No. 23-1041

IN THE
SUPREME COURT OF THE UNITED STATES

FLYING CROWN SUBDIVISION ADDITION NO. 1 AND ADDITION NO. 2 PROPERTY OWNERS ASSOCIATION,
Petitioner,

v.

ALASKA RAILROAD CORPORATION,
Respondent.

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

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

I. Whether the Alaska Railroad's active right-of-way is exclusive in nature, or whether management and control of the right-of-way must be shared between the railroad, the Flying Crown Property Owners' Association, and other adjoining landowners.

CORPORATE DISCLOSURE STATEMENT

Respondent Alaska Railroad Corporation is an Alaska public corporation and hereby states that it is neither owned by a parent corporation, nor is there a publicly held corporation owning ten percent (10%) or more of its shares.

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INTRODUCTION

The Ninth Circuit's underlying decision affirmed, unanimously, that the Alaska Railroad Corporation ("ARRC") holds a valid, exclusive-use easement in its right-of-way adjoining Flying Crown Subdivision Addition No. 1 and No. 2 Property Owners' Association ("Flying Crown").

Flying Crown's Petition goes to great lengths to cast this decision as being a startling and dramatic change to the law, with unknown (but ominous) implications for "hundreds of property owners and businesses" across Alaska.[1] Pet. 11. The opposite is true. In affirming the District Court, the Ninth Circuit merely affirmed what has been the status quo for decades – a status quo which Flying Crown has only recently decided to challenge, for reasons which remain unclear.

Flying Crown's primary legal argument against ARRC's exclusive-use interest is based on a misinterpretation of this Court's decision in *Marvin*

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[1] Among the allegedly impacted parties, Flying Crown's Petition lists three public utilities; Matanuska Telephone Association, ENSTAR Natural Gas Company, and the Alaska Pipeline Company, which Flying Crown claims "own easements under the right of way." This is a plain misstatement of fact, as those utilities are permittees of ARRC only. The District Court previously denied intervention to both MTA and ENSTAR on the basis that they lacked "a significant protectable interest relating to the property or transaction" at issue. D. Ct. Doc. 59 at 8 (June 9, 2021).

M. Brandt Revocable Tr. v. United States 572 U.S. 93 (2014). Specifically, Flying Crown argues that *Brandt* changed, at least implicitly, the exclusive nature of many active railroad rights-of-way through its reference to the common law of easements. According to Flying Crown, easements (or at least "simple easements") at common law are necessarily non-exclusive, and therefore, if ARRC's right-of-way is a "simple easement," then it must be non-exclusive too. Pet. 15-16.

Setting aside, momentarily, Flying Crown's flawed legal reasoning, nothing in the record indicates that ARRC holds a "simple easement" in the right-of-way at all. Flying Crown borrows that term solely from *Brandt*, arguing for its applicability to ARRC by a historical comparison of the Alaska Railroad's enabling act, passed in 1914,[2] to the act at issue in *Brandt*, passed in 1875.[3] Flying Crown claims the two acts, despite differing statutory language, share a common historical context and are substantively "no different." Pet. 16. In doing so, Flying Crown would ask the Court to reject the factual conclusions of the Ninth Circuit, which found, consistent with the District Court, that the 1875 Act was an "inapt analogy" to the 1914 Act because of the acts' markedly *different* historical context. *See e.g.*, Pet. App. 18a; 37a ("the circumstances of pre-1871 western United States—where the government granted railroad rights-of-

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[2] 1914 Alaska Railroad Act, 38 Stat. 305 (March 12, 1914) ("1914 Act").

[3] General Railroad Right-of-Way Act of 1875, 18 Stat. 482, 43 U.S.C. §§ 934–939 ("1875 Act").

way in exclusive-use limited fee—offer a more apt analogy to 1914 Alaska than the post-1875 western United States. Thus, the circumstances of the 1914 Act weigh in favor of finding at least an exclusive-use easement.")

