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 ARCTIC SLOPE REGIONAL CORPORATION, COOK INLET REGION, INC., AND SALAMATOF NATIVE ASSOCIATION, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER AND REVERSAL

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Arctic Slope Regional Corporation ("ASRC"), Cook Inlet Region, Inc. ("CIRI"), and Salamatof Native Association, Inc. ("SNAI") (collectively, "*amici*") submit this brief as *amici curiae* in support of Petitioner and reversal of the Ninth Circuit's opinion in *Sturgeon v. Masica* (No. 14-1209).[1] ASRC and CIRI are two of Alaska's twelve private, for-profit, Alaska Native regional corporations formed under the Alaska Native Claims Settlement Act of 1971 ("ANCSA"), Pub. L. No. 92-203, 85 Stat. 688 (codified at 43 U.S.C. § 1601 *et seq*.). SNAI is an ANCSA village corporation within the Cook Inlet region.

ASRC, Alaska's largest locally owned business, is owned by approximately 13,000 Iñupiat Eskimo shareholders, most of whom reside in Alaska's North Slope region. CIRI, the regional corporation for the Southcentral region of the State including the city of Anchorage, is owned by a diverse group of 7,300 Alaska Native shareholders from more than six different Native groups. *Amici* own significant ANCSA lands within the outer boundaries of federal conservation system units ("CSUs").

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[1] In accord with Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and no such counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received timely notice of *amici*'s intention to file this brief, and consent to file was granted by all parties. Letters reflecting the parties' consent to the filing of this brief have been filed with the Clerk.

Through the Alaska National Interest Lands Conservation Act of 1980, ("ANILCA" or the "Act"), Pub. L. No. 96-487, 94 Stat. 2371 (codified at 16 U.S.C. § 3101 *et seq*.), Congress balanced the conservation interests of the federal government with the economic development and subsistence interests of ANCSA corporations like ASRC and CIRI. The Ninth Circuit expanded federal regulatory authority over Native corporations' lands through a contorted misreading of the very provision in ANILCA meant to limit that authority. This ruling dramatically upsets the balance Congress struck in ANILCA, undermining the purpose of ANCSA to the great detriment of *amici*'s shareholders and those of their fellow Native corporations.

SUMMARY OF ARGUMENT

Congress, in its passage of ANILCA, made clear that its purpose was to balance conservation interests with the preservation of the subsistence way of life for its rural residents, with a particular focus on Alaska Natives. *See* 16 U.S.C. §§ 3101(b)-(c), 3111(1). Although these interests swept broadly, Congress was clear that ANILCA would accomplish its goals through the expansion of, and regulation of, "*public lands*," *i.e.* federal lands (expressly excluding State and Native corporation lands). *See, e.g.*, 16 U.S.C. §§ 3101(c)-(d), 3103(c), 3111(4)-(5), 3112. ANILCA was *not* intended to regulate Native corporation (or State or private) property falling within the geographically-drawn boundaries of CSUs; rather, Congress was explicit that only "public lands" within such boundaries were "deemed to be included as a portion of such unit." *See* ANILCA § 103(c), 16 U.S.C. § 3103(c).

Congress's limitation in ANILCA to regulating only "*public lands*" was critical to avoid undermining ANCSA, enacted nearly ten years earlier in 1971. Rather than placing lands in trust for Native people (as was done in the lower 48 states), ANCSA created Native corporations that would hold title to lands on which they could maintain a subsistence way of life and pursue economic development. Native Alaskans' ability to pursue those interests on lands falling within the geographically mapped areas of CSUs will be completely frustrated if ANILCA is interpreted to instead permit National Park Service ("NPS") regulation over their lands.

This case presents a straightforward issue of statutory interpretation. The Ninth Circuit misinterpreted ANILCA section 103(c) as an expansion of federal regulatory authority over millions of acres of private lands located within the boundaries of CSUs in Alaska, rather than as the limitation Congress intended. Section 103(c)'s plain language unambiguously confirms that NPS's regulatory authority extends only to "public lands" owned by the federal government, not to the private inholdings owned by the Native corporations, the State, or other private parties. The broader purpose, context, and structure of ANILCA reinforce the plain meaning of section 103(c), which is entirely consistent with Congress's focus in the rest of the Act upon regulating the "public lands" in Alaska.

The Ninth Circuit's interpretation of section 103(c) unconstitutionally extends broad federal regulatory authority over millions of acres of private lands without a source of authority for such regulation under either

the Property Clause or the Commerce Clause. Both the Ninth Circuit and the United States attempt to sidestep this constitutional problem by focusing on the particular hovercraft regulation at issue here and relying on an asserted federal interest in navigable waters. But the Ninth Circuit's interpretation extends far more broadly than navigable rivers. Both the district court and the Ninth Circuit rejected the United States' invitation to decide this case by finding a federal interest in the waters at issue sufficient to justify the hovercraft regulation impacting John Sturgeon. Before the lower courts decided this case, NPS had never before interpreted its powers to allow regulation of all State, Native corporation, or other non-federal lands within the NPS boundaries. And the NPS regulations themselves expressly state that they do not generally apply on "non-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries." 36 C.F.R. § 1.2(b).

The district court and the Ninth Circuit both went much further than NPS asked. Those courts interpreted section 103(c) as a broad source of authority to apply general NPS regulations to State, Native corporation and private lands within the boundaries of the CSUs. No constitutional basis supports this broad, new grant of regulatory authority.

