No. 12-1069

In The Supreme Court of the United States

CITY OF TOMBSTONE, ARIZONA,

Petitioner,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF COALITION OF ARIZONA/NEW MEXICO COUNTIES FOR STABLE ECONOMIC GROWTH, AS *AMICUS CURIAE* SUPPORTING PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal land management agency can modify a right-of-way granted pursuant to the Act of July 26, 1866 by imposing a permitting requirement for the maintenance of that right-of-way, or by otherwise administratively altering the easement?

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AMICUS CURIAE BRIEF OF THE COALITION OF ARIZONA/NEW MEXICO COUNTIES FOR STABLE ECONOMIC GROWTH IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, The Coalition of Arizona/New Mexico Counties for Stable Economic Growth ("Coalition") respectfully submits this *amicus curiae* brief, on behalf of itself and its members, in support of Petitioner.[1]

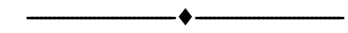
IDENTITY AND INTERESTS OF *AMICUS CURIAE*

The Coalition of Arizona/New Mexico Counties for Stable Economic Growth is a non-profit corporation made up of county governments, businesses, organizations and individuals in 13 counties in Eastern Arizona and Western New Mexico, including Cochise County, where the City of Tombstone is located. The Coalition's mission includes protecting rural economies of Arizona and New Mexico, maintaining and increasing the economic base which

[1] Pursuant to Supreme Court Rule 37.6, *amicus* confirms that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus*, their members, or their counsel have made a monetary contribution to the preparation or submission of the brief. The brief is filed with the consent of the parties. *See* S.Ct.R. 37.3(a). Counsel of Record for all parties received notice at least 10 days prior to the due date of the intention to file this brief.

results from the use of the federal lands, establishing and protecting private property rights of individuals and industries which are dependent on federal lands, and the introduction of new regulations which impact management of federal lands and private property. The Coalition is not a publicly-owned corporation, nor is it owned by any parent corporations.

Approximately 65% of the land that makes up the 13 member counties of the Coalition is federal land. Therefore, the members of the Coalition are directly impacted in the determination of private rights-of-way across federal land with respect to roads, trails, ditches, water lines for distribution and water rights, as well as by this Court's determination of the rights of the holders of those rights-of-way. Many of the Coalition's members are direct descendants of those who originally homesteaded in the American West, often taking advantage of land grants from the federal government. These federal land grants were, in large part, designed to encourage the settlement and development of the Western United States. The statute at issue in this case, "An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes," 14 Stat. 251 *et seq.*, 43 U.S.C. § 661 (July 26, 1866) ("1866 Act"), was one of many granting private citizens the means of settling this vast area, and developing infrastructure in order to do so. All of the counties at issue are impacted by the continued, uninterrupted use of rights-of-way over federal lands.



SUMMARY OF ARGUMENT

Amicus Curiae urges the grant of Petitioner's petition for writ of certiorari, and the reversal of the decision of the Ninth Circuit Court of Appeals. Certiorari should be granted in this case to resolve a conflict between the Ninth and Tenth Circuit Courts of Appeals. The present litigation involves rights-of-way granted pursuant to the 1866 Act, rights-of-way which allow for the provision of water to the City of Tombstone, Arizona. Many communities throughout the western United States, including those within the 13 counties represented by the Coalition, rely on those rights-of-way for their continued survival, as these rights-of-way provide access and water to those communities. *See id.* However, due to differing approaches taken by the Ninth and Tenth Circuit Courts of Appeals, holders of these rights-of-way lack certainty about their continued reliance upon these right-of-way grants. The Ninth Circuit's interpretation of the Property Clause that provides federal agencies with expansive regulatory authority over those rights-of-way has no basis in law, and is in direct conflict with the Tenth Circuit's approach.

ARGUMENT

I. BACKGROUND

The United States acquired all or part of the Western states of Colorado, Wyoming and Montana in the 1803 Louisiana Purchase. Forty-five years later,

with the Treaty of Guadalupe Hidalgo in 1848, Mexico ceded California, Nevada, Utah, Arizona, and New Mexico, as well as parts of Colorado and Wyoming, to the United States. *See* Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848). After acquiring these lands, the federal government encouraged westward expansion, providing incentive for private citizens to move west and develop the newly acquired lands. To that end, Congress enacted the Act of July 26, 1866, 14 Stat. 251 *et seq.*, 43 U.S.C. § 661 ("1866 Act").