As a result, to reach Flying Crown's legal argument over the implications of *Brandt* and the exclusivity (or purported lack thereof) of so-called "simple" railroad easements, the Court would first need to delve into a factual inquiry regarding the development of the Alaska Railroad, which Flying Crown claims the lower courts simply got wrong.

Even if the Court were so inclined, such inquiry would ultimately be pointless because Flying Crown's legal argument has been considered and soundly rejected by both circuit courts that have addressed it, including the Ninth Circuit in this case, and the Tenth Circuit before that. *See L.K.L. Assocs. v. Union Pac. R.R. Co.*, 17 F.4th 1287, 1297 (10th Cir. 2021) ("The fact that an easement can confer exclusivity on its holder is clear. Exclusivity is thus consistent with *Brandt's* guidance that a right of way under the 1875 Act is nothing more than an easement."); Pet. App. 39a ("We see no reason to depart from our sister circuit's sound reasoning [in *LKL*].")

Accordingly, there is no circuit split or conflict in existing authorities which must be resolved. To the extent that the Court may be inclined to someday revisit or extend its holding in *Brandt*, this case presents a poor vehicle to do so, as it involves an entirely different (and unique) statute, and unusual factual circumstances stemming from the

Alaska Railroad's history as the only federally-owned and operated railroad ever built.[4]

Finally, the question on which Flying Crown seeks review is, at its core, an academic one. As observed by the Ninth Circuit: "For decades, Flying Crown and ARRC coexisted peacefully . . . As far as we are aware, no significant problems arose because both parties acted in the spirit of mutual accommodation." Pet. App. 5a. Even considering the other property owners and businesses along the right-of-way, the Ninth Circuit's affirmation of a decades-old status quo hardly creates an exigency warranting the Court's further review.

STATEMENT OF THE CASE

The Alaska Railroad is the only railroad ever constructed, owned, and operated by the United States federal government. Pet. App. 9a. Accordingly, the history of its establishment, operation and eventual transfer to the State of Alaska is unique. Following the failure of private railroads in the early 1900s, Congress passed legislation – the 1914 Act – authorizing the creation of a federally-owned railroad in Alaska.

The 1914 Act directed the federal government, among other things, to "acquire rights of way, terminal grounds, and all other rights" necessary for the construction and operation of the Alaska Railroad, and to "reserve[] to the United

[4] As the Court has observed before, "Alaska is often the exception, not the rule." *Sturgeon v. Frost*, 139 S. Ct. 1066, 1080 (2019).

States a right of way for the construction of railroad, telegraph, and telephone lines" in all land patents issued in the Territory of Alaska thereafter. Pet. App. 88a. The Act further gave the government broad authority to use and manage the right-of-way, including authority to "make and establish [its own] rules and regulations for the control and operation of said railroad" and to "lease the said railroad or railroads, or any portion thereof, including telegraph and telephone lines, after completion under such terms as [the President] deems proper[.]" *Id.* Construction of the railroad, including the portion that now adjoins Flying Crown's property, was completed in 1923, and has been in continuous operation since then.

In 1950, federal land patent No. 1128320 was issued to Flying Crown's predecessor in interest, Thomas Sperstad. Pet. App. 138a. When the Sperstad patent was issued, the Alaska Railroad had already been operating on the property for more than twenty years. Pursuant to the 1914 Act, the patent reserved to the federal government a right-of-way for "railroads, telegraph and telephone lines" as well as rights-of-way for "roads, roadways, highways, tramways, trails, bridges, and appurtenant structures constructed or to be constructed by or under authority of the United States or of any State created out of the Territory of Alaska[.]" Pet. App. 139a. Like the 1914 Act, the patent made no reference to the right-of-way being an "easement."