ARGUMENT

I. THE NINTH CIRCUIT'S UNPRECEDENTED READING OF ANILCA SECTION 103(c) IMPROPERLY EXTENDS FEDERAL REGULATORY AUTHORITY OVER MILLIONS OF ACRES OF NATIVE CORPORATION LANDS.

The Ninth Circuit held that under section 103(c) of ANILCA, federal CSU regulations of nationwide applicability extend to State and privately owned inholdings in Alaska's national parks and refuges. Eighteen million acres of land conveyed to Alaska Native corporations under ANCSA are profoundly affected by this ruling.

A. Land Ownership in Alaska

Alaska's primary resource is its land. At 365.5 million acres, Alaska is more than twice as large as Texas. This vast terrain serves numerous local and national interests and goals, including economic development, energy security, environmental conservation, and subsistence use. In service of these goals, Congress has divided Alaska among three primary landowners: the federal government, the State itself, and the Alaska Native corporations. Together they hold over ninety-nine percent of Alaska; less than one percent of the state is held in traditional private ownership.[2]

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[2] A Department of the Interior map showing the State, Native corporation, and different categories of federal government lands in Alaska is available at http://www.asrc.com/lands/Pages/alaska%20maps.aspx.

A fundamental purpose of Congress's land conveyances to the State and Native corporations was to ensure their respective economic development and social well-being, and Alaskans' subsistence way of life. The Statehood Act, for its part, was enacted in 1958, and gave twenty-eight percent of Alaska's total area to the new state in order to "ensure [its] economic and social well-being . . . ."[3] *Trs. For Alaska v. State*, 736 P.2d 324, 335 (Alaska 1987). Land owned by the State of Alaska approximates the State of California in size.

The Statehood Act reserved the issue of aboriginal land claims of Alaska's indigenous people. Congress's passage of ANCSA in 1971 expressly resolved those claims. ANCSA addressed the "need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." ANCSA § 2(a), 43 U.S.C. § 1601(a). The statute created twelve for-profit regional corporations and more than two hundred village corporations in the State and made Alaska's Native people shareholders in those corporations. *See* ANCSA §§ 7–8, 43 U.S.C. §§ 1606-1607.

ANCSA called for conveyance of approximately 44 million acres of federal land to Alaska Native regional and village corporations, making the Native corporations as a group the third-largest landowner in

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[3] Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), *reprinted in* 48 U.S.C. ch. 2, refs. & annots., as amended; *Trs. for Alaska v. State*, 736 P.2d 324, 337 (Alaska 1987) (explaining that Congress's debates show it "recognized the financial burden awaiting the new state" and that "the large statehood land grant and the grant of the underlying mineral estate were seen as important means by which the new state could meet that burden").

the State. *See* ANCSA §§ 12, 14, 43 U.S.C. §§ 1611, 1613. Congress specifically intended the Native corporations to use their ANCSA lands largely for economic development benefiting the Native people of Alaska. *See* ANCSA § 8, 43 U.S.C. § 1607; *City of Saint Paul v. Evans*, 344 F.3d 1029, 1031 (9th Cir. 2003). And ANCSA provided that Native people statewide would benefit economically from the wealth-producing lands conveyed to all Native corporations, specifically including a structure through which the different corporations would share their profits. ANCSA § 7(i)-(j), 43 U.S.C. § 1606(i)-(j).

Nearly ten years after passing ANCSA, Congress enacted the Alaska National Interest Lands Conservation Act of 1980. The purpose of ANILCA was two-fold: to preserve the natural landscapes in Alaska and its wildlife, while also allowing rural residents to maintain their subsistence way of life. 16 U.S.C. § 3101(b)-(c). Congress was clear that ANILCA was *not* intended to impede upon Native corporations' or the State's control of their own lands conveyed under ANCSA and the Statehood Act. Rather, Congress repeatedly emphasized in ANILCA that regulation under that Act was to be limited to "public lands," which were by definition specifically limited to "*Federal* lands" in Alaska (specifically excluding certain State and Native corporation lands). *See* 16 U.S.C. § 3102(2)-(3) (definitions of "public lands" and "Federal land"); *see also* 16 U.S.C. §§ 3101(d), 3103(c), 3111(4)-(5), 3112 (all making express that federal regulation was to be limited to "public lands"). ANILCA established "units" which would be federally regulated as new or expanded national parks, preserves, monuments or wildlife refuges. *See* 16 U.S.C. § 3101(a). These newly

expanded areas were to be reflected on maps with boundaries drawn to "follow hydrographic divides or embrace other topographic or natural features." 16 U.S.C. § 3103(b). But Congress made clear that though mapping the boundaries in this way would encompass certain Native corporation and State lands, only the "public lands" within such boundaries would "be deemed to be included as a portion of such unit." 16 U.S.C. § 3103(c).

Over 120 million of Alaska's federally owned acres are now protected within federal CSUs. These include fifteen national parks, preserves, and monuments managed by NPS and sixteen national wildlife refuges managed by the United States Fish and Wildlife Service, most of which were created or expanded by ANILCA. The ANILCA-created federal CSUs ultimately engulfed over eighteen million acres of ANCSA corporation-owned land—vast islands of private land within CSUs.[4] Eleven of Alaska's twelve regional corporations and many of its over 200 village corporations own inholdings within ANILCA CSUs, and many Native people live on these lands in rural villages.

