No. 17-949

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.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JEFFREY H. WOOD
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
RACHEL P. KOVNER
Assistant to the Solicitor General
ANDREW C. MERGEN
ELIZABETH ANN PETERSON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether Section 103(c) of the Alaska National Interest Lands Conservation Act, 16 U.S.C. 3103(c), withdrew the National Park Service's authority to regulate activities on all navigable waters located within units of the National Park System in Alaska.

TABLE OF CONTENTS

Page

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases: Page

Cases—Continued: Page

Constitution, statutes, and regulations:

Statutes and regulations—Continued: Page

Statutes and regulations—Continued: Page

Miscellaneous—Continued: Page

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 17-949

JOHN STURGEON, PETITIONER

v.

BERT FROST, IN HIS OFFICIAL CAPACITY AS ALASKA REGIONAL DIRECTOR OF THE NATIONAL PARK SERVICE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 872 F.3d 927. An earlier opinion of the court of appeals (Pet. App. 26a-57a) is reported at 768 F.3d 1066. The decision of the district court (Pet. App. 58a-81a) is not published in the Federal Supplement but is available at 2013 WL 5888230.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 2017. The petition for a writ of certiorari was filed on January 2, 2018, and granted on June 18, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-11a.

STATEMENT

This case concerns the authority of the National Park Service (NPS or Park Service) to regulate navigable waters within the National Park System in Alaska. Congress has authorized the Park Service to regulate "activities on or relating to water located within" units of the National Park System, "including water subject to the jurisdiction of the United States." 54 U.S.C. 100751(b) (Supp. IV 2016). When Congress expanded the National Park System in Alaska through the Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2371 (16 U.S.C. 3101 *et seq.*), with the aim of protecting "waters," "freeflowing rivers," and "fish," 16 U.S.C. 3101, Congress did not simultaneously strip the Park Service of all authority to regulate conduct on navigable waters within the National Park System in Alaska.

A. Statutory Background

1. The authorities of the National Park Service

The United States has reserved federal lands and waters in the National Park System ever since the creation of Yellowstone National Park in 1872. Three of the largest National Parks in Alaska—Mount McKinley National Park, Katmai National Monument, and Glacier Bay National Monument—were created between 1917 and 1925. See Act of Feb. 26, 1917, ch. 121, 39 Stat. 938; Proclamation of Sept. 24, 1918, 40 Stat. 1855; Proclamation of Feb. 26, 1925, 43 Stat. 1988. The "fundamental purpose" of the National Park System "is to conserve the scenery, natural and historic objects, and wild life in System units and to provide for the enjoyment of" those areas. 54 U.S.C. 100101(a) (Supp. IV 2016). The National Park Service Organic Act (Organic Act), ch. 408, 39 Stat. 535, authorizes the Secretary to serve that goal through a general grant

of authority to "prescribe such regulations as the Secretary considers necessary or proper for the use and management of System units." 54 U.S.C. 100751(a) (Supp. IV 2016).

In addition, since 1976, Congress has specifically authorized the Secretary to "promulgate 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 the regulations are not in derogation of the authority of the Coast Guard. Act of Oct. 7, 1976 (1976 Act), Pub. L. No. 94-458, § 1(2)(h), 90 Stat. 1939. That provision's recent recodification replaces the phrase "waters located within areas of the National Park System" with the phrase "water located within Syste m units." 54 U.S.C. 100751(b) (Supp. IV 2016). The Department of the Interior urged the enactment of the 1976 Act to respond to "recreational boating and other water-related activities that affect the resources of many areas of the National Park System." Letter of Curtis Bohlen, Deputy Assistant Sec'y of the Interior (July 23, 1976), *reprinted in* S. Rep. No. 1190, 94th Cong., 2d Sess. 12 (1976). The Department explained that the enactment would make clear Congress's "intent to invoke its powers under the Commerce Clause" in support of regulation of such activities, *id.* at 11, and clarify the Secretary's authority over the navigable waters that are also subject to Coast Guard jurisdiction, *id.* at 12.

2. ANILCA and its predecessors

ANILCA is the third in a series of major statutes addressing the allocation of lands in Alaska.

a. The Alaska Statehood Act

The Alaska Statehood Act (Statehood Act), Pub. L. No. 85-508, 72 Stat. 339, which authorized Alaska to join the Union, "permitted Alaska to select 103 million acres of 'vacant, unappropriated, and unreserved' federal land" for conveyance to the State. 136 S. Ct. 1061, 1065 (quoting Statehood Act, § 6(a) and (b), 72 Stat. 340). The Statehood Act also provided, § 6(m), 72 Stat. 343, that Alaska, like other States, would be covered by the Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, which generally grants States "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters," as well as "the right and power to manage, administer, lease, develop, and use the said lands and natural resources." 43 U.S.C. 1311(a); see 136 S. Ct. at 1065.

b. The Alaska Native Claims Settlement Act

The United States had acquired the land that became Alaska through a treaty with Russia that did not extinguish the land tenure of Alaska Natives. See *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 277 (1955). The Statehood Act also did not address aboriginal title. After the Statehood Act's passage, Alaska Natives "asserted aboriginal title to much of the same land" claimed by the State, leaving title to those lands uncertain. 136 S. Ct. at 1065; see 34 Fed. Reg. 1025 (Jan. 23, 1969). Congress sought to resolve that conflict in the Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-903, 85 Stat. 688 (43 U.S.C. 1601 *et seq.*). ANCSA extinguished claims of aboriginal title, in exchange for a monetary settlement and a right of "corporations organized by groups of Alaska Natives to select 40 million acres of federal land to manage within the State." 136 S. Ct. at 1065; see 43 U.S.C. 1601, 1603(b), 1605, 1610-1615.

ANCSA also directed the Secretary to withdraw up to 80 million additional acres that the Secretary "deems are suitable for addition to or creation as units of the National Park, Forest, Wildlife Refuge, and Wild and Scenic Rivers Systems." 43 U.S.C. 1616(d)(2)(A). ANCSA provided for those reservations to be approved by Congress within five years, 43 U.S.C. 1616(d)(2)(D), but Congress did not act within the five-year period. Rather than allowing the designations to expire, President Carter invoked the Antiquities Act of 1906, 16 U.S.C. 431 *et seq.*, to designate the selected lands as national monuments without congressional approval. See 136 S. Ct. at 1065. The decision triggered protests, and "Congress once again stepped in to settle the controversy." *Id.* at 1066.

c. ANILCA

Congress enacted ANILCA to bring finality to the allocation of land in Alaska. ANILCA set aside approximately 105 million acres of additional "lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values." 16 U.S.C. 3101(a). ANILCA placed those lands in "conservation system unit[s]" (CSUs)—a term of art referring to "any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument." 16 U.S.C. 3102(4).

Congress set out ANILCA's objectives expressly, making clear that Congress understood the Secretary would be able to adopt rules for the conservation of "waters," "freeflowing rivers," and "fish" in the areas it set aside. 16 U.S.C. 3101. The statute named four objectives:

- To preserve the "lands and waters" reserved by the Act for "the benefit, use, education, and inspiration of present and future generations," based on their scenic, geologic, wildlife, and other values, 16 U.S.C. 3101(a);
- To protect the reserved areas' "natural landscapes," wildlife, "resources related to subsistence needs," historical locations, "rivers, and lands," and "wilderness resource values and related recreational opportunities," including opportunities for canoeing and fishing "on freeflowing rivers," and "to maintain opportunities for scientific research and undisturbed ecosystems," 16 U.S.C. 3101(b);
- To "provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so," where "consistent with management of fish and wildlife" and other principles, 16 U.S.C. 3101(c); and
- To "obviate[] * * * the need for future legislation designating" additional federal conservation lands in Alaska, 16 U.S.C. 3101(d).

Each of the 13 provisions that created or expanded a unit of the National Park System also described purposes for which the particular unit "shall be managed." 16 U.S.C. 410hh, 410hh-1. In each case, the purposes included protection of bodies of water such as rivers and lakes, protection of fish or marine mammal populations and their habitat, or a combination thereof. See *ibid.* For some areas, Congress's purposes included ensuring protection of particular identified waters. See 16 U.S.C. 410hh(1) (Aniakchak River); 16 U.S.C. 410hh(6) (Kobuk River Valley, including the Kobuk, Salmon, and other

rivers); 16 U.S.C. 410hh(8) (Noatak River); 16 U.S.C. 410hh(10) ("the entire Charley River basin").

Congress directed that the Secretary "shall administer the lands, waters, and interests therein" within new and expanded National Parks "as new areas of the National Park System" under the Organic Act "as amended and supplemented (16 U.S.C. 1 et seq.)." 16 U.S.C. 410hh-2. The 1976 Act authorizing regulation of activities on or relating to water in the National Park System was an amendment to the Organic Act. See § 1, 90 Stat. 1939 (amending 16 U.S.C. 1a-1 *et seq.* (1976)).

Congress also set out Alaska-specific directives with which the Park Service was required to comply when regulating fishing and boating in the new and expanded areas. See 16 U.S.C. 410hh-2, 1110(a), 3121, 3170(a).

Subsistence-Use Priority On "Public Lands." ANILCA created a priority for rural subsistence users of fish and wildlife by providing that on "public lands" in Alaska on which subsistence use is authorized, the taking of fish and wildlife for non-wasteful subsistence uses "shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." 16 U.S.C. 3114. ANILCA gave the State the option of controlling implementation of the priority, by providing that if the State "enact[ed] and implement[ed] laws of general applicability" containing the "definition, preference, and participation specified in" ANILCA, the federal government would not implement its own subsistence-use priority on "public lands." See 16 U.S.C. 3115(d).

Section 103(c) of ANILCA. When Congress created new CSUs in ANILCA, it drew the boundaries to "'follow hydrographic divides or embrace other topographic or natural features'" instead of "map[ping] the Federal

Government's landholdings." 136 S. Ct. at 1066 (quoting 16 U.S.C. 3103(b)). "As a consequence," CSUs in Alaska included "over 18 million acres of state, Native Corporation, and private land," in addition to "the Federal Government's landholdings." *Ibid.*

ANILCA Section 103(c), in three sentences, addresses the status of such lands. First, it states that only "public lands" within the borders of a CSU "shall be deemed to be included as a portion of such unit." 16 U.S.C. 3103(c). Public lands are "lands" and "waters," and also "interests therein" to which the United States holds title, excluding lands selected for transfer to the State or Native Corporations. 16 U.S.C. 3102(1)-(3); see 16 U.S.C. 3103(c).

Second, Section 103(c) provides that no lands "conveyed to the State, to any Native Corporation, or to any private party" shall be subject to those "regulations applicable solely to public lands within such units." 16 U.S.C. 3103(c).

Third, Section 103(c) provides that "[i]f 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).

Section 103(c) was added to ANILCA through a concurrent resolution to make technical "corrections," after ANILCA had been passed by both the Senate and House of Representatives. H.R. Con. Res. 452, 96th Cong., 2d Sess. (1980) (94 Stat. 3688). The resolution's sponsor in the House explained that the resolution would not "change any of the major features of" ANILCA or "have the effect of altering provisions related to conservation areas" in Alaska. 126 Cong. Rec.

