No. 12-16172

United States Court of Appeals for the Ninth Circuit

CITY OF TOMBSTONE,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; U.S. DEP'T OF AGRICULTURE; TOM VILSAK (in his official capacity); TOM TIDWELL (in his official capacity); CORBIN NEWMAN (in his official capacity),
Defendants/Appellees.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE DISTRICT OF ARIZONA, NO. 4:11-CV-00845-FRZ
HON. FRANK ZAPATA, U.S. DISTRICT JUDGE

AMICUS CURIAE BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PLAINTIFF-APPELLANT IN SUPPORT OF REVERSAL

LAWRENCE J. JOSEPH
(Cal. S.B. No. 154908)
1250 Connecticut Av NW Suite 200
Washington, DC 20036
Telephone: (202) 669-5135
Facsimile: (202) 318-2254
Email: ljoseph@larryjoseph.com

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: June 18, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, Cal. S.B. #154908
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

TABLE OF CONTENTS

Corporate Disclosure Statement i
Table of Contents ii
Table of Authorities iii
Identity and Interest of *Amicus Curiae* 1
Statement of the Case 1
Standard of Review 2
Summary of Argument 4
Argument 6
I. The District Court Had Jurisdiction to Enter a Preliminary Injunction, Notwithstanding the Forest Service's Sovereign Immunity 6
A. The APA's Waiver of Sovereign Immunity Provides Jurisdiction for a Preliminary Injunction 8
1. The Forest Service's Action Is Final 9
2. The APA Allows Preliminary Injunctions Even in the Absence of the Final Agency Action 10
3. The APA's Waiver of Sovereign Immunity Applies to Review Outside the APA 13
B. Sovereign Immunity Poses No Barrier to Preliminary Injunctions against Unconstitutional or Unlawful Federal Agency Action 14
1. Officer Suits Are Available to Tombstone, Even if the APA Is Not 15
2. Even If the QTA Impliedly Limits Officer Suits in Equity, Tombstone Can Bring an Officer Suit under *Leedom v. Kyne* 20
C. Tombstone's Claims Are Constitutionally and Prudentially Ripe 21
II. Tombstone Meets the Conditions for a Preliminary Injunction 23
A. Tombstone Is Likely to Prevail on the Merits 23
B. Tombstone Will Suffer Irreparable Harm Unless this Court Grants a Preliminary Injunction 25
C. The Balance of Equities Tips in Tombstone's Favor 25
D. A Preliminary Injunction Is in the Public Interest 26
Conclusion 27

TABLE OF AUTHORITIES

CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 8-9, 20-23

Air New Zealand Ltd. v. C.A.B., 726 F.2d 832 (D.C. Cir. 1984) 10

Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127 (9th Cir. 2011) 25

Am. Life Ins. Co. v. Stewart, 300 U.S. 203 (1937) 17

Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902) 16

Ass'n of Am. Medical Colleges v. U.S., 217 F.3d 770 (9th Cir. 2000) 22

Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) 17

Bennett v. Spear, 520 U.S. 154 (1997) 9

Block v. North Dakota ex rel. Bd. of Univ. & School Lands, 461 U.S. 273 (1983) 7, 19-20

Board of Governors of the Federal Reserve System v. MCorp Financial, 502 U.S. 32 (1991) 20

Bowen v. Massachusetts, 487 U.S. 879 (1988) 18

Buono v. Kempthorne, 502 F.3d 1069 (9th Cir. 2007) 21-22

Califano v. Sanders, 430 U.S. 99 (1977) 17-18

Central P.R. Co. v. Alameda County, 284 U.S. 463 (1932) 2

Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996) 13

City of Auburn v. Qwest Corp., 260 F.3d 1160 (9th Cir. 2001) 22

City of Tombstone v. U.S.A., No. 4:11-cv-0845-FRZ (D. Ariz. May 14, 2012) 6

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 9

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 3

Darby v. Cisneros, 509 U.S. 137 (1993) 19

Dart v. U.S., 848 F.2d 217 (D.C. Cir. 1988) 16

Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978) 18

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 9

Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist., 498 F.3d 1031 (9th Cir. 2007) 4

Envtl. Def. Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971) 10

Ex parte Young, 209 U.S. 123 (1908) 15

Fitzgerald Living Trust v. U.S., 460 F.3d 1259 (9th Cir. 2006) 8

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 24

Gonzalez v. Arizona, 677 F.3d 383 (9th Cir. 2012) 24-25

Harmon v. Brucker, 355 U.S. 579 (1958) 16

Heckler v. Ringer, 466 U.S. 602 (1984) 18

Hunt v. Imperial Merchant Servs., Inc., 560 F.3d 1137 (9th Cir. 2009) 2

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) 15

Leedom v. Kyne, 358 U.S. 184 (1958) 5, 20

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 14

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, __ U.S. __, 2012 WL 2202936 (2012) 7-8

Mathews v. Eldridge, 424 U.S. 319 (1976) 9

McFarland v. Kempthorne, 464 F.Supp.2d 1014 (D. Mont. 2006) 8

Morton v. Mancari, 417 U.S. 535 (1974) 18

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 24

Nat'l Airlines, Inc. v. C.A.B., 392 F.2d 504 (D.C. Cir. 1968) 9-10

Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engrs., 417 F.3d 1272 (D.C. Cir. 2005) 9

