No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CITY OF TOMBSTONE,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF AGRICULTURE; TOM VILSAK (in his official capacity); TOM TIDWELL (in his official capacity); CORBIN NEWMAN (in his official capacity);

Defendants-Appellants,

On Emergency Application from the
United States Court of Appeals for the Ninth Circuit

CITY OF TOMBSTONE'S EMERGENCY APPLICATION FOR INJUNCTION PENDING INTERLOCUTORY APPEAL TO THE HON. JUSTICE ANTHONY M. KENNEDY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTORY STATEMENT

Water is life to the historic desert town of Tombstone, Arizona, and its 1,562 residents. It is also life to Southeastern Arizona during wildfire season. And yet, Defendants are refusing to allow Tombstone to freely and fully restore its Huachuca Mountain municipal water system: (a) six years after arsenic contamination left just one of Tombstone's wells producing safe potable water, (b) sixteen months after a fire at Six Gun City nearly burned Tombstone's historic downtown to the ground, (c) nine months after the Monument Fire's denuding of forests caused monsoon flooding to destroy the water system, (d) three weeks after wildfires have returned to the Huachuca Mountains, (e) in the midst of peak seasonal demand for potable water, and (f) just one month before monsoon season returns.

Even though Tombstone's water system rests upon 130 year old rights of way across federal land *that were recognized as valid property rights by the Forest Service in 1916* (App. 467), Defendants claim *limitless power* under the Property Clause to commandeer Tombstone's essential water system and threaten the very existence of the historic City of Tombstone as a political subdivision of the State of Arizona.

In claiming such limitless power under the Property Clause, the federal government is defying this Court's very clear ruling in *Alden v. Maine*, 527 U.S. 706, 713-14 (1999), that the Constitution assumes the "continued

existence" of the States as a limitation on every power delegated to the federal government. Defendants are also refusing to yield to this Court's recent *unanimous* declaration that "[i]mpermissible interference with state sovereignty is not within the National Government's enumerated powers." *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011). Finally, by misapplying federal law to commandeer municipal property that is essential to protecting public health and safety, Defendants are violating the first principle that "[t]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Printz v. United States*, 521 U.S. 898, 920 (1997) (quoting *New York v. United States*, 505 U.S. 144 (1992)).

In short, despite the plain language and clear implications of more than twenty years of jurisprudence, the federal government will not concede that there is *no such thing as limitless federal power* under any provision of the Constitution, especially when the principle of state sovereignty is at stake.

Fortunately, it is not too late to rescue "The Town Too Tough to Die." As discussed below, this Court should grant Tombstone an injunction pending appeal under the All Writs Act and the Tenth Amendment. It is respectfully requested that the Court grant this application before June 8, 2012 or otherwise as soon as possible.

JURISDICTION

This application seeks an original injunction pending appeal under the All Writs Act, 28 U. S. C. § 1651(a). Extraordinary relief is justified because Tombstone finds itself in the most critical and exigent circumstance in which any political subdivision of any State could ever find itself. The historic town is fighting for its very existence.

In the event Tombstone's underlying appeal to the Ninth Circuit Court of Appeals is denied, the town will file a timely petition for the issuance of writ of certiorari seeking review from this Court. Granting the requested relief is "appropriate in aid of" the Court's jurisdiction over the contemplated appeal because it will be exceedingly inconvenient, if not impossible, for Tombstone to prosecute any ultimate appeal if the town burns to the ground. Accordingly, the Supreme Court of the United States has jurisdiction to decide this application for an original injunction pending appeal under the All Writs Act, 28 U.S.C. § 1651(a), as well as Sup. Ct. R. 22 and 23.

LAW AND STATUTES INVOLVED

The Property Clause provides: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, Sec. 3, Cl. 2. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to

the States respectively, or to the people." *Id.*, Amend. X. The All Writs Act, 28 U.S.C. § 1651, provides: "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction." The table of authorities lists all other relevant constitutional provisions, statutes and regulations. The Appendix contains their verbatim text.

