No. 22-401

In the Supreme Court of the United States

STATE OF ALASKA,
Petitioner,

v.

DEB HAALAND, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE INTERIOR, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

AMICUS CURIAE BRIEF OF ALASKA PROFESSIONAL HUNTERS ASSOCIATION, ALASKA OUTDOOR COUNCIL, AND SPORTSMEN'S ALLIANCE FOUNDATION IN SUPPORT OF PETITIONER

James H. Lister
Counsel of Record
George R. Pitts
Brian V. Gerd
BIRCH HORTON BITTNER & CHEROT, P.C.
1100 Connecticut Ave., NW, Suite 825
Washington, D.C. 20036
(202) 659-5800
jlister@dc.bhb.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Congressional Record and Reports

Other Authorities

INTERESTS OF AMICUS CURIAE

Amici Alaska Professional Hunters Association ("APHA"), Alaska Outdoor Council ("AOC"), and Sportsmen's Alliance Foundation ("SAF") are non-profit corporations that support the sustainable management of Alaska's wildlife and promote responsible recreational hunting and fishing opportunities on public lands. APHA's members are Alaska's hunting guides, who work extensively on federal public lands, including the National Wildlife Refuges in Alaska directly at issue in this case. AOC's members include Alaskans that regularly hunt and fish on refuges in Alaska. SAF is a national organization whose members hunt and fish across the United States, including on refuges in Alaska and other States. Amici have long participated and continue to engage in public rulemakings and litigation governing Alaska's hunting regulations and hunting on National Wildlife Refuges in Alaska and (for SAF) in other States.[1]

Through their knowledge and significant experience these amici are well-positioned to aid the court in the discussion of statutes governing the management of wildlife on public lands in Alaska and the significant impact of changes to wildlife

---

[1] All parties received notice of this amicus brief as required by Rule 37.2 and provided written consent to this brief's filing. No counsel for a party authored this brief in whole or in part, and no person or entity other than amici and their counsel made a monetary contribution to its preparation or submission.

management (such as the changes resulting from the Federal Defendants' adoption of rules at issue preempting state hunting rules on a refuge). APHA and SAF are also parties to related litigation over whether State hunting regulations should be preempted as to another type of federal land unit in Alaska, National Preserves.[2]

SUMMARY OF ARGUMENT

In this case, the Ninth Circuit's conclusions are undermined by its hasty and incorrect reading of § 6(e) of the Alaska Statehood Act. Pub. L. 85-508. In its reading, the Ninth Circuit assumed wrongly that the transition of wildlife management responsibilities from the Federal Government to the State, which occurred on January 1, 1960 after the Secretary of the Interior certified Alaska as ready to assume that responsibility, was subject to a non-existent exception, found nowhere in the Statehood Act, for fish and wildlife found on refuges. The court incorrectly conflated two provisos in § 6(e), finding that an exception from the transfer of title of certain lands also applied to the State's assumption of wildlife management authority, when no basis existed for that conclusion.

Section 6(e) of the Alaska Statehood Act contains three pertinent provisions: (1) a principal clause that "transfer[s]" to the State ownership of Federal Government property used in the

[2] See n. 22 below.

conservation of fish and wildlife, (2) a wildlife management proviso, which provides that the State will assume responsibility to manage "the fish and wildlife resources of Alaska" only after the Secretary of the Interior certified the new State as ready to take on that responsibility, and (3) a title transfer proviso which declares that "such transfer," i.e. the transfer of title to fish and wildlife lands directed in the principal clause, does not include lands "withdrawn or otherwise set apart as refuges ….." Pub. L. 85-508 § 6(e).

The title transfer proviso in § 6(e) that the Ninth Circuit relied on stands only for the uncontroversial proposition that the Federal Government retained title to lands designated as "refuges" at the time of Statehood. The Ninth Circuit, however, improperly inferred that because the Federal Government retained title to refuges following Statehood, as it did for most of the land in Alaska, the State never assumed management of fish and wildlife found on refuges. This interpretation misreads the title transfer proviso by expansively reading the words "such transfer" as referring to and modifying the State's assumption of management responsibility in the wildlife management proviso, rather than solely referring to and modifying the "transfer[]" of title to conservation lands directed by the principal clause of § 6(e):

> It is true that the Alaska Statehood Act transferred administration of wildlife from Congress to the State. Pub. L. No. 85-508 § 6(e). But this "transfer [did] not

> include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife" like the Kenai Refuge, which remain under federal control. *Id.*

Opinion, 9th Cir. No. 21-35030, Apr. 18, 2022 (reprinted at Pet. Appx. 16, "Pet.App.")