National League of Cities v. Usery, 426 U.S. 833 (1976) 24

Pimentel v. Dreyfus, 670 F.3d 1096 (9th Cir. 2012) 3, 23

Schlesinger v. Councilman, 420 U.S. 738 (1975) 18

Scripps-Howard Radio v. F.C.C., 316 U.S. 4 (1942) 12

Sea-Land Serv., Inc. v. Alaska R.R.,
659 F.2d 243 (D.C. Cir. 1982).....13

Singleton v. Wulff, 428 U.S. 106 (1976).....3

Skranak v. Castenada, 425 F.3d 1213 (9th Cir. 2005).....7

State of Cal. ex rel. State Water Resources Control Bd. v. F.E.R.C.,
966 F.2d 1541 (9th Cir. 1992).....22

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998).....6

Steffel v. Thompson, 415 U.S. 452 (1974).....18

Stone v. City & County of San Francisco,
968 F.2d 850 (9th Cir. 1992).....4

Swan v. Peterson, 6 F.3d 1373 (9th Cir. 1993).....4

The Presbyterian Church (U.S.A.) v. U.S.,
870 F.2d 518 (9th Cir. 1989).....13

Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994).....15, 20

Turner v. Rogers, 131 S.Ct. 2507 (2011).....3

U.S. v. Lee, 106 U.S. 196 (1882).....16

U.S. v. Mitchell, 463 U.S. 206 (1983).....18

US West Communications v. MFS Intelenet,
193 F.3d 1112 (9th Cir. 1999).....21-22

West Coast Truck Lines, Inc. v. American Industries, Inc.,
893 F.2d 229 (9th Cir. 1990).....22

Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008).....23

Wyeth v. Levine, 555 U.S. 555 (2009).....24

Zeneca, Inc. v. Shalala, 213 F.3d 161 (4th Cir. 2000).....12

STATUES

U.S. CONST. art. III.....21

U.S. CONST. amend. IX.....14

U.S. CONST. amend. X.....5-6, 15

Administrative Procedure Act,
5 U.S.C. §§551-706.....4-13, 15-16, 18-19, 23

5 U.S.C. §559.....10, 19

5 U.S.C. §701(a)(1).....10
5 U.S.C. §702.....4, 10, 14
5 U.S.C. §703.....11
5 U.S.C. §704.....4, 8, 11, 19
5 U.S.C. §705.....4, 11
5 U.S.C. §706.....8
28 U.S.C. §1291.....9
28 U.S.C. §1292(a)(1).....12
28 U.S.C. §1331.....17-18
28 U.S.C. §1346(f).....7
Declaratory Judgment Act,
28 U.S.C. §§2201-2202.....17-19
Quiet Title Act,
28 U.S.C. §2409a.....*passim*
28 U.S.C. §2409a(c).....6
28 U.S.C. §2409a(e).....6-7
42 U.S.C. §405(h).....18
43 U.S.C. §1769(a).....2
Pub. L. No. 96-486, §2(a), 94 Stat. 2369 (1980).....18
Federal Land Policy Management Act, Pub. L. No. 94-579, §706(a),
90 Stat. 2743, 2793 (1976).....2
Mining Act of 1866, ch. 262, 14 Stat. 251.....2
Revised Statute 2477.....2

LEGISLATIVE HISTORY

ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY,
S. DOC. NO. 248, 79th Cong., 2d Sess. (1946).....12, 19
S. REP. NO. 79-752 (1945), *reprinted in* ADMINISTRATIVE
PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248,
79th Cong., 2d Sess. (1946).....12

Senate Judiciary Committee Print (June 1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess. (1946) 11-12

H.R. REP. NO. 96-1461, *reprinted in* 1980 U.S.C.C.A.N. 5063 18

REGULATIONS AND RULES

FED. R. APP. P. 29(c)(5) 1

21 C.F.R. §10.35 12

21 C.F.R. §10.45(c).....12

OTHER AUTHORITIES

A.B.A. Section of Admin. Law & Regulatory Practice, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1 (2002) 16-17

EDWIN BORCHARD, DECLARATORY JUDGMENTS (1941) 18

Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967).....10

WILLIAM J. HUGHES, FEDERAL PRACTICE §25387 (1940 & Supp. 1945) 18

Louis L. Jaffee, *The Right to Judicial Review I*, 71 HARV. L. REV. 401 (1958).....14

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, files this brief with the consent of all parties. Founded in 1981, Eagle Forum has consistently defended federalism and supported states' autonomy from the federal government in areas – like public health and the disposition of state and local government lands and functions – that are of traditionally state and local concern. Accordingly, Eagle Forum has a direct and vital interest in the issues before this Court.[1]

STATEMENT OF THE CASE

Plaintiff City of Tombstone, Arizona ("Tombstone") has survived in the Arizona desert with water from springs in the Huachuca Mountains since 1881. In the Monument Fire last year, Tombstone's water system suffered first from fire and then from massive mudslides caused by monsoon rains on the fire-denuded terrain. Since that time, Tombstone has worked diligently with the U.S. Forest Service (collectively, with the other federal defendants-appellees, "Forest Service") to gain access to the portions of its water system in the Coronado National Forest.

---

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – made a monetary contribution to the preparation or submission of this brief.

Tombstone – through its predecessor – claims the right to access its water system under the principles of Revised Statute 2477 ("R.S.2477"), as originally enacted in the Mining Act of 1866, which Congress intended as a means of providing public access across unreserved public domain lands during an era when Congress sought to facilitate the settlement of the American West. *See Central P.R. Co. v. Alameda County*, 284 U.S. 463, 471-73 (1932). Although Congress repealed R.S.2477 in the Federal Land Policy Management Act, Pub. L. No. 94-579, §706(a), 90 Stat. 2743, 2793 (1976), Congress preserved any pre-existing rights-of-way or rights-of-use. 43 U.S.C. §1769(a).