30,498 (1980) (statement of Rep. Udall). The resolution was passed with unanimous consent in both the Senate and the House. See *id.* at 30,495-30,500, 31,108-31,109.

3. Regulation of navigable waters in the National Park System following enactment of ANILCA

After ANILCA was enacted, the Park Service continued to regulate activities on navigable waters within CSUs in Alaska. For instance, the Park Service adopted park-specific rules governing activities on particular navigable waters in National Parks. See, *e.g.*, 36 C.F.R. 7.46(b) and (c) (1982) (rules for Naknek Lake and Naknek River in Katmai National Park); NPS, U.S. Dep't of the Interior, *Katmai National Park and Preserve Management Plan* 53 (1986)[1] (explaining that Naknek Lake and Naknek River are navigable). Park management plans created under ANILCA, see 16 U.S.C. 3191(a), likewise stated that the Park Service was responsible for "manag[ing] all waters within the boundaries" of the National Parks to protect fish and wildlife, as well as their habitats, in cooperation with the State. See, *e.g.*, NPS, U.S. Dep't of the Interior, *Gates of the Arctic General Management Plan* 106 (1986).[2]

The Secretary also promulgated regulations, since ratified by Congress, that reflect the understanding that ANILCA allows regulation of activities on navigable waters within CSUs. The question whether "public lands" include navigable waters arose when the Secretary promulgated regulations to implement ANILCA's

---

[1] https://parkplanning.nps.gov/showFile.cfm?projectID=34515&MIMEType=application%252Fpdf&filename=KATM%20GMP%2Epdf&sfid=97151.

[2] https://www.nps.gov/gaar/learn/management/upload/GAAR_GMP-Land-Protection-Plan-Wilderness-Suitability-1986.pdf.

subsistence-use priority, which applies only on "public lands." In litigation over the scope of the subsistence-use priority, the Ninth Circuit agreed with the Secretary that ANILCA's definition of "public lands" permits application of the subsistence-use priority on those navigable waters inside park boundaries as to which the federal government has a reserved-water-right interest. *Alaska* v. *Babbitt*, 72 F.3d 698, 703-704 (9th Cir. 1995) (*Katie John I*), cert. denied, 516 U.S. 1036, and 517 U.S. 1187 (1996).

The Secretary implemented that understanding through regulations. 50 C.F.R. 100.3(b); see 64 Fed. Reg. 1276, 1279 (Jan. 8, 1999); see also 62 Fed. Reg. 66,216, 66,217-66,218 (Dec. 17, 1997). The regulations identified reserved-water-rights interests in navigable waters within CSUs in Alaska. 64 Fed. Reg. at 1276, 1279, 1286-1287.

Congress then ratified that understanding. Congress initially delayed full implementation of the regulations providing for "public lands" to include such waters, in order to allow Alaska to enact an ANILCA-compliant subsistence-use priority for "public lands."[3] That would have obviated the need for the federal regulations. See 16 U.S.C. 3115(d).

---

[3] See Department of the Interior and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-134, Tit. I, § 101(c) [tit. III, § 336], 110 Stat. 1321-210; Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, Tit. III, § 316(a), 111 Stat. 1592; Department of the Interior and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, Div. A, § 101(e) [tit. III, § 339(a)], 112 Stat. 2681-295.

Congress ultimately provided, however, that if Alaska did not enact a measure to implement ANILCA's subsistence-use priority "before October 1, 1999," the moratorium provision limiting the geographic scope of the subsistence-use regulations would be repealed, allowing the Secretary's definition of "public lands" to take effect. Department of the Interior and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, Div. A, § 101(e) [tit. III, § 339(b)], 112 Stat. 2681-296. Alaska did not enact a measure to implement ANILCA's subsistence-use priority. Accordingly, the subsistence-use regulations became operative. See 16 U.S.C. 3102 note.

In addition, in nationwide regulations issued in 1996, the Park Service made clear that park rules apply on all "'[w]aters subject to the jurisdiction of the United States,' includ[ing] navigable waters," within "the boundaries of [the] National Park System." 61 Fed. Reg. 35,133 (July 5, 1996) (citation omitted); see 36 C.F.R. 1.2(a)(3). The Park Service explained that the rulemaking "clarifies and interprets existing NPS regulatory intent, practices and policies." 61 Fed. Reg. at 35,133 (discussing history).

In promulgating those regulations, the Secretary considered and rejected Alaska's submission that "ANILCA § 103(c) preempts NPS's well-established authority on navigable waters," and that it was therefore improper for the Secretary to regulate navigable waters within units of the National Park System in Alaska. 61 Fed. Reg. at 35,135. The Secretary emphasized that Section 103(c), which had been "characterized by Congress as a minor technical provision," should not "be read in isolation from the context of the whole act." *Ibid.* Interpreting ANILCA in a manner "consistent with its underlying protective purposes," including "to protect objects

of ecological * * * interest," the Secretary rejected Alaska's argument. *Ibid.*

The Secretary has also construed Section 103(c) as inapplicable in the rare cases in which Park Service rules are validly written to apply to non-public as well as public lands. See 59 Fed. Reg. 65,948, 65,950 (Dec. 22, 1994). The Secretary explained that such regulations are not barred by the prohibition in Section 103(c) because they do not apply "solely to public lands within" the National Park System. *Ibid.* (quoting 16 U.S.C. 3103(c)).

4. Current regulation of navigable waters in the National Park System

The Park Service has issued a number of general rules that govern activities on waters within the units of the National Park System, including in Alaska. These rules apply within "[t]he boundaries of federally owned lands and waters administered by the National Park Service" and on "[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." 36 C.F.R 1.2(a). The rules include requirements relating to pollution and sanitation, *e.g.*, 36 C.F.R. 2.14, 3.13, introduction and removal of fish, plants, and wildlife, *e.g.*, 36 C.F.R. 2.1, 2.2, 2.3, 2.5, sanitation and noise standards for boats and other vessels, *e.g.*, 36 C.F.R. 3.1-3.19, and, as relevant here, a bar on "operation or use of hovercraft," 36 C.F.R. 2.17(e). The Park Service issued the hovercraft rule after determining that the crafts "introduce a mechanical mode of transportation

into locations where the intrusion of motorized equipment by sight or sound is generally inappropriate." 48 Fed. Reg. 30,252, 30,258 (June 30, 1983).[4]

B. Proceedings In This Case

1. In 2007, Park Service rangers observed petitioner repairing a hovercraft inside the Yukon-Charley Rivers National Preserve (Preserve), a unit of the National Park System in Alaska. Petitioner was on a gravel bar adjoining the Nation River, a navigable tributary of the Yukon. Pet. App. 31a & n.1. The rangers warned petitioner that he could not operate his hovercraft in the Preserve. *Id.* at 31a. Petitioner protested that Park Service rules could not be enforced on the Nation River within the Preserve on the ground that navigability of the Nation River makes the river immune from Park Service regulation. Pet. App. 3a, 31a. Nevertheless, he removed his hovercraft, and refrained from using it in the Preserve during the next two hunting seasons. *Id.* at 31a-32a.

2. In 2011, petitioner filed suit challenging the Park Service's authority to enforce its park rules on navigable waters within the National Park System in Alaska. He contended that Section 103(c) of ANILCA stripped the Park Service of any ability to regulate conduct on such waters. Pet. App. 30a, 59a-60a. Petitioner sought

---

[4] Neither petitioner, nor Alaska, nor any other party has petitioned the Park Service to create an Alaska-specific exception to the hovercraft rule, or otherwise argued that the rule should not be applied in the State because it is not suited to Alaska's conditions. Instead, petitioner and Alaska have argued throughout this litigation that the Secretary simply lacks authority to regulate any activity on navigable waters within National Park System boundaries, and that the hovercraft rule is invalid on that basis.

declaratory and injunctive relief permitting hovercraft use on the Nation River within the Preserve. *Ibid.*

The district court granted summary judgment to the government. Pet. App. 58a-81a. The court concluded that petitioner's challenge failed even if petitioner were correct in his assertion that the navigable waters of the Nation River are state-owned. It read Section 103(c) to limit only the Park Service's authority to impose *Alaska-specific* rules, emphasizing that Section 103(c) limits only regulations "applicable solely to public lands within [conservation system] units," and that "conservation system units" is a term that refers only to units of the National Park System *in Alaska*. *Id.* at 79a-80a (citation omitted).

3. The court of appeals affirmed on the same basis. Pet. App. 26a-57a.

4. This Court granted a writ of certiorari and vacated the court of appeals' decision. 136 S. Ct. at 1064, 1072. The Court concluded that Section 103(c) should not be understood as a prohibition on Alaska-specific regulations. It stated that the lower courts' reading "may be plausible in the abstract," but that "[s]tatutory language 'cannot be construed in a vacuum,'" and must instead be read in "'context and with a view to [the words'] place in the overall statutory scheme.'" *Id.* at 1070 (citation omitted). Looking to the overall scheme, the Court noted that ANILCA "repeatedly recognizes that Alaska is different," *ibid.*, and contains numerous "Alaska-specific provisions," *id.* at 1071. That statutory context made it "implausible" that Congress designed Section 103(c) to prohibit the Park Service from adopting rules or exceptions "recognizing Alaska's unique conditions." *Ibid.*

The Court observed that the government, in defending the hovercraft rule, had principally relied "on very different arguments * * * that it has longstanding authority to regulate waters within federally managed preservation areas, and that Section 103(c) does not take any of that authority away." 136 S. Ct. at 1069. The Court "d[id] not decide" the issues raised by those arguments. *Id.* at 1072. Instead, it stated, the court of appeals could address on remand whether the portions of the Nation River within the National Park System qualify as "public land" for purposes of ANILCA and "whether the Park Service has authority under Section 100751(b) to regulate [petitioner's] activities on the Nation River, even if the river is not 'public' land." *Ibid.*

5. A unanimous panel of the court of appeals rejected petitioner's challenge on the first of those grounds. Pet. App. 1a-19a. The court observed that under longstanding circuit precedent, "ANILCA's definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine." *Id.* at 12a (citation and internal quotation marks omitted); see *id.* at 12a-13a. Accordingly, the court observed, it had upheld application on navigable waters of a subsistence-use priority that only applies on "public lands" under ANILCA. *Id.* at 12a-13a. The court also concluded that application of the hovercraft rule served the purposes "for which ANILCA reserved lands as conservation system units." *Id.* at 14a. Because those conclusions sufficed to defeat petitioner's challenge, the panel did not address whether the Park Service's authority to issue rules "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(b) (Supp. IV 2016), is applicable only on "public lands."

Judge Nguyen, joined by Judge Nelson, also concurred. Pet. App. 20a-23a. The concurring judges stated that in the absence of circuit precedent, they would have upheld the Park Service's application of the hovercraft rule to the waters here based on the federal navigational servitude, rather than reserved water rights. *Ibid.*

SUMMARY OF ARGUMENT

ANILCA created and expanded National Parks, Wild and Scenic Rivers, Wildlife Refuges and other federal preserves in Alaska for stated purposes that include protecting "freeflowing rivers," "waters," and fish. 16 U.S.C. 3101. Section 103(c) of that same enactment did not deprive the Park Service of its ability to execute that directive by regulating conduct on navigable waters.