PROCEEDINGS BELOW

Tombstone has desperately and repeatedly sought emergency injunctive relief in the lower courts. On March 1, 2012, the district court denied Tombstone's first motion for preliminary injunction without prejudice, allowing the City to file an amended complaint and a second preliminary injunction motion by March 30, 2012, but barring any reply brief or oral argument in support of the second motion. Dist. Ct. Dkt. 44. On March 30, 2012, Tombstone filed a First Amended Complaint and a second preliminary injunction motion seeking to stop Defendants' interference with its emergency repair efforts to restore its municipal water system. Dist. Ct. Dkt. 47, 48. After Defendants responded, the court entered an order on May 4, 2012, instructing the parties to draft proposed orders containing detailed proposed findings of fact and conclusions of law. Dist. Ct. Dkt. 56. Two days

later, on Sunday afternoon, May 6, 2012, the court vacated that order, indicating a short decision would be issued in a "few days." Dist. Ct. Dkt. 57. More than a week later, on May 14, 2012, the court denied Tombstone's second preliminary injunction motion, whereupon Tombstone's interlocutory appeal was immediately filed. App. 2-15, 57-58. On May 21, 2012, Tombstone filed an emergency motion for injunction pending appeal with the Ninth Circuit Court of Appeals. After a full briefing, on May 30, 2012, two judges of the Ninth Circuit's three judge motions panel denied the motion without explanation.[1] App. 1.

BACKGROUND

For over nine months, Defendants have refused to allow Tombstone to freely and fully repair and restore its 130 year old water infrastructure in the Huachuca Mountains—a municipal water system built on federal land that dates back to the days of Wyatt Earp and Doc Holliday. It is now peak season for water consumption in Tombstone and there is not enough water flowing from the Huachuca Mountain water system to support both adequate safe drinking water and fire suppression. App. 580-83, 616.

The threat of a catastrophic fire is very real for Tombstone; in

[1] The Ninth Circuit Court of Appeals' denial of the requested injunction pending appeal was a clear abuse of discretion because it is a "bare decision" and is, therefore, impossible to review. *Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2006).

December of 2010 the town nearly lost its historic downtown during the Six Gun City fire. App. 614-16. Without all of the water that can be produced by the Huachuca Mountain system, Tombstone simply cannot justify upgrading its water distribution system to provide adequate fire suppression capacity. *Id.* Worse still, wildfires are currently raging throughout Arizona, including a recent fire in the Huachuca Mountains, and Tombstone is contractually obligated to furnish the Arizona State Forester with water and equipment to combat regional wildfires. App. 79-84. Faced with only a partially repaired water system, Tombstone may not be able to perform under this contract, undermining the wildfire-fighting capacity of federal, state and local agencies in the region. App. 79-94.

Previously, between May and July 2011, the Monument Fire engulfed a large part of the eastern portion of the Huachuca Mountains where Tombstone's water supply infrastructure is located. In July 2011, the monsoon rains were record-breaking. With no vegetation to absorb the runoff, huge mudslides forced boulders—some the size of Volkswagens—to tumble down mountainsides crushing Tombstone's waterlines and destroying reservoirs; thus, shutting off Tombstone's main source of water. In response, both Tombstone and Governor Jan Brewer declared a State of Emergency. App. 225-26, 624-25.

By declaring a State of Emergency, Governor Brewer exercised "all

police power vested in the state by the constitution and laws of this state" to alleviate the peril facing Tombstone from the loss of its municipal water supply. Ariz. Rev. Stat. §§ 26-301(15), 26-303(E). Nevertheless, despite the State of Emergency, for more than nine months Defendants have been impeding Tombstone's efforts to take reasonable emergency action to repair its century-old Huachuca Mountain water infrastructure. Initially, they allowed mechanized equipment to repair two of Tombstone's twenty-five spring catchments, namely Miller and Gardner Springs. App. 267-71, 496, 507-08, 525-26, 528-29, 532-33, 544, 550. Defendants have otherwise disputed Tombstone's entitlement to restore the remaining twenty-three springs. App. 267-68, 533, 558, 567. And since March 1, 2012, Defendants have refused to allow Tombstone to use anything other than hand tools to restore *any* part of its water system. App. 558(¶11).

