No. ___-_____

IN THE

Supreme Court of the United States

STATE OF ALASKA

Petitioner,

v.

UNITED COOK INLET DRIFT ASSOCIATION; COOK INLET FISHERMEN'S FUND,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

JAHNA LINDEMUTH
ATTORNEY GENERAL OF ALASKA

SETH M. BEAUSANG
COUNSEL OF RECORD
ASSISTANT ATTORNEY GENERAL
STATE OF ALASKA
DEPARTMENT OF LAW
1031 West 4th Ave., Suite 200
Anchorage, AK 99501
seth.beausang@alaska.gov
(907) 269-5100
ATTORNEY FOR PETITIONER

DATED: FEBRUARY 27, 2017

QUESTION PRESENTED

Since statehood, Alaska has managed under state law three salmon fisheries that overlap state and federal waters. The Federal Government has repeatedly approved of state management of these fisheries.

After fifty-seven years of successful state management, the Court of Appeals for the Ninth Circuit held that the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act" or the "Act") requires that the fisheries be managed under a federal fishery management plan ("FMP"), rather than under state law.

The National Marine Fisheries Service ("NMFS") agrees that managing these salmon fisheries to meet "escapement goals," as the State does, is more effective at preventing overfishing than how the fisheries will be managed under an FMP, which requires managing the fisheries to meet inflexible catch limits. The question presented is:

May the Secretary of Commerce, acting through NMFS, approve an FMP that excludes and defers to state management of a fishery, because NMFS concludes that the excluded fishery does not require a plan and would be worse off managed under a plan?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner in this case is the State of Alaska.

Respondents in this case are United Cook Inlet Drift Association, Cook Inlet Fishermen's Fund, and the federal parties listed below.

Before the Ninth Circuit the State was an intervenor-defendant-appellee, aligned with defendants-appellees (and respondents in this case) National Marine Fisheries Service; Penny Pritzker, in her official capacity as Acting United States Secretary of Commerce; Kathryn Sullivan, in her official capacity as Acting Under Secretary of Commerce and Administrator for the National Oceanic and Atmospheric Administration; and James W. Balsiger, in his official capacity as NMFS Alaska Region.

Before the Ninth Circuit United Cook Inlet Drift Association and Cook Inlet Fishermen's Fund were plaintiffs-appellants.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Constitution

Statutes

Treaties

Session Laws

Regulations

Other Authorities

PETITION FOR WRIT OF CERTIORARI

State of Alaska petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 837 F.3d 1055 and reproduced at Appendix ("App.") 1a–23a. The Ninth Circuit's order denying rehearing and rehearing en banc is unreported and reproduced at App. 82a–83a. The opinion of the district court is unreported and reproduced at App. 24a–81a.

JURISDICTION

The Ninth Circuit rendered its decision on September 21, 2016. App. 1a–23a. A timely petition for rehearing and rehearing en banc was denied on November 30, 2016. App. 82a–83a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801, et seq., and regulations promulgated thereunder, are reproduced at App. 84a–112a.

INTRODUCTION

The Ninth Circuit's decision in this case will harm some of the nation's most important fisheries. The case directly involves one of the nation's most productive wild salmon fisheries: Cook Inlet, Alaska. Cook Inlet and two other salmon fisheries in Alaska overlap state waters and a small part of the adjacent federal waters. The Ninth Circuit held that the federal waters portion of Cook Inlet must be managed under an federal fishery management plan ("FMP") even though the National Marine Fisheries Service ("NMFS") agrees that will do more harm than good for Cook Inlet salmon.

Salmon are anadromous fish. They hatch in freshwater streams and lakes, spend much of their lives at sea, and then return, often in large "runs" at predictable times to the freshwaters of their origin to spawn and sustain future runs of salmon.

Under an FMP, these salmon fisheries will have to be managed to meet annual catch limits. Catch limits restrict the amount of salmon that may be caught and are determined before the fishing season. Because it can be difficult to forecast how many salmon will return in a given year, NMFS agrees that managing these fisheries with catch limits risks overfishing: sometimes the limits will turn out to be too high, and sometimes too low.

The State's management method under state law is better. The State monitors salmon returns in-season, and by emergency order allows the level of fishing that will ensure that the appropriate number of salmon reach their spawning grounds to sustain the stock. NMFS agrees that the State manages

these fisheries consistent with the National Standards of the Magnuson-Stevens Act.

Since 1959, the State has managed these three fisheries under state law. In 2012, NMFS approved a salmon FMP for Alaska that excluded from its coverage the small part of federal waters where these fisheries occur, so that the State could continue managing the fisheries as single units in both state and federal waters. Removing the fisheries from the FMP allows for state management because the Magnuson-Stevens Act preserves state jurisdiction over in-state registered fishing vessels in federal waters in the absence of an FMP for a fishery. NMFS concluded that there was a low risk of fishing in these federal waters by out-of-state registered vessels, and if such fishing ever occurred, NMFS could close the fishery.

Plaintiffs are commercial fishermen who challenged NMFS's decision as it relates to Cook Inlet under the Administrative Procedure Act ("APA"). Plaintiffs contend that the Magnuson-Stevens Act requires an FMP for the entirety of any fishery that requires conservation and management in some manner from some entity. By contrast, NMFS has long interpreted the Act as requiring an FMP only when a fishery requires the conservation and management measures that an FMP would provide. The district court upheld NMFS's interpretation, but the Ninth Circuit reversed.

The Ninth Circuit's decision will upend management of some of the nation's most important salmon fisheries. Before statehood, the Federal Government managed Alaska's salmon fisheries using a strategy that, like annual catch limits, failed to ac-

count for the unpredictability of salmon returns. The result was record low salmon harvests. Since the State took over management of its salmon fisheries, commercial salmon harvests have increased more than tenfold, and Alaska's salmon fisheries are recognized as sustainable and among the best managed fisheries in the world. The court's decision will return these three salmon fisheries to inferior federal management over the opposition of the experts at NMFS.

The Ninth Circuit's decision also logically applies to and will require FMPs for those non-salmon fisheries in Alaska that NMFS has concluded are better managed by the State without an FMP. The decision means that in Alaska and the Ninth Circuit, where most domestically produced seafood is commercially harvested, NMFS will be deprived of an important fishery management tool: the ability to defer to state management of a fishery when that is the best way to manage the fishery and prevent overfishing. Because NMFS appears to use this tool most often in Alaska, and for more important fisheries, it is unlikely that another court of appeals will have the opportunity to directly rule on the issue the Ninth Circuit decided. This case may be the Court's only chance to correct the Ninth Circuit.

