No. 12-1069

In The
Supreme Court of the United States

CITY OF TOMBSTONE, ARIZONA,
Petitioner,
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),
Respondents.

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

BRIEF OF THE CATO INSTITUTE, THE RIO GRANDE FOUNDATION, THE MONTANA POLICY INSTITUTE, THE IDAHO FREEDOM FOUNDATION, AND THE GRASSROOT INSTITUTE OF HAWAII AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amici curiae,[1] the nationally-focused Cato Institute and a coalition of Western-state public policy and

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *Amici Curiae*'s intention to file this brief.

research foundations, file this brief to urge the Court to review the Ninth Circuit's decision and establish clear guidelines regarding federal authority over federally owned land which take into account the states' most important reason for existing: protecting the lives and property of their residents. The states with the largest percentages of federal lands are all in the West, and the issues presented here are of fundamental importance to *amici*. *See* FEDERAL REAL PROPERTY COUNCIL, FY 2010 FEDERAL REAL PROPERTY REPORT 11 (U.S. Gen'l Serv. Admin. 2010) (listing federally owned acreage per state). *See also The Open West, Owned by the Federal Government*, N.Y. TIMES (Mar. 23, 2012) ("The top states with the greatest percentage of federally owned land are all the Western states, including Alaska and Hawaii.").

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and pub-

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Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *Amici Curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

lishes the annual *Cato Supreme Court Review*. This case is important to Cato because it implicates the most basic division of authority between the federal and state governments set out in the Constitution.

The Rio Grande Foundation is a research institute dedicated to increasing liberty and prosperity for all of New Mexico's citizens. We do this by informing New Mexicans of the importance of individual freedom, limited government, and economic opportunity. Rio Grande Foundation is participating in this case because nearly 42 percent of New Mexico is controlled by the federal government, and New Mexico also has less surface water than almost any state in the nation making water more valuable and controversial than in most any state. While we encourage careful and considered efforts to evaluate and apply market principles to current water policies which were adopted centuries ago—and in many cases prior to the Founding—the federal government has so far been arbitrary in its efforts to administer water policies in the West, and has implemented policies that run counter to the application of free market principles in water policy.

The Montana Policy Institute is Montana's only free market think tank, dedicated solely to providing policy solutions that promote the liberty, prosperity, and quality of life for all Montanans. It operates as a 501(c)(3) organization. It is urging the Court to grant certiorari because nearly 30 percent of Montana is owned or controlled by the federal government, including the headwater areas of many watersheds that provide for the livelihoods and living needs for millions of people, not just in Montana but all the way to the Gulf of Mexico and Pacific Coast. This

water is coming under increasing attack as senior rights are being challenged by government and tribal agencies under the guise of environmental, treaty, and other concerns. Much of Montana's economy is based on water rights and usage compacts dating back to our statehood in the 19th century. Revisiting and revising those compacts through either regulatory or political fiat causes major disruption and is unfair to those who have played by the rules for generations.

The Idaho Freedom Foundation is a non-partisan educational research institute and government watchdog dedicated to improving the lives of Idahoans. It is participating in this case because major events in Idaho often involve or impact federal land because more than 60 percent of Idaho's land is controlled by the federal government. Idaho regularly struggles with wildfires and the devastation that they can cause, and the situation in Tombstone in which the federal government has prohibited the city from rebuilding the infrastructure that was destroyed by natural disasters raises serious concerns for Idaho. Idaho is home to many small rural communities that are adjacent to or surrounded by federal land, and those communities must have the ability to protect the public health and safety from the effects of fires and other potential natural disasters. In some cases, preemptive action, such as controlled burns or proactive thinning, may even be required on federal land to forestall such a calamitous outcome. Idaho cannot allow the federal government to impinge on its abilities to prevent or rectify the damage caused by natural disasters within its borders.

The Grassroot Institute of Hawaii is a nonprofit public policy organization based in Honolulu, and is the only free market think tank in the state. Its mission is to advocate good public policy which includes community organizing, political movement, research papers, community opinions, policy briefings, commentary, and conferences that promote three broad goals: individual liberty, free markets, and limited accountable government. The issues presented here are of importance because the federal government owns or controls nearly 20 percent of Hawaii's land, the state is prone to natural disasters such as hurricanes, tsunami, earthquakes, and volcanic eruptions, and water is a finite resource in our islands. Our state and municipal governments cannot be limited in their ability to prepare for these events, and respond if disaster strikes.