For more than nine months, Defendants have also played a cynical game of bureaucratic cat and mouse, rendering the exhaustion of administrative remedies futile in the context of this ongoing State of Emergency. App. 196-201, 207-14. Defendants, for example, have claimed that they do not know what Tombstone wants to do. But completing repairs to Tombstone's water system requires nothing more than what Defendants *already approved* during the first week of November 2011 with respect to Miller Spring. It requires usual and customary work that mirrors what has

been repeatedly done for decades with Defendants' knowledge and acquiescence. *Compare* App. 556-57, 570-73 *with* 211-12, 215-21, 518, 665-89.

Because Tombstone's water system is partially located in the Coronado National Forest, Defendants have also justified administrative delay by claiming ignorance about the town's legal authority to restore its municipal water system. But in 1916, the Forest Service acknowledged that Tombstone's municipal water system rests upon water rights and pipeline rights of way protected by the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661 ("1866 Mining Act"). App. 414. Rights protected by the 1866 Act are superior to any conflicting land patent. *California v. United States*, 438 U.S. 645, 656 n.11 (1978). Moreover, securing rights under the 1866 Act requires no federal permit or approval because the Act automatically protects rights recognized under local custom or law. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917); *Jennison v. Kirk*, 98 U.S. 453, 456, 460 (1878). Tombstone's municipal water system was indisputably established under local custom or law between 1881 and 1908. App. 629-61.

Finally, Defendants claim nine months of administrative delay has been necessary for mandatory interagency consultations. But if Defendants simply yielded to Tombstone exercising its rights under the 1866 Mining Act no agency action would occur that could trigger mandatory interagency

consultations. *Western Watersheds Project v. Matejko*, 468 F.3d 1099, 1111 (9th Cir. 2005).

STANDARD OF REVIEW

The standard of review for this application involves consideration of a four part showing:

> First, it must be established that there is a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction . . . Second, the applicant must persuade me that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous . . . Third, there must be a demonstration that irreparable harm is likely to result. . . And fourth, in a close case it may be appropriate to 'balance the equities' -- to explore the relative harms to applicant and respondent, as well as the interests of the public at large.

Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980). As discussed below, the foregoing elements weigh overwhelmingly in favor of the requested relief. Tombstone's right to injunctive relief is indisputably clear.

ARGUMENT

Defendants have erected procedural barriers to the restoration of Tombstone's municipal water system not because of any actual need for further administrative review of the proposed work. Defendants are commandeering Tombstone's municipal water system simply to make the town knuckle under. In the process, they are risking human life and property in Tombstone and Southeastern Arizona. But the Tenth Amendment protects

Tombstone from such abuse during a declared State of Emergency. For this reason, Tombstone applies for an injunction to bar the individual Defendants from interfering with its efforts to freely and fully restore its municipal water system during the pending appeal.

I. Irreparable Harm is Likely to Result without an Injunction.

Irreparable harm includes threats to public health and safety. *See, e.g.*, *Taverns for Tots, Inc. v. City of Toledo*, 307 F. Supp. 2d 933, 945 (N.D. Ohio 2004). In *Taverns for Tots, Inc.*, for example, the court ruled that the threat of second-hand smoke to public health and safety caused sufficient irreparable harm to justify a preliminary injunction. Here, Defendants' interference with Tombstone's efforts to freely and fully restore its municipal water supply for over nine months poses a far greater and more certain threat to public health and safety and, thus, irreparable harm is likely to result unless Defendants are enjoined.

When Defendants authorized temporary repairs to Gardner Spring in December 2011, they rendered the following administrative finding:

> Water from the springs is needed for safe drinking water for residents as well as visitors to this tourism based economy, as well as for emergency fire suppression . . . . Health and safety risks exist to the City of Tombstone if repairs are not completed expeditiously.

App. 525. The threat faced by Tombstone is the same today. It is undisputed that the temporary repairs to Gardner Spring will soon be washed away in

the impending monsoons. App. 198(¶6), 266(¶58), 268-69(¶64), 557(¶9). Thus, unless the requested relief is granted, Tombstone will soon find itself facing the *same water shortage* that Defendants described as a threat to public health and safety in their pre-litigation administrative findings. App. 518, 520, 524-25.