A. 1. Congress has authorized the Park Service to regulate conduct on the navigable waters flowing through the National Park System by enacting a water-focused provision directly addressing navigable waters. That provision states that the Park Service may make rules "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(b) (Supp. IV 2016). Navigable waters are the paradigmatic "water subject to the jurisdiction of the United States." *Ibid.*

2. ANILCA Section 103(c) does not strip the Park Service of that authority in Alaska. Petitioner relies on the portion of Section 103(c) providing that only "public lands" should be "deemed to be included as a portion of

[a conservation system] unit." 16 U.S.C. 3103(c). But regardless of whether navigable waters within the boundaries of the National Park System are public lands "deemed to be included as a portion of [a conservation system] unit," the Secretary's regulation of hovercraft use and other activities on the Nation River within the Preserve is regulation of "activities on * * * water located within System units." 54 U.S.C. 100751(b) (Supp. IV 2016). ANILCA makes clear that even non-public lands are located "within System units," as relevant to 1976 Act authority. See 16 U.S.C. 3191(b)(7); 16 U.S.C. 3103(c).

In any event, the Park Service's authority to regulate conduct on navigable waters under the 1976 Act does not depend on whether navigable waters are themselves located "within" conservation system units, because the 1976 Act authorizes rules for activities not only "on" water located within System units but also "*relating to* water located within System units." 54 U.S.C. 100751(b) (Supp. IV 2016) (emphasis added). There is no dispute that all non-navigable stretches of water on federal land within units of the National Park System constitute "water located within System units." *Ibid.* And regulations that apply on the navigable waters running through such units are, at minimum, regulations "relating to" the non-navigable stretches with which they interconnect.

3. Petitioner errs in arguing (Br. 42) that by specifying the areas that are "deemed a portion of" CSUs, Section 103(c) strips the Park Service of authority over all other lands and waters. The sentence on which petitioner relies is simply definitional. And petitioner's reading of that sentence as a substantive bar to Park Service regulation is countermanded by the very next

sentence of Section 103(c). That sentence states that state, Native Corporation and private lands—lands that are not "public lands"—cannot be subject to one particular class of Park Service regulations: the "regulations applicable *solely to public lands* within such [conservation system] units." 16 U.S.C. 3103(c) (emphasis added). Petitioner's argument would make superfluous the tailored prohibition that Section 103(c) actually contains. Petitioner's reading is equally incompatible with ANILCA's provisions concerning park management plans, which direct the Park Service to consider "issuance or enforcement of regulations" for "privately owned areas" within the National Park System. 16 U.S.C. 3191(b)(7). That provision recognizes that the Secretary's regulatory authority is not limited to "public lands" within CSUs.

B. Park Service regulation of petitioner's conduct on the navigable waters of the Nation River within the Preserve would be consistent with ANILCA even if the Park Service were limited to regulating "public lands" under ANILCA.

ANILCA defines "public lands" to include not only "lands" and "waters" but also "interests therein" to which the United States holds title. 16 U.S.C. 3102(1)-(3). ANILCA's definition encompassing "interests" is particularly important with respect to navigable waters because it is *only* possible to hold interests in navigable waters; "neither sovereign nor subject" can own the waters themselves. *Federal Power Comm'n* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10 (1954).

The United States holds interests in navigable waters in the National Park System in Alaska under the reserved-water-rights doctrine. That doctrine provides

that when the government reserves land, it also reserves an interest in appurtenant waters when "needed to accomplish the purpose" of the federal reservation. *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976). There is no dispute that the reservation of lands in Alaska as units of the National Park System carried with it a reservation of water rights. Congress created the National Parks in Alaska for purposes that expressly include safeguarding waters, protecting aquatic wildlife, providing opportunities for marine recreation, and preserving opportunities for subsistence uses such as fishing. 16 U.S.C. 3101; see 16 U.S.C. 410hh, 410hh-1. This Court has concluded that comparable provisions reserve rights in appurtenant waters. *Cappaert*, 426 U.S. at 141; *United States* v. *New Mexico*, 438 U.S. 696, 709-710 (1978). And the Secretary has determined in regulations that the federal title to lands reserved under ANILCA includes reserved water rights in navigable waters in the National Park System.

If any ambiguity existed at the time of ANILCA's passage as to whether navigable waters may be subject to rules for "public lands," Congress removed that ambiguity when it ratified the regulations on that topic. Congress initially delayed the implementation of subsistence-use regulations in which the Secretary determined that the government could impose rules for "public lands" on specified navigable waters based on the federal reserved-water-right interest. That delay gave Alaska time to enact an ANILCA-compliant subsistence-use priority, which would have obviated the need for the federal subsistence-use regulations. But Congress directed that if Alaska failed to enact such a priority by a particular date, the moratorium would be repealed, enabling the regulations defining the priority's

geographic scope to take effect. Accordingly, when Alaska failed to act, the Secretary's regulations construing "public lands" were implemented. This ratification through positive legislation is "virtually conclusive" evidence of the meaning of Section 103(c). *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986).

C. This Court has emphasized that Section 103(c) should not "be considered in a vacuum," and that its words should "be read in their context and with a view to their place in the overall statutory scheme." 136 S. Ct. at 1070 (citation omitted).

Here, ANILCA as a whole leaves no doubt that Section 103(c) did not eliminate Park Service authority to regulate conduct on navigable waters in the National Park System. Congress repeatedly stated in ANILCA that by placing new areas under Park Service authority, it intended to protect and preserve their rivers and waters. 16 U.S.C. 3101. ANILCA also identified particular navigable waters that it intended to protect. 16 U.S.C. 410hh. These provisions refute petitioner's contention that ANILCA Section 103(c)—which nowhere mentions navigable waters—stripped the Park Service of its authority to protect navigable waters within the National Park System.

ANILCA's subsistence-use provisions also confirm the Park Service's authority. Congress stated that it was the "intent and purpose" of ANILCA, 16 U.S.C 3101(c), that its subsistence-use priority enable rural residents who engaged in "customary and traditional fishing activities" to continue to do so, 16 U.S.C. 3113(c). ANILCA did so by authorizing subsistence fishing within new and expanded units of the National Park System and directing that subsistence fishing be given

priority over non-subsistence uses on the "public lands" where subsistence uses are authorized. 16 U.S.C. 410hh-2, 3114. Those provisions confirm that "public lands" include navigable waters. ANILCA would not ensure that rural residents engaged in traditional subsistence fishing could maintain a subsistence way of life unless the priority applied on navigable waters, because customary and traditional subsistence fishing takes place on navigable waters, rather than non-navigable ones. *Alaska* v. *Babbitt*, 72 F.3d 698, 702 (9th Cir. 1995) (*Katie John I*), cert. denied, 516 U.S. 1036 and 517 U.S. 1187 (1996).

ANILCA is shot through with other provisions demonstrating that the Park Service retains authority to regulate conduct on the navigable waters within CSUs. For example, the statute designates a number of navigable waters "wild and scenic rivers," to be administered under the "general statutory authorities relating to areas of the national park system" to "protect and enhance the values which caused [the rivers] to be" designated. 16 U.S.C. 1281. Those designations would not make sense if ANILCA stripped the Park Service of authority to regulate navigable waters. ANILCA's rules limiting Park Service regulation of certain motorboat use and commercial fishing, among others, also demonstrate that Section 103(c) did not strip the Park Service of regulatory authority over navigable waters altogether.

D. The enactment of Section 103(c) as a correction placed within the statute's "Maps" section confirms that the provision is not a sweeping withdrawal of Park Service authority. Congress would not have enacted a major reworking of Park Service authority as a subsection in a provision principally focused on the availability of

physical maps and "minor" adjustments of boundary lines. 16 U.S.C. 3103(c). The manner in which Congress enacted Section 103(c) confirms this point. There is no question that when initially passed by both Houses, ANILCA left in place the Park Service's authority to make rules protecting the navigable waters within National Parks. Congress then added Section 103(c) through a unanimous-consent concurrent resolution whose text explained that it contained only "corrections." H.R. Con. Res. 452, 96th Cong., 2d Sess. (1980) (94 Stat. 3688). That would not be an apt description of the major rescission of Park Service power that petitioner urges.

Moreover, Section 103(c) was described as one of several "minor revisions," 126 Cong. Rec. at 30,498, that were "technical" and "non-controversial," 125 Cong. Rec. at 11,156, and would not "change any of the major features of" the statute, 126 Cong. Rec. at 30,498. No Member of Congress suggested that the provision would rescind the Park Service's authority to regulate conduct on all the navigable waterways flowing through the National Park System in Alaska. On the contrary, Members of Congress repeatedly indicated that they understood ANILCA would allow the Park Service to protect the rivers within the National Park System in Alaska.

E. Petitioner errs in contending that Section 103(c) should be read to strip the Park Service of authority to regulate navigable waters based on a clear-statement rule. Both the 1976 Act and ANILCA make abundantly clear that the Park Service retains its authority to regulate conduct on navigable waters within Alaska. And in any event, no clear-statement rule applies to federal regulation of conduct on navigable waters—let alone navigable waters within the National Park System.

F. Text, structure, and history demonstrate that petitioner's construction of Section 103(c) is incorrect. But if they did not, the Secretary's reasonable regulations would resolve any remaining ambiguity under principles of *Chevron* deference. The Secretary has adopted regulations through notice-and-comment procedures that make Park Service rules applicable on navigable waters within the National Park System, including within Alaska. In doing so, the Secretary considered and rejected the argument that Section 103(c) "should be interpreted as superseding NPS authority" over navigable waters within Alaska under the 1976 Act, after determining that such a reading was not consistent with the statutory scheme or with ANILCA's express objectives. 61 Fed. Reg. at 35,135. The Secretary's conclusion is, at a minimum, a reasonable one that is entitled to deference.

ARGUMENT

THE PARK SERVICE MAY REGULATE ACTIVITIES ON THE NAVIGABLE WATERS WITHIN THE NATIONAL PARK SYSTEM IN ALASKA

Congress established the National Park System to preserve the natural resources contained in System units, such as rivers, fish, and plant life, and to enable the public to enjoy those resources. 54 U.S.C. 100101(a) (Supp. IV 2016). Congress did not depart from those aims when it set aside areas as units of the National Park System in Alaska under ANILCA. On the contrary, Congress expressly stated in ANILCA that it was creating and expanding areas of the National Park System for purposes that included protecting those areas' "freeflowing rivers," "waters," and "fish," 16 U.S.C. 3101, and it identified particular navigable bodies of water that it intended to protect, see 16 U.S.C. 410hh. For

instance, it created the Preserve here to protect "the environmental integrity of the entire Charley River basin," including "lakes" and "streams," as well as to protect "habitat for, and populations of, fish." 16 U.S.C. 410hh(10).

ANILCA was atypical in one respect, however. When it drew boundaries based on topographic and other natural features, "rather than to map the Federal Government's landholdings," ANILCA brought within park boundaries millions of acres of lands that had been conveyed, or selected for conveyance, to the State, Native Corporations, and private landholders. 136 S. Ct. at 1066.