The Ninth Circuit's decision is also erroneous. The Magnuson-Stevens Act obviously does not require an FMP for fisheries that will be worse off with an FMP than without one. In rejecting NMFS's longstanding interpretation of the Act, the Ninth Circuit failed to interpret the Act as a harmonious whole and give effect to every clause and word. This Court should grant the petition.

STATEMENT OF THE CASE

A. Alaska's salmon and other fisheries

Alaska leads the nation in the harvest of seafood. In 2014, commercial fishermen landed 5.7 billion pounds of finfish and shellfish in Alaska, which was 58 percent of the fish landed in the United States. U.S. Dep't of Commerce, *Fisheries of the United States 2014* (Sept. 2015) ("Fisheries of the United States"), at 8 (available at https://goo.gl/iGgHT9). The combined commercial harvest in Alaska and the other states within the jurisdiction of the Ninth Circuit equaled more than 70 percent of fish by weight landed in the United States. *Id.*

Fishing, and especially salmon fishing, is vital to Alaska's economy. In 2014, commercial fishing and the seafood industry accounted for billions of dollars in local economic impacts and supported approximately 61,000 full- and part-time jobs. U.S. Dep't of Commerce, *Fisheries Economics of the United States 2014* (May 2016) ("Fisheries Economics of the United States"), at 20 (available at https://goo.gl/SsDlvZ). That was more than one-sixth of all the jobs in the state. Recreational fishing accounted for another billion dollars in local economic impacts and supported 5,167 full- and part-time jobs. *Id.* at 21. Seafood is Alaska's largest foreign export, and the state by itself ranks sixth in seafood export value compared to seafood producing nations. The McDowell Group, *The Economic Value of Alaska's Seafood Industry* (Dec. 2015), at 5 (available at https://goo.gl/LLYfvQ). Among Alaska's commercial fisheries, salmon have the greatest ex-vessel value. *Id.* at 7. Salmon are also responsible for the greatest economic impact in terms of producing jobs and income, *id.* at 11, and are im-

portant to Alaska's recreational fisheries, Fisheries Economics of the United States, at 21.

Nearly 95 percent of salmon commercially landed in the United States are landed in Alaska. Fisheries of the United States, at xi–xii. Most of the rest are landed in Washington, California, or Oregon. *Id.* Alaska's salmon fisheries are certified as "well managed and sustainable" by the Marine Stewardship Council. Alaska's fisheries in general have been recognized as one the three best managed fisheries in the world, the others being Iceland and New Zealand. BOB KING, STATE OF ALASKA DEP'T OF FISH AND GAME, SUSTAINING ALASKA'S FISHERIES: FIFTY YEARS OF STATEHOOD 47 (Jan. 2009) ("Sustaining Alaska's Fisheries") (available at https://goo.gl/1HbvWl).

B. The pre-statehood decline of Alaska's salmon fisheries, and their post-statehood recovery

Alaska's salmon fisheries were not always well managed. The primary motivation for statehood was the failure of the federal government to properly manage Alaska's salmon fisheries and the desire for local control, according to a former territorial governor and keynote speaker at Alaska's constitutional convention. ERNEST GRUENING, THE STATE OF ALASKA 382–407 (1968) ("[T]he Territory of Alaska, deprived, as no other territory had been, of the control and management of its fisheries, through the intrigue and political manipulations of the same forces that have helped to destroy the resource, began to plead for the right of self-government."). Pre-statehood management of Alaska's salmon fisheries was so bad that by 1953 harvests reached their lowest point in thirty-two years, and President Eisenhower declared the territory a federal disaster area. *Id.* at 404–05.

Among other issues, the federal government failed to appropriate sufficient funds to manage Alaska's fisheries, *id.* at 400–01, and established fishing periods months in advance based on salmon run expectations. Sustaining Alaska's Fisheries, at 9.[1] Because the number of salmon returning varies from year to year, inflexible management decisions made in advance, before a run's size is known, risk over- or under-harvesting stocks. The danger of over-harvesting is obvious, but under-harvesting salmon can also harm stocks because having too many fish in the spawning areas can overload the areas' capacity and lead to fewer salmon surviving. When the State took over management of its salmon fisheries it gave local managers the authority to open fishing by emergency order, based on actual run strength, and only when enough salmon, but not too many, were ensured to reach the spawning areas so as to sustain future yields. *Id.* The number of salmon that managers aim to have escape harvesters and reach the spawning grounds to sustain and maximize future yields is known as an "escapement goal." The constitution for the new state required that fisheries be managed on the sustained yield principle. Alaska Const. art. VIII, § 4.

After the State assumed control over its salmon fisheries at statehood, salmon runs and harvests began to recover. In the 1960s annual state salmon harvests ranged between forty and sixty million fish,

---

[1] Another issue was the controversial use of fish traps in salmon fishing, which were allowed by the federal government but banned by the State at statehood. *Metlakatla Indian Cmty., Annette Islands Reserve v. Egan*, 369 U.S. 45, 47–48 (1962).

compared to twenty-five million in 1959. Sustaining Alaska's Fisheries, at 3, 10. Yet, a serious threat to Alaska's fisheries remained: foreign fishing. *See* App. 6a–7a (citing Mark H. Zilberberg, *A Legislative History of the Fishery Conservation & Management Act of 1976* ("Legislative History") 237–41, 352, 448–49, 455–56, 472–73, 476–81, 519 (1976). As an example, it was estimated that in 1975 Japanese fishermen caught more than twice as many salmon in the North Pacific than American fishermen. Legislative History, at 265. The Magnuson-Stevens Act was enacted "to protect the American fishing industry, and to preserve endangered stocks of fish, from what were perceived to be predatory incursions by foreign fishing fleets into American waters." *Davrod Corp. v. Coates*, 971 F.2d 778, 785 (1st Cir. 1992).

C. The Magnuson-Stevens Fishery Conservation and Management Act

In 1976, Congress enacted the Fishery Conservation and Management Act, Pub. L. No. 94-265, 90 Stat 331 (codified as amended at 16 U.S.C. §§ 1801–1891), later renamed the Magnuson-Stevens Fishery Conservation and Management Act, extending federal jurisdiction over fisheries within 200 miles from the coast. App. 6a. States retained jurisdiction over state waters, the first three miles from the coast, and the federal government asserted jurisdiction over the next 197 miles, called the exclusive economic zone ("EEZ"). *Id.* Among other things, the Magnuson-Stevens Act severely restricts foreign fishing in the EEZ. 16 U.S.C. §§ 1821–1829.

1. The National Fishery Management Program

The Magnuson-Stevens Act also establishes a National Fishery Management Program. 16 U.S.C.