In 1982, Senator Ted Stevens, along with co-sponsor Senator Frank Murkowski, introduced the

Alaska Railroad Transfer Act[5] ("ARTA"), authorizing the transfer of the Alaska Railroad, including all its real and personal property, to the State of Alaska. Within ARTA, Congress included an explicit finding that "exclusive use" was a necessary component of the railroad's right-of-way, stating that "exclusive control over the right-of-way by the Alaska Railroad has been and continues to be necessary to afford sufficient protection for safe and economic operation of the railroad." Pet. App. 117a. Congress therefore specified that, "not less than an exclusive-use easement" in the right-of-way would be transferred to the state. Pet. App. 118a.

Following ARTA's passage, in 1985, ARRC received a series of conveyances, including an interim conveyance for the federal government's interest in the right-of-way adjoining Flying Crown. In 2006, the Department of Interior issued a final patent for the right-of-way crossing Flying Crown property, perfecting ARRC's exclusive-use interest. Pet. App. 30a. More than a decade later, on October 23, 2019, ARRC received a letter from Flying Crown claiming that the federal transfer of the Alaska Railroad's right-of-way "attempted to award property rights no longer owned by the federal government." Pet. App. 31a. Specifically, Flying Crown objected to the transfer of an exclusive interest in the right-of-way to ARRC. Flying Crown's letter demanded that "ARRC immediately proclaim, by means of a legally recordable document, that it

[5] Codified at 45 U.S.C §§ 1201-1214.

relinquishes any and all claim to 'exclusive use' of the right-of-way[.]" *Id.*

In response to Flying Crown's demand that ARRC immediately relinquish "any and all claim" to exclusive use of its right-of-way, ARRC initiated an action to quiet title. ARRC prevailed on summary judgment at the District Court, and that decision was affirmed by the Ninth Circuit. Flying Crown's Petition to this Court followed.

REASONS FOR DENYING PETITION

A. The Ninth Circuit's Decision Does Not Conflict with *Brandt* or Decisions from Other Circuits

Neither the 1914 Act, nor the Sperstad Patent, use the term "exclusive use" or "easement." Instead, both refer to an undefined "right-of-way," reserved to the federal government for railroads, telegraph, and telephone lines. This is not surprising. When the 1914 Act was passed, the term "right-of-way," at least as applied to railroads, was a term of art which necessarily included the right to exclusive use and occupancy. *See e.g.*, *Western Union Telegraph Co. v. Pennsylvania Railroad Co.*, 195 U.S. 540, 570 (1904) ("A railroad right-of-way is a very substantial thing. It is more than a mere right of passage . . . [I]f a railroad's right-of-way was an easement it was 'one having the attributes of the fee, perpetuity and exclusive use and possession.'")

Flying Crown does not dispute that, in the 1914 Act, Congress had the authority to reserve a right-of-way to the United States that was at least

co-equal to the right-of-way at issue in *Western Union*. Notwithstanding, Flying Crown asserts (without direct evidence) that Congress simply chose not to – and thus, when the 1914 Act was passed (approximately ten years after *Western Union* was decided) Congress reserved a lesser interest in the Alaska Railroad's right-of-way than had been granted to the private company in that case. Of course, Flying Crown identifies no contemporaneous statement or authority which indicates that this was true. There is none.

Instead, Flying Crown rests its argument for Congressional intent on an extrapolation from this Court's 2014 decision in *Marvin M. Brandt Revocable Tr. v. United States* 572 U.S. 93 (2014), which considered an entirely different statute. In *Brandt*, the Court held that rights-of-way granted under the General Railroad Right-of-Way Act of 1875 are extinguished upon abandonment, noting that one of the "well settled" features of easements is that "if the beneficiary of the easement abandons it, the easement disappears." *Id*. at 105. According to Flying Crown, it is another well settled feature of easements that they are non-exclusive. Pet. 16. Flying Crown is wrong. Even at common law, easements can be exclusive. In fact, the same Restatement section quoted in *Brandt* makes clear that the exclusivity of easements is variable – and in some cases an easement may even include the right to exclude even the underlying fee owner. *See* Restatement (Third) of Property: Servitudes, § 1.2 cmt. c (2000) ("[t]he degree of exclusivity of the rights conferred by an easement or profit is highly variable" and in some cases, "the holder of the

easement or profit has the right to exclude everyone, including the servient owner, from making any use of the land within the easement boundaries.")