The provision on which petitioner relies in this case, Section 103(c) of ANILCA, limits the Park Service's authority to regulate these lands, but it does not strip the Park Service of its authorities to regulate activities on the waters, including the navigable waters, in National Parks. Petitioner's argument to the contrary rests on two mistaken premises: First, that the Secretary's authority to regulate activities on navigable waters within the National Park System in Alaska is limited to regulating waters that qualify as "public lands" under ANILCA, and second, that the United States lacks a property interest in navigable waters within the National Park System, and therefore may not regulate those waters as "public lands" under Section 103(c).

A. Park Service Rules Governing Conduct On Navigable Waters Are Valid Without Regard To Whether The United States Holds A Property Interest That Supports Classification Of Those Waters As "Public Lands" Under ANILCA

The Park Service's regulation of conduct on navigable waters within National Park System areas is authorized under the 1976 statute expressly authorizing such regulation—an authority unaffected by whether such navigable waters qualify as "public lands" under ANILCA.

1. The 1976 Act authorizes the Park Service to regulate activities occurring on navigable waters within the National Park System

In 1976, Congress enacted legislation specifically granting the Secretary authority to regulate conduct "on or relating to" waters within the National Park System, including navigable waters. 54 U.S.C. 100751(b) (Supp. IV 2016). As currently codified, the 1976 Act provides that the Secretary may "[p]rescribe 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," so long as the Secretary's regulations are not in derogation of the authority of the Coast Guard. *Ibid.* Navigable waters are the paradigmatic "water subject to the jurisdiction of the United States." See, *e.g.*, *In re Garnett*, 141 U.S. 1, 15-16 (1891); *The Propeller Genesee Chief* v. *Fitzhugh*, 53 U.S. (12 How.) 443, 457 (1852); see also 33 C.F.R. 2.38 ("Navigable waters of the United States" are "[w]aters subject to the jurisdiction of the United States") (emphasis omitted).

There is no dispute that, in the National Park System in every State other than Alaska, this authorization

fully supports sanitation and noise standards for boats and other vessels, *e.g.*, 36 C.F.R. 3.1-3.19, rules concerning pollution and sanitation, *e.g.*, 36 C.F.R. 2.14, 3.13, constraints on introduction and removal of fish, plants, and wildlife, *e.g.*, 36 C.F.R. 2.1, 2.2, 2.3, 2.5, and, as relevant here, a bar on "operation or use of hovercraft," 36 C.F.R. 2.17(e), on navigable waters, 36 C.F.R 1.2(a), as well as on the non-navigable waters on federally owned lands.

2. Section 103(c) does not strip the Park Service of its 1976 Act authorities on navigable waters in Alaska

Section 103(c) does not abrogate throughout Alaska the Park Service's authority to regulate activities on or relating to navigable waters under the 1976 Act. Petitioner rests his argument for abrogation (Br. 41-42) on the sentence of Section 103(c) providing that "[o]nly those lands within the boundaries of any conservation system unit which are public lands * * * shall be deemed to be included as a portion of such unit." 16 U.S.C. 3103(c). But even if "navigable waters" are not "public lands," the Park Service's authority to regulate navigable waters under the 1976 Act would remain intact.

First, regardless of whether navigable waters within the boundaries of CSUs are "deemed to be included as a *portion of* [a conservation system] unit" under Section 103(c), 16 U.S.C. 3103(c) (emphasis added), the Secretary's application on navigable waters within park boundaries of rules concerning hovercraft (and other subjects) would be regulation of "activities *on* * * * water located *within* System units"—as relevant to 1976 Act authority. 54 U.S.C. 100751(b) (Supp. IV 2016) (emphasis added). The 1976 Act expressly provides that the "water located within System units[] includ[es] water

subject to the jurisdiction of the United States," *ibid.*, like navigable waters, see, *e.g.*, *Garnett*, 141 U.S. at 15-16.

Petitioner suggests (Br. 41-42) that ANILCA Section 103(c) provides "more specific" direction excluding navigable waters. But the 1976 Act provides the most specific guidance on whether navigable waters (that is, "water subject to the jurisdiction of the United States") constitute "water located within System units." And ANILCA expressly directs that new and expanded CSUs be governed by the 1976 Act, by directing the Secretary to administer those units under the "Organic Act, as amended and supplemented." 16 U.S.C. 410hh. The 1976 Act is an amendment to the Organic Act. 1976 Act § 1, 90 Stat. 1939. ANILCA Section 103(c), in contrast, does not mention navigable waters.

Moreover, ANILCA Section 103(c) does not contradict the 1976 Act's authorization. ANILCA treats the areas that are "within" System units—to which the 1976 Act refers—as broader than the areas that are "deemed to be included as a portion of" System units. 16 U.S.C. 3103(c). Thus, the first sentence of Section 103(c) provides that "[o]nly those areas *within the boundaries* of any conservation system units" that are "public lands" "shall be deemed to be included as a portion of such unit." *Ibid.* (emphasis added). The boundaries of the unit thus encompass more than its public lands. Further, the second sentence of Section 103(c) itself provides that state, Native Corporation, and private inholdings shall not "be subject to the regulations applicable *solely to public lands within such units*." *Ibid.* (emphasis added). The second sentence's acknowledgment that certain rules apply "solely to public lands

within [conservation system] units" reflects the understanding that not *all* lands "within" CSUs are public lands. *Ibid.*

Congress confirmed as much in the portion of ANILCA that directs the Secretary to promulgate a management plan for each CSU that contains a description "of privately owned areas, if any, which are *within such unit*." 16 U.S.C. 3191(b)(7) (emphasis added). That provision again demonstrates that even non-public lands—such as "privately owned areas"—fall "within" CSUs, as relevant to 1976 Act authority. *Ibid.*

Second, the Secretary's authority to regulate activities on navigable waters under the 1976 Act does not depend on whether navigable waters are "within" CSUs, because the 1976 Act authorizes rules for activities not only "on" water located within System units, but also "*relating to* water located within System units." 54 U.S.C. 100751(b) (Supp. IV 2016) (emphasis added). The ordinary meaning of "relating to" is "expansive[]." *Lamar, Archer & Cofrin, LLP* v. *Appling*, 138 S. Ct. 1752, 1760 (2018) (citing *Coventry Health Care of Mo., Inc.* v. *Nevils*, 137 S. Ct. 1190, 1197 (2017); *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383-390 (1992); *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 139 (1990)). "Congress characteristically employs the phrase to reach any subject that has 'a connection with, or reference to' the topics the statute enumerates." *Coventry*, 137 S. Ct. at 1197 (citation omitted).

Regulations that apply to navigable waters within the boundaries of the National Park System are regulations "relating to" waters within the National Park System, even setting aside whether navigable waters are themselves "within" the CSUs. Petitioner does not dispute that all the *non-navigable* stretches of water on

federally owned lands within CSUs constitute "water located within System units," 54 U.S.C. 100751(b) (Supp. IV 2016). And navigable and non-navigable waters are interconnected. Indeed, whether a waterway is navigable often varies from stretch to stretch: navigability determinations are made "on a segment-by-segment basis," so that a single body of water can transition into and out of navigability depending on the "[p]hysical conditions that * * * often vary significantly over the length of a river." *PPL Mont., LLC* v. *Montana*, 565 U.S. 576, 593-595 (2012).

Regulations of activities on navigable stretches are, at minimum, regulations *relating to* those interconnected non-navigable waters, because regulating navigable stretches protects the integrity and enjoyment of navigable and non-navigable stretches alike. See 54 U.S.C. 100101(a) (Supp. IV 2016) (describing the Park System's "fundamental purpose" as to "conserve the scenery, natural and historic objects, and wild life in System units and to provide for the enjoyment of" the same). Thus, rules on navigable waterways that control such matters as sanitation, pollution, and noisy and visually obtrusive modes of transportation, see 48 Fed. Reg. at 30,258 (hovercraft rule), have a connection to, and effect on, the condition and enjoyment of the interwoven non-navigable stretches. See, *e.g.*, *Ingersoll-Rand Co.*, 498 U.S. at 139 (explaining that a law would "'relate[] to'" an employee benefit plan "even if the law is not specifically designed to affect such plans, or the effect [on such plans] is only indirect," if the law nevertheless "'has a connection with or reference to such a plan'") (citation omitted).

3. Petitioner's contrary arguments are incompatible with ANILCA's text

Petitioner argues (Br. 42) that the specification in the first sentence of Section 103(c) of the land "deemed to be included as a portion of [a conservation system] unit," 16 U.S.C. 3103(c), strips the Park Service of all authority to regulate land that is *not* deemed a portion of a CSU. But that is not what the first sentence says. That sentence is only definitional. And petitioner's reading is directly countermanded by the very next sentence of Section 103(c). That sentence provides that state, Native Corporation and private lands—lands that are not "public lands"—cannot be subject to one particular class of Park Service regulations: the "regulations applicable *solely to public lands* within such [conservation system] units." 16 U.S.C. 3103(c) (emphasis added). That tailored limitation confirms that non-public lands are not exempted from *all* Park Service regulations. Indeed, if the definition specifying what lands are "deemed to be included" in a CSU by itself prohibited the Park Service from regulating non-public lands, the prohibition on applying to state, Native Corporation, and private lands the "regulations applicable solely to public lands within" CSUs would be superfluous.

Petitioner's interpretation flouts other parts of ANILCA as well. ANILCA directs the Park Service to consider "issuance or enforcement of regulations" governing activities in "privately owned areas" within the boundaries of National Parks in Alaska, when needed to serve the purposes of the System unit. 16 U.S.C. 3191(b)(7). Congress would not have directed the Park Service to consider "issu[ing] or enforc[ing]" regulations for activities in privately owned areas if Section 103(c) barred the Secretary from issuing or enforcing

such regulations. *Ibid.* Petitioner has sought to explain this provision by stating that perhaps Congress meant the Secretary could *acquire* the private land. 14-1209 Reply Br. 3-4. But a provision directing the Secretary to consider "issuance or enforcement of regulations" for the "activities carried out in, or proposed for," "privately owned areas" is not plausibly read as a provision actually directing the Secretary to consider acquiring private lands.

Petitioner has previously argued that Section 103(c) would be "meaningless" unless it exempted non-public lands from all Park Service regulation. 14-1209 Reply Br. 3; see Alaska Amicus Br. 36. Petitioner thus has argued that unless Section 103(c) bans the application on non-public lands of all Park Service regulations, rather than only "regulations applicable solely to public lands," 31 U.S.C. 3103(c), "NPS could evade any limit on its authority merely by extending a regulation to both federal and nonfederal lands." 14-1209 Reply Br. 3.