§§ 1851–1869. The Secretary of Commerce, acting through NMFS, is given authority to implement the program "to prevent overfishing, to rebuild overfished stocks, to insure conservation, to facilitate long-term protection of essential fish habitats, and to realize the full potential of the Nation's fishery resources." *Id.* § 1801(a)(6). Assisting NMFS are eight Regional Fishery Management Councils, which are advisory bodies with authority over different coastal regions. *Id.* §§ 1852(a)–(b). The North Pacific Fishery Management Council ("North Pacific Council") has authority over the fisheries in federal waters off Alaska. *Id.* § 1852(a)(1)(G).

Section 1852(h) describes the "functions" of Councils. The principal task of each Council is to prepare FMPs and amendments "for each fishery under its authority that requires conservation and management." *Id.* § 1852(h)(1). Councils conduct public hearings to receive input on the development of FMPs, *id.* § 1852(h)(3), and submit FMPs to NMFS for review and approval, *id.* §§ 1852(h)(1), 1854(a). As FMPs lack regulatory effect, Councils also propose regulations to implement FMPs and submit the proposed regulations to NMFS for review and approval. *Id.* §§ 1853(c), 1854(b).

FMPs, and regulations that implement FMPs, must be consistent with ten National Standards for fishery conservation and management. *Id.* § 1851(a). FMPs must also include certain mandatory provisions, while other provisions are optional. *Id.* §§ 1853(a)–(b). NMFS must review a recommended FMP "to determine whether it is consistent with the national standards, the other provisions of this chapter, and any other applicable law," publish notice of

the plan and solicit public comments, and "approve, disapprove, or partially approve" the FMP. *Id.* §§ 1854(a)(1)–(3). A Council may submit a revised FMP if a plan is disapproved or only partially approved. *Id.* § 1854(a)(4).

NMFS reviews a Council's proposed regulations "to determine whether they are consistent with the fishery management plan, plan amendment, this chapter and other applicable law." *Id.* § 1854(b)(1). If that determination is affirmative, NMFS promulgates final regulations after providing notice and an opportunity for public comment. *Id.* § 1854(b)(3). If that determination is negative, the Council may submit revised proposed regulations. *Id.* § 1854(b)(2).

Councils do not propose FMPs for every fishery within their authority. The phrase "conservation and management" was added to § 1852(h)(1) in 1983 "to clarify that the function of the Councils is not to prepare a fishery management plan (FMP) for each and every fishery within their geographical areas of authority. Rather, such plans are to be developed for those fisheries which require conservation and management." H.R. CONF. REP. NO. 97-982 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4364, 4367. The Act defines "conservation and management" in part as "the rules, regulations, conditions, methods, and other measures … which are required to rebuild, restore, or maintain, and which are useful in rebuilding, restoring, or maintaining, any fishery resource and the marine environment." 16 U.S.C. § 1802(5).

NMFS has long interpreted § 1852(h)(1) as requiring Councils to prepare FMPs only for fisheries that require the conservation and management measures that an FMP would provide. Advisory

guidelines adopted by NMFS to assist Councils in the development of FMPs, 50 C.F.R. §§ 600.305–.355 (2016), recommend that if "an FMP can improve or maintain the condition of the stock," *id.* § 600.305(c)(1)(iii), and the amount of the stock caught in federal waters significantly contributes to the stock's status, that should "weigh heavily in favor" of a Council preparing an FMP, *id.* § 600.305(c)(3). On the other hand, if a stock is "already adequately managed by states" or otherwise, "consistent with the requirements of the Magnuson-Stevens Act and other applicable law," § 600.305(c)(1)(x), that may "weigh heavily against a Federal FMP action," *id.* § 600.305(c)(3). While these guidelines were recently revised, National Standard Guidelines, 81 Fed. Reg. 71858-01 (Oct. 18, 2016), that interpretation of § 1852(h)(1) by NMFS is longstanding, *see, e.g.*, 50 C.F.R. §§ 600.340(a)–(b) (1998).

Except for fisheries that are overfished, NMFS has discretion whether to adopt an FMP when a Council does not recommend one for a particular fishery. Specifically, NMFS "may" prepare its own FMP if a fishery requires conservation and management and a Council fails to develop an FMP after a reasonable time, 16 U.S.C. § 1854(c)(1)(A), or if NMFS disapproves or partially disapproves an FMP and a Council fails to submit a revised plan, *id.* § 1854(c)(1)(B). NMFS does not have discretion, and "shall" prepare its own FMP, if NMFS determines and notifies a Council that a fishery is overfished and the Council does not recommend an FMP for the fishery within two years. *Id.* §§ 1854(e)(2)–(5).

The Magnuson-Stevens Act allows a court to review and set aside NMFS's implementing regulations under some, but not all, of the judicial review provisions of the APA. *Id.* § 1855(f)(1)(B). The Act does not provide for judicial review of actions by Councils, such as whether a Council performed one of its "functions" under § 1852(h).

2. State jurisdiction over fisheries in the EEZ

As originally enacted, the Magnuson-Stevens Act preserved state jurisdiction over in-state registered fishing vessels in the EEZ. Pub. L. No. 94-265, 90 Stat. 331, 355 § 306(a) (previously codified at 16 U.S.C. § 1856(a) (1976)). The statutory language provided in relevant part:

> No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State.

Id. Of course, under the Supremacy Clause state regulation of vessels in the EEZ must be consistent with federal law. *See, e.g.*, *California v. Weeren*, 607 P.2d 1279, 1287 (Cal. 1980) (holding that the Magnuson-Stevens Act allowed California to regulate fishing in the EEZ where there was no FMP for the fishery).

The Sustainable Fisheries Act of 1996 amended the Magnuson-Stevens Act to both clarify and provide additional ways for a State to exercise jurisdiction over fishing vessels in the EEZ. Pub. L. No. 104-297, § 112(a), 110 Stat. 3559, 3595–96 (1996). The relevant subsection of the Magnuson-Stevens Act now has three discrete parts, 16 U.S.C.

§§ 1856(a)(3)(A)–(C), with subsection (a)(3)(A) allowing States to regulate fishing vessels in the EEZ if:

> The fishing vessel is registered under the law of that State, and (i) there is no fishery management plan or other applicable Federal fishing regulations for the fishery in which the vessel is operating; or (ii) the State's laws and regulations are consistent with the fishery management plan and applicable Federal fishing regulations for the fishery in which the vessel is operating.

