hole itself, without reference to any agency interpretation of the proclamation or related statutes. *Id*. at 139-40. The Court held that the implied reserved water rights doctrine only extends to the "amount of water necessary to fulfill the purpose of the reservation, no more." *Id*. at 141 (citing *Arizona v. California*, 373 U.S. 546, 600-01 (1963)). The Court also examined the entire proclamation to determine that the amount of water reserved was the amount necessary to preserve the pupfish, and that the pool could be allowed to drop to just above that level without impairing the federal water right. *Cappaert*, 426 U.S. at 141.

In *New Mexico*, the Court affirmed a decision of the New Mexico Supreme Court that denied the United States Forest Service's claim to implied reserved water

rights in Gila National Forest for recreation, aesthetics, wildlife preservation, and cattle grazing. 438 U.S. at 697. The Court "*carefully examined* both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated." *Id*. at 700 (footnote omitted; emphasis added). "Careful examination" was necessary for two reasons: the claimed right was implied by the statute, rather than expressed therein, and there is a strong and near invariable history of congressional deference to state water law. *Id*. at 701-02. The Court reemphasized its caution that the implied reserved water rights "doctrine is built on implication and is an exception to Congress' explicit deference to state water law in other areas. Without legislative history to the contrary, we are led to conclude that Congress did not intend . . . to reserve water . . . ." *Id*. at 715 (footnote omitted).

In stark contrast to *Cappaert* and *New Mexico*, the Ninth Circuit's opinion below conceded that there is no clear statutory basis for a federal reservation of water rights in ANILCA, but then deferred to the federal Respondents' assertion that ANILCA impliedly reserved an indeterminate amount of water to the federal government. *John*, 720 F.3d at 1221. Furthermore, the lower court left it up to the Respondents to quantify those rights. *Id*. at 1222. Yet this Court's opinions foreclose federal agencies from asserting reserved water rights where statutory text and legislative history do not clearly establish congressional intent to reserve such rights. *New Mexico*, 438 U.S. at 715.

The Ninth Circuit's opinion also conflicts with state court decisions analyzing the scope of the federal reserved water rights doctrine.[6] In *Potlatch Corp. v. United States*, 12 P.3d 1260 (Idaho 2000), the Idaho Supreme Court held that various congressional acts reserving wilderness areas in the State of Idaho did not impliedly reserve any water rights to the federal government. *Id*. at 1268. The court expressly limited its examination to the relevant statutory text and legislative history. *Id*. at 1266, 1268. The *Potlatch* court also considered the absence of any "standard by which quantification of the amount of water could be determined" as indicative that no water was impliedly reserved. *Id*. at 1266. The Ninth Circuit's decision in the instant case directly conflicts with *Potlatch* by finding an implied reserved right where the Ninth Circuit conceded that the statute and legislative history alone did not support such a finding. *John*, 720 F.3d at 1221 n.41 (citing *Babbitt*, 72 F.3d at 702). The decision below also contradicts *Potlatch* by finding an implied reserved right in the absence of any statutory basis for quantifying the right. *John*, 720 F.3d at 1222 (holding federal agencies responsible to identify scope of waters subject to implied reserved right).

The decision below is also at odds with the decision of the Colorado Supreme Court in *United States v. Jesse*, which ruled that the United States Forest Service was not foreclosed by *New Mexico* from trying to prove its claim for implied reserved water rights for the Pike and San Isabel National Forests, based upon the primary purpose of the Forest Service

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[6] Federal reserved water rights claims are amenable to adjudication in both state and federal courts. *See Cappaert*, 426 U.S. at 145-46; *see also New Mexico*, 438 U.S. at 697 n.1.

Organic Act. 744 P.2d 491, 494 (Colo. 1987). The Colorado Supreme Court, sitting in review of a lower court grant of summary judgment against the Forest Service, remanded the case to the state's water court with clear instructions that such a claim was subject to "strict scrutiny" of the statutory purposes of the reservation. *Id*. at 503 (citing *New Mexico*, 438 U.S. at 700). *Jesse*, relying on *New Mexico*, also required that any implied reserved water right must be strictly limited to the amount necessary to prevent the entire defeat of the forest reservation. *Jesse*, 744 P.2d at 503. The Ninth Circuit's decision below falls well short of either "strict scrutiny" or "careful examination" in finding implied reserved water rights in ANILCA. Rather than conducting any such searching inquiry, the decision below simply asserts that ANILCA does the job, and any holes in the required analysis should be filled in with judicial deference to agency interpretation. *John*, 720 F.3d at 1221-22.

