No. 23-1041

In The
Supreme Court of the United States

FLYING CROWN SUBDIVISION ADDITION NO. 1 AND ADDITION NO. 2 PROPERTY OWNERS' ASSOCIATION, a non-profit,

Petitioner,

v.

ALASKA RAILROAD CORPORATION,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Ninth Circuit has decided Respondent Alaska Railroad Corporation (ARRC) has a right-of-way like none other in the nation. *See* Pet. at 23–25. The Petition here asks the Court to review that decision by doing what it has done in other cases: interpret the meaning of the term "right-of-way" in a statute. *See, e.g.*, *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 590 U.S. 604, 613 (2020); *Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 110 (2014); *Great N. Ry. Co. v. United States*, 315 U.S. 262, 279 (1942); *Denver & Rio Grande Ry. Co. v. Alling*, 99 U.S. (9 Otto) 463, 475 (1878); *Smith v. Townsend*, 148 U.S. 490, 498 (1893). ARRC's attempt to dismiss the importance of the question presented is unpersuasive. *Cf.* Opposition to Petition for Writ of Certiorari (BIO) at 7–9. Contrary to ARRC's contention, BIO at 3, resolving this case would not require the Court to explore the lower courts' factual findings because the lower courts made no factual findings.

Instead, if this Court were to grant the petition, it would have to answer a question of law: what did Congress mean when it used the term "right-of-way" in the 1914 Alaska Railroad Act? The Court has interpreted the nature of railroad rights-of-way in other cases. *See* Petition for Writ of Certiorari (Pet.) at 15 (listing cases). But in answering the question here, the Ninth Circuit issued an opinion in conflict with those decisions. *Id.* at 15–26. This Court has held that a railroad right-of-way granted by Congress after 1871 is an easement, *i.e.*, a nonpossessory right to enter and use land in the possession of another that obligates the possessor not to interfere with the uses

authorized by the easement. *Brandt*, 572 U.S. at 104–05. But here, the Ninth Circuit held that ARRC has exclusive possession and control of the land subject to the easement, and its use of that area is not limited by the easement's purpose. *See* Petitioner's Appendix (Pet. App.) 21a.

ARRC's attempt to minimize the consequences of the Ninth Circuit's opinion is similarly unavailing. *See* BIO at 9–12. As a result of the opinion, hundreds of Alaskans are prevented from reasonably using their property unless they pay ARRC fees. *See* Brief of *Amici Curiae* Alaskans for Property Rights in Support of Petition for Certiorari (Alaskans Amicus Br.). ARRC's control over the easement property goes so far that ARRC has prevented volunteer firefighters from crossing the railroad tracks to prevent the spread of a forest fire. *Id.* at 11.

The Petition should be granted.

ARGUMENT

I. The meaning of "right-of-way" is a question of law that the Ninth Circuit interpreted in conflict with the relevant decisions of this Court and other courts.

A. The lower courts' opinions did not turn on any findings of fact.

ARRC argues that, if this Court grants the Petition, it will have to "delve into a factual inquiry" answered by the Ninth Circuit. BIO at 3. But the question presented is not a question of fact; it is a question of law that asks this Court to interpret the statutory term "right-of-way." *See* Pet. at i. As this Court has said for nearly a century and a half, "'[t]he solution of [ownership] questions [involving the

railroad grants] depends, of course, upon the construction given to the acts making the grants; and they are to receive such a construction as will carry out the intent of Congress[.]'" *Leo Sheep Co. v. United States*, 440 U.S. 668, 682 (1979) (quoting *Winona & St. Peter R.R. Co. v. Barney*, 113 U.S. 618, 625 (1885)). This Court routinely interprets statutes; ARRC's attempt to turn the question presented into something else is unpersuasive.

Specifically, ARRC points to statements in the Ninth Circuit opinion about the nature of Alaska in the early Twentieth Century. BIO at 2–3. But those are not factual findings that this Court must defer to in answering the question presented. They are merely statements interpreting the statutory and legislative history of the railroad act at issue. App. 15a.[1] The Ninth Circuit did not cite any findings of fact in the record. *See id.* Indeed, ARRC successfully moved to prevent any discovery at the District Court so the lower courts were unable to make any findings of fact that this Court must review. District Court Dkt. No. 16.