These eighteen million acres of ANCSA inholdings, over forty percent of all ANCSA lands, may now be subject to NPS regulations under the Ninth Circuit's decision. The Ninth Circuit's contortion of section

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[4] Many hundred private homestead sites were also engulfed by federal conservation lands under ANILCA. These private landowners are unlikely to muster the resources to make themselves heard in this Court, but their interests are markedly affected by the Ninth Circuit's ruling as well.

103(c) of ANILCA expanded federal regulatory authority over Native corporations' lands through the very provision meant to limit that authority. This ruling dramatically upsets the balance Congress struck in ANILCA, undermining the purpose of ANCSA to the great detriment of the Native corporations' shareholders.

B. ASRC Lands

ASRC holds title to nearly five million acres of ANCSA land in the northernmost part of the state, known as the "North Slope" of the Brooks Mountain Range. Its shareholders live primarily in eight extremely remote arctic villages in one of the most isolated and challenging environments in the world. More than 380 thousand of ASRC's acres are "inholdings" situated within the Gates of the Arctic National Park, the Alaska Maritime National Wildlife Refuge, and the Arctic National Wildlife Refuge ("ANWR"), all federal CSUs created or expanded by ANILCA.

ASRC's inholdings are home to many ASRC shareholders residing in two villages located on its inholdings within CSUs—Anaktuvuk Pass within Gates of the Arctic National Park and Kaktovik on the coastal plain within ANWR. These inholdings are necessary to ASRC's shareholders for subsistence use and economic development. The health of, and access to, caribou herds, fish, water fowl, Dall sheep, musk oxen, marine mammals, and other subsistence food populations are critically important to ASRC's people. Many of the inholding acres also have high potential for oil and gas development, other mineral development, tourism, and other economic uses.

C. CIRI Lands

CIRI owns well over a million acres of surface and subsurface land, both inside and outside CIRI's Southcentral Alaska region. Over its history, CIRI has paid more than one billion dollars in dividends and distributions to its shareholders, largely due to its rich land resources. Those lands include nearly sixty thousand acres of subsurface inholdings within Lake Clark National Park. The ANCSA village corporations in CIRI's region own significant surface acreage in Lake Clark National Park, lands with significant potential for tourism development. CIRI also holds nearly 200 thousand acres of oil and gas producing subsurface estate within the Kenai National Wildlife Refuge. Village corporations in the CIRI region similarly hold surface and subsurface interests in the Kenai National Wildlife Refuge.[5] Due to the relatively heavy development in its region of the State and other factors, CIRI has remaining land entitlements to select, forty-four years after the passage of ANCSA. CIRI is unique among the ANCSA corporations in this respect, and the Ninth Circuit's decision has serious implications for CIRI's future selections.

D. Effects of the Ninth Circuit's Ruling

Federal regulatory authority over ANCSA lands is an issue of tremendous economic and social importance to Alaska Native corporations, and ASRC and CIRI in particular. Moreover, given oil and natural gas

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[5] Amicus SNAI is one of the six Village Corporations associated with Regional Corporation CIRI. It owns significant surface lands in CSUs to which CIRI owns the subsurface interest.

development possibilities on some of the affected State and Native-owned lands, the decision also has potential nationwide consequences.

In national parks, human activity is intensely regulated for the purpose of protecting wildlife and the scenic wilderness character of the parks. Endless aspects of the use of the land are covered by the Code of Federal Regulations. Under the Ninth Circuit's reading of ANILCA, forty percent of private ANCSA lands may now be subject to this vast regulatory scheme. Innumerable activities integral to economic and social life on inholdings can fall within the regulatory ambit of the federal government.

The day-to-day consequences of applying the general NPS regulations to private inholdings would be stunning. Buildings may not be constructed in national parks without advance approval from the federal government. 36 C.F.R. § 5.7. Hunting and fishing on park lands are subject to extensive restrictions and permitting requirements. *Id.* §§ 2.1(a)(1), 2.2, 2.3. Camping is limited to designated areas; levelling ground or altering a site to make it more suitable for camping is prohibited. *Id.* § 2.10. Even gathering berries requires written findings from a park superintendent. *Id.* § 2.1(c)(1). Modes of transportation critical in rural Alaska such as snowmobiles, ATVs, watercraft, and even bicycles, are all limited to locations approved by the park service. *Id.* §§ 1.4(a) (definitions of "vehicle" and "vessel"), 2.18, 3.8, 4.10, 4.30. Aircraft—another critical aspect of access to rural Alaska communities—may be used only in designated locations and by permit. *Id.* § 2.17.

Commercial activities are circumscribed and regulated. *Id.* § 5.3. Research may be conducted only by specific institutions and agencies and only under the regulatory watch of the park service. *Id.* § 2.5. Public meetings, demonstrations and distribution of printed materials all require permits and federal government oversight. *Id.* §§ 2.50, 2.51, 2.52.

The Ninth Circuit's ruling will impede any efforts by ANCSA shareholders to develop their Native corporation lands within the geographical boundaries of a national park for ecotourism, either in the form of lodges or even through modest endeavors like providing basic trails, tent sites, and hiking permits to visitors. Buildings, trails, or roads of any kind potentially may not be constructed without permission under NPS regulations. Businesses in Native villages may be required to seek permits from federal agencies in order to do business. The result will fundamentally frustrate "the real economic and social needs of Natives" which were of fundamental concern to Congress in ANCSA. ANCSA § 2(b), 43 U.S.C. § 1601(b).