Under subsection (a)(3)(A), just as was true before its enactment, States can regulate in-state registered fishing vessels in the EEZ so long as federal law does not preempt state law. Legislative history for the amendment confirms that this subsection was meant not to change the law but to "clarify that a State may regulate a fishing vessel registered under its laws outside its boundaries if there is no Federal fishery management plan in place for a fishery," as the prior provision was "somewhat vague with respect to a State's authority to regulate its vessels and [had] been the subject of recent court challenges." S. REP. NO. 104-276, at 30 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4073, 4103.

Under subsection (a)(3)(B), States may regulate in- or out-of-state registered fishing vessels in the EEZ if the FMP for the fishery in which the vessel is operating delegates management authority to a State, and the State's laws are consistent with the FMP.

Subsection (a)(3)(C) applies only to fisheries in Alaska. Although legislative history does not explain

the reason for it, subsection (a)(3)(C) was a response to the "Mister Big" episode discussed by the Ninth Circuit, where in 1995 an out-of-state registered vessel overharvested scallops in a fishery in Alaska that was not covered by an FMP. App. 9a–10a. Subsection (a)(3)(C) allows the State to regulate out-of-state registered vessels operating in the EEZ off Alaska, like the Mister Big, if the vessel is operating in a fishery for which there was no FMP in place on August 1, 1996, and NMFS and the North Pacific Council find that the State has a legitimate interest in conserving and managing that fishery. The State is able to regulate in-state registered vessels in such a fishery pursuant to subsection (a)(3)(A)(i). The state regulatory authority provided for under subsection (a)(3)(C) terminates upon the approval and implementation of an FMP for the fishery.

D. The three historical commercial salmon fisheries

Since statehood, Alaska has managed three commercial salmon fisheries that extend into the EEZ, depicted on the map at App. 113a, and commonly referred to as the Cook Inlet, Alaska Peninsula, and Prince William Sound Areas.[2] The three areas constitute a very small part of the EEZ and are adjacent to state waters. *Id.* This case directly concerns Cook Inlet. The federal government regulated commercial salmon fishing in Cook Inlet before statehood, after which the State took over management of the fishery. *See Alaska v. United States*, 422 U.S. 184, 200–01 (1975).

---

[2] The map is also available at Figure 23 to 50 C.F.R. pt. 679 (2013).

The origin of these fisheries dates to 1953, when a treaty banned most commercial salmon net fishing in waters more than three miles from Alaska's coast, but exempted these three fisheries. App. 5a–6a. Congress implemented the treaty through the North Pacific Fisheries Act of 1954, and authorized the Secretary of Interior, who at the time had authority over fisheries, to promulgate regulations for fisheries contiguous to Alaska waters. *Id.* The Secretary, through the Bureau of Commercial Fisheries, Fish and Wildlife Service, issued a regulation prohibiting salmon net fishing in the western waters of Alaska, but excepting Cook Inlet and the two other areas where net fishing had historically been allowed; in those areas, federal regulation was to mirror Alaska regulation. 50 C.F.R. § 210.10 (1970) (repealed). In deferring to state management over these fisheries, the Bureau of Commercial Fisheries recognized that the State was best suited to manage the fisheries:

> Since salmon stocks are dynamic in nature the management of them must be extremely flexible and under common management both within and outside of State waters which are open to commercial fishing.

North Pacific Commercial Fisheries, North Pacific Area, 35 Fed. Reg. 7070, 7070 (May 5, 1970).

The State continued to manage these fisheries after the enactment of the Magnuson-Stevens Act, though the North Pacific Council and NMFS could have proposed and promulgated an FMP and federal

regulations for the fisheries.[3] Instead, the first FMP for Alaska's salmon fisheries deferred to existing state management of the fisheries. Fishery Management Plan for the High Seas Salmon; Fishery Off the Coast of Alaska, 44 Fed. Reg. 33250 (June 8, 1979).

The FMP divided the federal waters adjacent to Alaska into East and West Areas, with the boundary at the longitude of Cape Suckling. *Id.* at 33267; *see* App. 113a (map depicting Cape Suckling). In the West Area, the FMP prohibited commercial salmon fishing except for the "existing small-scale net fisheries" in the three fisheries. *Id.* The plan noted that these fisheries were "technically" in the EEZ but "are conducted and managed by the State of Alaska as inside fisheries." *Id.* at 33267. At the time, a state could exercise jurisdiction over in-state registered vessels in the EEZ, consistent with federal law, even if the fishery was technically included within the FMP. The first FMP deferred to state management by including the fisheries within the plan but declining to adopt any federal management measures for the fisheries beyond the existing regulations under the North Pacific Fisheries Act (which deferred to state management). *Id.*[4]

In 1992, Congress repealed the North Pacific Fisheries Act and passed the North Pacific Anadro-

---

[3] In 1970, most of the functions of the Bureau of Commercial Fisheries transferred to the Secretary of Commerce. Reorganization Plan No. 4 of 1970, § 1(a), 84 Stat. 2090 (1970).

[4] The Ninth Circuit's observation that in 1979 Cook Inlet salmon stocks were at historic lows under state management, App. 7a–8a, appeared to overlook that the Magnuson-Stevens Act was enacted in part to stop foreign fishing that was decimating fish stocks in the EEZ, Legislative History, at 265.

mous Stocks Act of 1992, which implemented a new fishing treaty that replaced the 1953 treaty. App. 9a. The new treaty did not apply to the EEZ. *Id.* As a result, NMFS repealed for lack of a statutory basis the regulations at 50 C.F.R. part 210 that had expressly deferred to the State's management of the three fisheries. Removal of Regulations, 60 Fed. Reg. 39272 (Aug. 2, 1995). The FMP was not amended at that time to reflect this change in law, and continued to provide that the State would manage the fisheries.

After the 1996 amendments to the Magnuson-Stevens Act, the State's jurisdiction over the three fisheries depended on the fisheries being excluded from the FMP, and the fisheries remained technically within the management area for the FMP, but with no federal management measures. Still, the State has continued to manage the three fisheries, just as it has done since statehood.

State management of Alaska's salmon fisheries has been extraordinarily successful. Whereas under federal management the state salmon harvest reached a low of twenty-five million fish in 1959, the state commercial salmon harvest in 2015 was estimated to be 263.5 million fish. Alaska Department of Fish & Game, *2015 Alaska Preliminary Commercial Salmon Harvest and Exvessel Values* (Oct. 16, 2015) (available at https://goo.gl/ap9Mp2). Even with this huge commercial harvest Alaska's salmon fisheries are recognized as sustainable and among the best managed fisheries in the world.