Because it rejected the State's argument that the Statehood Act provided Alaska with management responsibility for the fish and wildlife present on refuges, the Ninth Circuit accordingly rejected the State's key argument that the 1980 Alaska National Interest Lands Conservation Act ("ANILCA") in 16 U.S.C. § 3202(a) reaffirmed and continued the State's fish and wildlife management role conferred by the Statehood Act. Pet.App.16-17. This led the Ninth Circuit to conclude that ANILCA furnished U.S. Fish & Wildlife ("FWS") with "plenary" authority to adopt "any regulations" regarding hunting on refuges deemed appropriate by FWS. *Id.* (citing 16 U.S.C. § 3202(c)).

The Ninth Circuit's expansive interpretation of § 6(e) was not requested by the Federal Defendants, but rather by private Respondent Defendant-Intervenors.[3] Indeed, the conclusion that the federal agency's authority is "plenary" runs contrary to the statutory provisions reviewed below and binding policy of the Department of the Interior ("DOI") under

[3] Ninth Circuit brief of Alaska Wildlife Alliance, et al, pp. 23-25 (ECF Doc. 47, Case No. 21-35030).

which state law controls hunting on DOI units, including refuges, "in the absence of specific, overriding federal law." 43 C.F.R. 24.1(a).

As demonstrated below, once the erroneous reading of § 6(e) is corrected, it follows that FWS possesses constrained non-plenary authority allowing it to regulate hunting only in specific situations set forth in statute, principally in ANILCA and the National Wildlife Refuge System Improvement Act, 16 U.S.C. § 668dd and 668ee ("NWRSIA"). FWS can preempt State hunting regulations only when acting within that specific authority. General authority to manage the fish and wildlife resources of Alaska rests with the State under § 6(e) of the Statehood Act.

The Court should therefore (1) grant certiorari, (2) reverse the Ninth Circuit's erroneous holding that the title transfer proviso in § 6(e) of the Statehood Act exempted fish and wildlife found on refuges from the State's assumption of management authority over Alaska's fish and wildlife pursuant to the wildlife management proviso in § 6(e), (3) reverse the closely related and erroneous conclusion that FWS has "plenary" authority to regulate methods, means, and seasons of hunting on refuges, and (4) having corrected that incorrect starting point that colored and undermined the Ninth Circuit's analysis, decide for itself or remand to the Ninth Circuit the issue of whether the specific and limited regulatory authorities Congress did grant to FWS in ANILCA and NWRSIA support the challenged federal regulations preempting State hunting law.

I. BACKGROUND AND OVERVIEW

DOI certified Alaska as able to provide for the administration, management, and conservation of its fish and wildlife resources effective January 1, 1960, triggering the State's assumption of authority to manage and administer its wildlife pursuant to Statehood Act § 6(e).[4] DOI recognizes that "[i]n general the States possess broad trustee and police powers over fish and wildlife within their borders, including fish and wildlife found on Federal lands within a State." 43 C.F.R. 24.3. Congress further acknowledges that lands within the National Wildlife Refuge System are to be managed consistently with State fish and wildlife laws and regulations "to the extent practicable." 16 U.S.C. § 668dd(m).

This matter involves questions arising from a dispute between the State and FWS regarding the hunting of wildlife on the Kenai National Wildlife Refuge, which occupies approximately 1.9 million acres in south central Alaska. In 2013, Alaska concluded increased brown bear population levels allowed for expanded hunting opportunities for Kenai brown bears, including hunting bears with the use of bait. FWS disagreed and in 2016 published a final rule codifying a ban on hunting brown bears over bait in the Kenai Refuge, and also preempting various other state hunting rules. 81 Fed. Reg. 27,030 (May

---

[4] 105 Cong. Rec. S6874 (April 25, 1959). Available at: https://www.congress.gov/bound-congressional-record/1959/04/28/senate-section

5, 2016). Multiple other States allow use of bait, including on federal lands.[5] The State filed suit challenging this rule, which the courts below affirmed in relevant respects.

II. ARGUMENT

A. Section 6(e) of the Alaska Statehood Act does not Create an Exception Excluding Fish and Wildlife Found on "Refuges" from the State's Assumption of Responsibility to Manage the Fish and Wildlife of Alaska.