As demonstrated by this Court's previous cases interpreting railroad acts, there is nothing unusual about this Court reviewing a lower court's interpretation of the meaning of "right-of-way" in a railroad act. *Brandt*, 572 U.S. at 110; *Great N. Ry. Co.*, 315 U.S. at 279; *Denver & Rio Grande Ry. Co.*, 99 U.S. at 475; *Smith*, 148 U.S. at 498. For example, in *Brandt*, the Court laid out the history of settlement of the western United States, and the role railroads

[1] These also happen to be statements that are contradicted by the statutory and legislative history as well as this Court's precedents. *See* Pet. at 19.

played in that development. 572 U.S. at 95. *Brandt* relied heavily on *Great Northern*, which also "delved into a factual inquiry" surrounding the 1875 General Railroad Right-of-Way Act. *See* 315 U.S. at 273–77.

To be sure, context matters in interpreting the meaning of right-of-way. *Leo Sheep*, 440 U.S. at 682 (railroad statutes should "receive such a construction as will carry out the intent of Congress" by looking at "the condition of the country when the acts were passed, as well as to the purpose declared on their face" (quotations omitted)). But that is true for all statutory text. *Cf. Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168 (2010) ("[C]ontext, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional."). Interpreting a statute in context does not change a legal inquiry into a factual inquiry, as ARRC implies, and it is not a sufficient reason to deny review of the question presented.

B. The lower courts' opinions conflict with the relevant decisions of this Court and other courts.

The Ninth Circuit's analysis of the 1914 Act conflicts with this Court's cases interpreting similar railroad acts. *See* Pet. at 15–25. This Court has repeatedly held that railroad rights-of-way established by Congress after 1871 are simple easements. *Brandt*, 572 U.S. at 110; *Great N. Ry. Co.*, 315 U.S. at 279; *Denver & Rio Grande Ry. Co.*, 99 U.S. at 475; *Smith*, 148 U.S. at 498. And "[a]n easement is a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the

easement." 572 U.S. at 105 (quotations omitted). An easement "merely gives the grantee the right to enter and use the grantor's land for a certain purpose[.]" *Id.* at 105 n.4. The Ninth Circuit, however, interpreted the term "right-of-way" in the 1914 Act to give ARRC *exclusive* possession of the easement area, and allowed it to use the servient estate's land for any purpose. App. 21a.

ARRC argues that Flying Crown identifies no "contemporaneous statement" that Congress intended rights-of-way reserved under the 1914 Act to be the same as other rights-of-way granted after 1871. BIO at 8. But the 1914 Act itself contains contemporaneous statements that the 1914 Act is consistent with Congress's post-1871 change in policy. The 1914 Act states that the purpose of the railroad right-of-way is to settle and develop land. 38 Stat. 305, 306 (Mar. 12, 1914) (1914 Act's stated policy was "to aid in the development of the agricultural and mineral or other resources of Alaska, and the settlement of the public lands therein"). This is the same policy as other post-1871 railroad acts. *United States v. Denver & Rio Grande Ry. Co.*, 150 U.S. 1, 8 (1893) (With the 1875 Act, Congress intended to "promote the building of railroads through the immense public domain remaining unsettled and undeveloped at the time of its passage."); *see also* Cong. Globe, 42d Cong., 2d Sess., 1585 (1872) (House resolution adopting a policy of holding public lands "for the purpose of securing homesteads to actual settlers"). An "exclusive-use" easement would upset that policy. Pet. at 12.

In contrast, ARRC identifies no "contemporaneous statement" that Congress intended to rescind its expressly adopted policy of "securing

homesteads for actual settlers." Cong. Globe, 42d Cong., 2d Sess., 1585 (1872). Instead, ARRC argues that the 1914 Act is materially different than other post-1871 Acts because it reserves telegraph rights-of-way in addition to the railroad right-of-way. BIO at 10. But other post-1871 acts granted similar rights-of-way to the railroads. For example, an 1872 Act granted a "right of way" for both railroad and telegraph operations, 17 Stat. 339 (June 8, 1872), just like the 1914 Act, 38 Stat. at 306. Likewise, an 1884 Act granted a railroad company the right-of-way to operate railroad, telegraph, and telephone lines. 23 Stat. 73 (July 4, 1884). In *Great Northern*, this Court stated that the 1872 Act and the 1884 Act were "rather similar to the general act of 1875[.]" 315 U.S. at 279. Thus, the 1914 Act's inclusion of a telegraph right-of-way does not meaningfully distinguish it from the 1875 Act or other post-1871 railroad statutes.[2]