E. Factual background

In 2010, the North Pacific Council began a comprehensive review of the FMP. App. 12a. During that process, NMFS realized that Cook Inlet and the oth-

er two historical fisheries were "not exempt from the FMP as previously assumed." *Id.* The FMP claimed that fishing in the areas was authorized by "other Federal law." App. 12a–13a. But the "other Federal law" was the North Pacific Fisheries Act and its implementing regulations, both of which had been repealed. The North Pacific Council therefore circulated a draft Environmental Assessment analyzing four options for amending the FMP to provide for management of these areas, held five public meetings, and took testimony. App. 13a.

An update of the FMP was also needed after passage of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 ("Reauthorization Act"). Pub. L. 109-479, 120 Stat. 3575 (2007). Subsection 104(a)(10) of the Reauthorization Act required that by 2011 FMPs establish a mechanism for specifying annual catch limits for fisheries managed under an FMP and accountability measures to ensure compliance with those limits. 16 U.S.C. § 1853(a)(15).

In December 2011, the North Pacific Council unanimously recommended that NMFS approve Amendments 10, 11, and 12 to the FMP. Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Salmon, 77 Fed. Reg. 19605-01 (Apr. 2, 2012). Amendment 12, at issue in this case, revised the FMP to reflect the Council's salmon management policy: to facilitate State management of all of Alaska's salmon fisheries in accordance with the Magnuson-Stevens Act, Pacific Salmon Treaty, and applicable federal law. *Id.* at 19606. To that end, Amendment 12 redefined the FMP's management area to exclude from the West Area the three fisheries and

the sport salmon fishery. *Id.* at 19606–07. The Council concluded that federal conservation and management of these fisheries was not necessary because salmon are more appropriately managed as a unit to meet in-river escapement goals. *Id.* at 19607. Excluding these fisheries from the FMP would allow the State to continue managing the stocks as seamlessly as practicable throughout their range, rather than imposing dual state and federal management. *Id.*[5]

As required by the Magnuson-Stevens Act, 16 U.S.C. § 1854(a)(1), NMFS evaluated Amendment 12 to ensure its consistency with the Act, including the National Standards and other applicable law. Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Salmon, 77 Fed. Reg. 75570 (Dec. 21, 2012). NMFS agreed that State management of the three fisheries is "consistent with the policies and standards of the Magnuson-Stevens Act, and that Federal management of … [these fisheries] would serve no useful purpose or provide present or future benefits that justified the costs of Federal management." *Id.* at 75570. NMFS and the North Pacific Council considered four alternatives for managing the fisheries, including whether the fisheries should be managed under an FMP, and preferred the State's escapement goal management system. *Id.* at 75582–83. NMFS

[5] For the East Area, Amendment 12 delegated management of the commercial and sport salmon fisheries to the State pursuant to 16 U.S.C. § 1856(a)(3)(B). 77 Fed. Reg. at 19607. Management of the East and West Areas require different considerations because unlike in the West Area, many salmon stocks caught in the East Area spawn in rivers thousands of miles away in Canada, Washington, and Oregon and are subject to the Pacific Salmon Treaty.

agreed with the North Pacific Council that under an FMP, even if management authority were delegated to the State, annual catch limits would have to be established for the fisheries "in advance through notice and comment rule making, which would result [in] harvests being restricted in years when returns were above forecast and harvests too high in years when returns were below forecast." *Final Envtl. Assessment/Regulatory Impact Review for Amendment 12* (June 2012), at 31 (available at https://goo.gl/s7w3Sp). NMFS agreed that the State's escapement goal management system is consistent with National Standard 1, 16 U.S.C. § 1851(a)(1), because the State's system is more effective than an FMP for preventing overfishing of the salmon stocks in the three fisheries. 77 Fed. Reg. at 75582. NMFS also agreed that the State manages salmon stocks for optimum yield as required by National Standard 1. *Id.* at 75581.

NMFS further agreed that removing the fisheries from the FMP, and deferring to State management, is consistent with National Standard 2, 16 U.S.C. § 1851(a)(2), because the State manages fisheries using the best scientific information available; consistent with National Standard 3, *id.* § 1851(a)(3), because Amendment 12 allows the State to manage salmon stocks in Cook Inlet as a unit; and consistent with National Standard 7, *id.* § 1851(a)(7), because Amendment 12 minimizes costs and avoids unnecessary duplication. 77 Fed. Reg. at 75575. Although under Amendment 12 the State has jurisdiction to regulate only in-state registered vessels in the EEZ, NMFS agreed that the risk of unregulated fishing in the three fisheries is unlikely for several reasons, including the fisheries' remoteness. *Id.* at 75576. "The

negligible level of risk [of fishing by out-of-state registered vessels] did not warrant retaining the net fishing areas in the FMP." *Id.* at 75578. NMFS also stated that it may have insufficient funds to manage the fisheries through an FMP. *Id.* at 75574.

F. Proceedings below

Plaintiffs are two groups representing Cook Inlet commercial salmon fishermen that opposed NMFS's proposed rule to implement Amendment 12. App. 13a. Plaintiffs argued that commercial harvests of sockeye salmon in Cook Inlet had declined since 1981, which plaintiffs attributed in part to the State managing those stocks to achieve escapement goals rather than catch limits. *Id.*

In 2013, plaintiffs filed suit under the APA challenging Amendment 12 and NMFS's implementing regulations as contrary to the Magnuson-Stevens Act's requirement that the North Pacific Council prepare an FMP "for each fishery under its authority that requires conservation and management," 16 U.S.C. § 1852(h)(1); inconsistent with the National Standards; and arbitrary and capricious and contrary to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C). App. 14a.

The district court granted the State's motion to intervene to defend NMFS's rule, and entered summary judgment for defendants. The court applied *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), App. 42a–43a, and at step one of *Chevron* held that the Act is ambiguous as to whether a Council must prepare an FMP for every fishery that requires conservation and management in any manner from any entity, App. 54a. Reading the Act as a harmonious whole, the

court held that by allowing States to regulate in-state registered fishing vessels in the EEZ in the absence of an FMP, "Congress contemplated situations in which there would be no FMP for a fishery and a state would need to regulate outside the delegation process." App. 48a. The court was also guided by National Standard 3, requiring that stocks of fish be managed as a unit where practicable, and National Standard 7, requiring that conservation and management measures minimize costs and avoid unnecessary duplication, in concluding that a Council has some discretion in determining whether to prepare an FMP for a particular fishery. App. 49a–50a. At step two of *Chevron*, the court held the Act did not expressly forbid NMFS's interpretation that Councils could defer to state management of a fishery by declining to include the fishery within an FMP, and that NMFS's interpretation was within permissible bounds and consistent with the National Standards. App. 55a–66a. The court also rejected plaintiffs' NEPA claim. App. 67a–80a. Plaintiffs appealed.