The Statehood Act's language does not support the Ninth Circuit's conclusion (printed at Pet.App.16) that Congress created an exception excluding refuge lands from the State's assumption of authority to administer and manage Alaska's wildlife. Instead, the text of § 6(e) of the Statehood Act demonstrates that its title transfer proviso directly refers to and modifies its principal clause transferring title to land, not the wildlife management proviso under which the State manages the fish and wildlife resources of Alaska.[6] Section 6(e) provides:

---

[5] 60 Fed. Reg. 14,720, 14,722 (March 20, 1995) (declining to preempt state laws allowing use of bait in hunting bears and other animals on National Forests: there "is no evidence that baiting increases human-wildlife conflicts" as a general matter); 59 Fed. Reg. 17,758 (April 14, 1994) (eleven States allow use of bait in National Forests); 85 Fed. Reg. 35,181, 35,185 (June 9, 2020) (baiting allowed on four national parks located in other States).

[6] The State noted the Ninth Circuit's incorrect reading of § 6(e) in its Petition at pages 20-21, n. 7.

Sec. 6 …
(e) All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska, under the provisions of the Alaska game law of July 1, 1943 … and under the provisions of the Alaska commercial fisheries laws … ***shall be transferred and conveyed to the State of Alaska*** by the appropriate Federal agency:

Provided, That administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until … the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest:

Provided, That ***such transfer shall not include lands withdrawn or otherwise set apart as refuges or*** reservations for the protection of wildlife ***nor facilities*** utilized in connection therewith; or in connection with general research activities relating to fisheries or wildlife. ….

Pub. L. No. 85-508 § 6(e) (emphasis and spacing between clauses added). Although the title transfer proviso directly follows the wildlife management proviso, there is no grammatical or subject matter connection between the two clauses. Instead, the reference to "such transfer" in the title transfer proviso refers back to the "shall be transferred" language in the principal title transfer provision. Multiple other textual and statutory construction considerations rebut the Ninth Circuit's reading.

First, the wildlife management proviso refers to the "fish and wildlife resources ***of Alaska,"*** i.e. all of Alaska, which necessarily includes fish and wildlife found on federal lands and waters. Pub. L. No. 85-508, § 6(e) (emphasis added). Thus, the State's assumption of wildlife management responsibility, following DOI's certification that the State was ready for that task, was not limited to fish and wildlife on the minority of Alaska's land mass that would be in state or private ownership following Statehood. Congress knew when it debated the Statehood Act that the majority of the land of Alaska would remain federally-owned.[7] The percentage of federal ownership remained extremely high (perhaps 90%) until the 1970s.[8] Further, the wildlife management proviso refers to "management and administration of the fish and wildlife ***resources***" and does not refer to

---

[7] 104 Cong. Rec. H.R.9219 (May 21, 1958). Available at: https://www.congress.gov/bound-congressional-record/1958/05/21/house-section

[8] *See* H.R. Rep. No. 96-97, pt. 1, at 135 (April, 1979).

or draw distinctions based on land categories. § 6(e) (emphasis added).

Second, one cannot presume that Congress intended general regulatory responsibility to manage fish and wildlife on public lands to be placed in the same governmental entity that holds title to the land.[9] As the State explains, 16 U.S.C. § 3202(a) and (b), enacted 22 years after Statehood, provides that ANILCA does not increase or diminish the State's responsibility to manage the fish and wildlife present on federal lands including refuges, and also does not increase or diminish the Federal Government's responsibility to manage the land itself.[10] This draws

---

[9] Acquisition of ownership of land does not, *eo ipso*, convey any "ownership" in wildlife that may happen to be present on that land at any time: "… animals within a state… at the time, beyond the reach or control of man, so that they cannot be subjected to his use or that of the state in any respect … are not the property of the state or of any one in the proper sense." *Geer v. Connecticut*, 161 U.S. 519, 539 (1896) (Field, J., dissenting); see also, *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (discussion of modern acceptance of the view of the dissenters in *Geer*). The responsibility and authority to manage fish and wildlife is a regulatory matter governed by statute.

[10] (a) Nothing in this Act 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 may be provided in [the subsistence provisions of ANILCA] or to amend the Alaska constitution.

(b) Except as specifically provided otherwise by this Act, nothing in this Act is intended to enlarge or diminish the responsibility and authority of the Secretary [of the Interior] over the management of the public lands.

an explicit distinction between management of wildlife and management of the land on which that wildlife is found. ANILCA also directs that "officers of the State" be allowed onto refuges by agreement "for purposes of conserving fish and wildlife." Pub. L. No. 96-487, § 304(f)(2)(B). Conversely, the wildlife management proviso in § 6(e) provided for the Federal Government to manage all of Alaska's fish and wildlife, including fish and wildlife present on state lands, during the short transition in 1958 and 1959 before the State was ready to take on that task.[11]

Third, the title transfer proviso never discusses the general administration or management of fish or wildlife, which strongly suggests it does not address that topic. Pub. L. No. 85-508 § 6(e). The title transfer proviso mentions fish and wildlife only to identify what lands qualify as "refuges" and to identify federal properties on which wildlife "research" activities were occurring. *Id*. There is no reference in the title transfer proviso to general fish and wildlife management tasks such as the administration of fishing and hunting, or to the process set forth in the adjoining wildlife management proviso by which DOI would certify the State's readiness to manage the fish and wildlife

16 U.S.C. § 3202(a) and (b). "Public lands" are generally defined to be "federal lands" and include refuges. 16 U.S.C. § 3102(3).

[11] The D.C. Circuit held at the time that the wildlife management proviso "makes [DOI] a 'trustee' for both the federal government and the new state 'in the broad national interest' during the transition of administration from the federal to the state authorities." *Ketchikan Packing Co. v. Seaton*, 267 F.2d 660, 663 (D.C. Cir. 1959).

resources of Alaska. Had Congress intended to postpone for a longer period of time or forever the State's assumption of management responsibilities as to fish and wildlife found on refuges, Congress could easily have done so by utilizing the title transfer proviso to explicitly modify the adjoining wildlife management proviso.

Fourth, provisos are construed narrowly rather than expansively. *See Knight v. C.I.R.,* 552 U.S. 181, 190-91 (2008). The title transfer proviso should not be read expansively to carve an unwritten exception to the wildlife management proviso. *Sutherland, Statutory Construction*, § 20:22 (7th ed.) ("In interpreting a proviso, if the restrictive scope of the proviso is in doubt, the proviso is strictly construed, and only those subjects expressly restricted are freed from the operation of the statute.") The narrow construction rule applies with particular force here because a primary purpose of the Statehood Act was to allow Alaskans more control over their natural resources.[12] This again weighs against broadly reading the title transfer proviso as implicitly and substantially limiting the State's assumption of fish and wildlife management responsibilities under the wildlife management proviso.

Fifth, provisos are usually construed to modify the "principal clause" to which they relate, which here is the opening sentence of § 6(e) transferring title to

---

[12] *See Sturgeon v. Frost*, 139 S.Ct. 1066, 1074 (2019) (collecting authorities); 104 Cong. Rec. H.R.9340, 9360 (May 22, 1958). Available at: https://www.congress.gov/bound-congressional-record/1958/05/22/house-section

conservation land, not other provisos. *See Republic of Iraq v. Beatty*, 556 U.S. 848, 857-58 (2009); *Quackenbush v. United States*, 177 U.S. 20, 26 (1900) (Provisos commonly "limit, restrain, or otherwise modify the language of the enacting clause."). As the title transfer proviso does, a proviso sometimes goes further "to state a general independent rule …" relating in some way to the principal clause. *Alaska v. United States*, 545 U.S. 75, 106 (2005).[13] But there is no reason to presume that one proviso modifies another proviso. As was the case with § 6(e), provisos are commonly added for different purposes at different points in the legislative process.

Finally, to the extent there is any ambiguity in the text of § 6(e), the legislative history fully confirms the textual analysis above. Until the late insertion of the wildlife management proviso by amendment in the final debates on the House floor, the title transfer proviso was the first proviso in § 6(e) and immediately followed the principal clause transferring title to conservation lands.[14] This further demonstrates that "such transfer" in the title transfer proviso is an explicit reference to "shall be transferred" in the principal clause of § 6(e), and not an implicit reference to the later-added wildlife management proviso.

---

[13] In *Alaska v. United States*, this Court construed the title transfer proviso as going somewhat beyond the principal clause of § 6(e) by retaining in federal ownership refuges in Alaska, whether or not the land would otherwise have been transferred to the State by the opening sentence of § 6(e). 545 U.S. at 110.

[14] 104 Cong. Rec. H.R.9606 (May 27, 1958) (printing bill text as it then stood). Available at: https://www.congress.gov/bound-congressional-record/1958/05/27/house-section

The sponsor of the amendment adding the wildlife management proviso to § 6(e) fully described its purposes in the debate, without mentioning "refuges" (the subject of the title transfer proviso) or making any distinctions based on land categories or titles. 104 Cong. Rec. H.R. 9747-9750 (May 28, 1958) (reading of wildlife management proviso, followed by remarks by Rep. Westland, its sponsor, followed by favorable vote to amend the bill by adding that proviso).[15] The sponsor explained that Alaska's preparation to manage fisheries was deficient because the new State's board of fisheries would at the outset be stacked in favor of commercial fishing interests. *Id.* The sponsor did not discuss the title transfer proviso, which was already part of the bill, or suggest that it would modify the wildlife management proviso being added to the bill. *Id.*

The sponsor did not suggest that the State's assumption of the responsibility for management of fish and wildlife, once it was ready for that task, would be limited to non-federal lands and waters. *Id.* Indeed, he noted that, once the new State assumed management responsibility for Alaska's fish and wildlife, the State would be managing "resources which belong not only to the people of Alaska but to all the people of the United States." *Id.* at 9748. This is reflected in the statutory text, which directs that management of the "fish and wildlife resources of Alaska" be carried out "in the broad ***national*** interest." Pub. L. 85-508 § 6(e) (emphasis added).

---

[15] Available at https://www.congress.gov/bound-congressional-record/1958/05/28/house-section

B. This Court's Caselaw Construing the Alaska Statehood Act Favors State Management of the Fish and Wildlife of Alaska.

This Court has never decided whether the title transfer proviso in § 6(e) modifies the wildlife management proviso.[16] The Court has, however, twice construed the Alaska Statehood Act in examining the validity of a federal agency action that preempted a general state law banning fish traps to the extent that state law applied to specific Alaska Native communities. *Organized Village of Kake v. Egan,* 369 U.S. 60, 68-69 (1962) ("Kake"); *Metlakatla Indian Community v. Egan,* 369 U.S. 45, 57-59 (1962) ("Metlakatla"). These cases offer insight.

In *Kake,* DOI had issued a rule preempting state law by authorizing two Alaska Native communities (Organized Village of Kake and Angoon Community Association) to commercially use fish traps, notwithstanding a State law banning that activity statewide. 369 U.S. at 61-62. This Court considered whether § 4 of the Alaska Statehood Act supported DOI's preemptive order. *Id.* at 67-69. Section 4 reserved to the Federal Government "absolute jurisdiction and control" over various "property" interests, including "fishing rights" held by Alaska Natives, by the United States, or by the United States for the benefit of Alaska Natives. Pub.

---

[16] See *Alaska v. United States*, 545 U.S. at 104-110 and *United States v. Alaska*, 521 U.S. 1, 55-61 (1997) (both interpreting § 6(e) solely to determine title to lands).

L. 85-508, § 4, as amended by Pub. L. 86-70, § 2. The Alaska Native communities asserted they held fishing rights, a property right subject to absolute federal jurisdiction pursuant to § 4. 369 U.S. at 67. Section 4 paired what at first blush sounded like strong federal regulatory authority ("absolute jurisdiction and control") with a property interest ("fishing rights"). But that was not enough to allow preemption of state fishing law.

In overturning the preemptive rule, the Court in *Kake* held that DOI did not have sufficient specific statutory authority to justify preemption of state fishing law. *See* 369 U.S. at 67-69. The Court concluded that (1) by placing "absolute jurisdiction and control" in the United States over the fishing rights held by the two Alaska Native communities, § 4 of the Statehood Act dealt with property owner rights, and did not provide the Federal Government with exclusive regulatory authority, and (2) the State therefore retained jurisdiction to enforce its own fishing laws. *Id*. at 68, 75-76. That part of the Court's ruling by itself seemingly left the door open for concurrent federal and state regulation of fishing, and for federal regulation to preempt any particular conflicting state regulation. But the Court immediately closed that door, by finding that DOI needed more specific authorization from Congress to preempt this state fishing law. *See id*. at 76. The Court concluded: "Congress has neither authorized the use of fish traps at Kake and Angoon nor empowered the Secretary of the Interior to do so." *Id.* at 76. Accordingly, the Court set aside DOI's order preempting the state fish trap ban. *Id.*