The Forest Service and courts have recognized Tombstone's right to the water system, including the Forest Service's recognition in 1916. ER 1156-1158. In the wake of the Monument Fire, however, the current administrators have reversed course without explanation or notice during a state of emergency. Now, instead of the power equipment that Tombstone routinely has used to maintain its water supply, the Forest Service has limited Tombstone to working with hand tools and small equipment wholly inadequate to the task of clearing more than ten feet of mud and the accompanying boulders.

STANDARD OF REVIEW

Appellate courts review jurisdictional issues *de novo, Hunt v. Imperial Merchant Servs., Inc.*, 560 F.3d 1137, 1140 (9th Cir. 2009), and review the

granting or denial of a preliminary injunction for abuse of discretion. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012). In doing so, this Court employs a two-part test:

> [F]irst, we determine *de novo* whether the trial court identified the correct legal rule to apply to the relief requested; second, we determine if the district court's application of the correct legal standard was ... illogical, ... implausible, or ... without support in inferences that may be drawn from the facts in the record. A decision based on an erroneous legal standard or a clearly erroneous finding of fact amounts to an abuse of discretion.

Id. (interior citations and quotations omitted). Thus, while a "court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law," *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990), that court would also abuse its discretion by basing unsupported, illogical, or implausible findings on a correct view of the law. *Pimentel*, 670 F.3d at 1105.

The "matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases," *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976), including arguments raised solely by *amici*. *Turner v. Rogers*, 131 S.Ct. 2507, 2519-20 (2011); *id.* at 2521 (Thomas, J., dissenting). This Court "[g]enerally … do[es] not consider on appeal an issue raised only by an *amicus*," although it "ha[s] reached the issue [raised by an *amicus*] where it involves a jurisdictional

question or touches upon an issue of federalism or comity that could be considered *sua sponte*." *Swan v. Peterson*, 6 F.3d 1373, 1383 (9th Cir. 1993); *Stone v. City & County of San Francisco*, 968 F.2d 850, 855-56 (9th Cir. 1992) (federalism and comity); *see also Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.*, 498 F.3d 1031, 1044 (9th Cir. 2007) (reaching *amicus* arguments that are readily answered and go the central legal questions presented by the parties). Particularly in interlocutory appeals on preliminary injunctions – where a key question is the movant's likelihood of prevailing in future merits proceedings – this Court should consider arguments raised by *amicus* briefs that the parties are free to adopt not only on appeal but also in the future merits proceedings.

SUMMARY OF ARGUMENT

Amicus Eagle Forum focuses its brief on the jurisdictional bases for a preliminary injunction, in light of the preclusion of preliminary relief for claims under the Quiet Title Act, 28 U.S.C. §2409a ("QTA"). Notwithstanding that preclusion *for QTA claims*, the federal government has waived sovereign immunity in 5 U.S.C. §702 for prospective injunctive and declaratory relief against the federal government *in non-QTA claims*, which applies both to claims under the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), and to non-APA claims (Section I.A). Moreover, notwithstanding 5 U.S.C. §704's requirement for final agency action or actions made reviewable by statute, 5 U.S.C. §705 allows

interim relief where necessary to avoid irreparable harm (Section I.A.2) even if the Forest Service could establish that its actions are not sufficiently final for APA review now (*but see* Section I.A.1). In any event, the officer-suit exception to sovereign immunity enables plaintiffs to challenge unconstitutional conduct, even if the APA does not (Section I.B.1). Significantly, if necessary to avoid irreparable harm, officer suits in equity can proceed under *Leedom v. Kyne,* notwithstanding an implied congressional intent to preclude such suits, (Section I.B.2). Finally, this action is ripe for review (Section I.C).

With respect to the substantive bases for a preliminary injunction, *amicus* Eagle Forum defers primarily to Tombstone's brief and the compelling case Tombstone makes for irreparable harm, balancing the equities, and the public interest (Sections II.B-II.D). On the merits, the Forest Service's unexplained about-face, without notice or comment, and even in the middle of a state of emergency should deny the Forest Service the deference that this Court otherwise might provide (Section II.A). For all of these reasons together with Tombstone's reliance on more recent federalism arguments under the Tenth Amendment, Tombstone raises sufficiently serious questions that – when coupled with its showings on irreparable harm, balancing the equities, and public interest – justify a preliminary injunction (Section II.A).

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION TO ENTER A PRELIMINARY INJUNCTION, NOTWITHSTANDING THE FOREST SERVICE'S SOVEREIGN IMMUNITY

Federal appellate courts have an obligation to consider not only their own jurisdiction but also the lower courts' jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). Here, the district court reasoned that the gravamen of Tombstone's complaint lies under the QTA – which precludes preliminary relief, 28 U.S.C. §2409a(c) – and thereby undermines jurisdiction for preliminary relief in Tombstone's claims under the APA and the Tenth Amendment. ER 7-9 (*citing Block v. North Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273, 286 (1983)). The district court's jurisdictional concerns are misplaced. Nothing precludes Tombstone's prevailing – either permanently or preliminarily – on its APA or constitutional claims. The following subsections establish jurisdictional bases on which to sue the federal government or federal officers, notwithstanding the judge-made doctrine of federal sovereign immunity.