In fact, all of the ingredients are currently in the mix for a repeat of the Six Gun City and Monument Fire disasters—or worse. Peak potable water consumption begins during mid-May. App. 582(¶10). At this time of the year Tombstone residents and visitors regularly use all of the potable water from Tombstone's one remaining safe and fully operational well. App. 580(¶5). If that well breaks down, there will not be enough water flowing from the Huachuca Mountains to furnish potable water for more than a few days—much less to address the tinderbox conditions that exist in Tombstone's historic downtown, which led to the Six Gun City fire during December 2010. App. 582-83, 614-16. Even if Tombstone's one remaining safe source of well water does not break down, the water it produces could become unsafe at any time due to arsenic contamination. App. 580-82 (¶5-11). Tombstone has already lost the use of three other wells due to arsenic contamination, most recently in 2006. *Id.*

At the same time, Tombstone is located in a region that is presently subject to an extremely high wildfire risk. App. 83, 94. Wildfires are already

starting to burn in the Huachuca Mountains. App. 83(¶14). Denying Tombstone the ability to fully restore its municipal water system thus threatens not only Tombstone, but the entire region because the system is needed for wildfire suppression efforts—as ironically evidenced by the Forest Service's own use of the system during the Monument Fire. App. 83(¶16), 212-13(¶20).

Under these circumstances, Tombstone obviously needs to permanently restore every water source it owns as soon as possible for truly adequate fire suppression capacity and potable water. Given that Tombstone has the clearly documented right to all waters rising and flowing from twenty-five springs and the surrounding canyons under the 1866 Mining Act (App. 629-61), a reasonable level of public health and safety is being denied every day that Defendants force the town to rely upon only three mountain spring water catchments—one of which is soon to be washed away. Defendants' commandeering of Tombstone's water system indisputably poses a greater and more certain threat to public health and safety than secondhand smoke in a bar. *See Taverns for Tots, Inc.*, 307 F. Supp. 2d at 945.

II. The Balance of Harms, Equities and Public Interest Indisputably Favor Injunctive Relief.

Tombstone's interest in protecting public health and safety is a "paramount" public interest. *Hodel v. Va. Surface Mining & Reclamation*

Ass'n, 452 U.S. 264, 300 (1981). By contrast, Defendants' asserted environmental interest in obstructing Tombstone's restoration work is entirely abstract. In fact, just as they have sandbagged Tombstone's restoration work, Defendants have frivolously resisted Freedom of Information Act requests seeking proof of their environmental claims. App. 96-98. Such behavior, in combination with the absence of any significant record evidence of Defendants' environmental claims, tends to confirm that the Monument Fire and subsequent flooding substantially destroyed the ecosystem that previously existed in the Huachuca Mountains. App. 558-59 (¶12). No study is in the record or has been produced through Freedom of Information Act requests showing any endangered or threatened animals are currently inhabiting the fire and flood ravaged area surrounding Tombstone's municipal water system. App. 97-98(¶9), 100(¶18). Although Defendants advanced conclusory statements in the lower court about the presence of spotted owl nesting areas in the vicinity of the proposed repair work, voluminous documents originating from the Fish and Wildlife Service show that the sort of repair work contemplated by Tombstone poses no threat to the spotted owl or other endangered or threatened species in the unlikely event they return to the area despite the catastrophic Monument Fire. App 100-101, 550.

In substance, Defendants are seeking to elevate the preservation of a

moonscape over Tombstone's paramount public health and safety interest. The harm to Defendants' illusory environmental interest if the requested relief is granted cannot possibly outweigh the harm to Tombstone' public health and safety interest if the requested relief is denied. Indeed, no public interest advanced under any relevant federal law would be harmed from the requested injunction.