The Ninth Circuit's distinction between nationwide and Alaska-specific regulations, applying the former but not the latter on inholdings, leads to even more absurd results. Subsistence use is specifically permitted in many Alaska CSUs, including the use of subsistence cabins, *see, e.g.*, 36 C.F.R. §§ 13.160, 13.410, but subsistence use is generally not allowed under the nationwide regulations. Applying nationwide regulations on the inholdings, as the Ninth Circuit's interpretation requires, means that NPS could forbid Native hunters from using their ATVs or snowmobiles to carry game back to the village. But on

most Alaska National Parks themselves, less restrictive Alaska-specific park regulations that the Ninth Circuit has held would be inapplicable to Native corporation lands within national parks, often permit such travel. Similarly, under the nationwide regulations that the Ninth Circuit has applied to inholdings, camping is generally restricted to designated areas; in Alaska parks, it is generally allowed. *Compare id.* § 2.10, *with id.* §13.25. Many more examples exist.

NPS, in an effort to minimize the broad effect of the Ninth Circuit's holding, has recharacterized the Ninth Circuit's decision, asserting that it does not serve "to extend the gamut of parks regulations to privately held, state-held, and Native-held inholdings." U.S. Cert. Opp. 22. But the government's narrow characterization does not square with the Ninth Circuit's decision itself or the broad license NPS has already taken as a result of that decision. Just two months after the filing of the Solicitor General's Brief in Opposition to a grant of certiorari in this case, NPS expressly relied on the Ninth Circuit's decision in a proposed rule seeking to extend federal oil and gas permitting regulations to previously exempt Native-owned lands within the boundaries of CSUs in Alaska. 80 Fed. Reg. 65572, 65572-65573 (Oct. 26, 2015) ("We also note that because these regulations are generally applicable to NPS units nationwide and to non-federal interests in those units, they are not 'applicable solely to public lands within [units established under ANILCA,]' and thus are not affected by section 103(c) of ANILCA. *See Sturgeon v. Masica*, 768 F.3d 1066, 1077-78 (9th Cir. 2014).").

This proposed rule makes clear that the Ninth Circuit's ruling is not limited to hovercraft regulation of navigable waters over submerged land owned by the State. Instead, NPS views the ruling as a license to regulate oil and gas permitting over Native corporations' lands within the geographical boundaries of CSUs, the very sort of economic development that Congress recognized in ANCSA was vital to Native corporations. Despite NPS protestations to the contrary in briefing to this Court, the Ninth Circuit's decision grants NPS broad discretion to extend regulatory authority to millions of acres of Native corporation, State and private lands.

Taking a vast federal regulatory regime aimed at public land conservation and enforcing it on private, ANCSA land undermines the purposes of both ANCSA and ANILCA, to the detriment of *amici* and all Alaskans. ANCSA lands were granted to Alaska's Native people so that they may freely live, work, and engage in subsistence activity and commerce there. And of course, part of Alaska's oil and other mineral wealth was specifically granted to ANCSA corporations in order to ensure the economic stability of Alaska's Native people. The land wealth held by ASRC and CIRI benefits not only their own shareholders, but Alaska Native people statewide through the revenue sharing provisions of ANCSA. ANCSA § 7(i)-(j), 43 U.S.C. § 1606(i)-(j).

II. SECTION 103(c) OF ANILCA DIRECTLY PROHIBITS NPS FROM EXERCISING REGULATORY CONTROL OVER NATIVE CORPORATION, STATE, AND PRIVATE LAND THAT IS LOCATED WITHIN THE MAPPED BOUNDARIES OF AN ALASKA CSU, THUS RENDERING NPS REGULATIONS INAPPLICABLE ON SUCH LANDS.

The District Court and Ninth Circuit both erred in their interpretation of the scope of NPS regulatory control accorded by ANILCA over Native corporation, State, and private land. Both courts myopically focused upon "the second sentence of §103(c) [as] dispositive in this case," Pet. App. 56a, and then found that the meaning of the statute turned upon *a single word* in one phrase of that second sentence: "The plain text of § 103(c) only exempts nonfederal land from 'regulations applicable *solely* to public lands within [CSUs].'" Pet. App. 25a (quoting 16 U.S.C. § 3103(c) (emphasis and alteration added by Ninth Circuit)). This approach blatantly disregards this Court's instruction under *Chevron* to determine "whether Congress has directly spoken to the precise question at issue," in which case the court "must give effect to the unambiguously expressed intent of Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121, 125 (2000) (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).[6]

[6] Because the statutory text is unambiguous, NPS's invitation for this Court to apply *Chevron* deference is misplaced. Congress has "directly spoken to the precise question at issue" in both the statute itself and in the legislative history as discussed herein.

Rather, "[i]n determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Id.* at 132; *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (same). When "deciding whether the language is plain," words must be read "in their context and with a view to their place in the overall statutory scheme." *Burwell*, 135 S. Ct at 2489 (quoting *Brown & Williamson*, 529 U.S. at 133). The Ninth Circuit's isolation of the word "solely" within the second phrase of the second sentence of section 103(c) incorrectly ignored that principle.