The Ninth Circuit reversed. The Ninth Circuit framed the issue in the case as "whether NMFS can exempt a fishery under its authority that requires conservation and management from an FMP because the agency is content with State management." App. 5a. The court stated that the "usual initial question is whether the fishery at issue even needs conservation and management," with the agency's answer reviewed under the arbitrary and capricious standard of review, but the court felt no need to "tarry over that issue here; the government concedes that the Cook Inlet fishery requires conservation and management." App. 15a–16a.

The Ninth Circuit next assessed NMFS's interpretation of the Magnuson-Stevens Act at step one of *Chevron*. App. 16a. The court began its analysis by looking to § 1852(h)(1), which provides that as one of its "functions" a Council "shall" prepare an FMP for a fishery that requires "conservation and management." *Id.* To accept NMFS's interpretation that a Council may exclude a fishery from an FMP and defer to State management, the court thought it would need to add the word "federal" before the phrase "conservation and management," which the court would not do. App. 16a–17a. Instead, the court interpreted § 1852(h)(1) as requiring an FMP for every fishery requiring conservation and management in any manner from any entity. App. 17a–18a. As for § 1856(a)(3)(A)(i), which allows States to regulate in-state registered vessels in the EEZ in the absence of an FMP, the court held that that express grant of state regulatory authority did not override the North Pacific Council's duty to prepare an FMP for Cook Inlet. *Id.* The court thought § 1856(a)(3)(A)(i) would be "a strange form of delegation of federal regulatory authority, as it does not allow states to regulate vessels registered in other states." *Id.* The court held that the "Act is clear: to delegate authority over a federal fishery to a state, NMFS must do so expressly in an FMP." *Id.* The court thought subsection 1856(a)(3)(A)(i) only "covers those waters where for some reason a plan is not in effect; it is not an invitation to a Council to shirk the statutory command that it 'shall' issue an FMP for each fishery within its jurisdiction requiring conservation and management." *Id.* Ruling against NMFS at step one of *Chevron*, the court declined to reach plaintiffs' other challenges to Amendment 12, including plaintiffs' claim that the

FMP was inconsistent with the National Standards. App. 23a. The court denied the State's petition for rehearing and rehearing en banc with a one-sentence order. App. 82a–83a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit "has decided an important federal question that has not been, but should be, settled by this Court." Sup. Ct. Rule 10(c). When Alaska's salmon fisheries were last managed by the Federal Government using a strategy akin to catch limits, before statehood, salmon harvests fell to record lows. By contrast, under State management Alaska's salmon fisheries have flourished. The Ninth Circuit's decision returns these fisheries to that inferior federal management. Commercial salmon fishing is crucial to Alaska's economy.

The decision also deprives NMFS of a fishery management tool that it uses for other important fisheries in Alaska, where most domestic commercial fishing occurs. The Ninth Circuit's interpretation of the Magnuson-Stevens Act is also deeply flawed.

I. The Petition Raises a Federal Question of Exceptional Importance to Alaska and All Who Benefit From Its Fisheries.

The Ninth Circuit decided a federal question so important to the State—how Alaska's salmon fisheries will be managed—that it was the primary impetus for statehood. For more than fifty years, with the express, repeated, and continuous approval of the Federal Government, Alaska has managed these three salmon fisheries the same way it manages most salmon fisheries in state waters: to meet escapement goals. The Ninth Circuit held that the Magnuson-

Stevens Act forecloses that option and requires that the fisheries be managed under an FMP with annual catch limits. NMFS agrees that managing the fisheries with catch limits increases the risk of over- and under-harvesting salmon. Whether salmon are over- or under-harvested, the result is the same: fewer salmon in years to come.

Managing the three fisheries with annual catch limits harkens back to how the Federal Government managed Alaska's salmon fisheries before statehood, when fishing periods were inflexibly established months before the fishing season based on run expectations. By the 1950s Alaska's salmon harvests were at record lows under that inflexible federal management and the territory was declared a federal disaster area. A writ of certiorari is needed for Alaska to retain what it achieved at statehood: the authority to manage the three fisheries the way they should be managed to sustain and maximize yields, including Cook Inlet, "one of the nation's most productive salmon fisheries." App. 5a. This Court's intervention is especially needed because NMFS warned it may lack sufficient funds to manage the fisheries through an FMP; lack of funding for fishery management was also a problem before statehood. Alaska's salmon fisheries are critically important to the state's economy and the nation.

This case also warrants the Court's attention because Alaska and the other states within the Ninth Circuit are where most of the nation's commercial seafood is harvested, including almost all salmon. Salmon fisheries are usually best managed to meet escapement goals. For fisheries with populations that are more stable and easier to quantify, catch limits

work better. Yet, the fishery management experts at the North Pacific Council and NMFS have determined, for various reasons, that Alaska should also manage some non-salmon fisheries without an FMP, including the Tanner crab fishery in the Gulf of Alaska. *See* Tanner Crab off Alaska, 52 Fed. Reg. 17577-01 (May 11, 1987). The North Pacific Council and NMFS have also declined to adopt an FMP for lingcod in Alaska, deferring management of the entire EEZ for that fishery to the State. These fisheries require conservation and management in some manner from some entity, meaning the NMFS-approved state management of these fisheries is in jeopardy after the Ninth Circuit's decision.

This case may be the Court's one chance to correct the Ninth Circuit's misinterpretation of a forty-year-old statute. When NMFS defers to state jurisdiction over fisheries in Alaska, it is for more important fisheries than elsewhere in the nation. While NMFS and other Councils have deferred to state jurisdiction over fisheries outside of the Ninth Circuit, it seems they do so because little harvest occurs in those federal waters. *See, e.g.*, Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic, 77 Fed. Reg. 15916, 15918 (Mar. 16, 2012) (removing thirteen species of snapper/grouper from the FMP); Stone Crab Fishery of the Gulf of Mexico; Removal of Regulations, 76 Fed. Reg. 59064-01 (Sept. 23, 2011). NMFS may defer to state management more often in Alaska, and for more important fisheries, because of Alaska's expertise in fisheries management. Alaska's remoteness undoubtedly is also a factor. Under the Magnuson-Stevens Act, States have jurisdiction over only in-state registered fishing vessels in the absence of an FMP, but Alaska's unique geography makes it

unlikely that a vessel registered elsewhere would make the long trip to fish in one of Alaska's non-FMP fisheries. *See, e.g.*, 77 Fed. Reg. at 75576 (NMFS agreeing that unregulated salmon fishing in Cook Inlet under Amendment 12 was unlikely). For these reasons, it is unlikely that another court of appeals will have the opportunity to directly rule on the issue the Ninth Circuit decided.