If anything, the public interests advanced by federal law favor the requested relief for two reasons. First of all, there is an undisputed national policy requiring deference to state sovereignty with respect to water ownership and development. *United States v. New Mexico*, 438 U.S. 696, 705-18 (1978). Secondly, Tombstone's water system predates all legal authority claimed by Defendants to justify their behavior. The statutes purportedly authorizing Defendants' regulatory activities, as well as Defendants' own internal guidelines, explicitly recognize the continued viability of Tombstone's rights of way and permit the proposed water structure repair work. The Federal Land and Management Policy Act of 1976 guarantees continued recognition of vested rights under the 1866 Mining Act. 43 U.S.C. § 1761(c)(2)(A). The November 6, 1906, Proclamation of President Theodore Roosevelt establishing the Huachuca Forest Reserve (now known as the Coronado National Forest) declared, "This proclamation will not take effect upon any lands . . . which may be covered by any prior valid claim, so long as

the . . . claim exists." The Wilderness Act of 1964 was expressly made "subject" to existing rights. 16 U.S.C. § 1131(c). 16 U.S.C. §1134(a) further guarantees that state and private owners of interests in lands surrounded by a Wilderness Area "shall be given such rights as may be necessary to assure adequate access to such State-owned or privately owned land by such State or private owner and their successors in interest." 16 U.S.C. §1134(a). Additionally, §1134(b) requires the Forest Service to permit means of ingress and egress "customarily enjoyed" for valid occupancies located within wilderness areas. Likewise, the Arizona Wilderness Act of 1984, which designated the Miller Peak Wilderness Area on lands surrounding portions of Tombstone's municipal water system, requires administration of the Area to be conducted "subject to valid existing rights." 98 Stat. 1485, Pub. L. No. 98-406, §101(a)(14)(b). Correspondingly, Forest Service's own guidelines allow motorized and mechanized transportation that was "practiced before the area was designated as Wilderness." 2300 Forest Service Manual, Ch. 20, § 2323.43d, available at http://www.fs.fed.us/im/directives/fsm/2300/2320.doc. Finally, the same guidelines require the Forest Service to "permit maintenance or reconstruction of existing [water] structures . . . [including] reservoirs, ditches and related facilities for the control or use of water that were under valid special use permit or other authority when the area involved was incorporated under the Wilderness Act." *Id.*

In view of national water policy and the foregoing savings clauses protecting Tombstone's 1866 Mining Act rights, it is readily apparent that federal law must be construed to accommodate, rather than somehow to conflict with and impliedly preempt, the town's concurrent police power jurisdiction to restore its water supply. *Compare Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976), *with Chamber of Commerce of the United States v. Whiting*, 131 S.Ct. 1968, 1987 (2011); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). The balance of harms, equities and public interest thus indisputably favor the requested relief.

III. There is a "Reasonable Probability" that Four Justices will Consider the Issues Sufficiently Meritorious to Grant Certiorari or to Note Probable Jurisdiction.

Depending on the outcome of the pending appeal before the Ninth Circuit Court of Appeals, Tombstone's contemplated certiorari petition will raise at least two issues of national importance: (1) Whether the federal government's regulatory power over federal lands under Property Clause is "without limitation," as stated in *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976); and (2) Whether judicial review of violations of the Tenth Amendment is still controlled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), or the three prong "traditional governmental function" test of *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981), which originates from *National League of Cities v. Usery*, 426 U.S.

833 (1976).

It is respectfully submitted that state sovereignty would be illusory if federal officials could claim unlimited regulatory authority over federal lands to prevent state and local governments from quickly responding to natural disasters to protect public health and safety. As illustrated by Tombstone's plight, limitless federal power can become an existential threat to political subdivisions of the State—especially in States where more than forty percent of their jurisdiction consists of federal lands and essential infrastructure exists on those lands. Moreover, given the number and magnitude of natural disasters affecting state and local government in recent years—from Katrina to the BP oil spill—it is clearly a question of great national importance to determine whether the Constitution gives such potentially destructive unlimited power to the federal government, or whether the Property Clause, like all other provisions of the Constitution, yields to the principle of state sovereignty.