ARRC also argues that Congress could reserve the same interest in the 1914 Act that Congress granted to railroads prior to 1871. BIO at 7. ARRC, however, identifies no Congressional statement that Congress intended to do so. Instead, ARRC argues that Congress must have intended to reserve such an interest because of one statement in *Western Union Tel. Co. v. Pennsylvania R.R. Co.* that cited a case that is not controlling when interpreting a post-1871 railroad statute. 195 U.S. 540, 570 (1904) (citing *New Mexico v. United States Trust Co.*, 172 U.S. 171

[2] While *Great Northern* focused on the difference between "the" right-of-way and "a" right-of-way in analyzing the 1875 Act, 315 U.S. at 271, the different article does not matter as the 1884 Act uses "a right of way," 23 Stat. 73 (July 4, 1884), and was still an easement. *Smith*, 148 U.S. at 498.

(1898)); *Great N. Ry. Co.*, 315 U.S. at 278 (cases that "deal with rights of way conveyed by land-grant acts before the shift in Congressional policy occurred in 1871" including *New Mexico*, *id.* at 277 n.18, "are not controlling" when interpreting the term "right-of-way" in a post-1871 railroad statute).[3]

Furthermore, in making this argument, ARRC ignores that, a decade before *Western Union*, this Court held that a railroad that received a right-of-way in a post-1871 act "had simply an easement, not a fee in the land." *Smith*, 148 U.S. at 498. If Congress was aware of *Western Union* when it passed the 1914 Act, then it was also aware that in *Smith* this Court correctly recognized the post-1871 change in policy toward railroad rights-of-way.

Contrary to ARRC's argument, the purported lack of any "contemporaneous statement" supports the position that Congress intended the 1914 Act to reserve the same rights-of-way as those granted in the post-1871 Acts. Congress announced a new policy towards railroads in 1871 and passed several statutes effecting the new policy change. This Court recognized the change in policy in subsequently interpreting those statutes, and then Congress passed the 1914 Act using similar language to those other post-1871 Acts. Congress expressly adopted a resolution in 1871 announcing a change in policy so that it did not have to contemporaneously restate that policy in every subsequent statute.

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[3] *Western Union* interpreted an 1866 statute about telegraph lines and involved a railroad right-of-way granted under state law. 195 U.S. at 541.

Moreover, neither ARRC nor the Ninth Circuit's opinion argues that the 1914 Act reserved the same interest as the railroads received in pre-1871 statutes. *See* Pet. App. 10a ("the federal government transferred the Alaska Railroad's *easement* over what was originally the Sperstad Patent to ARRC" (emphasis added)). The pre-1871 rights-of-way were fees and post-1871 rights-of-way were easements. *Great N. Ry. Co.*, 315 U.S. at 271. And, despite the Ninth Circuit trying to draw analogies between 1914 Alaska and the Western United States prior to 1871, App. 15a, the Ninth Circuit did not conclude that the 1914 Act reserved anything other than an easement.

Instead, the Ninth Circuit and ARRC assert that a railroad right-of-way is a special type of easement. Pet. App. 14a (citing *New Mexico*, 172 U.S. at 181–82). But the Ninth Circuit's reliance on *New Mexico* demonstrates how the opinion conflicts with this Court's precedent. As this Court stated in *Great Northern*, and reiterated in *Brandt*, cases that "deal with rights of way conveyed by land-grant acts before the shift in Congressional policy occurred in 1871" including *New Mexico*, "are not controlling here[,]" *Great N. Ry. Co.*, 315 U.S. at 278; *id.* at 277 n.18 (listing *New Mexico* as one of the cases that is not controlling in interpreting a post-1871 railroad right-of-way); *see also Brandt*, 572 U.S. at 104.

There is no dispute that the 1914 Act reserved an easement; there is only a dispute about the scope of the easement. As this Court said in *Brandt* and numerous other cases, railroad rights-of-way granted after 1871 are simple, nonpossessory easements. *Brandt*, 572 U.S. at 110; *Smith*, 148 U.S. at 498. And because these rights-of-way were "product[s] of the

sharp change in Congressional policy with respect to railroad grants after 1871," they do not "grant more than a right of passage[.]" *Great N. Ry. Co.*, 315 U.S. at 275.