Alaska's fisheries are among the best managed in the world and of critical importance to the state economy. The Court should grant the petition so that the State may continue to manage those fisheries in federal waters that the experts at the North Pacific Council and NMFS agree are best managed by the State under state law.

II. The Ninth Circuit's Interpretation of the Magnuson-Stevens Act is Incorrect.

To find against NMFS at step one of *Chevron*, as the Ninth Circuit did, the court had to conclude that the Magnuson-Stevens Act "unambiguously forbid[s]" NMFS's interpretation. *Barnhart v. Walton*, 535 U.S. 212, 218 (2002). To the contrary, when read as a harmonious whole, the Act clearly allows NMFS to approve an FMP that is consistent with the National Standards, and excludes small areas that do not need the conservation and management measures that an FMP would provide. If the statute is ambiguous on that point, NMFS's interpretation should be upheld as well within "permissible bounds" at step two of *Chevron*. *Id.*

A. The Magnuson-Stevens Act does not require a Council to prepare an FMP for a fishery that does not need one.

NMFS has long interpreted 16 U.S.C. § 1852(h)(1) as requiring an FMP only for those fisheries that need the conservation and management measures that an FMP would provide. 50 C.F.R. § 600.305(c) (2016); 50 C.F.R. §§ 600.340(a)–(b) (1998). That interpretation is not only reasonable, it is manifestly correct. Under the Ninth Circuit's contrary interpretation, Councils could be required to prepare FMPs for small areas of federal waters even if that would lead to overfishing, impose unnecessary costs and duplication, and force state and federal managers to manage stocks piecemeal instead of as units, all in violation of the National Standards. The Act does not require that counter-intuitive result.

Instead, 16 U.S.C. § 1852(h)(1) requires that as one of its "functions" Councils "shall" prepare FMPs "in accordance with the provisions of this chapter." Far from "shirk[ing]" its duty, App. 19a, the North Pacific Council held five public meetings to consider four options for managing the three fisheries; among the options considered was whether to manage the fisheries under an FMP. 77 Fed. Reg. at 75582–83. The North Pacific Council made a reasoned decision to exclude the fisheries so that the FMP would be consistent with the National Standards and prevent overfishing. *Id.* The Ninth Circuit should have found that the Council performed its function. The easy answer to the Ninth Circuit's hypothetical worrying that NMFS might approve an FMP "for only a single ounce of water in [the Alaska salmon] fishery," App. 22a, is that approval of such an FMP would be al-

lowed only in the very unlikely event that the FMP prevented overfishing of salmon and complied with the other National Standards.

The Ninth Circuit's interpretation of § 1852(h)(1) renders § 1856(a)(3)(A)(i) virtually meaningless. That subsection explicitly preserves state jurisdiction over in-state registered vessels in a fishery in the absence of an FMP. Under the Ninth Circuit's interpretation, that subsection would allow States to regulate fishing vessels precisely when a fishery does not need any conservation and management in any manner from any entity. The Ninth Circuit's interpretation also means that the North Pacific Council will have to prepare FMPs for fisheries currently managed by Alaska under § 1856(a)(3)(C), rendering empty that grant of state jurisdiction.[6] Alaska's management authority under that subsection terminates upon the adoption and implementation of an FMP for a fishery. The Ninth Circuit violated this Court's command to "give effect, if possible, to every clause and word of a statute rather than to emasculate an entire section." *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (internal quotation marks omitted).

The Ninth Circuit's interpretation of 16 U.S.C. § 1852(h)(1) also conflicts with its history, as the phrase "conservation and management" was added to the Act in 1983 to clarify that Councils are not required to prepare an FMP for every fishery within

---

[6] An example of such a fishery is the Tanner crab fishery for the Gulf of Alaska, for which Alaska has jurisdiction over out-of-state registered fishing vessels under § 1856(a)(3)(C), and jurisdiction over in-state registered fishing vessels under § 1856(a)(3)(A)(i).

their authority. 1982 U.S.C.C.A.N. at 4367. Every ongoing commercial fishery requires conservation and management from some entity and in some manner—for example, measures requiring a permit, recordkeeping, or certain methods and means. If the phrase "conservation and management" had the unbounded meaning that the Ninth Circuit ascribed to it, then Councils would have to prepare an FMP for every fishery within their authority, contrary to the clear intent of Congress. The Ninth Circuit's circular response to this point, App. 21a, fails to explain how a commercial fishery could operate without any conservation and management measures. For similar reasons, the Ninth Circuit erred to the extent it viewed as significant NMFS's concession that the Cook Inlet salmon fishery requires conservation and management. App. 15a. All commercial fisheries do, but not all of them require the conservation and management measures of an FMP.

Read in context, the phrase "conservation and management" in § 1852(h)(1) must mean the conservation and management measures that an FMP would provide. Otherwise, Councils will be required to prepare FMPs for fisheries that do not need FMPs. NMFS's interpretation of that phrase is consistent with its statutory definition. 16 U.S.C. § 1802(5). Under that definition, the requirement in § 1852(h)(1) that Councils prepare an FMP for a "fishery . . . that requires conservation and management" simply means Councils must prepare an FMP for a fishery that requires the "measures … required to … rebuild, restore, or maintain … any fishery resource"—in other words, the "measures" in an FMP. *Id.* § 1802(5). In a case that the Ninth Circuit thought turned on the meaning of "conservation and

management," the court never even acknowledged the statutory definition of that phrase.