Furthermore, despite *Garcia*'s core holding that States must look to the political process to protect their sovereignty, and its express reversal of *National League of Cities*, numerous courts, including the First and Tenth Circuit Courts of Appeal and lower courts elsewhere, still apply the three prong "traditional governmental function" test of *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981), which originates from

National League of Cities. See, e.g., United States v. Bongiorno, 106 F.3d 1027, 1033 (1st Cir. 1997); *United States v. Hampshire*, 95 F.3d 999, 1004 (10th Cir. 1996); *Delawder v. Platinum Fin. Servs. Corp.*, 443 F. Supp. 2d 942, 951 (S.D. Ohio 2005); *Qwest Broadband Servs. v. City of Boulder*, 151 F. Supp. 2d 1236, 1245 (D. Colo. 2001). Members of the Fourth Circuit Court of Appeals have even engaged each other in heated debate over the continued viability of *Garcia* versus the *National League of Cities. See, e.g., Petersburg Cellular P'ship v. Bd. Of Sup'rs of Nottoway County,* 205 F. 3d 688, 711, 717-19 (4th Cir. 2000).

Resolving this debate once and for all is of nationwide importance because both state and federal officials need a clear unifying legal framework to guide them in assessing when federal law violates the principle of state sovereignty. As shown by the unanimous opinion in *Bond*, the importance of providing such guidance is clearly felt by all members of this Court. Accordingly, for all of the foregoing reasons, there is a "reasonable probability" that at least four justices will consider the issues raised by the underlying appeal sufficiently meritorious to grant certiorari or to note probable jurisdiction.

IV. There is a Fair Prospect that a Majority of the Court Will Conclude that the Decision Below was Erroneous.

Because Tombstone is a fire prone desert town with a history of close

calls with disaster, Defendants' commandeering of the town's water system threatens the town's very existence as a political subdivision of the State of Arizona and the State's sovereign right to maintain the existence of its political subdivision. This existential threat undermines the Constitution's assumption of the "States' continued existence." *Alden*, 527 U.S. at 713-14. Moreover, Defendants' conduct plainly violates the constitutional principles enforced in *Printz* and *National League of Cities*. Consequently, there is a fair prospect the district court's refusal to issue the requested preliminary injunction would be reversed by this Court based on the principle of state sovereignty.[2]

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[2] A court abuses its discretion when its decision is premised on errors of law. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Errors of law abound in the district court's decision. For example, the court erroneously ruled that Tombstone failed to exhaust its administrative remedies even though there is no requirement for a State or its political subdivision to exhaust administrative remedies where, as here, doing so is futile because of the inadequacy of such remedies to prevent irreparable harm. *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 773 (1947). The district court wrongly premised its ruling on the belief that sovereign immunity barred injunctive relief against the individual Defendants despite the well-established rule that unconstitutional actions by federal officials are not those of the sovereign and, therefore, not protected by sovereign immunity. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690, 696-97, 702 (1949). The district court erroneously ruled sovereign immunity barred Tombstone's request for injunctive relief under the Quiet Title Act based on *Block v. N.D. ex rel. Bd. of Univ. and Sch. Lands*, 461 U.S. 273, 285 (1983), despite the fact that *Block* only bars officer suits under the Quiet Title Act where allowing the suit to proceed would have the substantive effect of permanently clouding United States' title after the statute of limitations specified in the Act has expired. This ruling obviously has no applicability to

One of the clearest examples of impermissible interference with state sovereignty, of course, is federal commandeering of the organs or officials of state government. *New York*, 505 U.S. at 166. This ban on commandeering, however, is not a constitutional axiom. Rather, it is an implication of the first principle that "[t]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Printz*, 521 U.S. at 920. The district court should have applied this first principle tautologically to stop Defendants from interfering with Tombstone's water system restoration efforts.[3]

After all, by overriding a gubernatorial emergency proclamation and commandeering Tombstone's municipal water system, Defendants are literally regulating the State of Arizona through its political subdivision. They are not regulating individuals. Defendants' conduct is no different in principle than demanding Tombstone secure a federal permit to drive a fire truck or a squad car during a firestorm or a riot. From the perspective of state autonomy, there are no material differences between commandeering municipal officials and commandeering sovereign property without which the

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a *timely* request for *temporary* injunctive relief against federal officers which cannot possibly permanently cloud United States' title, much less violate the Quiet Title Act's statute of limitations.