The 1866 Act was passed in response to the federal government's general policy of development and settlement of the West. Through this Act, Congress intended to open up federal lands by promoting building of roads and water developments in order to stimulate the Western development to support United States' expansion and increase the value of the newly-acquired public lands. *See* 1866 Act, 14 Stat. 251 (declaring the mineral lands of the public domain "free and open to exploration and occupation," § 1, allowing the issuance of patents to those who discover veins or lodes of quartz, § 3, recognizing and providing for rights-of-way for construction of public highways, § 8,[2] and granting rights-of-ways for construction of canals and ditches, § 9).

[2] The rights-of-way granted in § 8 of the 1866 Act are typically referred to as "R.S. 2477" rights-of-way, as it was Revised Statute 2477 (formerly codified at 43 U.S.C. § 932).

The City of Tombstone, in Cochise County, Arizona, holds title to the beneficial use of water and appurtenant road, siting, water structure, canal, pipeline, flume, ditch, construction, maintenance, and excavation right-of-way easements relating to 25 springs in the Huachuca Mountains. *See* Petitioner's App. 125. All but one of these easements were obtained pursuant to the Act of 1866. *See id.* This pipeline and water system was fully operational and serving the City of Tombstone by no later than 1890, and were acknowledged by the Forest Service almost 100 years ago. *See id.* at 126. The lands surrounding these easements were not placed into the Huachuca Forest Reserve until November 6, 1906. *See* Huachuca Forest Reserve, Proclamation No. 682 (November 6, 1906).

The rights-of-way at issue in the present litigation, as well as the rights-of-way which provide access and waterway easements throughout the Western United States, are currently in jeopardy, as the property rights associated with those rights-of-way are currently called into question by decisions from the Ninth Circuit Court of Appeals. These decisions allow regulation of the rights-of-way to the point that they are without practical meaning, clearly in conflict with the intent of the law under which they were established, and leaving communities which rely on those rights-of-way with questions as to whether they will continue to have access and ability to receive water.

II. HOLDERS OF 1866 ACT RIGHTS-OF-WAY ARE NOT REQUIRED TO OBTAIN PRIOR APPROVAL FROM FEDERAL AGENCIES TO PERFORM MAINTENANCE.

A. The Scope of an 1866 Act Right-of-Way Includes the Right to Maintain that Right-of-Way

The City of Tombstone, as a result of acts of nature, is currently without the use of many of its 1866 Act rights-of-way, which supply water to the town. Critical to the determination of the claims present in this litigation is the determination of the question of whether a federal agency has the authority to require application for and the grant of a permit before repair and maintenance of an 1866 Act right-of-way can occur to assure that the right-of-way continues to function for its intended purpose. The answer to this question is of utmost importance to the holders of these rights-of-way, which include roads, ditches, and canals which service towns and counties throughout the West. Currently, the Ninth and Tenth Circuits have resolved this question differently, leading to uncertainty as to how these rights-of-way will be managed.

The 1866 Act, entitled "An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes," provides, in pertinent part:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural,

> manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed.

43 U.S.C. § 661.[3] In order for a right-of-way to vest under this section, the prospective grantee must possess valid water rights under state law, and must construct the ditch on unoccupied and unreserved lands. *See Bear Lake & River Waterworks & Irrigation Co. v. Garland*, 164 U.S. 1, 12 (1896).