At the outset, the entire premise that the QTA displaces other forms of substantive review is fundamentally wrong. Even the QTA itself acknowledges that QTA claimants may have claims against the federal government that rely on non-QTA grounds:

> If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any

> time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease *unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.*

28 U.S.C. §2409a(e) (emphasis added).[2] For example, if the Forest Service disputed the terms of an adjacent city's easement over a national park and prohibited members of a particular race from crossing that easement, there is no question that the city could challenge the racial restriction outside the QTA.

More specifically and less extreme, the APA also applies to agency action and inaction, regardless of the QTA:

> While *Block* would bar judicial review of an agency's resolution of state or common law property claims raised in an administrative proceeding, *Block* does not bar the agency from resolving such claims in the administrative proceeding itself. Neither does *Block* prevent us from reviewing an agency's failure to resolve such claims. Because the Skranaks and Harpole only challenge the Forest Service's failure to resolve whether they had easements, the district court has jurisdiction to entertain a claim under the APA.

Skranak v. Castenada, 425 F.3d 1213, 1218 (9th Cir. 2005); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, __ U.S. __, 2012 WL 2202936, 5 (2012) (APA allows – and QTA does not bar – APA suits for grievances

[2] 28 U.S.C. §1346(f) provides district courts "exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States."

different from those that the QTA concerns); *McFarland v. Kempthorne*, 464 F.Supp.2d 1014, 1024 (D. Mont. 2006) (APA challenge to denial of special use permit is reviewable, outside of QTA claim to an easement); *Fitzgerald Living Trust v. U.S.*, 460 F.3d 1259, 1263-64 (9th Cir. 2006) (allowing APA review in parallel with QTA review). Where the APA applies, of course, it applies to claims of both arbitrariness and unconstitutionality. 5 U.S.C. §706.

A. The APA's Waiver of Sovereign Immunity Provides Jurisdiction for a Preliminary Injunction

The APA's "generous review provisions" require "hospitable interpretation" favoring review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967). Notwithstanding that generous review, a problem can arise if an agency order is neither "made reviewable by statute" nor "final agency action." 5 U.S.C. §704. Intermediate or otherwise non-final orders *might* evade *pre-enforcement* APA review under APA §10(c):

> A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

Id. When facing costly compliance if the party acquiesces versus large potential penalties (or any other irreparable harm) if the party does not prevail in post-enforcement review, the denial of pre-enforcement review can present a Hobson's choice: pay the potentially unlawful compliance costs or risk the penalties. While

this is indeed an APA problem, it is easily avoided, both under the APA and in equity.

1. The Forest Service's Action Is Final

Finality has two prongs: (1) a consummated decision-making process, and (2) the agency action is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (interior quotations omitted). Courts interpret finality in a "pragmatic" and "flexible" way, *Abbott Labs.*, 387 U.S. at 149-50; *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engrs.*, 417 F.3d 1272, 1279 (D.C. Cir. 2005) (same), "rather than a technical construction." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (construing 28 U.S.C. §1291); *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976) (analogizing *Cohen* and §1291 to statutory finality). Courts must evaluate "competing considerations underlying all questions of finality – the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974). With that background, the Forest Service plainly has taken final agency action here.

While the final contours of whatever access the Forest Service may allow with respect to the remaining springs, the Forest Service has definitively denied Tombstone's claims to unhindered access to the springs. *See, e.g., Nat'l Airlines*,

Inc. v. C.A.B., 392 F.2d 504, 511 (D.C. Cir. 1968) ("effective deprivation of petitioners' rights" constitutes final action); *Envtl. Def. Fund v. Ruckelshaus*, 439 F.2d 584, 589 n.8 (D.C. Cir. 1971) ("[t]he test of finality for purposes of review is ... whether [the action] imposes an obligation or denies a right with consequences sufficient to warrant review"). This process has consummated, and rights flow from it. Section 704 requires no more for finality.

2. The APA Allows Preliminary Injunctions Even in the Absence of the Final Agency Action

The APA does not override any pre-APA statute that *expressly or impliedly* denies review:

> Nothing herein … confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. §702; *id.* §701(a)(1) (same). For post-APA statutes, however, the denial of review must be *express.* 5 U.S.C. §559. Nothing in the QTA *expressly* precludes pre-enforcement review *for non-QTA claims.*

Moreover, the APA expressly allows review even where special forms of statutory review exist but are inadequate to avoid irreparable harm:[3]

[3] The Court should distinguish between nonstatutory review and special forms of statutory review, as the enactment of review *statutes* such as the APA has rendered "nonstatutory" something of a "misnomer." *Air New Zealand Ltd. v. C.A.B.*, 726 F.2d 832, 836-37 (D.C. Cir. 1984) (Scalia, J.); *cf.* Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and*

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, *in the absence or inadequacy thereof*, any applicable form of legal action[.]

5 U.S.C. §703 (emphasis added). When statutory review is inadequate, a plaintiff may bring *inter alia* "actions for declaratory judgments or writs of prohibitory or mandatory injunction" in any "court of competent jurisdiction." *Id.*

In the absence of APA §10(d), APA §10(c) indeed might present a Hobson's choice of incurring cost to comply with a potentially unlawful federal demand versus risking prosecution by ignoring that federal demand. *Compare* 5 U.S.C. §705 (allowing interim relief from agencies and reviewing courts) *with* 5 U.S.C. §704 (requiring final action). The Senate Judiciary Committee explained §10(d) as necessary to avoid putting parties "at their peril" before those parties can obtain judicial review:

> The second sentence authorizes courts to postpone the effective dates of administrative judgments or rules in cases in which, as by subjection to criminal penalties, parties could otherwise have no real opportunity to seek judicial review except at their peril. There is no reason why such a rule should not be recognized as to administrative agencies, since it is applied in the case of legislation of Congress itself.