[3] Tombstone's Tenth Amendment claim challenges Defendants' unconstitutional and sustained misapplication of federal law. It is not a facial attack.

municipality cannot fulfill its traditional function of protecting public health and safety. Defendants are depriving the State of its structural autonomy and *its reason for being* just as assuredly as if they had directly commanded Tombstone's Mayor to use hand tools to repair the city's water infrastructure himself. For this reason, Defendants' regulatory commandeering of Tombstone's municipal water system violates the principle of state sovereignty enforced in *Printz*, 521 U.S.at 920.

This conclusion is reinforced by application of the three prong test of *National League of Cities*, which this Court and others are clearly right to apply. As explained in *Alden*, the Court is now committed to enforcing the principle of state sovereignty that "[t]he States 'form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" 527 U.S. 706, 714 (1999) (citations omitted). This ruling and others indisputably echo the methodology, rationale and holding of *National League of Cities*, 505 U.S. at 852-54. *See e.g., United States v. Lopez*, 514 U.S. 549, 552 (1995); *United States v. Morrison*, 529 U.S. 598, 611, 617-18 (2000). Such fully-engaged judicial review of federal incursions into the province of state sovereignty has been further buttressed by cases that have repeatedly applied heightened scrutiny to federal actions that have invoked the 14th Amendment's Enforcement Clause to override

state sovereignty (where, if anything, the principle of state sovereignty is less secure than here). *See, e.g.*, *Horne v. Flores*, 129 S.Ct. 2579, 2595-96 (2009); *City of Boerne v. Flores*, 521 U.S. 507, 527-36 (1997).

In short, as in *National League of Cities*, this Court has clearly embraced the principle that the federal judiciary properly patrols the traditional boundaries between state sovereignty and federal power without deferring to Congress. *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 169 F.3d 820, 844-47 (4th Cir. 1999), *aff'd, Morrison*, 529 U.S. 598. This jurisprudence is utterly inconsistent with the holding of *Garcia* that the defense of state sovereignty must be mounted from within the political process at the federal level—in Congress—not within the court system. 469 U.S. at 554. Consequently, it appears that the Court has by inescapable logical implication overruled *Garcia*, and thereby reinstated the three prong test of *National League of Cities* through *New York*'s citation to *Hodel*. *New York v. United States*, 505 U.S. 144, 160, 166 (1992) (citing *Hodel*, 452 U.S. at 288). This conclusion is underscored by *Bond*, which for the first time confirmed citizen standing to enforce the Tenth Amendment in court—something utterly inconceivable under *Garcia*. *See also* Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 Harv. J.L. & Pub. Pol'y 947, 954 (2008) (observing "*Garcia* has . . . been rendered a dead letter by . . . *Alden v. Maine*").

In the final analysis, only the three prong test of *National League of Cities* harmonizes all of the Supreme Court's federalism jurisprudence since 1989. *Massachusetts v. Sebelius*, 698 F.Supp.2d 234, 252 n.154 (E.D. Mass. 2010) ("'the traditional government functions' analysis [is]. . . appropriate in light of more recent Supreme Court cases"). Moreover, applying the three prong test of *National League of Cities* leaves no doubt that Defendants' refusal to allow Tombstone to freely and fully repair its municipal water system violates the principle of state sovereignty—and that a majority of this Court would likely reverse the district court for failing to apply the test. This is because such conduct: (1) regulates "states as states," (2) concerns attributes of state sovereignty, and (3) impairs the state's ability to structure integral operations in areas of traditional governmental functions. *National League of Cities*, 426 U.S. at 852-54.

First of all, contrary to any claim that Defendants are only regulating federal lands, the Forest Service recognized that the federal government did not own Tombstone's water system or the underlying rights of way in 1916. App. 467. Secondly, in seeking to restore its water system, Tombstone is exercising the State's concurrent police power jurisdiction over federal lands under a declared State of Emergency. App. 225-26, 624-25. Thirdly, Tombstone's maintenance of a municipal water system to provide adequate potable water and fire suppression capability is at the core of the sovereign

powers reserved to a political subdivision of the State. *Brush v. Commissioner*, 300 U.S. 352, 370-73 (1937).