That is wrong. ANILCA's directive that certain lands not be deemed a portion of the conservation system unit substantially constrains the Park Service's authority. The Organic Act allows the Park Service to make only rules that are "necessary or proper for the use and management of System units," 54 U.S.C. 100751(a) (Supp. IV 2016). And, as more specifically relevant here, the 1976 Act authorizes the Park Service only to issue regulations governing boating and other activities on or relating to covered waters. 54 U.S.C. 100751(b) (Supp. IV 2016). Accordingly, Section 103(c) means that the Park Service's authority over non-public lands within CSUs is limited to imposing certain water-related rules and those rules "necessary or proper for

the use and management of" the public lands themselves—most notably, rules regarding activities on non-public lands that pose hazards for the public lands. 54 U.S.C. 100751(a) (Supp. IV 2016); see 36 C.F.R. Pt. 6 (rules regarding solid-waste disposal sites made applicable on all lands within National Park System boundaries); 36 C.F.R. 9.1 (rules regarding mining made applicable on all lands within National Park System boundaries); see also, *e.g.*, *Kleppe* v. *New Mexico*, 426 U.S. 529, 537-538 (1976) (explaining that rules for conduct on private lands adjoining federal lands may be appropriate to safeguard wildlife or ecological features of federal lands, under the Property Clause). Petitioner's suggestion that giving the language of Section 103(c) its ordinary meaning would leave the Park Service with "unfettered authority" to regulate state, Native Corporation, and private lands, 14-1209 Reply Br. 4-5, is incorrect.

B. In Any Event, The Park Service May Enforce Regulations Of "Public Lands" On Navigable Waters Within The National Park System In Alaska

Even if Section 103(c) were read to strip the Park Service of all authority over lands that are not "public lands," the regulations here would be valid, because of the federal property interest in navigable waters under the reserved-water-rights doctrine.

1. The Park Service's regulations of navigable waters are regulations of "public lands" under ANILCA because of the federal interest in those waters

ANILCA defines "public lands" as lands, waters, and "interests therein" to which the United States holds title. 16 U.S.C. 3102(1)-(3). Accordingly, federal authority over "public lands" extends to circumstances in which the United States holds "interests" in land or water.

Amoco Prod. Co. v. *Village of Gambell*, 480 U.S. 531, 549 n.15 (1987). Thus, in *Village of Gambell*, the Court explained that even if the United States did not hold title to submerged lands on the Outer Continental Shelf, those lands could be subject to regulation as "public lands" if the United States held an "interest[]" in those submerged lands. *Ibid.*

ANILCA's definition of "public lands" as encompassing "interests" in water is particularly important with respect to navigable waters because, as petitioner (Br. 36) and Alaska (Amicus Br. 24-25) acknowledge, it is *only* possible to own "interests" in navigable waters, rather than the navigable waters themselves. As this Court has held, "[n]either sovereign nor subject can acquire anything more than a mere usufructuary right" in navigable waters. *Federal Power Comm'n* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 247 n.10 (1954). That principle dates back to the "Institutes of Justinian," which explained that "running waters, like the air and the sea, were *res communes*—things common to all and property of none." *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 744 (1950); see also 2 William Blackstone, *Commentaries on the Laws of England* 395 (1766 ed.); Memorandum of Assistant Attorney General Olson, *Federal Non-Reserved Water Rights*, 6 Op. O.L.C. 328, 364-367 (1982); *Waters and Water Rights* § 36.02 (Amy K. Kelly, ed.) (3d ed. LexisNexis 2018). That principle is also reflected in the Submerged Lands Act, which provides that States generally hold "title to and ownership of the lands beneath navigable waters," and title to "the natural resources within such lands and waters," 43 U.S.C. 1311, not title to the navigable waters themselves.

The United States has interests in the navigable waters within and appurtenant to the federal lands inside the National Park System in Alaska. "[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose," under the doctrine of reserved water rights, "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). For example, where the United States holds title to reservation lands in trust for an Indian tribe, and the productivity of the reservation lands depends on irrigation, the United States' title also includes the right to waters appurtenant to the reservation sufficient to fulfill the tribe's needs to make agricultural use of their reservation lands. *Arizona* v. *California*, 373 U.S. 546, 600 (1963); see *Winters* v. *United States*, 207 U.S. 564, 576 (1908) (same). Reserved water rights exist not only when a reservation's purposes require withdrawal of water, but also when those purposes require that waters be protected against depletion or withdrawal by others. See, *e.g.*, *Cappaert*, 426 U.S. at 139.

Applying those principles, the United States holds interests in the navigable waters that are appurtenant to or within the federal lands set aside as portions of the National Park System in Alaska, because those waters must be safeguarded against depletion or diversion in order "to accomplish the purpose[s] of the reservation" of the adjoining land. *Cappaert*, 426 U.S. at 138. Congress has set aside land in the National Park System for the "fundamental purpose" of conserving the scenery, natural objects, and wildlife therein and facilitating enjoyment of those natural features. 54 U.S.C. 100101(a)

(Supp. IV 2016). And in creating and expanding units of the National Park System in Alaska specifically, Congress has again stated that its purposes include safeguarding waters, protecting aquatic wildlife, preserving opportunities for marine recreation, and preserving opportunities for subsistence use, including subsistence fishing. 16 U.S.C. 3101. Further, in each of the individual provisions of ANILCA that created or expanded units of the National Park System in Alaska, Congress stated its intent to protect particular bodies of water, particular fish or marine mammal populations and habitats, or a combination thereof. See 16 U.S.C. 410hh, 410hh-1. Because those purposes require that the waters within CSUs be safeguarded against depletion and diversion by others, Congress's reservations of park lands also reserved interests in appurtenant navigable waters.

This Court has repeatedly explained that statements of purpose like those at issue here reserve water rights for conservation purposes. *Cappaert*, 426 U.S. at 141 (reserved water right created by preservation of land at Devil's Hole Monument "for the reservation of the unusual features of scenic, scientific, and educational interest," because the proclamation stated that the pool was home to a particular species of fish and that the pool was of "outstanding scientific importance"); *United States* v. *New Mexico*, 438 U.S. 696, 709-710 (1978) (determining that particular language creating a national forest did not create a reserved water right in part based on the contrast between the statement of purpose for the forest and the language of the Organic Act noted above).

The Secretary has further concluded in regulations promulgated pursuant to notice-and-comment procedures that the United States' title to the lands reserved

in ANILCA includes reserved water rights in navigable waters within the National Park System. See 64 Fed. Reg. at 1279; 50 C.F.R. 100.3(b); see also 62 Fed. Reg. at 66,217-66,218 (proposed rule). As a result, as the Ninth Circuit correctly concluded in the *Katie John* cases, those reserved water rights constitute an "interest[]" in the navigable waters within the National Park System, and therefore establish that those waters are not removed from the sphere of permissible regulation by ANILCA Section 103(c).

Petitioner does not dispute that the United States holds an interest in the navigable waters appurtenant to or within federal lands in the National Park System in Alaska under the reserved-water-rights doctrine. Instead, he argues (Br. 35-36) that those rights are not "a title interest," but rather "a limited reservation of sovereign power." That is incorrect. Rights to withdraw or maintain flows of water are "property rights," *Niagara Mohawk*, 347 U.S. at 251, and their owners hold "title" to them. 3 Herbert T. Tiffany, *The Law of Real Property* § 722, at 117 (3d ed. 1939) (discussing "usufructuary title" to waters); see *Crum* v. *Mt. Shasta Power Corp.*, 30 P.2d 30, 36 (Cal. 1934) (en banc) (per curiam) (discussing riparian owners' "usufructuary title to the water"); *Radcliff's Ex'rs* v. *The Mayor*, 4 N.Y. 195, 196 (1850) (stating that an action is available against a person who diverts water "without having title to any thing more than the usufruct"). The federal government, moreover, holds that property right as an incident of its title to land. That is, the reserved water rights doctrine is based on the principle that when Congress exercises its right to reserve *property* interests to the government, its reservation of land carries with it the property interest in water needed to achieve the

purposes for which the federal government reserved lands in federal ownership. *Cappaert*, 426 U.S. at 139.

Petitioner alternatively contends (Br. 37-41) that regulation of activities on or relating to navigable waters within the National Parks "exceeds the scope of whatever reserved right the United States might hold," Br. 37. He observes that a reserved water right permits the United States to "exclude others from appropriating water that feeds federal land or to ensure that the federal government has access to a sufficient volume of water to meet its statutory objectives," Br. 38, but does not "confer[] on the federal government plenary regulatory power over the body of water at issue," Br. 39. This argument misunderstands the relevance of reserved water rights under ANILCA. The government does not argue that reserved water rights themselves carry sovereign powers. Rather, the Park Service's regulatory authority derives from the Organic Act, as amended by provisions including the 1976 Act. Reserved water rights are relevant, however, because petitioner has argued that Section 103(c) strips the Park Service of all authority to regulate lands that are not "public lands," and "public lands" are defined under ANILCA as not only lands and waters but also "interests" therein. The federal usufructuary title in navigable waters—the only type of title that it is *possible* to hold in navigable waters—demonstrates that such waters may be regulated as "public lands" under Section 103(c).

2. Congress has ratified the Secretary's construction of "public lands"

If ambiguity existed at the time of ANILCA's passage regarding whether navigable waters may be sub-

ject to rules for "public lands," that ambiguity was removed when Congress ratified regulations addressing that question. The Secretary addressed the application to navigable waters of ANILCA provisions concerning "public lands" more than two decades ago through regulations to implement ANILCA's subsistence-use priority. The Secretary ultimately determined that the federal interest in the navigable waters in the National Park System in Alaska permitted application on those waters of ANILCA's subsistence-use priority for "public lands." See *Alaska* v. *Babbitt*, 72 F.3d 698, 702 (9th Cir. 1995) (*Katie John I*) (explaining and adopting Secretary's conclusion that "public lands" under ANLICA include waters in which the United States has "reserved water rights"), cert. denied, 516 U.S. 1036 and 517 U.S. 1187 (1996); 64 Fed. Reg. at 1276 (identifying navigable waters within the National Park System in Alaska as "Federal land units in which reserved water rights exist," and consequently as "public lands").

Congress ultimately ratified those regulations. Appropriations measures initially delayed the full implementation of the Secretary's definition of "public lands" to reach navigable waters. Under the moratoria, the Secretary was permitted to enforce subsistence-use rules only in limited areas, rather than in all the areas identified as "public lands" through the regulations.[5] Those delays gave Alaska an opportunity to obviate the

---

[5] See Department of the Interior and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-134, Tit. I, § 101(c) [tit. III, § 336], 110 Stat. 1321-210; Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, Tit. III, § 316(a), 111 Stat. 1592; Department of the Interior and Related Agencies Appropriation Act, 1999, Pub. L. No. 105-277, Div. A, § 101(e) [tit. III, § 339(a)], 112 Stat. 2681-295.

need for the federal subsistence-use regulations entirely, by enacting an ANILCA-compliant subsistence-use priority. See 16 U.S.C. 3115(d) (providing that the Secretary shall not implement the subsistence-use priority if the State chooses to implement the priority itself). In 1999, however, Congress directed that if Alaska did not enact a measure to implement ANILCA's subsistence-use priority "before October 1, 1999," those geographic limits would be repealed, allowing the rules specifying the geographic scope of the subsistence-use priority for public lands to become operative. Department of the Interior and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, Div. A, § 101(e) [tit. III, § 339(b)], 112 Stat. 2681-296. When Alaska did not enact a rural subsistence-use priority by the date specified, the regulations applying the priority to specified navigable waters took effect.