Senate Judiciary Committee Print (June 1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 248, 79th Cong., 2d Sess., at

---

"Nonstatutory" Judicial Review of Federal Administrative Action, 81 HARV. L. REV. 308 (1967).

38 (1946) (hereinafter, "APA LEG. HIST.") (collecting cases). The Committee also emphasized that APA §10(d) empowered courts (like agencies) to provide every form of interim relief except the power to grant an initial license:

> This section permits *either agencies or courts*, if the proper showing be made, to maintain the status quo. While it would not permit a court to grant an initial license, it *provides intermediate judicial relief for every other situation* in order to make judicial review effective. The authority granted is equitable and should be *used by both agencies and courts to prevent irreparable injury* or afford parties an adequate judicial remedy.

S. REP. NO. 79-752 (1945), *reprinted in* APA LEG. HIST., at 213 (emphasis added); *cf. Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 17 (1942) (recognizing courts' authority to stay administrative orders).

Some agencies have promulgated rules that require petitioning the agency for interim relief before seeking interim relief in court. 21 C.F.R. §§10.35, .45(c); *Zeneca, Inc. v. Shalala*, 213 F.3d 161, 166 n.7 (4th Cir. 2000) (denial of administrative stay is reviewable final agency action); *cf.* 28 U.S.C. §1292(a)(1) (allowing interlocutory appeals of denial of interim injunctive relief). In the absence of a formal agency process for seeking interim relief – and thereby obtaining a final agency action that denies interim relief – one can seek interim relief informally under APA §10(d), using the same process (*e.g.*, a demand letter) that one would use when threatened with irreparable harm by a private party. If the agency denies interim relief – as the Forest Service plainly has done here – APA

§10(d) authorizes judicial review of the denial of interim relief, even if APA §10(c) would postpone review of the ultimate agency decision.

3. The APA's Waiver of Sovereign Immunity Applies to Review Outside the APA

Significantly, although Congress located the 1976 waiver of sovereign immunity within an APA section, that waiver applies more broadly to all actions for prospective injunctive or declaratory relief not otherwise limited by another statute. *The Presbyterian Church (U.S.A.) v. U.S.*, 870 F.2d 518, 524-26 (9th Cir. 1989). Specifically, that amendment "*eliminat[ed]* the sovereign immunity defense in *all equitable actions* for specific relief against a Federal agency or officer acting in an official capacity." *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1982) (*quoting* S. Rep. No. 94-996, 8 (1976)) (emphasis added). "On its face, the 1976 amendment is an *unqualified* waiver of sovereign immunity in actions seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable." *Presbyterian Church*, 870 F.2d at 525 (emphasis added). As such, its "waiver of sovereign immunity applies to any suit *whether under the APA or not.*" *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) (emphasis added); *Presbyterian Church*, 870 F.2d at 525 n.9. As relevant here, the APA waiver of sovereign immunity applies to Tombstone's constitutional claims for declaratory and injunctive relief, even if no final agency action has yet triggered APA review.

B. Sovereign Immunity Poses No Barrier to Preliminary Injunctions against Unconstitutional or Unlawful Federal Agency Action

Under the federal Constitution, the federal government is a sovereign of limited powers, and – to its credit – it has consented to prospective injunctive and declaratory relief in federal court. 5 U.S.C. §702. Long before the 1976 statute granting that consent, however, our political and legal tradition allowed suit to compel government officers to comply with the government's laws and Constitution:

> that the King's courts … could order his officers to account for their conduct [] was the essence of … "the rule of law." Whatever the logical contradictions between this doctrine and sovereign immunity, [it] had become firmly established [and] as much a part of the law as … sovereign immunity.

Louis L. Jaffee, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 433 (1958); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165 (1803) ("the law … entertains no respect or delicacy [for the Crown's officers]; but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice") (*quoting* 3 WILLIAM BLACKSTONE, COMMENTARIES *255). Thus, notwithstanding the Forest Service's sovereignty, Tombstone can enforce the sovereign rights retained to the People and the States, U.S. CONST. amend. IX ("enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"),

to whom the Constitution reserves all powers not expressly provided to the federal government. U.S. CONST. amend. X. As explained in this section, this foundational principle allows review, even if the APA does not.[4]

1. Officer Suits Are Available to Tombstone, Even if the APA Is Not

Assuming *arguendo* that the APA neither provides judicial review nor waives sovereign immunity, sovereign immunity poses the question whether plaintiffs can seek relief against an agency officer acting outside his lawful authority. Assuming again *arguendo* that the APA neither provides judicial review nor waives sovereign immunity, review in equity would nonetheless exist because "his actions beyond those limitations [on his authority] are considered individual and not sovereign actions." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); *Ex parte Young*, 209 U.S. 123, 160 (1908) (officer acting without valid authority is "stripped of his official or representative capacity and is *subjected in his person* to the consequences of his *individual conduct*," and suit is "against [him] *personally as a wrongdoer* and not against the State") (emphasis

[4] The Supreme Court's decision in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), does not – indeed *cannot* – resolve the availability of pre-enforcement review to avoid irreparable harm. Simply put, this Court held that the *Thunder Basin* petitioner lacked – or at least presented no evidence of – irreparable harm. 510 U.S. at 216-17. Each of the three theories of review presented here requires irreparable harm. Because *Thunder Basin* lacked that prerequisite to review, *Thunder Basin* is inapposite here.

added); *U.S. v. Lee*, 106 U.S. 196, 213 (1882) ("if the person who is the real principal … be himself above the law … it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit") (*quoting Osborn v. U.S. Bank*, 9 Wheat. 738, 842 (1824)). Unlike the Forest Service itself, the federal-officer defendants cannot assert sovereign immunity here.