In short, "a right-of-way [is an] easement" that grants "a nonowner a limited privilege to use the lands of another" and "grant only nonpossessory rights of use limited to the purposes specified in the easement agreement." *Cowpasture*, 590 U.S. at 613 (quotations omitted). In its response, ARRC fails to address *Cowpasture*'s interpretation of "right-of-way," along with this Court's numerous non-*Brandt* cases interpreting railroad rights-of-way granted after 1871, *see* Pet. at 15–23.

ARRC also failed to address the conflict with other courts. ARRC discusses *L.K.L. Associates v. Union Pacific Railroad Co.*, BIO at 9, but does not address that *L.K.L. Associates* recognized that a railroad's use of its easement must be in furtherance of a railroad purpose, 17 F.4th 1287, 1303 (10th Cir. 2021). ARRC, however, believes it has exclusive control over its right-of-way, and can use all 200 feet of property for nonrailroad purposes as well. *See* BIO at i (reframing the question presented); Alaskans Amicus Br. at 5–11 (providing examples of how ARRC has used its "exclusive-use" easement for nonrailroad purposes). Numerous other cases demonstrate how the Ninth Circuit's opinion goes beyond any other court that has interpreted a railroad right-of-way. Pet. at 23–25. But even *L.K.L. Associates*, the case most favorable to ARRC, demonstrates the Ninth Circuit's conflict with other courts.

II. The consequences of the Ninth Circuit's opinion are not academic and have a nationwide impact.

ARRC attempts to downplay the consequences of the Ninth Circuit's decision by stating that ARRC and Flying Crown currently have a permitting arrangement that allows the homeowners' use of the airstrip. BIO at 4. But that permit is revokable, and Flying Crown's property rights are not secure absent a decision quieting title in its favor. Pet. at 13. Indeed, in at least one instance, ARRC changed its position after granting permission for a business owner to use the easement area, Alaskans Amicus Br. at 8–9, which demonstrates that Flying Crown's concerns about its current agreement with ARRC are not unfounded.

Furthermore, the Ninth Circuit's decision affects hundreds of Alaska property owners. The amicus brief from Alaskans for Property Rights demonstrates just some of the consequences of the Ninth Circuit's decision. Alaskans Amicus Br. at 5–11. Because ARRC's "exclusive-use" easement is not limited by the purpose of the easement, ARRC has complete possession and control of the entire easement area. As a result, ARRC is allowed to grant nonrailroad easements across people's backyards, *id.* at 5, remove gardens that do not interfere with railroad operations, *id.* at 6, charge businesses for using their own property in a way that does not affect the railroad, *id.* at 8–9, prevent business owners from operating a lakeside retreat bisected by the railroad unless they pay fees to the railroad, *id.* at 10–11, and, as noted above, forbid volunteer firefighters from reaching private property to prevent the spread of a forest fire, *id.* at 11.

The effects of the Ninth Circuit's decision to Flying Crown and other Alaskans provide a sufficient reason to grant the Petition. Pet. at 11–15. ARRC argues that this Court should not grant certiorari on an Alaska-centric issue, BIO at 9–11, but looks past the numerous times this Court has granted review in cases with outsized effects on Alaskans, Pet. at 11. Indeed, ARRC in passing cites *Sturgeon v. Frost II*, BIO at 4 (citing 139 S. Ct. 1066, 1080 (2019)), a case this Court first granted on an issue where "no circuit split [was] possible" but which did raise "an issue of great[] importance to the people of Alaska," Petition for a Writ of Certiorari at 19, *Sturgeon v. Frost I* (No. 14-1209) (filed March 31, 2015), *cert. granted* October 1, 2015. Even if the Ninth Circuit's opinion only affected Alaskans, this Court should, based on its past practice, grant the Petition.

But the Ninth Circuit's opinion affects more than Alaska because it raises an issue about how lower courts should interpret the statutory term "right-of-way," particularly in railroad statutes enacted in the late Nineteenth and early Twentieth Century. *See* Pet. at 15–25. *Brandt* recognized that these rights-of-way were "simple easements," 572 U.S. at 110, but lower courts have disagreed about the scope of these easements, *see* Pet. 28–29. Thus, as ARRC recognizes, BIO at 9 n.6, resolving the question presented here will have an impact on property owners who own land subject to railroad rights-of-way across the nation.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: April 2024.

Respectfully submitted,

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