SUMMARY OF ARGUMENT

If the states have the power to regulate private uses of federal land to further "environmental" goals—as this Court held in *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987)—then surely under the powers reserved to them by the Tenth Amendment, states also possess the right to access and use federal land to respond to emergencies to protect the lives and properties of their residents, without undue interference from federal bureaucrats. The national government's expansive authority to regulate federal property is thus not exclusive, particularly when states act under their emergency powers to protect life and property. Without clear guidelines delimiting the scope of the federal government's authority in such cases, states and municipalities will be left wandering the virtual desert, relying on the sufferance of federal administrators alone for their continued existence.

This brief addresses a single issue: whether the City of Tombstone is likely to succeed on its claim that its ability to access and repair the sources of its municipal water located on federal land is not trumped by the federal government's authority under the Property Clause, but rather is a traditional government function reserved to the states. *Amici* respectfully argue that it is, so this Court should review the important issues raised in Tombstone's petition.

ARGUMENT

ARIZONA'S EMERGENCY POWERS DESERVE AT LEAST THE SAME CONSIDERATION AS ITS ENVIRONMENTAL REGULATIONS

Starting with the principle expressed by this Court unanimously in *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011), that "[i]mpermissible interference with state sovereignty is not within the National Government's enumerated powers," the U.S. Forest Service's actions in this case exceeded federal authority under the Property Clause. The concept of state sovereignty within our federal system must include the states' ability to respond to emergencies, particularly those which threaten its municipalities' very existence, as here.

The Property Clause gives Congress the "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, § 3, CL. 2. It has been viewed expansively, with the courts mostly ceding the field to legislative and executive decisions regarding federal land. *See United States v. City and County of San Francisco*, 301 U.S. 16, 29-30 (1940) ("The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.'") (quoting *Light v. United States*, 220 U.S. 523, 537 (1911)).

This deference to legislative and executive judgment under the Property Clause, however, has never been as absolute as the oft-quoted "without limita-

tions" language may suggest. *See*, *e.g.*, *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) ("And 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.'") (quoting *United States v. City and County of San Francisco*, 301 U.S. at 29). For example, this Court has held that even within federal land, states may enforce their core interests such as "criminal and civil laws," provided those laws do not conflict with federal law. In those vital spheres, state and federal authority coexist:

> Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.

Id. at 543 (citations omitted). While the Property Clause gives Congress plenary power over federal land, "even within the sphere of the Property Clause, state law is pre-empted only when it conflicts with the operation or objectives of federal law, or when Congress 'evidences an intent to occupy a given field.'" *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 593 (1987) (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)).

Thus, this Court has not left decisions regarding the use of federal lands entirely to the political process of the legislative or executive branches, and has developed a doctrine for determining when a

state's interests will be determined to coexist with federal policy. For example, in *United States v. California*, 332 U.S. 19 (1947), California entered into leases with private parties for mineral exploration after oil was discovered off the state's coast. The federal government brought an original jurisdiction action in this Court seeking to confirm its ownership of those lands and enjoin the state. California responded by arguing that it had secured title to these lands in the same fashion it obtained title to inland tidelands—upon admission to the union under the equal footing doctrine. *See Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). Although this Court rejected California's argument and confirmed U.S. title, it recognized that states retain some authority to regulate the uses that may be made of federal property, and presumed that Congress would not exercise its power to the detriment of the states:

> But beyond all this we cannot and do not assume that Congress, which has constitutional control over Government property, will execute its powers in such way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission.

United States v. California, 332 U.S. at 40 (citing *United States v. Texas*, 162 U.S. 1, 89, 90 (1896); *Lee Wilson & Co. v. United States*, 245 U.S. 24, 32 (1917)). The Court contrasted *The Abbey Dodge*, 223 U.S. 166 (1912), a case concluding that Florida could regulate activities within its territorial waters even though doing so was prohibited by a federal statute, and suggested that the state's motivation is one of the key factors examined to determine in what situations a state may be entitled to regulate use in

federal land. The Court thus distinguished a state's desire to "regulate and conserve" (permissible) with its desire to "use and deplete resources which might be of national and international importance" (impermissible).

> [This Court] thus narrowed the scope of the statute because of a belief that the United States was without power to regulate the Florida traffic in sponges obtained from within Florida's territorial limits, presumably the three-mile belt. But the opinion in that case was concerned with *the state's power to regulate and conserve* within its territorial waters, not with its exercise of the right to *use and deplete resources which might be of national and international importance*. And there was no argument there, nor did this Court decide, whether the Federal Government owned or had paramount rights in the soil under the Gulf waters.

United States v. California, 332 U.S. at 37-38 (emphasis added). Thus, even "paramount" national interests such as "commerce and to live in peace in the world," *id.* at 35, might need to coexist with the ability of the states to regulate certain interests within that sphere.