Other rights-of-way pursuant to the 1866 Act vested in similar fashion. Importantly, grants in the 1866 Act did not require the grantee to obtain any permission or authorization from the federal government to accept the right-of-way. *See Wilderness Society v. Kane County, Utah*, 632 F.3d 1162, 1165 (10th Cir. 2011) (R.S. 2477 was a "standing offer of a free

[3] This section, and other portions of the 1866 Act were repealed on October 21, 1976 with the enactment of the Federal Land Policy and Management Act of 1976 ("FLPMA"). *See* 43 U.S.C. §§ 1701-82. However, FLPMA did not terminate valid rights-of-way existing as of the date of its approval. *See* Pub. L. No. 940579, § 701(a), 90 Stat. 2744, 2786 (codified at 43 U.S.C. § 1701 note (a)). Therefore, R.S. 2477 rights-of-way that perfected prior to FLPMA's enactment are "grandfathered in" and continue to be valid public easements.

right of way over the public domain," the acceptance of which occurred "without formal action by public authorities.") (*quoting Southern Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 741 (10th Cir. 2005) ("SUWA")); *see also* U.S. Dept. of Interior, *Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands* (June 1993) (R.S. 2477 highways "were constructed without any approval from the federal government and with no documentation of the public land records, so there are few official records documenting the right-of-way or indicating that a highway was constructed on federal land under this authority.").[4] The self-executing manner in which these rights-of-way were implemented by federal management agencies exemplified Congress' ultimate goal for the Act: to promote orderly future settlement and to legitimize the occupancy of settlers whose presence had outpaced the law." *See San Juan County, Utah v. United States*, 2011 WL 2144762 (D. Utah 2011); *see also United States v. Utah Power & Light Co.*, 208 F. 821, 823 (D. Utah 1913) (rights-of-way granted pursuant to 1866 Act unaffected by passage of subsequent laws). Therefore, state

[4] Although different sections of the 1866 Act confer rights-of-way for differing purposes (*e.g.*, Section 8 confers rights-of-way for highways and Section 9 confers rights-of-way for ditches and canals), the scope of those rights-of-way should be interpreted *in pari materia*. *See Cole v. Ralph*, 252 U.S. 286, 306 (1920) (provisions of the General Mining Law should be interpreted *in pari materia*).

and local governments throughout the western United States could acquire 1866 Act rights-of-way without any regulatory action or approval of the federal government.

In the present case, the City of Tombstone's 1866 Act rights-of-way are being regulated by the Forest Service in a manner which is untenable. The Forest Service's jurisdiction to regulate the forest reserves is derived from the various laws establishing the national forest system. *See, e.g.,* 16 U.S.C. § 475 (stating the "[p]urposes for which national forests may be established and administered"); 16 U.S.C. § 551 (authorizing regulation for the "[p]rotection of national forests"); 16 U.S.C. § 1133(a)(1) ("[n]othing in this chapter shall be deemed to be in interference with the purpose for which national forests are established"). These statutory authorizations codify Congress' intent concerning national forests, which it carefully articulated in 1897. *See* Organic Administration Act of June 4, 1897 (hereinafter "Organic Act"), 30 Stat. 34, 16 U.S.C. § 473 *et seq*. The Organic Act expounded on, and clarified, the original grant of power to create national forest reserves, as provided by the Creative Act of Mar. 3 1891, § 24, 26 Stat. 1103, as amended 16 U.S.C. § 471 (repealed 1976), which authorized the President to "set apart and reserve, in any State or Territory having public land bearing forest, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations."

On February 22, 1897, pursuant to the Creative Act, President Cleveland issued proclamations placing approximately 20,000,000 acres of public lands into forest reserves. *See United States v. Jenks*, 22 F.3d 1531, 1515 (10th Cir. 1994). These Presidential proclamations prevented additional settlement on reserved lands and raised concerns regarding access for existing property holders. Following the issuance of the Presidential proclamations, Congress sought to protect the access rights of homesteaders and others holding property interests surrounded by the newly created forest reserves by enacting the Organic Act. Specifically, Section 478 of the Organic Act "protect [ed] whatever rights and licenses with regard to the public domain existed prior to the reservation." *See Montana Wilderness Ass'n v. United States*, 496 F. Supp. 880, 888 (D. Mont. 1980) (construing 16 U.S.C.A. § 478), *aff'd on other grounds*, 655 F.2d 951 (9th Cir. 1981).