A. The Plain Text of Section 103(c) Unambiguously Precludes NPS Enforcement over Native Corporation, State, and Private Lands.

"[B]egin[ning], as always, with the text of the statute," *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 173 (2009) (internal quotation omitted), section 103(c) of ANILCA provides as follows:

Chevron, 467 U.S. at 842. Further, to receive deference, "the rule [in question] must be promulgated pursuant to authority Congress has delegated to [an] official." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). But ANILCA grants NPS the authority to administer only "units of the National Park System," ANILCA §§ 201-203; *see also* 16 U.S.C. § 3202, not State, Native corporation, or private land. *Chevron* deference cannot be used to expand federal regulatory authority not found in a statute.

> **(c) Lands included within unit; acquisition of land by Secretary**
>
> Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act) shall be deemed to be included as a portion of such unit. 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. If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly.

16 U.S.C. § 3103(c). All three sentences, not just the second clause in the second sentence, bear on the issue of NPS's authority over Native Corporation, State, and private lands.

The first sentence alone draws a clear distinction between those lands that are, and those lands that are not, subject to NPS authority under the Act: "*Only* those lands within the boundaries of any conservation system unit which are *public lands* (as such term is defined in this Act) *shall be deemed to be included as a portion of such unit*." 16 U.S.C. § 3103(c) (emphasis added). In other words, even though Congress directed that the boundaries of the maps showing "each change in land management status effected by this Act . . . . [w]henever possible . . . shall follow hydrographic divides or embrace other topographic or natural

features," 16 U.S.C. § 3103(b), the actual lands "deemed to be included" as part of the CSUs, and thus "effected by this Act," were limited to the "public lands (as such term is defined in this Act)" that fell within those boundaries. *Id.* § 3103(b)-(c). By necessary implication, lands falling outside the statutory definition of "public lands," but that nonetheless fell within the mapped boundaries of a CSU, are not part of that CSU. Those lands thus are not subject to any NPS regulation—whether of general applicability to National Parks or the CSUs in particular—because they are not subject to any "change in land management status effected by [the] Act."

The term "public lands (as such term is defined in this Act)," is expressly defined as follows:

> (3) The term "public lands" means land situated in Alaska which, after December 2, 1980, are Federal lands, except—
>
> > (A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;
> >
> > (B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.] which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

> (C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act [43 U.S.C. 1618(b)].

16 U.S.C. § 3102(3). Correspondingly, "[t]he term 'Federal land' means lands the title to which is in the United States after December 2, 1980." 16 U.S.C. § 3102(2). Thus, under the first sentence in section 103(c), the only lands within the mapped boundaries of CSUs that are actually "deemed to be included as a portion of such unit," are lands whose title is in the United States after December 2, 1980, expressly excepting certain lands referred to and selected under ANCSA and certain State of Alaska lands and land selections.

The second sentence in section 103(c) provides: "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." A "cardinal principle of interpretation" requires courts to "give effect, if possible, to every clause and word of a statute." *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014). And it is likewise axiomatic that "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004).

Given these principles, the first clause in section 103(c)'s second sentence requires attention—"[n]o lands which, before, on, or after December 2, 1980, are conveyed to the State, to any Native Corporation, or to any private party"—and cannot simply be glossed over and ignored as the Ninth Circuit did here. *See* Pet.

App. 23a-25a. Notably, this first clause does not simply refer to "nonpublic lands" but instead sweeps broadly and expressly delineates those lands that are to be treated as nonpublic. It does so by being more expansive as to time than the definitions of "public land" and "Federal land," referring to lands "*before, on, or after December 2, 1980*," rather than only lands "after December 2, 1980." *Compare* 16 U.S.C. § 3103(c), *with* § 3102(2)-(3). Viewed in context, section 103(c)'s second sentence makes explicit that lands "conveyed to the State, to any Native Corporation, or to any private party" *at any time* are not "subject to the regulations applicable solely to public lands within such units." These lands fall within the class that, under section 103(c)'s first sentence, is *not* "public land[]" and indeed is not even "deemed to be included as a portion of such unit." As such, these lands underwent no "change in land management status effected by this Act." *See* 16 U.S.C. § 3103(b). They are not subject to NPS's regulatory authority.

In this context, the meaning of the word "solely" becomes clear. "Solely" was included to differentiate between federal NPS regulations applicable *solely* on "public lands"—the only lands deemed to be part of the newly established units—and federal regulations applicable to public and private lands alike, such as those under the Clean Air Act or the Water Pollution Control Act. If the word "solely" were omitted and section 103(c) instead provided that no State, Native Corporation, or private lands "shall be subject to the regulations applicable to public lands within such units," the section would exempt those lands from EPA-regulated acts like the Clean Air Act and Water Pollution Control Act. "Solely" was inserted to make

clear that although the newfound authority granted to NPS over "public lands" in CSUs does not extend to State and private land, other preexisting federal authority over those lands remained.

Consistent with the first two sentences, the third sentence of section 103(c) addresses what occurs if such land is conveyed to the Secretary of the Interior: "If the State, a Native Corporation, or other owner desires to convey any such lands, the Secretary may acquire such lands in accordance with applicable law (including this Act), and any such lands shall become part of the unit, and be administered accordingly." This sentence reinforces the plain meaning of the first two sentences summarized above. Only upon conveyance to the Secretary do "such lands . . . become part of the unit, and be administered accordingly." But while such lands are held by a Native Corporation (or the State or other private owner), they are *not* part of the CSU, and are *not* subject to NPS administrative authority.