The Court should grant the Petition. It is essential for the Court to review this case and determine whether the Court's implied federal reserved water rights doctrine—as recast by the Ninth Circuit—authorizes a federal takeover of hunting and fishing on Alaska's waterways.

III

CONSTRUING ANILCA TO TAKE OVER ALASKA'S WATERWAYS INTERFERES WITH ALASKANS' ABILITY TO ACCESS LARGE AREAS OF THEIR STATE

Finally, in considering the Petition, the Court should be aware that ANILCA regulations are preventing Alaskans from having reasonable access to public lands within their State's borders. A recent opinion from the District Court for the District of Alaska illustrates the problem. In *Sturgeon v. Masica*, the court recounted how the National Park Service prohibited Alaska resident John Sturgeon from navigating the Nation River within the boundaries of the Yukon-Charley Rivers National Preserve, an area covered by ANILCA. 2013 WL 5888230, at *5 (D. Alaska Oct. 30, 2013). Mr. Sturgeon had been hunting along the Nation River on a regular basis since 1990, but the Park Service told him in 2007 that he would be in violation of federal regulations if he continued to use his hovercraft to hunt on the river.[7] *Id*. Mr. Sturgeon argued that ANILCA does not authorize federal regulation of his activities on the Nation River. The

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[7] *See* Tim Mowry, Fairbanks Daily News-Miner, *Judge sides with Park Service on hovercraft decision in Yukon-Charley* (Nov. 1, 2013), *available at* http://www.newsminer.com/news/local_news/judge-sides-with-park-service-on-hovercraft-decision/article_a9a0db16-42ce-11e3-9f0c-001a4bcf6878.html (last visited Nov. 27, 2013). Hovercraft use is perhaps more common in Alaska than in other States. One hovercraft manufacturer, Bering Marine Corporation, advertises its Alaska Hovercraft line as being well-suited to Alaska's "subzero temperatures and wide-open spaces," going where "no other marine vessels dare to venture." Bering Marine Corp., Alaska Hovercraft, www.lynden.com/bmc/hovercraft.html (last visited Nov. 27, 2013).

district court agreed with Mr. Sturgeon on one important point—that the State of Alaska holds title to the lands underlying the navigable waters of the Nation River, even where the river runs through a federal area. *Id*. at *7. Nevertheless, the district court applied the federal regulations and ruled that Sturgeon's rights as an Alaska resident do not allow him to hunt on the Nation River where the Park Service prohibits him from doing the same. *Id*. at *9.

The State of Alaska intervened in the *Sturgeon* case because even State employees are being prevented from accessing areas of Alaska as a result of federal regulation. In 2010, federal regulators denied a permit to the Alaska Department of Fish and Game that would have allowed Department officials to conduct salmon research on the State-owned Alagnak River in Katmai National Preserve. *Id*. at *5. The federal government denied the request because Alaska officials proposed to access the area by helicopter, which federal regulations prohibit. *Id*.

ANILCA's regulatory regime is flatly inconsistent with Alaska's policies for fish and wildlife management, and effectively bars Alaskans' access to the State's waterways without any clear statutory justification for such interference. This Court's review is necessary to restore the constitutional balance between State and federal authority on Alaska's extensive waterways.

CONCLUSION

The Court should grant the Petition and address the major constitutional conflicts arising from the subsistence rule. The rule is based on a statute—ANILCA—that does not plainly apply to Alaska's waterways, and which does not provide any clear basis for impliedly reserving water rights to the federal government. Yet the Respondents are engaged in a regulatory takeover that is interfering with Alaskans' ability to access public resources in a manner guaranteed to them by their State's constitution and wildlife management regulations. This case calls out to be resolved by this Court.

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Respectfully submitted,

M. REED HOPPER
DANIEL A. HIMEBAUGH
Counsel of Record
Pacific Legal Foundation
10940 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
E-mail: dah@pacificlegal.org

ANTHONY L. FRANÇOIS
Of Counsel
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: alf@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation