Nos. 20-35721, 20-35727, and 20-35728

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRIENDS OF ALASKA NATIONAL WILDLIFE REFUGES, et al.,
Plaintiffs-Appellees,

v.

DEBRA HAALAND, et al.,
Defendants-Appellants,

and

KING COVE CORPORATION, et al., and
STATE OF ALASKA,
Intervenor-Defendants/Appellants.

On Appeal from the United States District Court
for the District of Alaska

BRIEF OF JIMMY CARTER AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR REHEARING EN BANC

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[*]

My name is Jimmy Carter. In my lifetime, I have been a farmer, a Naval officer, a Sunday school teacher, an outdoorsman, a democracy activist, a builder, Governor of Georgia, and recipient of the Nobel Peace Prize. And from 1977 to 1981, I had the privilege of serving as the 39th President of the United States. In that capacity, I signed into law the Alaska National Interest Lands Conservation Act, ANILCA, the law whose meaning is the subject of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

ANILCA is no ordinary statute. As many scholars have recognized, it is one of the most exceptional pieces of conservation legislation enacted by our great Nation or any Nation. In sheer magnitude, it stands alone, establishing conservation mandates for more than 100 million acres of federal public lands and preserving the rights of Alaska Native and rural residents to continue to undertake subsistence activities on those lands. ANILCA lands constitute over 50 percent of the Nation's congressionally designated Wilderness, over 80 percent of its Wildlife Refuges, 60 percent of its National Parks, and include the Nation's two largest National Forests. Among the National lands ANILCA protected through establishment or expansion are: Denali National Park and Preserve; Gates of the Arctic National Park and

[*] No party's counsel authored this brief in whole or part, and no person – other than *amicus* or his counsel – contributed money intended to fund the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

Preserve; Glacier Bay National Park and Preserve; Kenai Fjords National Park; Lake Clark National Park and Preserve; Wrangell-St. Elias National Park and Preserve; Arctic National Wildlife Refuge; Kodiak National Wildlife Refuge; Yukon Flats National Wildlife Refuge; Yukon Delta National Wildlife Refuge; Land Bridge National Preserve; numerous Wild and Scenic Rivers; Misty Fjords National Monument; Admiralty Island National Monument and Tongass National Forest Wilderness areas. Birds nourished by these lands travel to every State in our country and every continent; caribou migrate freely across vast landscapes; salmon flow into free-running rivers; and Alaska Native and rural residents rely on these resources and more to support traditional subsistence ways of life.

True to the statute's name, the unrivaled and inestimably important values that ANILCA secures are for the benefit of the people of our entire Nation. Each year, millions of Americans visit Alaska to experience them first-hand, as I have many times since leaving office. Developments in the intervening four decades—the growing threats to our planet's climate and biodiversity and growing awareness of those threats—have shown even the statute's name to have been an understatement: the protections we enacted now have global significance and enable the Nation to fulfill important international treaty obligations. Both the benefits for Alaska's economy and the increasing awareness of climate and biodiversity crises have strengthened in-State support for ANILCA's conservation lands. Alaska Native

communities have thrived and prospered, demonstrating ANILCA's innovative recognition that conservation interests and the subsistence hunting and fishing activities of people who have been on these lands for thousands of years are complementary and mutually reinforcing.

ANILCA also stands apart in terms of the time, attention, and political effort devoted to securing its passage. From the time I arrived in Washington, I was aware that the issue of Alaska land conservation had been at an impasse in the 18 years since Statehood, and that subsistence rights had been unresolved by Congress in the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§ 1601, et seq. (ANCSA). And time was running out. When it became clear that Congress would not enact legislation in time for the December 1978 deadline ANCSA established, I exercised my authority under the Antiquities Act, 54 U.S.C. §§ 320301, et seq., to set aside 56 million acres of land, and Interior Secretary Cecil Andrus exercised his power under the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701, et seq., to reserve an additional 40 million acres. After those measures brought all parties to the negotiating table, my administration worked relentlessly to craft and rally support for the legislative resolution.

ANILCA entailed facing up to large, complex, seemingly intractable long-term problems—and bringing often-antagonistic stakeholders to the table to hash out practical, enduring solutions. The resolution we reached in December 1980 was the

culmination of decades of work by visionary, yet pragmatic legislators like Morris Udall and John Seiberling, of exemplary leadership by public servants like Secretary Andrus, and of perseverance from Alaska Native people, whose just and urgent subsistence claims helped many to grasp the necessity of enacting legislation. In the end, the statute also reflected the good-faith participation of legislators like Senator Ted Stevens, who worked hard to ensure that the balance Congress settled on was, from their perspective, sensible, if not ideal.

My familiarity with and involvement in ANILCA's drafting and enactment, and my belief in the importance of this legislation are what impel me to file this friend-of-court brief. While I have worn many hats in my life, I am not an attorney; and even as President, I did not see it as my role to quibble with every decision that construed a statute differently than I would have. But the decision of the panel majority in this case rests on a grave misunderstanding of the fundamentals of this vital law. In enacting ANILCA, Congress did not, as the decision concluded, vest the Secretary with "discretion" to decide whether lands like the Izembek National Wildlife Refuge should be retained in their natural state or whether the economic and social benefits of road-building or other development outweigh the ecological and subsistence harms that such activities would inflict.

That is precisely what ANILCA disallowed when it expressly designated particular lands for conservation and subsistence, legislative decisions that carry

corresponding, enduring protections. Those designations were not based on the assumption that these lands lacked economic value. Just the opposite: ANILCA's framers and supporters knew there would forever be claims, often advanced by organized and well-financed interests, that they should be put to immediate use for local economic development and other purposes. Valuable benefits to the Nation as a whole, to subsistence users, and to future generations would fare poorly in an ad hoc balancing.

When Congress characterized ANILCA as striking an "adequate" balance between conservation and utilization, see 16 U.S.C. § 3101(d), it was not, as the panel majority's decision assumed, licensing future Interior and Agriculture Secretaries to trade away lands with irreplaceable ecological and subsistence values for economic benefits. The statute was instead describing the end-state that Congress's enactments had achieved, where 104 million acres of national interest land were permanently protected for conservation and subsistence purposes, while comparably large swaths of territory were left to State and private control and the pursuit of economic benefits. Furthermore, Congress did not, as the panel concluded, provide a pass-key for administrators to overrule these statutory judgments when it enacted Section 3192(h)(1), a modest and uncontroversial provision that confirms the Secretary's power to acquire valuable conservation and subsistence lands, by means of a land exchange.

This brings me to the principal reason for filing this brief. The understanding adopted by the panel majority here is not only deeply mistaken, it is also dangerous. The decision upheld the building of a road on congressionally designated Wilderness land through a drastic reinterpretation of the foundations of the statute. The secretarial powers the decision recognized would apply equally to National Parks, National Forests, National Wildlife Refuges, as well as Wilderness Areas and other conservation lands, and to all manner of development and extractive activities, not just road building. Congress's landmark action—the culmination of years of study and struggle—to designate for permanent preservation specific unrivaled national interest lands would be negated. In view of the national importance of ANILCA, and the serious impairment of the statute's integrity that the panel decision threatens, I ask respectfully that the full Court reconsider the case and reinstate the legal regime that Congress plainly enacted.

ARGUMENT

I. The Panel Majority Misinterpreted ANILCA, in Ways that Subvert the Statute's Core Legislative Judgments

A. The Secretary of Interior Does Not Have the Authority Under Section 3192(h)(1) or Any Provision of ANILCA to Unilaterally Undercut the Statute's Purposes Through a Land Exchange

The divided panel's decision does not just affect Izembek National Wildlife Refuge; it imperils over 100 million acres of land protected by ANILCA. The decision makes precedent-setting errors of exceptional public importance that will affect considerations of secretarial actions in a majority, from an acreage perspective, of our Nation's National Parks, National Wildlife Refuges and congressionally designated Wilderness. With respect to the conservation lands at issue here, the Interior Secretary has no authority under ANILCA to release for private road development lands that Congress designated as Wilderness. Exchanges are permissible only in order "[1] to acquire lands [2] for the purposes of this Act." 16 U.S.C. § 3192(h)(1). The transaction here, contrary to the statute, was not based on the need or desire to acquire lands within or adjacent to a conservation system unit for conservation or subsistence purposes.

The panel majority's contrary conclusion rested on its unfounded assertion that advancing the "economic and social" interests of Alaskans, 16 U.S.C. § 3101(d) is *also* a purpose of ANILCA, meaning that the secretarial power to exchange Wilderness (or other conservation lands) includes discretion to transfer such lands

to individuals and corporations whenever, in the Secretary's judgment, *that* "purpose" outweighs ecological and subsistence damage that development might inflict. This balancing authority, the majority insisted, is no different from what is found under many federal statutes—where Congress identifies the governing policy interests but leaves it to administrative discretion how best to balance them in particular situations. Indeed, the majority maintained, the Supreme Court's recent decision in *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019), had suggested that ANILCA is just such a statute.

That understanding, I respectfully submit, gets wrong the statute's fundamentals. When Congress used the word "balance" in Section 3101(d), it was describing what Congress had accomplished through ANILCA as a whole: both by designating 104 million acres of federal conservation land *and* at the same time leaving many millions more of federal lands (as well as State, corporate and private lands) open to development. Section 3101(d) was never meant to be a delegation of authority to agency officials to rebalance conservation against economic uses as to land ANILCA had set aside as conservation lands. It was a description of a definitive resolution—the one struck, firmly, by Congress.

Nor does the language from *Sturgeon* in any way support the majority's interpretation. That case concerned powers with respect to areas that all parties agreed *were not* federal under ANILCA—rivers subject to state jurisdiction.

Because ANILCA had not made those waters federal, respect for the statutory compromise required that the National Park Service regulations at issue could not be imposed. But this case concerns management of clearly federal lands that *were* denominated national interest lands by Congress. The Secretary has discretion to make land acquisitions (including by land exchange) that further the law's purposes, but ANILCA leaves him or her without power, under the acquisition provision, to overrule Congress's judgment and authorize land exchanges that will result in degradation of lands Congress decided have "inestimable" ecological and subsistence value in their unaltered state.

The history of ANILCA's enactment strongly confirms the clear reading of the enacted text. Anyone who was present or participated in the negotiations, deliberations, drafting and signing of the statute—including, I would hazard to say, those skeptical and even hostile to the law—would recognize the difference between Sections 3101(b) and (c) on one hand, which guide and direct the Secretary's exercise of his or her management and conservation powers, and Section 3101(d). Section 3101(d) expresses Congress's judgment that the statutory allocation of federal lands, which left 149 million acres (including vast stores of natural resources) placed in private or state control, would suffice to meet Alaskans' social and economic development needs. No one believed the Secretary would then enjoy authority to sell or trade away designated Wilderness lands under Section

3192(h)(1), a minor provision allowing in-kind as well as cash *acquisitions* of national interest lands whenever he or she believed that doing so would bring material economic benefit. We understood that the designated lands had such distinct and ecological, subsistence, scientific, archeological and recreational values in their unspoiled state that they should be set aside and sheltered from such development.

On reflection, it is simply impossible to understand ANILCA the way the panel majority did. If the Secretary had the power to override Congress's directives by land exchange, Congress's designation of 104 million acres as Wildernesses, National Parks, National Wildlife Refuges and National Forests would at best, be provisional, and at worst, meaningless. Some statutes announce competing policies, meaning there will be situations where Congress anticipates or intends that administrators (and future administrations) will balance the relevant concerns, informed by their own policy views. But ANILCA is not such a statute. Congress itself struck a balance, after years of experience, deliberation, debate and political negotiation, and only allowed the construction of roads and utility corridors on conservation lands under Title XI's strict provisions. Congress drew the line there.

B. The Court's Decision Allowing the Secretary to Avoid ANILCA's Detailed Strictures was Incorrect and Destructive of the Statute's Central Conservation and Subsistence Protection Structure

The panel majority's decision seriously harms ANILCA and the lands, wildlife, subsistence and other values that ANILCA protects. The decision allows

the Secretary to bypass carefully crafted provisions designed to stringently protect Wilderness Areas from incursions by roads and other development. And the manner by which the decision did so throws open the door to future incursions that negate Congress's central objectives on all ANILCA conservation lands.

In Title XI of ANILCA, Congress set out a comprehensive framework governing proposals to construct roads and utility infrastructure within conservation lands. *See* 16 U.S.C. §§ 3161(c), 3164(a). Like other parts of ANILCA, Title XI represents a carefully defined compromise. While recognizing that Alaska's infrastructure "[was] largely undeveloped," *id.* § 3161(a), Congress provided for specific procedures for approving proposals for different kinds of designated lands.

For designated Wilderness Areas, ANILCA established special, and extraordinarily protective measures, to ensure that no intrusions could occur without the most careful and thorough examination and democratic deliberation. Secretarial approval, after a thorough and carefully explained analysis, is but the first step. The approval of the President of the United States—based on a review of the record and supported by a written "report setting forth in detail the relevant factual background and the reasons for his findings and recommendation"—is then required. But even then, the application must still be denied unless the Senate and the House of Representatives approve a resolution—in conformity with statutorily specified procedures—within 120 calendar days of continuous session. 16 U.S.C. § 3166(c).

This elaborate, unusual procedure reflects ANILCA's profound commitment to rigorous protection of Wilderness lands. The remarkably high bar that the statute established for such projects ensures that only those proposals whose necessity was demonstrated through the most thorough possible review and democratic deliberation would go forward.

Secretary Bernhardt "did not follow" any of the procedures in Title XI. *See* 29 F.4th 432, 443 (panel majority). Rather, accepting the Secretary's arguments, the panel majority concluded that these strictures were "no longer" operative, because the land on which the proposed road sits would be first exchanged out of federal ownership— even though the entire, avowed purpose of the "exchange" was to build a road. *Id*. at 443–44.

The majority's conclusion makes no sense. On its reading, the Secretary of Interior's road-approval-by-land-exchange power would exceed the authority of the President of the United States (combined with the Secretary, and either House of Congress) to approve the same project over the same lands, for the same reasons, by way of an easement. Congress assuredly did not erect a precise, extraordinarily rigorous process, including required presidential and congressional approvals—and then, *in the same statute*, hand the Secretary a pass-key, in the form of land exchange authority, by which all these protections for our precious and vulnerable conservation lands could be bypassed.

II. It is Imperative That the Panel Decision Not Stand

The issues presented here are of "exceptional importance," Fed. R. App. P. 35(a)(2), for all the reasons that ANILCA is important. The panel decision is in no way limited to land exchanges that facilitate construction of single-lane gravel roads. Rather, the decision's reasoning would apply to every one of the 104 million acres that Congress designated as National Interest lands in 1980 and would apply to any proposal that sought to develop or put those lands to intensive economic use. Under the precedent established, the lands identified for protection based on their inestimable and irreplaceable values would remain unexploited only until such time that a future Interior or Agriculture Secretary decides some other use is more beneficial, notwithstanding acknowledged grave ecological and subsistence harms. And those officials would wield a "get-out-of-ANILCA-free" pass, in the form of a limitless "exchange power," enabling them to side-step carefully considered and hard-negotiated procedures Congress codified.

These are not idle concerns: There will *always* be plausible "economic and social" justifications for putting land to uses other than conservation—and there will be well-organized, well-funded interests urging development. The losses that such withdrawals effect are irreversible. That is why Congress and I acted in 1980 the way we did: To ensure that these precious jewels would remain protected for future

generations, sheltered from the crosswinds of narrow and transient political and economic agendas.

The decision effectively annuls core provisions of this landmark law. The administrative evasion here, now blessed by the panel's decision, will surely be used again, making for open season on the precious, globally unique, ecologically rich and intact areas ANILCA set aside for posterity. Review by the en banc court is necessary.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted,

/s/ Sean H. Donahue

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Certificate of Compliance

9th Cir. Case Number(s): **20-35721, 20-35727, and 20-35728**

I am the attorney or self-represented party.

This brief contains 2994 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature /s/ Sean H. Donahue **Date** May 9, 2022
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CERTIFICATE OF SERVICE

I certify that on this 9th day of May, 2022, I filed the foregoing Brief of Jimmy Carter as *Amicus Curiae* in Support of the Petition for Rehearing En Banc via the Court's CM/ECF system, which will provide electronic copies to all registered counsel.

/s/ Sean H. Donahue
Counsel for *Amicus*