Congress's actions present an unusually clear case of ratification. When Congress simply reenacts statutory language without change, against the backdrop of an authoritative construction by the responsible agency, Congress can be understood to have ratified the agency's interpretation. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012). Here, however, "Congress has not just kept its silence by refusing to overturn [an] administrative construction," but has instead "ratified [the administrative construction] with positive legislation," *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986), by providing for regulations defining "public lands" to take effect if the State failed to enact a subsistence-use priority within a specified period. This Court has explained that when Congress ratifies an administrative construction with positive legislation, courts "cannot but

deem [the administrative] construction virtually conclusive." *Ibid.*

C. Surrounding Provisions Of ANILCA Confirm That Section 103(c) Did Not Strip The Park Service Of Authority To Regulate Activities On Navigable Waters Within The National Park System

In considering Section 103(c) two years ago, this Court emphasized the importance of construing the provision in light of the "context of the statute as a whole." 136 S. Ct. at 1070. It explained that "[s]tatutory language 'cannot be construed in a vacuum,'" and that the words of Section 103(c) must "'be read in their context and with a view to their place in the overall statutory scheme.'" *Ibid.* (quoting *Roberts* v. *Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012)). Here, statutory context removes any doubt that Congress understood and intended that the Park Service could adopt rules to protect navigable waters and regulate conduct on or relating to those waters within the National Park System in Alaska.

1. Surrounding provisions demonstrate that the Park Service retains authority to regulate navigable waters within the National Park System

Numerous provisions of ANILCA demonstrate that the Park Service retains authority to regulate conduct on navigable waters within the boundaries of the National Park System. First, as noted above, Congress stated clearly (and repeatedly) in ANILCA that its purposes in placing new areas under the Park Service's regulatory authority included "to protect and preserve * * * rivers," 16 U.S.C. 3101(b), to protect the "waters" in the new and expanded units, 16 U.S.C. 3101(a), and to preserve opportunities for canoeing and fishing on

"freeflowing rivers," 16 U.S.C. 3101(b). It did the same in the statements of purpose regarding particular units, including in designations that state an intent to protect navigable waters such as the "Aniakchak River," 16 U.S.C. 410hh(1), the Kobuk and Salmon Rivers, 16 U.S.C. 410hh(6), and "the Noatak River," 16 U.S.C. 410hh(8), and stretches of "the Alsek River," 16 U.S.C. 410hh-1(1). Indeed, Congress directed that the Secretary manage the Yukon-Charley *Rivers* National Preserve, in which petitioner was operating his hovercraft, "[t]o 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). Those provisions demonstrate that Congress regarded rivers and other waters as central parts of System units. And they confirm that the Park Service is permitted under ANILCA to issue rules to protect and preserve the waters, including navigable waters, within the National Park System.

Second, ANILCA's provisions relating to subsistence use demonstrate that Congress regarded navigable waters within the National Park System as subject to regulation as public lands. Congress stated that it sought through ANILCA to "provide the opportunity for rural residents engaged in a subsistence way of life," 16 U.S.C. 3101(c), including "customary and traditional" fishing activities, 16 U.S.C. 3113, "to continue to do so," 16 U.S.C. 3101(c). It described "the continuation of the opportunity for subsistence uses by rural residence of Alaska * * * on the public lands" as "essential" to both Native and non-Native Alaskans. 16 U.S.C.

3111(1). And it stated that there was no practical alternative "to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses." 16 U.S.C. 3111(2). Congress therefore authorized subsistence hunting and fishing activities within many units of the National Park System and provided a priority for subsistence fishing over non-subsistence fishing on all "public lands." 16 U.S.C. 3114. Those provisions demonstrate that the "public lands" to which the subsistence-use priority applies include navigable waters, because the "customary and traditional" fishing activities that Congress specified the priority would protect, 16 U.S.C. 3113, are conducted "in navigable waters," rather than non-navigable ones. *Katie John I*, 72 F.3d at 702. Congress could not have "[p]rovide[d] the opportunity for rural residents engaged in a subsistence way of life to continue to do so," 16 U.S.C. 3101(c), without protecting the "customary and traditional" fishing activities, 16 U.S.C. 3113, that are part of a "subsistence way of life," 16 U.S.C. 3101(c).

Third, Congress again made clear that ANILCA preserves the Secretary's authority to regulate conduct on navigable waters in provisions designating particular rivers to be part of the National Park System. Title VI of ANILCA decrees that 26 rivers are "to be administered by the Secretary of the Interior" as "wild and scenic rivers within the national park system" or "wild and scenic rivers within national wildlife refuge system," §§ 601-603, 94 Stat. 2412-2413 (capitalization omitted). Under the Wild and Scenic Rivers Act, 16 U.S.C. 1271 *et seq.*, a river that Congress designates to be "administered by the Secretary of the Interior through the National Park Service" is made "part of the national park system," and

is to be administered pursuant to the "general statutory authorities relating to areas of the national park system," 16 U.S.C. 1281(c), for the purpose of "protect[ing] and enhanc[ing] the values which caused [the river] to be" designated, 16 U.S.C. 1281(a). Such designations thus reflect Congress's intent that the Park Service could in fact administer the rivers pursuant to its general statutory authorities. Those designations cannot be reconciled with a reading of ANILCA Section 103(c) that would immunize navigable waters from federal regulation by placing them outside of the relevant CSU. See 16 U.S.C. 3102(4) (defining "conservation system unit" to include "any unit in Alaska of the National Park System" or "National Wild and Scenic Rivers Systems").

Fourth, ANILCA again establishes that it did not rescind the Park Service's authority to regulate activities on navigable waters within the National Park System in Alaska through provisions that either confirm or constrain Park Service authority to regulate individuals' passage along particular navigable waters, motorboating, and fishing. For example, ANILCA provides that:

- Motorboats may be used in conservation systems units "subject to reasonable regulations by the Secretary to protect the natural and other values of the conservation system units," 16 U.S.C. 3170; see 16 U.S.C. 3121 (permitting motorboats "on the public lands");
- The Secretary may issue "regulations prescribing * * * restrictions relating to * * * fishing," 16 U.S.C. 3201; see also 16 U.S.C. 3204;
- "[P]ermanent improvements and facilities such as fishways, fish weirs, fish ladders, fish hatcheries,

spawning channels, stream clearance, egg planting, and other accepted means of maintaining, enhancing, and rehabilitating fish stocks may be permitted" in wildlife refuges, but only "[s]ubject to reasonable regulations," 16 U.S.C. 3203(b);

- "The Secretary may take no action to restrict unreasonably the exercise of valid commercial fishing rights or privileges obtained pursuant to existing law," ANILCA § 205, 94 Stat. 2384; and
- "[S]ubject to reasonable regulation, the Secretary shall administer the [Yukon Delta Wildlife] refuge so as to not impede the passage of navigation and access by boat on the Yukon and Kuskokwim Rivers," ANILCA § 303, 94 Stat. 2393.

These provisions again confirm that Section 103(c) does not divest the Park Service of authority to regulate conduct on navigable waters within the boundaries of the National Park System. Congress would not have barred the Secretary from impeding "passage of navigation and access by boat on the Yukon and Kuskowim Rivers" within the Yukon Delta Wildlife Refuge if the Secretary lacked authority to regulate conduct on navigable waters—because the Yukon and Koskowim Rivers within the Yukon Delta Wildlife Preserve are navigable. See, *e.g.*, *United States* v. *Wilde*, No. 10-cr-21, 2013 WL 6237704 (D. Alaska Dec. 3, 2013) (noting that Yukon River is navigable); Bureau of Land Management, *Final Summary Report: Federal Interest in Lands Underlying Kuskokwim River in the Kuskokwim Bay Subregion, Alaska.*[6] And statutory safeguards for motorboating and "valid commercial fishing

[6] https://www.blm.gov/sites/blm.gov/files/LandsRealty_Alaksa_RDI_KuskokwimRiver_FinalReport_05012013.pdf.

rights" likewise reflect an understanding that the Park Service would have regulatory authority over activities on navigable waters within the National Park System, because motorboating and commercial fishing are not activities that occur with any frequency on waters that are not navigable.

Petitioner's view of Section 103(c) as withdrawing Park Service authority over activities on navigable waters is equally undermined by the provision concerning ANILCA's "[e]ffect on existing rights; water resources," 16 U.S.C. 3207, that petitioner himself invokes (Br. 33). Section 3207 specifies that "[n]othing in [ANILCA] shall be construed as limiting or restricting the power and authority of the United States," and then provides —in a manner incompatible with petitioner's position— that "[n]othing in this Act shall be construed * * * as affecting in any way any law governing * * * use of * * * water on lands within the State of Alaska." Petitioner contradicts those instructions by construing Section 103(c) to affect—indeed, to withdraw entirely—the Secretary's preexisting authorities under the Organic Act, as amended by the 1976 Act, to regulate uses of water within the National Park System in Alaska, including in National Parks that predated ANILCA.

Petitioner disregards that portion of Section 3207, but invokes (Br. 33) the portion stating that nothing in ANILCA should be understood "as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control." 16 U.S.C. 3207(2). That provision does not bear on the Secretary's authority here, because rules concerning such matters as sanitation, pollution, and transportation on waters in the National Park System

do not deprive the State or federal government of "jurisdiction, responsibility, interests, or rights" in the "resources" contained within water. See *ibid.* (referring to "water resources" that can be "develop[ed]"); see also 16 U.S.C. 3207(3) (discussing "Federal agencies which are authorized to develop or participate in the development of water resources or to exercise licensing or regulatory functions in relation thereto"). Petitioner's invocation of Section 3207(2) appears to rest on a misreading of the provision (Br. 33) as discussing "water resources, development, or control" rather than "water resources development or control." 16 U.S.C. 3207(2). In any event, if regulation of boating and other activities *were* a matter of "water resources development or control," *ibid.*, interpreting Section 103(c) to rescind the Park Service's authority over those activities would "diminish[] Federal * * * jurisdiction, responsibility, interests, or rights" in those matters. *Ibid.*

More generally, petitioner's approach to Park Service authority is implausible. Petitioner appears to believe that Congress intended Section 103(c) to create a patchwork of jurisdiction, in which the Park Service would be free to regulate pursuant to its longstanding authorities on non-navigable stretches, but would be divested of its authorities where the waters become navigable—and perhaps only for limited stretches, if the waters then became non-navigable again. That approach, however, would often make the duties of Park Service rangers impossible. Determining navigability requires analysis of whether particular stretches of water could be used for trade and travel at the time of statehood. See *PPL Montana*, 565 U.S. at 600. For many waters, those determinations are difficult, and in Alaska, the remoteness of rivers and the fact that many

rivers debouch from glaciers and flow shallowly across the landscape for some distance can make navigability determinations even more piecemeal and complex. Thus, navigability determinations depend in many instances on information that "is both time consuming and expensive" to obtain, particularly in light of "Alaska's undeveloped and remote character"; require application of a navigability test that has been the subject of substantial disagreement when applied "to the specific uses of Alaska's lakes and streams"; and yield an answer that is "always subject to legal challenge." Alaska Dep't of Natural Res., Mining, Land & Water, *State Policy on Navigability*, http://dnr.alaska.gov/mlw/nav/policy. It is improbable that Congress intended to make the ability of Park Service rangers to enforce rules within the National Park System turn on such costly and uncertain determinations.