Three decades later, this Court gave that analysis more depth when it explained in *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987), that a state could regulate activity on federal land in certain circumstances, and rejected an argument that the Property Clause "*per se*" preempts a state's authority. *Id.* at 580. Indeed, the Court concluded the opposite, holding that "[t]he Property Clause

itself does not automatically conflict with all state regulation of federal land." *Id.*

In *Granite Rock*, a mining operation holding federal patents on federal land within California's coastal zone asserted it need not obtain a coastal development permit from the California Coastal Commission because the state was precluded from regulating activities on federal land. This Court first noted the touchstone principle that the power under the Property Clause "entrusted to Congress is without limitations." *Id.* at 570 (quoting *Kleppe*, 426 U.S. at 529). However, it rejected as "totally unfounded" Granite Rock's contention that "the Property Clause not only invests unlimited power in Congress over the use of federally owned lands, but also exempts federal lands from state regulations whether or not those regulations conflict with federal law." *Id.* The Court rejected each of Granite Rock's and the federal government's arguments that federal law preempted the California Coastal Act. The Court distinguished between "land use planning" and "environmental regulation," and held that reasonable state environmental regulations were not always prohibited on federal land.

A state's response to an emergency that requires it to access and use federal lands should be given at least the same regard as its regulation of federal land to advance "environmental" goals. As long as emergency powers do not directly conflict or impede federal law—and, under the Tenth Amendment, even in certain cases where they do—states must retain the authority to respond to emergencies, even where that response requires the use of federal land. There is no more "traditional government function" exer-

cised by states and their municipalities than the protection of life and property, and responding to emergencies. The Ninth Circuit declined to address the argument, summarily holding that there are no "serious questions" about the issue, and that the appropriate test under the Tenth Amendment is that of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), despite *Garcia* being "rendered a dead letter" by two later decisions from this Court. Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 HARV. J. LAW & PUB. POL'Y 947, 954 (2008) (citing *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 77 (1996); *Alden v. Maine*, 527 U.S. 706, 739-40 (1999)). *See* Pet. App. 20 & n.4. It did so even though the situation presented here is much more compelling than the state's exercise of environmental regulatory authority approved in *Granite Rock*, because it is not merely a state regulating third-party private interests that might impact the environment, but the state itself acting pursuant to its sovereign powers to prevent imminent danger to the lives and property of its citizens:

> "State of emergency" means the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons or property within the state caused by air pollution, fire, flood or floodwater, storm, epidemic, riot, earthquake or other causes, except those resulting in a state of war emergency, which are or are likely to be beyond the control of the services, personnel, equipment and facilities of any single county, city or town, and which require the combined efforts of the state and the political subdivision.

ARIZ. REV. STAT. § 26-301. The states' power to declare and respond to emergencies to protect their residents' lives and property is among the most traditional government functions reserved to them by the Tenth Amendment, and has its roots in the Roman law concept of "justitium," the period of public mourning following a national disaster or the death of an important person, and long predates the modern notion of environmental regulation. *See* ABEL H.J. GREENRIDGE, ROMAN PUBLIC LIFE 175 (1901) ("A far more comprehensive act was the edict of a magistrate with *major potestas* that all lower magistrates should suspend the exercise of their functions. Such a cessation of public business was known as *justitium*, a name derived from the suspension of that department of business which was the most constant sign of the active life of the state, the courts of law (*juris statio*)."). *Cf. National League of Cities v. Usery*, 426 U.S. 833 (1979) (the "traditional government functions" test for reserved powers under the Tenth Amendment).

Thus, while federal administrators fiddle, Tombstone literally burns or at least dries up, as hardscrabble desert towns tend to do when cut off from water. Yes, federal approvals might someday be forthcoming, but we need look no further than the Federal Circuit's decision in *Estate of Hage v. United States*, 687 F.3d 1281 (Fed. Cir. 2012) for an example of a case where "might" can be stretched into decades, and even if ultimately allowed, the approvals may come too late to be of any practical effect. In *Hage*, the Federal Circuit held that a 22-year-old takings claim resulting from the federal government cutting off access to water was not ripe: even though the federal agency denied Hage's every application

for a *grazing* permit, it might issue a *special use* permit that might allow the use of the water he alleges was taken. Hage's certiorari petition is currently pending before this Court as No. 12-918.

By denying an injunction and failing to seriously review Tombstone's claims under the Tenth Amendment, the Ninth Circuit essentially substituted the judgment of federal administrators for those of Arizona's state and municipal officials about whether Tombstone's claim of a dire water situation is truly an emergency. Although the national government's power under the Property Clause with respect to federally owned land is expansive, it has never been held to be the power to override the considered judgment of state officials that their citizens need to use federal land to respond to an emergency.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to review the Ninth Circuit's judgment.

Respectfully submitted,

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