Defendants' conduct thus regulates Tombstone when it is acting in a purely sovereign capacity with respect to sovereign property that is essential to protecting public health and safety and also within the scope of the town's concurrent sovereign jurisdiction. If words mean anything, such conduct (a) regulates "states as states," (b) concerns essential attributes of state sovereignty, and (c) impairs governmental functions traditionally assigned to the States; thus easily passing *National League of Cities*' test of unconstitutionality under the Tenth Amendment. For this reason, there is a fair prospect the district court's decision will be reversed by a majority of this Court.

CONCLUSION

The district court wrongly embraced *Garcia* and reduced the Tenth Amendment to a meaningless tautology by ruling that limitless power was delegated to the federal government under the Property Clause and therefore the Tenth Amendment reserves nothing to the States to limit that power. As this Court held in *Alden*, 527 U.S. at 713-14, the background principles of the Constitution preclude construing any federal power as entailing authority to threaten the "continued existence" of the States. Moreover, in *Bond*, 131 S. Ct. at 2366, this Court *unanimously* reiterated the Constitution's assumption

that all federal powers are limited by the principle of state sovereignty. Indeed, the rule of law that the principle of state sovereignty limits even plenary powers is underscored by the fact that the federal government's treaty power was at issue in *Bond*. The contrary notion that federal power under the Property Clause is "without limitation," as expressed in *United States v. Gardner*, 107 F.3d 1314, 1318 (9th Cir. 1997), is just plain wrong. For this fundamental reason, Plaintiffs ask the Court to grant their Application and to enter an injunction pending appeal before June 8, 2012 or otherwise as soon as possible.

Specifically, for the duration of all appeals in this case, the Court should enjoin Defendants, TOM VILSAK, TOM TIDWELL, and CORBIN NEWMAN, and anyone acting at their direction, from in any way interfering with the Tombstone's use of the heavy equipment and vehicles identified at App. 570-73 to repair and restore: (1) the pipelines depicted in the surveyed rights of way shown at App. 456, 704; and (2) the water structures depicted in the surveyed parcels and rights of way shown at App. 352, 357, 366, 371, 376, 381, 386, 396, 401, 411, 421, 426, 431, 436, 441, 447, 478-82, 487-91 (with coordinates and dimensions plainly set out in the notices of appropriation shown at App.350, 355-56, 360-62, 364, 367, 369, 372, 374, 377, 379-80, 384-85, 389-90, 394-95, 399-400, 404-05, 409-10, 415-16, 419-20, 424, 429, 434, 439, 445, 450-51); by (c) probing the ground for buried springs; (d) building

simple dam-like structures called "catchments" at the springs once located; (e) building up mounds of dirt around the springs called "flumes" to keep workers safe from flash floods in the coming Monsoons; and (f) burying pipes to those catchments.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The ORIGINAL and TWO COPIES of Plaintiffs' Application and Appendix (Vol. I-III) were dispatched via prepaid FedEx Express Overnight courier service on May 31, 2012 to:

Clerk of the Court
SUPREME COURT OF THE UNITED STATES
1 First Street, N.E.
Washington, DC 20543

One electronic courtesy copy of each of the foregoing was also served via electronic mail sent to Danny Bickell, Supreme Court Emergency Applications/Motions Clerk, at dbickell@supremecourt.gov on May 31, 2012.

Additionally, I hereby certify that, pursuant to Supreme Court Rule 29.2, each separately represented party was served with ONE COPY of Plaintiffs' Application and Appendix (Vols. 1 through 3) on May 31, 2012 via prepaid FedEx Express Overnight courier service and electronic mail (Defendants' counsel has consented to such electronic service) at the addresses indicated below:

Parties and Counsel Served
UNITED STATES OF AMERICA; U.S. DEPARTMENT OF AGRICULTURE; TOM VILSAK (in his official capacity); TOM TIDWELL (in his official capacity); CORBIN NEWMAN (in his official capacity). Emily C. Spadoni, esq. Supervisor, Case Management Section, Office Solicitor General 950 Pennsylvania Ave., N.W., Rm. 5614 Washington, D.C. 20530 Emily.C.Spadoni@usdoj.gov

I, Nicholas C. Dranias, declare under penalty of perjury under 28 U.S.C. § 1746(2), the laws of the United States and of the State of Arizona, that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 31st day of May, 2012.