B. The Structure and Context of ANILCA as a Whole Reinforce the Plain Meaning of Section 103(c).

Examining the broader purpose, context, and structure of the Act confirms this interpretation—that only "public lands" are part of CSUs and thus subject to NPS regulation, while all lands conveyed to Native Corporations (as well as to the State and private parties) are not part of CSUs and are thus not subject to NPS regulation. Congress's purpose behind the Act was two-fold. On the one hand, it was "the intent of Congress in this Act to preserve unrivaled scenic and geological values associated with natural landscapes," as well as maintain wildlife and preserve wilderness

resource values and recreational opportunities. 16 U.S.C. § 3101(b). And on the other, it was "further the intent and purpose of this Act . . . to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." 16 U.S.C. § 3101(c).

Critically, Congress was clear that it intended to advance these purposes through the regulation of "public lands" and establishment of conservation system "units." The very first provision in the Act makes this evident: "In order to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters in the State of Alaska . . . *the units described in the following titles are hereby established*," *i.e.*, the CSUs. 16 U.S.C. § 3101(a) (emphasis added). Congress's statement of purpose also made clear that the Act obviated the need for future legislation:

> This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values *on the public lands* in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, *the designation and disposition of the public lands in Alaska pursuant to this Act* are found to represent a proper balance between the reservation of national conversation system units and *those public lands* necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new

> national conservation areas, or new national recreation areas, has been obviated thereby.

16 U.S.C. § 3101(d) (emphasis added).

Congress also made apparent its intent to limit regulation to "public lands" through its finding and declaration regarding subsistence management and use. There, Congress "invoke[d] its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses *on the public lands* by Native and non-Native rural residents." 16 U.S.C. § 3111(4). Congress likewise highlighted that the national interest "require[s] that an administrative structure be established for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses *on the public lands in Alaska*." 16 U.S.C. § 3111(5) (emphasis added).

Congress's emphasis upon cooperative agreements further bolsters its intention that NPS would not have direct regulatory authority over Native Corporation, State, or private lands located within the geographical boundaries of CSUs. The statement of policy in section 802 of the Act, for example, made clear that Congress's policy interest concerned "the public lands of Alaska," requiring that "Federal land managing agencies . . . shall cooperate with adjacent landowners and land managers, including Native Corporations, appropriate State and Federal agencies, and other nations," while making clear that Congress's emphasis was on "the

public lands in Alaska." 16 U.S.C. § 3112; *see also* ANILCA § 304(f)(1) (authorizing Secretary to enter into cooperative management agreements in national wildlife refuges).

The purpose, structure, and context of the Act further confirm that Congress intended section 103(c) to exclude nonpublic lands from *all* NPS regulation, not just regulations specific to Alaska CSUs. Notably, the next section in ANILCA after section 103(c) established new "areas" "as units of the National Park System," to be administered under both the *general* laws governing National Parks, as well as those *specific* to the CSUs under ANILCA. ANILCA § 201 ("The following areas are hereby established as units of the National Park System and shall be administered by the Secretary under the laws governing the administration of such lands and under the provisions of this Act . . . ."). Being excepted from inclusion as part of those newly established units, as is the case for lands conveyed to Native Corporations, the State, and private parties, necessarily means that section 201 does not apply to those lands. Correspondingly, those lands are then excepted from both general and CSU-specific NPS regulations. The Ninth Circuit's contrary conclusion, that section 103(c) exempts non-federal land from only "*CSU-specific regulations*" promulgated by NPS, premised upon its narrow focus upon the word "*solely*," *see* Pet. App. 24a-25a, cannot be squared with the plain text of section 103(c), particularly when interpreted against this broader statutory backdrop of the Act as a whole.

C. The Legislative History Confirms this Plain Meaning.

Consultation of ANILCA's legislative history is hardly necessary to distill Congress's express intent that Native Corporation, State, and private party lands falling within the mapped boundaries of CSUs are not part of those units, and not subject to any NPS regulation. But the legislative history fully reinforces this meaning. *See Brown & Williamson Tobacco*, 529 U.S. at 146-47 (confirming Congress's expressed intent not to have the FDA regulate tobacco by observing that "there is no evidence in the text of FDCA or its legislative history that Congress in 1938 even considered the applicability of the Act to tobacco products"). To provide just one example, the Senate Report provides as follows:

> Those private lands, and those public lands owned by the State of Alaska or a subordinate political entity, are not to be construed as subject to the management regulations which may be adopted to manage and administer any national conservation system unit which is adjacent to, or surrounds, the private or non-Federal public lands. Federal laws and regulations of general applicability to both private and public lands, such as the Clean Air Act, the Water Pollution Control Act, U.S. Army Corps of Engineers wetlands regulations, and other Federal statutes and regulations of general applicability would be applicable to private or non-Federal public land inholdings within conservations [sic] system units, and to such lands adjacent to conservation system

> units, and are thus unaffected by the passage of this bill.