The companion case (*Metlakatla*) considered similar issues with one key difference – the 1891 statute establishing the reservation for the Metlakatla community specifically placed DOI in charge of regulating the activities of this fishing-dependent community, and a 1916 presidential proclamation clarified that this federal regulation was to include fishing regulation. *Metlakatla*, 369 U.S. at 48-49 (citing 26 Stat. 1095, 1101 (1891) and 39 Stat. 1777 (1916)). After analyzing the application of both § 4 and § 6(e) of the Statehood Act to fishing on this reservation owned by the United States for the benefit of a Native community, the Court concluded that the Statehood Act did not authorize DOI to preempt the State's fish trap ban, and thus the Secretary erred by relying on the Statehood Act in preempting. *Id*. at 58-59. The Court suggested, however, that the "unusual" special legislation for the Metlakatla community would authorize preemption, if the Secretary chose on remand to invoke that different and more specific authority. *Id.* at 53, 57-59 ("the 1891 statute gave the Metlakatlans the right to fish under regulations of the Secretary of the Interior"). The Court allowed DOI's preemptive rule to remain in effect only through the end of that year's fishing season, and remanded the matter to the Secretary. *Id*. at 59.

Read together, *Kake* and *Metlakatla* illustrate that federal retention or management of property rights does not alone furnish federal agencies the plenary authority to preempt state hunting and fishing law on federal property or in areas of federal interest whenever the federal agency believes

preemption is in the public interest. Much more specific statutory preemptive authority is required.

C. State Hunting Regulatory Authority on Refuges may not be Absolute, but Federal Land Managers' Authority to Preempt State Hunting Regulations is Far More Constrained than the Ninth Circuit held.

None of this is to suggest that Alaska or any other State is exempt from the power of Congress under the property clause of the U.S. Constitution to enact legislation regulating the management of wildlife on federal lands including refuges. This Court in *Kleppe v. New Mexico* recognized Congress's authority under the property clause to legislate with regard to federally-owned property such as refuges. 426 U.S. 529, 541 (1976).

The point instead is that Congress in § 6(e) of the Statehood Act made the decision that fish and wildlife management authority as a general matter would be assumed by the State, with no exceptions for federal lands as a whole or refuge lands in particular. Congress may enact legislation delegating property clause authority to federal agencies, but it has, for the most part, refrained from utilizing this power as to regulation of hunting on federal land units open to hunting: "With [certain] exceptions, and despite the existence of constitutional power respecting fish and wildlife on Federally owned lands, Congress has, in fact, reaffirmed the basic responsibility and authority of the States to manage fish and resident wildlife on Federal lands." 43 C.F.R. 24.3(b) (DOI policy).

In ANILCA and NWRSIA, and in some other statutes, Congress granted federal agencies specific regulatory powers over fish and wildlife, but not the type of general "plenary" authority that would allow federal agencies to displace the State's management role whenever they felt it was in the public interest to do so. These delegated powers are constrained, not "plenary":

- In the ANILCA provision governing "Taking of Fish and Wildlife" on "public lands," i.e. federal lands, Congress: (1) left unchanged its decision in § 6(e) of the Statehood Act that the State would assume responsibility for management of the fish and wildlife of Alaska, 16 U.S.C. § 3202(a); (2) left unchanged the authority of the federal land managers to manage the land, § 3202(b); and (3) declared that "State and Federal law" would govern hunting on the public lands, without in that section granting any specific hunting regulatory authority to the federal land managers, § 3202(c) (providing more specific directions as to fishing).[17]
    - Examples of Federal "laws" providing such specific regulatory authority to federal agencies to manage hunting

[17] In contrast to § 3202(c), which recognizes that "State and Federal law" governs hunting on refuges, neighboring 16 U.S.C. § 3201 recognizes that "State and Federal law ***and regulation***" govern hunting on national preserves (emphasis added). The Ninth Circuit nevertheless read "law" in § 3202(c) as a source of authority for FWS regulations. Pet.App.17.

include 16 U.S.C. § 742j-1, which prohibits hunting from aircraft over any lands, and 16 U.S.C. § 1538(a), which prohibits "take" of endangered species

- In ANILCA, Congress directed that refuges be administered by DOI "in accordance with the laws governing the administration of units of the National Wildlife Refuge System, and this Act." Pub. L. No. 96-487, § 304(a). Those laws, as since amended, include NWRSIA, which provides:

  - That hunting and fishing, where "compatible" with refuge purposes, are "priority" uses of refuges. 16 U.S.C. §§ 668dd(a)(3)(C) and 668ee(2) ("wildlife-dependent recreational uses" given "priority" are defined to include "hunting" and "fishing").