Under our common-law heritage, "[t]he acts of all [federal] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902). "Nothing in the subsequent enactment of the APA altered the *McAnnulty* doctrine of review. … It does not repeal the review of *ultra vires* actions recognized long before, in *McAnnulty*." *Dart v. U.S.*, 848 F.2d 217, 224 (D.C. Cir. 1988); *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958) (relying on *McAnnulty* for the proposition that "generally, judicial review is available to one who has been injured by an act of a government official which is in excess of his express or implied powers").

"Under the longstanding officer suit fiction …, … suits against government officers seeking prospective equitable relief are not barred by the doctrine of sovereign immunity." A.B.A. Section of Admin. Law & Regulatory Practice, *A*

Blackletter Statement of Federal Administrative Law, 54 ADMIN. L. REV. 1, 46 (2002). Thus, provided that Tombstone alleges an ongoing violation of federal law, longstanding equity practice allows suing federal officers who act beyond their lawful authority.

Equity traditionally required irreparable harm and the inadequacy of legal remedies. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959). But those threatened by future injury need not await their alternate legal remedy before filing suit in equity, and a *subsequent* legal remedy does not displace equity review: the "settled rule is that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter." *Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937). A party injured by unlawful agency action need not await the remedy at law provided by Congress when irreparable injury comes before that remedy.

With the advent of the Declaratory Judgment Act, 28 U.S.C. §§2201-2202 ("DJA"), equitable relief in the form of a declaration of the law is even more readily available that traditional equitable relief in the form of injunctions. The federal-question statute, 28 U.S.C. §1331, provides subject-matter jurisdiction for nonstatutory review of federal agency action. *Califano v. Sanders*, 430 U.S. 99, 105 (1977) (1976 amendments to §1331 removed the amount-in-controversy threshold for "any [federal-question] action brought against the United States, any

agency thereof, or any officer or employee thereof in his official capacity") (*quoting* Pub. L. 94-574, 90 Stat. 2721 (1976)), and 28 U.S.C. §2201(a) authorizes declaratory relief "whether or not further relief … could be sought." *Accord Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 70-71 n.15 (1978); *Steffel v. Thompson*, 415 U.S. 452, 471-72 (1974). Since 1976, §1331 has authorized DJA actions against federal officers, regardless of the amount in controversy. *Sanders*, 430 U.S. at 105 (quoted *supra*). Declaratory relief makes it even easier for parties to obtain pre-enforcement review.[5]

Significantly, the availability of declaratory relief against federal officers predates the APA, WILLIAM J. HUGHES, FEDERAL PRACTICE §25387 (1940 & Supp. 1945); EDWIN BORCHARD, DECLARATORY JUDGMENTS, 787-88, 909-10 (1941), and the APA did not displace such relief, either as enacted in 1946 or as amended in

---

[5] In 1980, Congress amended §1331 to its current form, Pub. L. No. 96-486, §2(a), 94 Stat. 2369 (1980), without repealing the 1976 amendment relied on by *Sanders* and its progeny. H.R. REP. NO. 96-1461, at 3-4, *reprinted in* 1980 U.S.C.C.A.N. 5063, 5065; *Bowen v. Massachusetts*, 487 U.S. 879, 891 n.16 (1988); *U.S. v. Mitchell*, 463 U.S. 206, 227 & n.32 (1983); *cf. Morton v. Mancari*, 417 U.S. 535, 550 (1974) (repeal by implication is disfavored). Indeed, "'repeals by implication are disfavored,' and this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975). Statutes that foreclose alternate forms of review must do so expressly. *Compare* 42 U.S.C. §405(h) ("[n]o action against the United States… or any officer… thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter") *with Heckler v. Ringer*, 466 U.S. 602, 616-17 (1984) (assuming without deciding that §405(h)'s exclusion of jurisdiction *under 28 U.S.C. §1331* does not foreclose jurisdiction *under 28 U.S.C. §1361*).

1976. *See* APA LEG. HIST., at 37, 212, 276; 5 U.S.C. §559; *Darby v. Cisneros,* 509 U.S. 137, 153 (1993) (rejecting argument that 1976 APA amendments expanded APA's preclusion of review) (*citing* 5 U.S.C. §559 *and Dickinson v. Zurko,* 527 U.S. 150, 154-55 (1999)). Thus, even if APA §10(c) precludes declaratory relief *under the APA,* 5 U.S.C. §704, suitable plaintiffs nonetheless can obtain that relief *under the DJA.*

Although the Supreme Court rejected officer suits in equity as an alternative to suing under the QTA, the Court did so only with respect to circumventing the QTA's statute of limitations. *Block,* 461 U.S. at 285-86. Moreover, in doing so, the Court expressly acknowledged that the QTA's statute of limitations might be unconstitutional as applied to certain claims in existence when Congress enacted the QTA but cut off by the new statute of limitations. *Block,* 461 U.S. at 286 n.23. Of course, the QTA's statute of limitations poses no barrier to Tombstone's suit against the federal government. But even Block acknowledged that the QTA can be unconstitutional as applied, even if it is not facially unconstitutional. If the QTA compels Tombstone to suffer the Forest Service's arbitrary and unconstitutional denial of Tombstone's rights without a remedy adequate to protect Tombstone from irreparable harm, the QTA is unconstitutional as applied to Tombstone. As such, the QTA obviously cannot pose a barrier to Tombstone's suit.

2. Even If the QTA Impliedly Limits Officer Suits in Equity, Tombstone Can Bring an Officer Suit under *Leedom v. Kyne*

Although not presented here, this Court has identified instances where due process provides forms of review even in the face of statutes that deny review. *See, e.g.*, *Leedom v. Kyne*, 358 U.S. 184, 188-90 (1958) (allowing nonstatutory equitable review, notwithstanding that the statute in question impliedly prohibits judicial review). In *Board of Governors of the Federal Reserve System v. MCorp Financial*, 502 U.S. 32, 43 (1991), the Court upheld the "familiar proposition" underlying *Kyne* review: namely, that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." 502 U.S. at 44 (*quoting Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967)). Because the *MCorp* statute *expressly* prohibited judicial review of the regulations at issue and *expressly* authorized a challenge to them only in an enforcement action, this Court withheld the *Kyne* action. 502 U.S. at 43-44. Significantly, *MCorp* found the statutory review adequate, 502 U.S. at 43 ("[t]he cases before us today are entirely different from *Kyne* because [the *MCorp* statute] expressly provides MCorp with a meaningful and adequate opportunity for judicial review"), which removes *MCorp* (like *Thunder Basin*) from any relevance here.

As relevant here, *Kyne* – not *MCorp* – applies because the QTA merely *impliedly* precludes resort to non-QTA forms of relief. *Block*, 461 U.S. at 284-85.

As such, nothing in the QTA precludes Tombstone from seeking interim relief under non-QTA theories where the QTA remedies are inadequate.

C. Tombstone's Claims Are Constitutionally and Prudentially Ripe

Ripeness involves both a constitutional and a prudential component. *Buono v. Kempthorne*, 502 F.3d 1069, 1077 (9th Cir. 2007). For its constitutional aspect, ripeness arises under the Article III requirement for a "case" or "controversy" and so resembles constitutional standing. *See id.* ("analysis is similar to the injury-in-fact inquiry under the standing doctrine"). Tombstone unquestionably meets the Article III minima of injury-in-fact in the form of lost property rights, caused by the Forest Service, and redressable by a court order enjoining the Forest Service's interference with Tombstone's rights. Of course, the Forest Service's denial of water in the desert – during a state of emergency, no less – is a particularly extreme form of injury, but any injury suffices for Article III.

Prudential ripeness poses a "twofold" inquiry that "require[es courts] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs*, 387 U.S. at 148-49; *Buono*, 502 F.3d at 1079. As explained below, the Forest Service's actions meet both prongs of the ripeness inquiry.

"A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *US West*

Communications v. MFS Intelenet, 193 F.3d 1112, 1118 (9th Cir. 1999) (*quoting Standard Alaska Production Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989)) (internal quotation marks omitted); *accord Buono*, 502 F.3d at 1079 (*citing Exxon Corp. v. Heinze*, 32 F.3d 1399, 1404 (9th Cir. 1994)). These conditions are plainly met here, at least with respect to denying Tombstone's claims to access its springs as necessary to maintain them. Indeed, "[i]t is difficult to postulate an issue more proper for judicial decision than that of the statutory authority of an administrative agency." *State of Cal. ex rel. State Water Resources Control Bd. v. F.E.R.C.*, 966 F.2d 1541, 1562 (9th Cir. 1992).

On the hardship of withholding review, "Courts typically read the *Abbott Laboratories* rule to apply where regulations require changes in present conduct on threat of future sanctions." *Ass'n of Am. Medical Colleges v. U.S.*, 217 F.3d 770, 783 (9th Cir. 2000). Here, Tombstone faces the Hobson's Choice of obtaining expensive water elsewhere (if possible) versus ignoring the Forest Service's commands and risking penalties for doing so if courts ultimately uphold the Forest Service. "This Hobson's Choice suggests the ripeness of the issue for review." *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1172 (9th Cir. 2001); *cf. West Coast Truck Lines, Inc. v. American Industries, Inc.*, 893 F.2d 229, 233 (9th Cir. 1990) (holding that agency's interpretation of the law is final and ripe for review). Indeed, that is precisely the type of "dilemma that it was the very purpose of the

Declaratory Judgment Act to ameliorate." *Id.* (quoting *Abbott Labs.*, 387 U.S. at 152). For all of the foregoing reasons, ripeness presents no barrier to review here.

II. TOMBSTONE MEETS THE CONDITIONS FOR A PRELIMINARY INJUNCTION

Preliminary injunctions should be granted upon the weighing of four factors: (1) whether the plaintiff is likely to succeed on the merits, (2) whether the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief, (3) whether the balance of equities tips in his favor, and (4) whether an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). This Circuit uses a "'sliding scale' approach to preliminary injunctions" under which "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Pimentel*, 670 F.3d at 1105-06 (interior quotations omitted). Because Tombstone easily meets these four factors, this Court should reverse the denial of a preliminary injunction and enter an Order granting Tombstone's requested relief.