S. Rep. No. 96-413, at 303 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 5070, 5247. As this Report makes clear, it is only those federal laws "*unaffected by the passage of this bill*" that apply to non-federal lands within the mapped boundaries of a CSU. *See id.* Thus, as highlighted by the Senate Report, regulation by the EPA under the Clean Air Act and Water Pollution Control Act would still apply to those lands, as would U.S. Army Corps of Engineers regulations over wetlands. But what would not apply would be any regulation by NPS, whether general to all National Parks or specific to Alaska CSUs, because NPS's regulatory authority over CSUs is specifically created by virtue of the Act.

D. The Unambiguously Expressed Intent of Congress Forecloses NPS Regulation of Native Corporation, State, and Private Land Within CSUs.

For the reasons stated above, Congress unambiguously expressed its intent that Native Corporation, State, and private land located within the mapped boundaries of CSUs are not within such CSUs, and not subject to any of NPS's regulations. The NPS hovercraft regulation at issue here, as well as all other NPS regulations, are accordingly inapplicable and unenforceable on lands conveyed to Native Corporations, the State, or private parties.

III. NO CONSTITUTIONAL BASIS EXISTS FOR THE BROAD REGULATORY POWER THE NINTH CIRCUIT FOUND IN SECTION 103(c) OF ANILCA.

The constitutional avoidance canon of construction further reinforces the proper construction of section 103(c). NPS argued that its federal interest in navigable waters supports the hovercraft regulation. But the Ninth Circuit's ruling swept much further. Declining the government's invitation to rule based on a federal interest in navigable waters, the Court affirmed the district court's reading that section 103(c) supported regulation even if Alaska held full title to the navigable rivers within the parks, unencumbered by any federal interest in those rivers' waters. Pet. App. 55a-57a. This interpretation of section 103(c) far exceeds Congress's constitutional authority in many applications across most of the inholdings where the section applies.

As NPS recognizes, the Ninth Circuit opinion does not "resolve the constitutional avoidance arguments that might be made concerning construction of [federal] statutes, if NPS sought to regulate not navigable waters, but private inholdings." U.S. Cert. Opp. 22. The breadth of the Ninth Circuit's ruling, however, requires consideration of the constitutional issues implicated here.

As the United States has recognized, "[a]ny such regulation would have to rest on a grant of regulatory power." *Id.* The National Park Service Organic Act gives NPS authority to "[p]romulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the

National Park System, *including waters subject to the jurisdiction of the United States*," so long as those regulations do not derogate the authority of the U.S. Coast Guard. 16 U.S.C. § 1a-2(h) (emphasis added). Acting under those authorities, NPS has adopted regulations that apply to federally owned lands and waters in the national parks, and to navigable waters within national parks, but that do not generally apply to privately held, State-held, or Native-held land within park boundaries. The NPS regulations apply within "[t]he boundaries of federally owned lands and waters administered by the National Park Service," and within the "[w]aters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters . . . without regard to the ownership of submerged lands, tidelands, or lowlands." 36 C.F.R. § 1.2(a)(1), (3). In contrast, the regulations expressly state that they do not generally apply on "non-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries." 36 C.F.R. § 1.2(b). To put it bluntly, NPS has never before interpreted its powers to allow NPS regulation of all Native Corporation, State, or other non-federal lands within CSU boundaries.

Any newfound regulatory authority in section 103(c) must have a foundation in Congress's powers under the Constitution. Possible sources for such a power are the Property Clause and the Commerce Clause. But neither clause confers the breadth of legislative authority that would be required to support the Ninth Circuit's broad grant of regulatory power over private land.

The Property Clause is the source of broad regulatory power over *federal* lands, including conservation system units: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Under the Property Clause, "[t]he power over the public land thus entrusted to Congress is without limitations." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (alteration in original). This Court has reiterated the "obvious" point that the "Property Clause is a grant of power only over federal property"; it does not generally reach private land. *Id.* at 537-38.[7]

Although this Court has not considered the issue, some circuits have held that the Property Clause supports limited regulation of non-federal lands to the extent necessary to protect the federal lands.[8] But no

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[7] *See also Kansas v. Colorado*, 206 U.S. 46, 89, 93 (1907) ("But clearly [the Property Clause] does not grant to Congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits.").

[8] *Free Enter. Canoe Renters Ass'n of Mo. v. Watt*, 711 F.2d 852, 855-56 (8th Cir. 1983) (upholding permit requirement for canoe rental business located on state or county lands to regulate how many canoes were used in Ozark National Scenic Riverways); *United States v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979) (holding that the Property Clause "grants to the United States power to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters," and may require fire permits for campfires on State-owned river beds). For an example of such a regulation, see 36 C.F.R. § 2.13 (applying fire regulations to lands within park boundaries "regardless of land ownership" so long as the lands are "under the legislative jurisdiction of the United States").

court has held that the Property Clause supports general regulation of large swaths of non-federal lands absent a showing that the specific regulation is necessary for the protection of federal lands. Congress has no Constitutional authority under the Property Clause to extend broad general regulations—or even narrow regulations unrelated to protection of federal lands—to millions of acres of State and Native Corporation lands.

Ducking this constitutional problem, the Ninth Circuit cited Congress's "pre-eminent authority" under the Commerce Clause to regulate "the flow of navigable waters," where John Sturgeon operated his hovercraft. *Sturgeon v. Masica*, 768 F.3d 1066, 1081 (9th Cir. 2014) (quoting *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 n.6 (1982)). Similarly, NPS argues only that "the United States retain[s] 'a dominant servitude' in navigable waters, grounded in the Commerce Clause," and "has reserved water rights in many navigable rivers within parks—including the waters at issue here." U.S. Cert. Opp. at 15.