This Court reviewed the text and history of both the Creative Act and the Organic Act in *United States v. New Mexico*, 438 U.S. 696, 706-08 (1978), and noted that the Organic Act represented Congress' effort to address continuing problems with the forest reserves[5]

[5] The Court's analysis touched on the shortcomings of the Creative Act, including conservationists' dismay over the continued degradation of new national forests, which were not well maintained and regulated, and Western settlers' concerns that indiscriminate reservations of land would cause disastrous outcomes for those living on or near the forest reserves. *See United States v. New Mexico*, 438 U.S. 696, 706 (1978).

by "carefully defin[ing] the purposes for which national forests could in the future be reserved" and "provid[ing] a charter for forest management and economic uses within the forests." *Id.* at 706. Notably, the Organic Act – under which the Huachuca Forest Reserve was created – outlined the purpose of the nation's forest reserves by clearly stating that "[n]o national forest shall be established, except to improve and protect the forest within the boundaries, *or for the purpose of securing favorable conditions of water flows*, and to furnish the continuous supply of timber for the use and necessities of citizens of the United States." *See* Organic Act, 30 Stat. 35, as codified, 16 U.S.C. § 475 (emphasis added). In *United States v. New Mexico,* the Court's analysis of the Organic Act stressed that "Congress authorized the national forest system principally as a means of enhancing the quantity of water that would be available to the settlers of the arid West." *United States v. New Mexico*, 438 U.S. at 713. Furthermore, the Court concluded that Congress' efforts revealed a "principled deference to state water law." *Id.* at 718. Tombstone's proposed restoration work is fully in line with Congress' limited purposes for establishing a national forest and its deference to state water law.

This Court has settled the dispute over the existence and nature of 1866 Act rights-of-way, *see, e.g., Jennison v. Kirk*, 98 U.S. 453 (1878); *Broder v. Natoma Water & Mining Co.*, 101 U.S. 274, 276 (1879); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 734 (1950), recognizing that the 1866 Act

was a "voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, [rather] than the establishment of a new one." *See Broder*, 101 U.S. at 276. Further, this Court recognized that the 1866 Act enacted to encourage roads as "necessary aids to the development and disposition of the public lands," recognizing that their maintenance was "clearly in furtherance of the general policies of the United States." *See Central Pac. Ry. v. Alameda County*, 284 U.S. 463, 472-73 (1931). However, in recent years, questions as to the nature of the private property rights associated with these rights-of-way have become more pressing.

B. Rights-of-Way Established Pursuant to the 1866 Act Are Not Superceded by the Property Clause

Rights held under the 1866 Act are critical for the continuation and recognition of access and water rights-of-way in the western United States. These rights-of-way are relied upon by many local, county, and state governments, as well as individuals throughout the West. However, in this case, the district court held and the Ninth Circuit affirmed that the Property Clause of the United States Constitution controlled the outcome of the issues present in this litigation, and that the Forest Service had engaged in appropriate regulation relating to federal land by denying the City of Tombstone access to its rights-of-way, water rights, and water structures located in the Coronado National Forest. This precedent could be

devastating to other governmental entities which hold, and rely upon, similar types of rights-of-way, as their ability to rely on those rights-of-way for access and water purposes will be called into question.

Under the Property Clause of the United States Constitution,

> The 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, and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

See U.S. CONST. Art. IV § 3, cl. 2. In *Kleppe v. New Mexico*, this Court noted that "while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.'" *See Kleppe v. New Mexico,* 426 U.S. 529, 539 (1976) (*quoting United States v. San Francisco*, 310 U.S. 16, 29 (1940)). Additionally, this Court has held that the Property Clause gives Congress the power over public lands "to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them." *See Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917).

However, this Court has not definitively answered the question of the relationship that the

federal government has with the holders of 1866 Act rights-of-way. Under one approach, the federal government's power over such a right-of-way would be limited to that granted a normal proprietor under state law, affording the government the same rights as any servient estate owner in that state. Conversely, under another approach, the federal government would have expansive authority over these rights-of-way, allowing powerful regulatory control that, in some cases, would essentially negate the existence of the right-of-way. In *Kleppe v. New Mexico*, this Court recognized both approaches, holding that "Congress exercises the powers both of a proprietor and of a legislature over the public domain." *See* 426 U.S. at 540 (citation omitted). Circuit courts of appeals have examined these issues utilizing both of these approaches separately, leading to confusion amongst federal land managers and the holders of these rights-of-way.

C. Conflict Between Ninth and Tenth Circuits Regarding Rights Associated with 1866 Act Rights-of-Way

Encouraged by the federal government to do so, settlers moved westward at the end of the nineteenth century, and utilized federal land grants such as the 1866 Act to establish roadways, pipelines, and ditches for public, private, commercial and agricultural uses. *See Southern Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 740 (10th Cir. 2005). Many communities, including those within the 13

counties represented by the Coalition, rely on those rights-of-way for their continued survival. *See id.* However, due to differing approaches taken by the federal courts of appeals, holders of these rights-of-way lack certainty about their continued reliance upon these right-of-way grants. Illustrative of this uncertainty are the rights-of-way held by the City of Tombstone – rights-of-way which are over 130 years old, and which supply water for that town. Due to an interpretation of the Property Clause that provides federal agencies with expansive regulatory authority over those rights-of-way, Tombstone's rights have been sharply curtailed.

If Tombstone, Arizona was located in the Tenth Circuit, it is likely that this litigation would have had a different outcome. Cases determining the rights associated with 1866 Act rights-of-way in the Tenth Circuit have taken the proprietary approach: the federal government's power over such a right-of-way would be limited to that granted a normal proprietor under state law, affording the government the same rights as any servient estate owner in that state. *See, e.g., Southern Utah Wilderness Alliance*, 425 F.3d at 748. The Tenth Circuit has looked to the property law of the state in which the 1866 Act right-of-way is found to establish whether or how they are perfected, as well as the permissible scope of future improvements. *See id.* Likewise, the Tenth Circuit has also looked to applicable state law to characterize the federal government's regulatory authority over the 1866 Act rights-of-way, while never invoking broader

legislative Property Clause powers. *See, e.g., United States v. Jenks*, 804 F. Supp. 232, 235 (D.N.M. 1992), *aff'd in part as modified, rev'd in part*, *United States v. Jenks*, 22 F.3d 1513 (10th Cir. 1994), *aff'd*, *United States v. Jenks*, 129 F.3d 1348 (10th Cir. 1997) (holding that whether an 1866 Act right-of-way had been established is a question of state law, and that easement rights are subject to regulation by the Forest Service as the owner of the servient estate); *see also United States v. Garfield County*, 122 F. Supp. 2d 1201, 1240 (D. Utah 2000) (stating that an 1866 Act right-of-way is subject to reasonable federal regulation and discussing the United States' interest as a servient estate owner).

In *Southern Utah Wilderness Alliance*, the Tenth Circuit relied on the common law of servitudes to determine the scope of an 1866 Act right-of-way, and to determine that, similar to other easements, "routine maintenance" could occur without the approval by or consultation with the federal land management agency. *See Southern Utah Wilderness Alliance*, 425 F.3d at 749. However, "construction of improvements" would require consultation with the federal land management agency. *See id.* There, the Court held that:

> Defined in terms of the nature of the work, "construction" . . . . includes the widening of the road, the horizontal or vertical realignment of the road, the installation (as distinguished from cleaning, repair, or replacement in kind) of bridges, culverts and

> other drainage structures, as well as any significant change in the surface composition of the road (*e.g.,* going from dirt to gravel, from gravel to chipseal, from chipseal to asphalt, etc.), or any "improvement," "betterment," or any other change in the nature of the road that may significantly impact [federal] lands, resources, or values. "Maintenance" preserves the existing road, including the physical upkeep or repair of wear or damage whether from natural or other causes, maintaining the shape of the road, grading it, making sure that the shape of the road permits drainage [, and] keeping drainage features open and operable– essentially preserving the status quo.