As a result, numerous courts have recognized that there is no contradiction in railroad easements being exclusive. *See e.g.*, *Vieux v. E. Bay Reg'l Park Dist.*, 906 F.2d 1330, 1333 (9th Cir. 1990) ("After 1871, the government granted the railroads a lesser interest in the property, often referred to as an exclusive use easement."); *L.K.L. Assocs.*, 17 F.4th at 1295 ("An 1875 Act easement allows the grantee to exclude everyone—including the grantor and fee owner."). The Tenth Circuit, in *LKL*, went so far as to address the connection with *Brandt* explicitly, holding that "[e]xclusivity is thus consistent with *Brandt's* guidance that a right of way under the 1875 Act is nothing more than an easement." *Id*. at 1297.

B. The Ninth Circuit's Decision Has Limited Impact Outside of Alaska and Does Not Warrant Review

To the extent that the Court is inclined to revisit and expand *Brandt*, this case is a poor vehicle for doing so because it involves an unusual statute that differs materially from the railroad acts typified by the 1875 Act.[6] Although Flying Crown's Petition

[6] While the Ninth Circuit's decision, as it currently stands, has limited impact outside of Alaska, any *reversal* of that decision on the basis proposed by Flying Crown would have major implications outside of the state – fundamentally altering right-of-way management for private railroads across the country that presently co-exist with thousands of adjoining landowners under the framework affirmed in *LKL*.

argues that the 1914 Act is "no different" from those acts, it is wrong. Pet. 16.

First, the 1875 Act involved sovereign grants to private railroad companies, which the Court has construed narrowly based on the "sovereign grantor" canon. *See Brandt*, 572 U.S. at 116 ("a grant is to be resolved favorably to a sovereign grantor . . . nothing passes but what is conveyed in clear and explicit language.") The Alaska Railroad, by contrast, was never owned by a private rail company, but by the sovereign grantor itself. The *grantee* in this case, therefore, is not the railroad, but rather is Flying Crown's own predecessor in interest, which received a land patent in 1950 *subject* to the federal government's existing right-of-way. As a result, it is Flying Crown's interest which must be construed narrowly – not ARRC's.

Second, unlike the 1875 Act, the 1914 Act explicitly contemplated broad-based revenues for the railroad, including from leasing, mineral extraction, and timber harvest. For this reason, the 1914 Act gave the President broad discretionary authority to "lease the said railroad or railroads, or any portion thereof, including telegraph and telephone lines, after completion under such terms as [the President] deem[s] proper[.]" Pet. App. 88a.

Finally, the 1875 and 1914 Acts were passed by Congress under markedly different circumstances. The 1875 Act – targeted at development of the transcontinental railroad – was passed decades after railroads begun to successfully develop the western states. As noted in *Brandt*, "[w]estern settlers, [were] initially some of the

staunchest supporters of governmental railroad subsidization" but "public resentment against such generous land grants to railroads began to grow in the late 1860s." *Brandt*, 572 U.S. at 97.

When Congress passed the 1914 Act, however, the private rail companies that had attempted rail service in Alaska had failed or were failing. Thus, as with the pre-1871 acts (such as the act at issue in *Western Union*), it was a return to railroad development characterized by "great risk" and "staggering cost," except this time the railroad was being built by a sovereign. Even Flying Crown does not dispute that pre-1871, railroad rights-of-way were exclusive, and the 1914 Act's reservations have more in common with the pre-1871 grants than those made under the 1875 Act. As observed by the Ninth Circuit below, "[i]f anything, the circumstances that gave rise to the Alaska Railroad were more like the pre-1871, rather than the post-1875, western United States." Pet. App. 15a.

CONCLUSION

For all the aforementioned reasons, the petition for writ of certiorari should be denied.

DATED: April 18, 2024

Respectfully submitted,

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