But the Ninth Circuit's decision is not limited to federal interests in navigable waters. Rather, section 103(c) and NPS regulation of Native Corporation, State, and private party land implicate the constitutional issues expressly recognized by the United States. *See* U.S. Cert. Opp. 22. These concerns cannot be ignored (as the Ninth Circuit did, and the United States urges the Court to do here) simply because this suit addresses a hovercraft regulation that could implicate some undefined and nonspecific federal interest in navigable waters.

Rather, as this Court has emphasized, "when deciding which of two plausible statutory constructions to adopt,[9] a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (footnote added). In other words, "[t]he lowest common denominator, as it were, must govern." *Id.* at 380. Here, "the lowest common denominator" dictates that section 103(c) must be construed as foreclosing any regulation (whether general or specific to the CPU) applicable to the "public lands" within a CSU by virtue of ANILCA's enactment, from being applied to Native corporation, State, or private lands.

Congress expressly confirmed the constitutional source of its power in its "Congressional declaration of findings" regarding "Subsistence Management and Use" in section 801 of ANILCA, recognizing that "it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses *on the public lands* by Native and non-Native rural residents." 16 U.S.C. § 3111(4) (emphasis added). Critically, however, Congress invoked its authority over Native affairs, and

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[9] For the reasons stated above, the statute is unambiguous and can be read only as a limit of federal power as argued by Petitioner and *amici*. Although this canon of construction is generally invoked when choosing between two plausible readings of an ambiguous statute, the principle also reinforces the plain meaning here.

under the Property and Commerce clauses, only with respect to regulations "*on the public lands*." And by the very terms of the Act, the "public lands" *excluded* lands conveyed to Native Corporations and to the State. It would thus be incongruous with the Act itself and Congress's constitutional powers for section 103(c) to be interpreted to *expand* the government's regulatory reach over inholdings owned by Native corporations or the State, which ANILCA makes clear are *not* "deemed to be included as a portion of such [conservation system] unit."

This constitutional problem with the Ninth Circuit's interpretation cannot be simply brushed aside by finding a Commerce Clause basis for reading the statute as applied to Sturgeon or the facts of this case. As this Court made clear in *Clark*, 543 U.S. at 381, interpreting a statute differently in a facial versus an as-applied constitutional challenge "misconceives—and fundamentally so—the role played by the canon of constitutional avoidance in statutory interpretation." This Court has emphasized that "the meaning of words in a statute cannot change with the statute's application." *United States v. Santos*, 553 U.S. 507, 522 (2008) (citing *Clark*, 543 U.S. at 378).

Even if hovercraft could constitutionally be excluded from the State's navigable waters, the Ninth Circuit was required to consider the absence of any constitutional basis for enforcing many general regulations across inholdings. For example, NPS regulates a broad array of activities including public assembly and meetings, the leashing of pets, and many others where regulation on private land would be unsupportable by Congress's commerce power.

To avoid this obvious issue with the Ninth Circuit's ruling, NPS attempts to recharacterize the Ninth Circuit's ruling as far more limited than it is. But both the district court and Ninth Circuit rejected the federal government's alternative arguments based on a federal interest in navigable waters sufficient to affirm the application of the hovercraft regulation at issue in Petitioner's case. At the district court level, the federal government failed to articulate any relationship between a federal interest in the subject waters and the hovercraft regulation at issue here. To avoid the thorny and difficult legal issue of the competing and conflicting state and federal interests in navigable waters, the district court adopted an untenable interpretation of section 103(c). Though that interpretation is both unconstitutional and contrary to long-standing agency understanding of agency power, the Ninth Circuit affirmed it. The decision cannot stand.

Section 103(c)'s language unambiguously clarifies that Congress had no intent to grant broad, general regulatory authority over inholdings. The Ninth Circuit ignored this Court's direction that it must consider the wide array of unconstitutional results flowing from its preferred interpretation of section 103(c). Interpreting the statute in accordance with its plain meaning raises no constitutional concerns. The doctrine of constitutional avoidance reinforces what the plain text of section 103(c) and its surrounding structure and purpose make clear—NPS regulations (whether of general applicability or specific to Alaska CSUs) do not apply to any Native corporation lands in Alaska.

CONCLUSION

The Ninth Circuit incorrectly interpreted the plain language in section 103(c) of ANILCA to expand federal authority over non-federal inholdings, including millions of acres of lands owned by Native corporation *amici*. But the plain language unambiguously limits federal authority to public lands, consistent with the constitutional authority underpinning ANILCA. This reading is confirmed by long-standing NPS regulations confirming that such regulations generally do not apply on "non-federally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries." 36 C.F.R. § 1.2(b). The Ninth Circuit's decision must be reversed so that Native corporations and their shareholders remain free to pursue economic development and subsistence activity—as well as ordinary day-to-day life in Native villages—without pervasive federal government regulatory intervention. *Amici* ASRC, CIRI, and SNAI, join John Sturgeon, the State of Alaska, and the other Alaska Native Corporation *amici* in urging this Court to reverse the Ninth Circuit's decision.

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