  - That FWS shall "ensure that opportunities are provided within the [Refuge] System for compatible wildlife-dependent recreational use," which, as noted above, include hunting and fishing. § 668dd(a)(4)(I).

  - That FWS shall make determinations regarding whether "hunting" and "fishing" are "compatible" with the "major purposes" for establishing a refuge. § 668dd(d)(1)(A). Notably, the purposes of ANILCA, which

established or re-established the refuges in Alaska, include "preserv[ing] … recreational opportunities including but not limited to … sport hunting …." 16 U.S.C. § 3101(b).

- That in making these compatibility determinations, FWS must give "consideration [to] consistency with State laws and regulations as provided for in subsection (m) …." 16 U.S.C. § 668dd(d)(3)(A)(iii). "Nothing in [NWRSIA] shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the [Refuge] System." § 668dd(m).

- That "Regulations permitting hunting or fishing of fish and resident wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws, regulations, and management plans." § 668dd(m). This is an important constraint on the power of FWS to adopt regulations preempting state law.

- Two saving clauses in the subsistence title of ANILCA may recognize some limited and

> constrained authority held by federal land managers regarding non-subsistence hunting. 16 U.S.C. §§ 3125(3), 3126(b).[18]

As can be seen above, there are no provisions granting the federal agency unconstrained plenary powers to preempt state hunting laws. Significantly, DOI effectively acknowledges this fundamental point in its codified policy. 43 C.F.R. 24.1(a), 24.3(b), 24.4(e), 24.4(i)(4), and 24.7(b).

Whether the various more specific non-plenary regulatory authorities that FWS does possess under ANILCA and NWRSIA are sufficient to sustain the challenged preemptions of particular state hunting rules as to the FWS Kenai Refuge is a distinct issue. *See* Pet.App.17-18. The Ninth Circuit's analysis of that issue was colored by and undermined by its erroneous starting point -- the premise that the State never assumed authority to manage the fish and wildlife on Refuges and that FWS has "plenary" authority to preempt "any" state hunting regulations it deems undesirable. *See id.* (rejecting State's argument that ANILCA in 16 U.S.C. § 3202(a) preserved the State's authority to manage wildlife on refuges, by finding that the State never got that authority in the Statehood Act in the first place).

---

[18] Federal agencies currently regulate subsistence hunting in Alaska, as the State declined this task. 16 U.S.C. § 3115(d). This case concerns non-subsistence hunting, often called "sport hunting," although food is sometimes the objective.

D. The Case Presents Issues of Exceptional Importance that by their Nature are Unlikely to Present a "Circuit Split."[19]

This Court has never considered the fundamental issue of whether the title transfer proviso in § 6(e) of the Alaska Statehood Act carves an exception to the wildlife management proviso for fish and wildlife found on refuges. Because § 6(e) addresses all refuges in Alaska, this case presents statewide issues going beyond a single refuge.

The Ninth Circuit's holding that FWS has "plenary" authority to regulate hunting, at least on refuges, is thus fundamentally important for Alaska. There are 16 refuges totaling 78 million acres in Alaska.[20] Another 20 million acres of Alaska are designated as "national preserves" rather than "refuges."[21] The District of Alaska promptly extended to national preserves the Ninth Circuit's ruling that DOI agencies have "plenary" authority to regulate hunting.[22]

---

[19] Cases construing the Alaska Statehood Act will mostly be litigated in the Ninth Circuit, making a "circuit split" unlikely. *See Organized Village of Kake v. Egan,* 80 S.Ct. 33, 35-36 (1959) (providing reasons Supreme Court review would likely be granted in case involving the wildlife management proviso – no circuit split involved), *merits opinion*, 369 U.S. 60 (1962) (discussed in Point B above).

[20] https://alaskausfws.medium.com/science-that-spans-78-million-acres-9a855d3a05cd (last visited November 26, 2022).

[21] 85 Fed. Reg. 35,181, 35,187 (June 9, 2020).