2. Neither petitioner nor Alaska persuasively accounts for these provisions

Neither petitioner nor amicus Alaska persuasively reconciles their interpretations of Section 103(c) with these numerous surrounding statutory provisions. Petitioner acknowledges (Br. 34 & n.4) that the application on navigable waters of the subsistence-use priority limited to public lands has a "foothold in the statute" (citation omitted). But he fails to explain how "public lands" could have a different meaning in the subsistence-use provision than it does elsewhere in ANILCA.[7]

---

[7] Petitioner briefly suggests (Br. 34) that the subsistence-use provisions aid his argument because ANILCA specifies that "[n]othing in [ANILCA] is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands" except as is provided in the subsistence-use provisions. 16 U.S.C. 3202(a). But in declining to rescind the

Beyond this, petitioner addresses the subsistence-use priority, the statutory statements of purpose, and the other provisions premised on Park Service authority over navigable waters only by invoking (Br. 29) the principle that "Congress did not intend to pursue conservation at all costs." That observation does not aid petitioner. ANILCA does demonstrate a commitment to balancing conservation goals against other aims, including through Alaska-specific safeguards for private and commercial activity that the Park Service might otherwise have prohibited for conservation reasons. See 136 S. Ct. at 1071 (discussing protections for motorboating, commercial fishing, and other examples); pp. 43-45, *supra*. But ANILCA's statements of purpose, subsistence-use priority, and limited protections for activities such as commercial fishing and motorboating all demonstrate that Congress struck a balance between conservation and other goals under which the Park Service generally retained authority to regulate conduct on navigable waters.

Alaska does not address most of the water-related provisions discussed above, but it acknowledges (Br. 29-35) that the subsistence-use priority on "public lands" within CSUs must be applied on navigable waters in light of the provisions explaining the priority's intended operation. Br. 31-32. It agrees that "this Court should preserve the *Katie John* precedents" holding as much. Br. 31. Alaska nevertheless posits that this Court could interpret ANILCA as rescinding within

---

Park Service's preexisting authority to regulate boating and other activities on or relating to navigable waters within National Parks in Alaska, ANILCA did not "diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on public lands." *Ibid.*

Alaska the Park Service's authority to regulate conduct on navigable waters within the National Park System by giving "public lands" one meaning in the context of the subsistence-use-related sections of ANILCA and a different meaning in the context of Section 103(c).

ANILCA, however, forecloses that course: the statute contains a definitional section that sets out the meaning of "public lands" throughout ANILCA. 16 U.S.C. 3102(1)-(3) (defining "public lands," in relevant part, as "lands, waters, and interests therein," "the title to which is in the United States"). Accordingly, this Court held in *Village of Gambell* that "the same definition of 'public lands' which defines the scope of Title VIII"—ANILCA's subsistence-use provisions—"applies as well to the rest of the statute," except where the definitional provision itself provides to the contrary. 480 U.S. at 550-551. That holding reflects the principle that "[w]hen a statute includes an explicit definition, [the Court] must follow that definition." *Digital Realty Trust, Inc.* v. *Somers*, 138 S. Ct. 767, 776-777 (2018) (citation omitted). And it reflects that a statute "[l]eav[es] no doubt as to [a] definition's reach" when it contains a directive concerning the provisions as to which a definition applies, as ANILCA does. *Id.* at 777; see 16 U.S.C. 3102 (specifying that definitions of specified terms, including "[t]he term 'public lands,'" apply "[a]s used in this Act (except that in titles IX and XIV, the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act and the Alaska Statehood Act)") (citation omitted).

Alaska invokes (Br. 33-34) *Utilities Air Regulatory Group* v. *EPA*, 134 S. Ct. 2427 (2014), which found a statutory definition did not govern certain provisions

when it was "plain as day" that the term carried a narrower meaning in those provisions and that application of the statutory definition would be "incompatible" with the statute's "regulatory structure." *Id.* at 2240, 2242. But *Village of Gambell* rejected that approach to ANILCA's definition of "public lands" for good reason: the circumstances in which "a defined meaning can be replaced with another permissible meaning of [a] word on the basis of other textual indications" are "very rare"; "the definition is virtually conclusive." Scalia & Garner 228. Here, there are no compelling indicators that "public lands" is used differently in different provisions of ANILCA. On the contrary, as discussed above, multiple provisions of ANILCA—not just the subsistence-use provision—indicate that the government's interest in navigable waters was understood to permit regulation of those waters as "public lands."

D. The Placement And History Of Section 103(c) Confirm That The Provision Does Not Rescind Park Service Authorities Over Navigable Waters

1. The placement of Section 103(c) provides additional evidence that it is not to be read as the sweeping withdrawal of the Park Service's authority that petitioner claims. Rather than placing Section 103(c) in one of the ANILCA provisions setting forth or limiting the Secretary's substantive authority, Congress placed it in a section entitled "Maps." 16 U.S.C. 3103. That section is principally focused on the availability of physical maps. Its provisions require the Secretary to place maps "on file and available for public inspection," 16 U.S.C. 3103(a), to arrange for maps and descriptions to be placed on file with Congress and published in the Federal Register, and to address "minor" adjustments of boundary lines, 16 U.S.C. 3103(b). Congress does not "hide elephants

in mouseholes." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Accordingly, Congress's placement of Section 103(c) as a third subsection in the Maps' section of ANILCA reinforces that Section 103(c) should not be read as an implicit revocation of the Park Service's longstanding authority to regulate activities on navigable waters within the boundaries of the National Park System.

2. The manner in which Congress added Section 103(c) to ANILCA reinforces that conclusion. When ANILCA was initially passed by the Senate and House of Representatives, it left the Park Service's authority over navigable waters in place, expressly directing the Secretary to "administer the lands, waters, and interests" within new CSUs "as new areas of the National Park System" under the provisions of the Organic Act which includes the 1976 Act. See 16 U.S.C. 410hh-2. Congress then added Section 103(c) to ANILCA as part of a concurrent resolution, the text of which explained that it contained only "corrections." H.R. Con. Res. 452, 96th Cong., 2d Sess. (1980) (94 Stat. 3688). A "correction[]" would not be an apt description of a significant withdrawal of Park Service authorities. And it is improbable that a Congress seeking to protect waters, rivers, and fish in new and expanded National Parks would have voted to rescind Park Service authority to regulate activities on navigable waters by a unanimous vote of both Houses.

3. The legislative record supplies still further evidence that Section 103(c) was not designed to make any broad change in the Park Service's authority over navigable waters. In offering the concurrent resolution that added Section 103(c) to ANILCA, the sponsor in the House of Representatives emphasized that no portion

of the resolution would "change any of the major features of the Alaska National Interest Lands Conservation Act" or "have the effect of altering provisions related to conservation areas." 126 Cong. Rec. at 30,498 (statement of Rep. Udall). And in both the House and the Senate, Section 103(c) was labeled a "minor revision[]" —a label plainly inapplicable to an amendment that would rescind or revise longstanding authority to regulate navigable waters throughout National Parks System Units in the State of Alaska. *Ibid.*; see 126 Cong. Rec. 31,108 (1980); see also 125 Cong. Rec. 11,156 (1979) (statement of Rep. Seiberling) (describing amendment to add text of Section 103(c) to bill as "technical," "noncontroversial," and not a "substantive amendment[]").

Petitioner plumbs the legislative record (Br. 7-10) for statements in which Members of Congress noted ANILCA's distinction between "public lands" and "State, native, or private land." But petitioner identifies no occasion at any point when any Member of Congress suggested that rivers, lakes, and other navigable waters that ANILCA sought to protect through the creation and expansion of CSUs would be excluded from Park Service regulation. To the contrary, Members repeatedly indicated that they understood that ANILCA would enable federal park managers to safeguard the rivers placed within park units, as the statute itself makes clear. See, *e.g.*, H.R. Rep. No. 97, 96th Cong., 1st Sess. Pt. 1, at 457 (1979); 125 Cong. Rec. 14,673 (1978) (Rep. Kostmayer); 125 Cong. Rec. 11,178 (1979) (Rep. Bereuter).

E. Petitioner Errs In Urging A Clear-Statement Rule As A Basis For Rescinding The Park Service's Authorities Over Navigable Waters

Petitioner urges (Br. 31-32) that the Court should reject application of Park Service rules to navigable waters in Alaska based on a clear-statement rule. He invokes the principle that a clear statement is required when a statute "alter[s] the 'usual constitutional balance between the States and the Federal Government.'" Br. 32 (quoting *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991)).

That argument lacks merit. In the first place, the 1976 Act and ANILCA make abundantly clear in numerous provisions that the Park Service's authority applies to navigable waters in the National Park System. Under the 1976 Act, there is no dispute that the Park Service may generally regulate such matters as sanitation, pollution, and watercraft use on navigable waters within the National Park System. In arguing that ANILCA Section 103(c) withdrew the authority that the 1976 Act supplies, within the State of Alaska, it is petitioner who seeks to alter a federal-state balance Congress has clearly established. Moreover, for the reasons described above, ANILCA itself also makes clear that the Park Service retains its 1976 Act authorities over navigable waters within the National Park System.

In any event, there is no basis for a clear-statement rule in the context of federal regulation of navigable waters. Since the Founding Era, the "usual constitutional balance" concerning navigable waters has been one of joint federal and state control, Pet. Br. 32 (citation omitted). As a general matter, each State holds "title within its borders to the beds of waters [that were] navigable"

at the time of statehood, but its authority to govern activities on navigable waters is "subject * * * to 'the paramount power of the United States to control such waters'" under the dominant federal navigational servitude. *PPL Montana*, 565 U.S. at 591 (citation omitted); see *United States* v. *Rands*, 389 U.S. 121, 127 (1967) (argument that federal regulation of activity on navigable waters "subverts the policy of the Submerged Lands Act" is "misplaced," because that act "expressly recognized that the United States retained 'all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership'") (citation omitted); see also *Alaska* v. *United States*, 545 U.S. 75, 116-117 (2005) (Scalia, J., concurring in part and dissenting in part) ("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."). This "paramount" power applies to regulation of navigable waters "irrespective of whether navigation" itself "is involved." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 173-174 (1979).

Petitioner points to no case in which this Court has required a "clear statement" to uphold a federal statute exercising this traditional power to regulate conduct on navigable waters. Petitioner invokes (Br. 32) *Solid Waste Agency* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), and *Rapanos* v.