While the Ninth Circuit thought the state jurisdiction preserved in 16 U.S.C. § 1856(a)(3)(A) to be "strange," as it does not allow for regulation of out-of-state registered vessels, App. 18a, the Magnuson-Stevens Act as originally enacted preserved that same limited state jurisdiction over fishing vessels in the EEZ. 16 U.S.C. § 1856(a) (1976). The 1979 FMP for Alaska's salmon fisheries deferred to that same limited state jurisdiction; following the Ninth Circuit's reasoning, that first FMP must have been contrary to law. In any event, the experts at the North Pacific Council and NMFS agree that for the three fisheries this limited state jurisdiction is enough for Alaska to regulate the fisheries effectively. The Ninth Circuit should have deferred to that expert judgment regardless of how strange the court thought it was. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) ("The court is not empowered to substitute its judgment for that of the agency.").[7]

The Ninth Circuit appeared to give much weight to Congress's rejection of proposals to amend the Magnuson-Stevens Act. App. 8a–9a, 19a–20a. That was an error, as "courts have no authority to enforce a principle gleaned solely from legislative history

[7] Although the Mister Big was briefly able to exploit this so-called jurisdictional loophole, the situation in Cook Inlet is different. An out-of-state registered salmon fishing vessel in Cook Inlet would be quickly noticed, for when salmon are present in Cook Inlet so are other fishing vessels and law enforcement. The Mister Big was able to fish unnoticed for a time because it was fishing when the scallop fishery was closed.

that has no statutory reference point." *Shannon v. United States*, 512 U.S. 573, 584 (1994). Whatever the reasons for Congress's rejection of amendments to the Magnuson-Stevens Act that would have *mandated* state management of fisheries in the EEZ, App. 8a–9a, the Act has always preserved state jurisdiction over in-state registered fishing vessels in the EEZ in the absence of an FMP. NMFS is allowed to defer to that explicit preservation of state jurisdiction, so long as NMFS does not act in an arbitrary or capricious manner. *Volpe*, 401 U.S. at 415–16.

The Ninth Circuit was also incorrect in finding that the 1996 amendments were intended to limit State authority over fisheries in the EEZ. App. 17a–18a. Legislative history states that the amended language was intended to clarify the law. Nothing in the history of the amendments, or in the amendments themselves, suggests that Congress intended to alter Alaska's longstanding authority to manage the three fisheries. Though the 1996 amendments added additional avenues for States to exert jurisdiction over fishing vessels in the EEZ, the amendments explicitly preserved state jurisdiction over in-state registered vessels in the EEZ in the absence of conflicting federal law. Management of the three fisheries under an FMP, even if management authority is delegated to the State, is not an acceptable substitute for current State management because under an FMP the fisheries must be managed with annual catch limits. The Ninth Circuit incorrectly stated that the Magnuson-Stevens Act requires catch limits. App. 13a. It does not. Only FMPs must include catch limits, and not every fishery is managed under an FMP. 16 U.S.C. §§ 1856(a)(3)(A)(i) & (3)(C). The Ninth Circuit

erred by effectively reading these provisions out of the statute.

B. The Ninth Circuit Erred By Not Limiting Its Review to NMFS's Approval of the FMP.

The Ninth Circuit should not have even looked to 16 U.S.C. § 1852(h), which describes the "functions" of Councils, to assess whether NMFS acted contrary to law in approving Amendment 12 and its implementing regulations. The Magnuson-Stevens Act provides for judicial review of NMFS's final regulations implementing an FMP, *id.* § 1855(f), not of whether a Council performed one of its listed functions, such as recommending to NMFS an FMP for a fishery.

Because NMFS's implementing regulations must be consistent with an FMP, *id.* § 1854(b), a court probably can also review NMFS's determination that a recommended FMP is consistent with the Act, such as NMFS's determination that an FMP is consistent with the National Standards, *id.* § 1851(a) ("Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this subchapter shall be consistent with the following national standards for fishery conservation and management …").

For example, the Ninth Circuit could have reviewed NMFS's determinations that: State conservation and management measures prevent overfishing while achieving optimum yield of Cook Inlet salmon stocks, consistent with National Standard 1, *id.* § 1851(a)(1); the FMP allows Cook Inlet salmon stocks to be managed as a unit, consistent with National Standard 3, *id.* § 1851(a)(3); and the FMP minimizes costs and avoids unnecessary duplication,

consistent with National Standard 7, *id.* § 1851(a)(7). The Ninth Circuit also could have reviewed NMFS's determination that the FMP included all of the mandatory provisions listed in § 1853(a). The Ninth Circuit opted instead to review solely whether the North Pacific Council, an advisory body, performed its function under § 1852(h)(1). App. 23a.

But the Magnuson-Stevens Act does not provide for judicial review of a Council's recommendation to NMFS of what fishery to include in an FMP, just as it does not provide for judicial review of whether a Council performed any of its other "functions." *See, e.g.*, 16 U.S.C. § 1852(h)(3) (providing that as one if its "functions," a Council "shall" "conduct public hearings"); *id.* § 1852(h)(4) (Council "shall" "submit to the Secretary such periodic reports as the Council deems appropriate"); *id.* § 1852(h)(7) (Council "shall" "develop . . . multi-year research priorities for fisheries"). In essence, the Ninth Circuit re-wrote § 1852(h)(1) to establish a substantive requirement of an FMP, rather than merely list one of the functions of Councils.

NMFS could have overruled the North Pacific Council's recommendation to exclude the three fisheries from the FMP. The Act provides that NMFS "may" adopt an FMP for a fishery requiring conservation and management if a Council fails to. 16 U.S.C. §§ 1854(c)(1)(A)–(B). By using the permissive "may," the Act signals that NMFS has discretion. *S. Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 455–56 (1979) (holding an agency decision unreviewable where the underlying statute, which provided that the agency "may" take certain actions and was silent on what factors should guide the agency's

decision, was "written in the language of permission and discretion"). The Act only requires that NMFS "shall" adopt an FMP if NMFS determines a fishery to be overfished and a Council fails to act (not the case with the three fisheries). 16 U.S.C. §§ 1854(e)(2)–(5). Ninth Circuit should have avoided the "nonsensical result" of finding NMFS to have violated the Act by approving of the North Pacific Council's decision to leave the three fisheries without an FMP, when NMFS had discretion to make that same decision. *Paroline v. United States*, 134 S. Ct. 1710, 1729 (2014).[8]

[8] The Ninth Circuit's decision is in tension with a recent decision from the Court of Appeals for the D.C. Circuit. *Anglers Conservation Network v. Pritzker*, 809 F.3d 664 (D.C. Cir. 2016). In that case, environmental groups sued NMFS alleging that a Council had violated 16 U.S.C. § 1852(h)(1)'s command that the Council "shall" prepare an FMP for certain fish stocks, similar to the claim made by plaintiffs in this case. *Id.* at 668. In *Anglers*, the court of appeals affirmed the dismissal of the case on the grounds that Council's decision to not include the stocks within an FMP was but a recommendation to NMFS, and therefore not a reviewable final agency action, and because the Magnuson-Stevens Act provides that NMFS "may" adopt an FMP if a Council fails to, indicating agency discretion. *Id.* at 669–72.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

SETH M. BEAUSANG
COUNSEL OF RECORD
ASSISTANT ATTORNEY GENERAL
STATE OF ALASKA
DEPARTMENT OF LAW
1031 West 4th Ave., Suite 200
Anchorage, AK 99501
seth.beausang@alaska.gov
(907) 269-5100

February 27, 2017