[22] *Alaska Wildlife All. v. Haaland*, No. 3:20-CV-00209-SLG, pp. 40-42 (D. Alaska Sept. 30, 2022).

These large federal land units in Alaska provide the greatest economic value for hunting guides and many of the best recreational hunting and wilderness adventure opportunities for individual hunters. This is both because of the federal units' sheer size compared to state and private parcels, and because the Federal Government at the time of Statehood kept for itself the most scenic and highest quality wildlife habitat. Amici support state management of fish and wildlife resources and are less able to pursue these endeavors if the federal land managers have "plenary" authority over hunting and fishing regulations and so can preempt state hunting and fishing regulations whenever they choose to do so.

The case also has a national impact. The Ninth Circuit's "plenary" authority holding is in tension with FWS's statutory duty in managing refuges in all 50 States to defer to state hunting rules whenever "practicable," 16 U.S.C. § 668dd(m), and with the DOI rules limiting preemption of state hunting rules by FWS, 43 C.F.R. 24.1-24.7. There are over 450 refuges spread across the Nation.

E. The Ninth Circuit Overlooked Lands that Only Attained "Refuges" Status ***After*** Statehood.

Finally, the Ninth Circuit overlooked the tens of millions of acres of lands presently within the Refuge System in Alaska that did not attain "refuge" status until after Statehood. In construing the title transfer proviso of § 6(e), this Court has clearly indicated that the proviso only applies to those lands

already "withdrawn or otherwise set apart as refuges" as of Statehood in 1958. *See U.S. v. Alaska*, 521 U.S. at 58-61. In 1957, the year before Statehood, DOI began proceedings to designate as a refuge the lands that became Arctic National Wildlife Refuge, and at the start of those proceedings it gave notice to Congress and segregated the lands from the general public domain. *See id.* The Court held that this provisional refuge status was sufficient (perhaps just barely so) to bring those lands within the title transfer proviso as lands "set apart" for refuge status, so the lands stayed in federal ownership. *Id.* The Court's articulation of the legal standard clearly indicated that the title transfer proviso operated as of Statehood and would not apply unless the formal process for designating lands as refuges had at least started before Statehood. *Id.*[23]

The Ninth Circuit's error in failing to realize this temporal limitation on the title transfer proviso is immaterial if the Court agrees that the title transfer proviso did not carve any exceptions to the wildlife management proviso. In that case, none of Kenai Refuge was exempted from the wildlife management proviso, and there is no need to distinguish between the pre-Statehood and post-Statehood portions of that Refuge. However, if

---

[23] *U.S. v. Alaska (Arctic Coast),* 521 U.S. at 61 ("Section 6(e) of the Alaska Statehood Act expressly prevented lands that ***had been*** 'set apart as [a] refug[e]' from passing to Alaska. It follows that, because all of the lands covered by the 1957 application [to establish a refuge] ***had been*** 'set apart' for future use as a refuge, the United States retained title.…") (emphasis added).

arguendo the title transfer proviso did implicitly carve an exception from the wildlife management proviso, the failure to apply the temporal limitation recognized in *Alaska v. U.S.* would directly impact the 240,000 acres added to the Kenai Refuge after Statehood. Pub. L. No. 96-487, § 303(4)(A).[24] Further, because the Ninth Circuit's reading of § 6(e) applies to all refuges in Alaska, the same error would extend to the more than 26 million acres added after Statehood to other pre-existing refuges by ANILCA, and to the tens of million acres of new refuges established by ANILCA.[25] This is a substantial portion of the acreage on which amici hunt and guide hunts in Alaska.

---

[24] The rest of the Kenai Refuge was designated as refuge lands before Statehood, as the Kenai Moose Range. 6 Fed. Reg. 6,471 (Dec. 18, 1941).

[25] *See* Pub. L No. 96-487 §§ 302 (creating new refuges, specifying acreage), 303 (adding acres to pre-existing refuges).

III. CONCLUSION

For the reasons stated above, the Court should grant certiorari and reverse the judgment below.

Respectfully submitted,

James H. Lister
Counsel of Record
George R. Pitts
Brian V. Gerd
Birch Horton Bittner & Cherot, P.C.
1100 Connecticut Ave., NW, Suite 825
Washington, D.C. 20036
(202) 659-5800
jlister@bhb.com

Counsel for Alaska Professional Hunters Association, Alaska Outdoor Council, and Sportsmen's Alliance Foundation.

November 30, 2022