A. Tombstone Is Likely to Prevail on the Merits

At the outset, Tombstone is likely to prevail on its APA-based claims because the Forest Service neither followed its own procedures nor took the opportunity to explain – much less allow the opportunity for comment on – the Forest Service's changed position. Although Tombstone may not press its APA claims in this appeal, the Forest Service's unexplained about-face – even without

its unfortunate occurrence in the middle of a state of emergency – nonetheless undermines the deference that courts otherwise might consider for administrative action. *Wyeth v. Levine*, 555 U.S. 555, 576-81 (2009); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). This Court should not defer to the Forest Service's implicit new policies restricting access to non-federal assets on federal lands.

In addition to that issue of deference, *amicus* Eagle Forum supports the merits arguments raised by Tombstone. As Tombstone argues, several decades of federalism jurisprudence have undermined *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and elevated the three-part "traditional government function" test used in *National League of Cities v. Usery*, 426 U.S. 833 (1976). *See* Tombstone Br. at 41-49. An *en banc* panel of this Court recently addressed when precedent "constitutes binding authority which must be followed unless and until overruled by a body competent to do so." *Gonzalez v. Arizona*, 677 F.3d 383, ___ n.4 (9th Cir. 2012) (*en banc*) (interior quotations omitted).[6] In doing so, the Court recognized that "where 'the relevant court of last resort' has 'undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are *clearly irreconcilable*,' then 'a three-judge panel of this

[6] The West Publishing Company has not yet released the final pagination. Footnote 4 appears at pages 4123-24 of the Slip Opinion.

court and district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled.'" *Id.* (*quoting Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (*en banc*)). Under the circumstances, Tombstone's constitutional challenge raises "serious questions going to the merits" sufficient to justify preliminary relief where the "balance of hardships … tips sharply towards the plaintiff" and the plaintiff shows irreparable harm and supporting public interests. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). Here, Tombstone makes that showing.

B. Tombstone Will Suffer Irreparable Harm Unless this Court Grants a Preliminary Injunction

Tombstone has established that it is perilously low on water and that the current state of affairs is a "disaster waiting to happen" according to Tombstone's Fire Chief. ER 833-34 (¶¶8-9). Further, without immediate action, the coming rainy season will wipe out at least some of the remaining water system in the Huachuca Mountains. ER 956 (¶58), 958 (¶64), 775 (¶9), 786, 961 (¶72), 1346:16-21. Tombstone clearly has shown irreparable harm without interim relief.

C. The Balance of Equities Tips in Tombstone's Favor

Tombstone's concerns are for Tombstone's near-term survival and the health and safety of its citizens and visitors. Moreover, Tombstone's rights are longstanding. The Forest Service's concerns are with a natural habitat that is

nothing like the habitat that predated the Monument Fire or the habitat that will prevail when the area recovers from the Monument Fire. In the interim, the coming rainy season will wash away the footprint of Tombstone's construction activity, regardless of whether Tombstone uses appropriate modern equipment of its choosing or the hand tools that the Forest Service would prefer. ER 768-69 (¶4), 776 (¶12), 909-11, 1443:16-25, 1444:1-4. Significantly, the Forest Service's position results from an unexplained about-face, without notice or the opportunity to comment, even without the press of a state of emergency that threatens Tombstone and its inhabitants. The balance of equities tips sharply toward Tombstone.

D. A Preliminary Injunction Is in the Public Interest

There is no appreciable public interest that supports the Forest Service. Any concern about the national forests' particular natural habitat or ecosystem *at any one time* is belied by the Forest Service's allowance of forest fires to burn out naturally. While this might be good stewardship of these natural assets in the long-term, it is inconsistent with any professed concern for short-term construction impacts. On the other hand, Tombstone has very real, life-and-death public-health concerns that weigh heavily in its favor.

CONCLUSION

For the foregoing reasons and those raised by Tombstone, *amicus curiae* Eagle Forum respectfully submits that this Court should reverse the denial of preliminary relief.

Dated: June 18, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
(Cal. S.B. No. 154908)
1250 Connecticut Av NW Suite 200
Washington, DC 20036
Telephone: (202) 669-5135
Facsimile: (202) 318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

BRIEF FORM CERTIFICATE

Pursuant to Rules 29(c)(5) and 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE and Circuit Rule 32-1 of the U.S. Court of Appeals for the Ninth Circuit, I certify that the accompanying brief is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 6,256 words, including footnotes, but excluding this Brief Form Certificate, the Table of Authorities, the Table of Contents, the Corporate Disclosure Statement, and the Certificate of Service. I have relied on Microsoft Word 2010's word-count feature for the calculation.

Dated: June 18, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
(Cal. S.B. No. 154908)
1250 Connecticut Av NW Suite 200
Washington, DC 20036
Telephone: (202) 669-5135
Facsimile: (202) 318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of June, 2012, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that some of the participants in the case are not CM/ECF users and that, on the same date, I served a copy of the foregoing brief by U.S. Priority Mail, postage prepaid, on the following CM/ECF non-participant:

Casandra Casaaus Currie
USDA Office of General Counsel
P.O. Box 586
Albuquerque, NM 87103

/s/ Lawrence J. Joseph

Lawrence J. Joseph, Cal. S.B. #154908
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com