United States, 547 U.S. 715 (2006). But those cases applied a clear-statement rule in determining how far the Clean Water Act extends *beyond* traditional navigable waters. While the Clean Water Act states that it applies on "navigable waters," "the meaning of 'navigable waters' in the [Clean Water] Act is broader than the traditional understanding of the term." *Rapanos*, 547 U.S. at 731 (plurality opinion) (citation omitted); see, *e.g.*, *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). *SWANCC* and *Rapanos* addressed how far beyond traditional navigable waters the statute extended, with each case rejecting extensions to particular non-navigable waters. *SWANCC*, 531 U.S. at 162, 171 (addressing "nonnavigable" intrastate waters used as migratory bird habitats); *Rapanos*, 547 U.S. at 735 (plurality opinion) (agreeing that Clean Water Act jurisdiction extends beyond traditional navigable waters, but stating that the Court need not decide how far because "typically dry channels" receiving intermittent flows of water are not covered). And a clear-statement rule would be especially inappropriate in the context of waters within the National Park System—where the federal government has interests as a property-holder in addition to as a sovereign.

F. The Secretary's Interpretation Would Warrant *Chevron* Deference If There Were Ambiguity In The Statutory Scheme

The text and structure of the 1976 Act and of Section 103(c) clearly establish that Section 103(c) does not rescind the Park Service's authority to regulate conduct on navigable waters within CSUs. But if ambiguity existed, the Secretary's formal rulemaking would settle the matter. The Secretary is entitled to deference concerning reasonable interpretations of ANILCA and the

1976 Act. See *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 666 (2007).

Here, the Secretary has issued regulations through notice-and-comment procedures that make Park Service rules applicable on navigable waters within the boundaries of the National Park System, including within Alaska. 36 C.F.R. 1.2(a)(3); see 61 Fed. Reg. at 35,136. In doing so, the Secretary considered and rejected the argument that Section 103(c) "should be interpreted as superseding NPS authority" under the 1976 Act to "promulgate and enforce regulations concerning boating and related activities * * * on navigable waters within park boundaries." 61 Fed. Reg. at 35,135. The Secretary determined that Section 103(c) did not "preempt[] NPS's well-established authority on navigable waters," emphasizing that ANILCA "charged NPS to protect populations of fish and wildlife and habitat that necessarily includes the great river systems running through and within the parks (ANILCA Title II)." *Ibid.* The Secretary rejected petitioner's interpretation of Section 103(c), "which was characterized by Congress as a minor or technical provision," after reading Section 103(c) in "the context of the whole act." *Ibid.*

The Secretary has also rejected petitioner's arguments regarding Section 103(c) in other notice-and-comment regulations. First, the Secretary has determined that Section 103(c) does not bar application on non-public lands of the narrow class of regulations validly written to apply to both public and non-public lands within the National Park System. 59 Fed. Reg. at 65,950. The Secretary has explained that such regulations are not rules that apply "solely to public lands within" the parks. *Ibid.* (quoting 16 U.S.C. 3103(c)). Moreover the Secretary explained, while non-public

lands are not "'a portion of' the [conservation system] unit," such lands are still "'within' [the] unit." 59 Fed. Reg. at 65,950. See pp. 26-29, *supra* (explaining that Section 103(c) is not relevant to 1976 Act authority for this reason). In addition, as noted above, in implementing ANILCA's subsistence-use priority, the Secretary adopted regulations, subsequently ratified by Congress, reflecting the reasonable conclusion that "public lands" include navigable waters within the National Park System in Alaska, by virtue of federal reserved water rights. 64 Fed. Reg. at 1276; see pp. 32-37, *supra* (explaining that the federal interest in navigable waters supports regulation of those waters as "public lands" for this reason). At minimum, these conclusions are reasonable and entitled to deference.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JEFFREY H. WOOD
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
RACHEL P. KOVNER
Assistant to the Solicitor General
ANDREW C. MERGEN
ELIZABETH ANN PETERSON
Attorneys

SEPTEMBER 2018

APPENDIX

1. 16 U.S.C. 3101 provides:

Congressional statement of purpose

(a) Establishment of units

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 that contain nationally significant natural, scenic, historic, archeological, geological, scientific, wilderness, cultural, recreational, and wildlife values, the units described in the following titles are hereby established.

(b) Preservation and protection of scenic, geological, etc., values

It is the intent of Congress in this Act to preserve unrivaled scenic and geological values associated with natural landscapes; to provide for the maintenance of sound populations of, and habitat for, wildlife species of inestimable value to the citizens of Alaska and the Nation, including those species dependent on vast relatively undeveloped areas; to preserve in their natural state extensive unaltered arctic tundra, boreal forest, and coastal rainforest ecosystems; to protect the resources related to subsistence needs; to protect and preserve historic and archeological sites, rivers, and lands, and to preserve wilderness resource values and related recreational opportunities including but not limited to hiking, canoeing, fishing, and sport hunting, within large arctic and subarctic wildlands and on free-

flowing rivers; and to maintain opportunities for scientific research and undisturbed ecosystems.

(c) Subsistence way of life for rural residents

It is further the intent and purpose of this Act consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for which each conservation system unit is established, designated, or expanded by or pursuant to this Act, to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.

(d) Need for future legislation obviated

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 conservation 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.

2. 16 U.S.C. 3102 provides in pertinent part:

Definitions

As used in this Act (except that in titles IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.], and the Alaska Statehood Act)—

(1) The term "land" means lands, waters, and interests therein.

(2) The term "Federal land" means lands the title to which is in the United States after December 2, 1980.

(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)].

(4) The term "conservation system unit" means any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers Systems, National Trails System, National Wilderness Preservation System, or a National Forest Monument including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated, or expanded hereafter.

* * * * *

3. 16 U.S.C. 3103 provides:

Maps

(a) Filing and availability for inspection; discrepancies; coastal areas

The boundary maps described in this Act shall be on file and available for public inspection in the office of the Secretary or the Secretary of Agriculture with regard to the National Forest System. In the event of discrepancies between the acreages specified in this Act and those depicted on such maps, the maps shall be controlling, but the boundaries of areas added to the National Park, Wildlife Refuge and National Forest Systems shall, in coastal areas not extend seaward be-

yond the mean high tide line to include lands owned by the State of Alaska unless the State shall have concurred in such boundary extension and such extension is accomplished under the notice and reporting requirements of this Act.

(b) Changes in land management status; publication in Federal Register; filing; clerical errors; boundary features and adjustments

As soon as practicable after December 2, 1980, a map and legal description of each change in land management status effected by this Act, including the National Wilderness Preservation System, shall be published in the Federal Register and filed with the Speaker of the House of Representatives and the President of the Senate, and each such description shall have the same force and effect as if included in this Act: *Provided, however*, That correction of clerical and typographical errors in each such legal description and map may be made. Each such map and legal description shall be on file and available for public inspection in the office of the Secretary. Whenever possible boundaries shall follow hydrographic divides or embrace other topographic or natural features. Following reasonable notice in writing to the Congress of his intention to do so the Secretary and the Secretary of Agriculture may make minor adjustments in the boundaries of the areas added to or established by this Act as units of National Park, Wildlife Refuge, Wild and Scenic Rivers, National Wilderness Preservation, and National Forest Systems and as national conservation areas and national

recreation areas. For the purposes of this subsection, a minor boundary adjustment shall not increase or decrease the amount of land within any such area by more than 23,000 acres.

(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.

4. 16 U.S.C. 3191(b) provides in pertinent part:

Management plans

(b) National Park service plan requirements

Each plan for a unit established, redesignated, or expanded by subchapter LIX-F of chapter 1 of this title shall identify management practices which will carry out the policies of this Act and will accomplish the purposes for which the concerned National Park System

unit was established or expanded and shall include at least the following:

* * * * *

(7) A description (A) of privately owned areas, if any, which are within such unit, (B) of activities carried out in, or proposed for, such areas, (C) of the present and potential effects of such activities on such unit, (D) of the purposes for which such areas are used, and (E) of methods (such as cooperative agreements and issuance or enforcement of regulations) of controlling the use of such activities to carry out the policies of this Act and the purposes for which such unit is established or expanded.

* * * * *

5. 54 U.S.C. 100101 (Supp. IV 2016) provides in pertinent part:

Promotion and regulation

(a) IN GENERAL.—The Secretary, acting through the Director of the National Park Service, shall promote and regulate the use of the National Park System by means and measures that conform to the fundamental purpose of the System units, which purpose is to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will

leave them unimpaired for the enjoyment of future generations.

* * * * *

6. 54 U.S.C. 100751 (Supp. IV 2016) provides in pertinent part:

Regulations

(a) IN GENERAL.—The Secretary shall prescribe such regulations as the Secretary considers necessary or proper for the use and management of System units.

(b) BOATING AND OTHER ACTIVITIES ON OR RELATING TO WATER.—The Secretary, under such terms and conditions as the Secretary considers advisable, may prescribe regulations under subsection (a) concerning boating and other activities on or relating to water located within System units, including water subject to the jurisdiction of the United States. Any regulation under this subsection shall be complementary to, and not in derogation of, the authority of the Coast Guard to regulate the use of water subject to the jurisdiction of the United States;

* * * * *

7. 16 U.S.C. 410hh provides in pertinent part:

Establishment of new areas

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:

* * * * *

(10) Yukon-Charley Rivers National Preserve, containing approximately one million seven hundred and thirteen thousand acres of public lands, as generally depicted on map numbered YUCH–90,008, and dated October 1978. 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, including but not limited to the peregrine falcons and other raptorial birds, caribou, moose, Dall sheep, grizzly bears, and wolves; and in a manner consistent with the foregoing, to protect and interpret historical sites and events associated with the gold rush on the Yukon River and the geological and paleontological history and cultural prehistory of the area. Except at such times when and locations where to do so would be inconsistent with the purposes of the preserve, the Secretary shall permit

aircraft to continue to land at sites in the Upper Charley River watershed.

8. 36 C.F.R. 1.2 provides in pertinent part:

Applicability and scope

(a) The regulations contained in this chapter apply to all persons entering, using, visiting, or otherwise within:

(1) The boundaries of federally owned lands and waters administered by the National Park Service;

(2) The boundaries of lands and waters administered by the National Park Service for public-use purposes pursuant to the terms of a written instrument;

(3) Waters subject to the jurisdiction of the United States located within the boundaries of the National Park System, including navigable waters and areas within their ordinary reach (up to the mean high water line in places subject to the ebb and flow of the tide and up to the ordinary high water mark in other places) and without regard to the ownership of submerged lands, tidelands, or lowlands;

(4) Lands and waters in the environs of the District of Columbia, policed with the approval or concurrence of the head of the agency having jurisdiction or control over such reservations, pursuant to the provisions of the Act of March 17, 1948 (62 Stat. 81);

(5) Other lands and waters over which the United States holds a less-than-fee interest, to the extent necessary to fulfill the purpose of the National Park Service administered interest and compatible with the nonfederal interest.

(b) The regulations contained in parts 1 through 5, part 7, and part 13 of this chapter do not apply on nonfederally owned lands and waters or on Indian tribal trust lands located within National Park System boundaries, except as provided in paragraph (a) or in regulations specifically written to be applicable on such lands and waters.

(c) The regulations contained in part 7 and part 13 of this chapter are special regulations prescribed for specific park areas. Those regulations may amend, modify, relax or make more stringent the regulations contained in parts 1 through 5 and part 12 of this chapter.

* * * * *

9. 36 C.F.R. 2.17 provides in pertinent part:

Aircraft and air delivery.

* * * * *

(e) The operation or use of hovercraft is prohibited.

* * * * *