See id., *citing Garfield County*, 122 F. Supp. 2d at 1253 (footnote omitted).[6] The Tenth Circuit determined that, under that definition, grading or blading a road for the first time would constitute "construction" and would require advance consultation, though grading or blading a road to preserve the character of the road in accordance with prior practice would not. *See id.* Importantly, this definition of "maintenance" is in line with the actions that the City of Tombstone

[6] Although this definition was drawn as an interpretation of 36 C.F.R. § 5.7, which applies within national parks, the Tenth Circuit determined that this definition was "applicable to distinguishing between routine maintenance and actual improvements of [rights-of-way pursuant to the Act of 1866] across federal lands more generally." *See Southern Utah Wilderness Alliance*, 425 F.3d at 749.

desires to take in the present case. As noted by the Tenth Circuit, "maintenance" preserves the existing [right-of-way], including the physical upkeep or repair of wear or damage *whether from natural* or other cases." *See id.* In this litigation, the City of Tombstone seeks to maintain its rights-of-way to repair damage which occurred as a result of natural causes. Therefore, it is likely that this case would have had a markedly different outcome if it had occurred in the Tenth Circuit.

However, because Tombstone, Arizona is located in the Ninth Circuit, the continued existence of the town is at risk, as this desert town may wither without the water sources that have allowed it to flourish. The Ninth Circuit has taken a diametrically different approach to the interpretation and application of the Property Clause, focusing on enabling statutes by which Congress delegates its property power, and determining that the Property Clause is in no way constrained by state law. *See, e.g., Hale v. Norton*, 476 F.3d 694, 699 (9th Cir. 2007) (upholding severe regulation on 1866 Act right-of-way that could not be justified under the common law of servitudes, and in direct conflict with 1997 Tenth Circuit decision in *United States v. Jenks*); *see also Clouser v. Espy*, 42 F.3d 1522, 1526, 1529-30 (9th Cir. 1994) (upholding Forest Service decision restricting plaintiffs to "using pack animals or other non-motorized means" to access private mining claims in National Forests and Wilderness Areas despite adverse impact on the commercial viability of those claims); *United States v.*

Vogler, 859 F.2d 638, 642 (9th Cir. 1988) (holding that whether the state of Alaska had a valid 1866 Act right-of-way or not, the National Park Service had authority to restrict use of a right-of-way into the Yukon-Charley Rivers National Preserve under the Property Clause because the regulation was "necessary to conserve the natural beauty of the Preserve"). Pursuant to this approach by the Ninth Circuit, there are few, if any, limitations to federal regulatory authority over these rights-of-way.

In effect, Ninth Circuit interpretation of the Property Clause as applied to rights-of-way such as those obtained under the 1866 Act could result in those rights-of-way becoming meaningless. For communities which have relied on these rights-of-way for access and water, among other things, since their inception, this is severely troubling. The situation at issue in the present case provides a strong example of how overly-broad interpretation of federal regulatory authority could render these rights-of-way useless. However, this is not the only case where the Ninth Circuit's approach has resulted in the practical loss of a right-of-way. The 2007 decision in *Hale v. Norton* is a prime example. In *Hale*, the Plaintiffs owned over four hundred acres which were entirely surrounded by the Wrangell-St. Elias National Park and Preserve in Alaska. *See* 476 F.3d at 696. After the house on the property burned down in 2003, the Hales used a bulldozer to bring in supplies to rebuild the home. *See id.* The National Park Service required the Hales to apply for a right-of-way permit, irregardless of the

fact that the Hales had a valid right-of-way to access their property. *See id.* Quoting *Vogler*, the Ninth Circuit upheld the NPS' decision, holding that the federal land management agency could regulate use of the right-of-way, resulting in the inability to utilize the right-of-way for large portions of the year. *See id.* at 700 (reasonable regulation could include only allowing access across right-of-way in the winter).

Rights-of-way established pursuant to the 1866 Act provide a large portion of the infrastructure for the western United States, and modifications to how federal land management agencies deal with those rights-of-way are critically important. Requiring right-of-way holders, such as the City of Tombstone, to obtain permits prior to performing maintenance on those rights-of-way is contrary to the very nature of the perpetual right-of-way easement. Conflict between the Ninth and Tenth Circuits on this issue will promote uncertainty among federal land managers, as well as those who are the grantees of the rights-of-way. It is for this reason that the *amicus curiae* urges this Court to grant Petitioner's petition for writ of certiorari.

CONCLUSION

Amicus Curiae urges the Supreme Court to grant Petitioner's petition for writ of certiorari, and to reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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