Nos. 18-1584, 18-1587

In The Supreme Court of the United States

UNITED STATES FOREST SERVICE, et al.,

Petitioners,

v.

COWPASTURE RIVER PRESERVATION ASS'N, et al.,

Respondents.

ATLANTIC COAST PIPELINE, LLC,

Petitioner,

v.

COWPASTURE RIVER PRESERVATION ASS'N, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF AMERICAN FOREST RESOURCE COUNCIL AND 16 OTHER FORESTRY ASSOCIATIONS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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LIST OF *AMICI CURIAE*

American Forest Resource Council
Federal Forest Resource Coalition
Intermountain Forestry Association
American Walnut Manufacturers Association
Colorado Timber Industry Association
Douglas Timber Operators
Montana Wood Products Association
Minnesota Forest Industries
Missouri Forest Products Association
New Mexico Forest Industry Association
Associated California Loggers
Associated Logging Contractors-Idaho
Associated Oregon Loggers
Great Lakes Timber Professionals Association
Montana Logging Association
Washington Contract Loggers Association
Ohio Forestry Association

QUESTION PRESENTED

The Mineral Leasing Act of 1920 permits Federal agencies to grant rights-of-way across Federal land for energy pipelines, with limited exceptions including "lands within the National Park System." 30 U.S.C. §185(b)(1). The Forest Service granted such a right-of-way to the proposed Atlantic Coast pipeline crossing through Virginia's George Washington National Forest. The right-of-way intersects the Appalachian Trail as it passes through the Forest.

The Appalachian Trail, as formalized by the National Trails System Act, 16 U.S.C. §§1241–1251 (the Trails Act), is administered by the Secretary of the Interior through the National Park Service. The Fourth Circuit, contrary to the position of both the Forest Service and Park Service, the text of the statute, and basic principles of federal public land law, held that this administration of the Trail causes the Trail to be "lands within the National Park System." Accordingly, it vacated the Forest Service's grant of the right-of-way.

Does the designation of the National Park Service as a Trail's administrator effect a transfer of the underlying land from the Forest Service, and thereby strip the Forest Service of its authority to issue a right-of-way through the National Forest?

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King v. St. Vincent's Hosp.,
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Kleppe v. New Mexico,
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Maracich v. Spears,
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Montanans for Multiple Use v. Barbouletos,
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Nat'l Labor Relats. Bd. v. Jones & Laughlin Steel Corp.,
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Lessee of Pollard v. Hagan,
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Simms v. Simms,
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United States v. Gratiot,
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United States v. Menasche,
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Wilderness Soc'y v. Morton,
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16 U.S.C. §§475 *et seq*. 5

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16 U.S.C. §535 14

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54 U.S.C. §100902(a)(3) 14

54 U.S.C. §101511 14

Controverted Lands Act of 1954, Pub. L. No. 83-426, §2, 68 Stat. 270, 271 (1954).....24

Omnibus Enabling Act of 1889, 51st Cong., 1st Sess., ch. 180, 25 Stat. 676, §§10, 14 (1889) 25

Pub. L. No. 94–588, 90 Stat. 2949 (1976).....12

Pub. L. No. 111–8, §410, 123 Stat. 524 (2009) 17

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OTHER AUTHORITIES

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36 C.F.R. §§219.11(b), (d).....13

TABLE OF AUTHORITIES—Continued

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C.H. Vincent et al., *Federal Land Ownership: Overview and Data,* Cong. Research Serv. R 42346 (Mar. 3, 2017), *available at* https://fas.org/sgp/crs/misc/R42346.pdf 16

Exec. Order No. 13855 of Dec. 21, 2018, 84 Fed. Reg. 45 (Jan 7, 2019) 19

G.C. Coggins et al., *Fed. Pub. Land & Res. Law.* (5th ed. 2002).....22

Gov. E.G. Brown, Jr., Calif., Exec. Order B-52-18 (May 10, 2018).....19

Gov. E.G. Brown, Jr., Procl. of a State of Emergency, Oct. 30, 2015 19

Gov. G. Newsom, Procl. of a State of Emergency, Mar. 22, 2019 19

H.R. Rep. No. 95–1165, 95th Cong., 2d Sess. (May 15, 1978).....6

Interim Chief Vicki Christiansen, U.S. Forest Service, "Envisioning Healthy Forests for Families and Communities," Mar. 26, 2018 18

J. Mooallem, *'We Have Fire Everywhere': Escaping California's Deadliest Blaze*, N.Y. TIMES MAGAZINE, July 31, 2019 19

3 J. Story, *Commentaries on the Constitution* §1322 (1833) 24

M. Farrand, 1 *The Records of the Federal Convention* 583 (1911).....25

TABLE OF AUTHORITIES—Continued

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National Park Service, *National Historic Trails & Routes*, https://imgis.nps.gov/html/?viewer=nht (last visited June 7, 2019) 11

Ore. Forest Res. Inst., *Oregon Forest Facts 2019-20, available at* https://oregonforests.org/sites/default/files/2019-01/OFRI_2019-20_ForestFacts_WEB.pdf 16

Public Land Law Review Commission, *One Third of the Nation's Land: A Report to the President and to the Congress* (1970) 25

P.W. Gates, *History of Public Land Law Development* (1968).....22, 25

R. Keiter & M. McKinney, *Public Land and Resources Law in the American West: Time for Another Comprehensive Review?*, 49 Envtl. L. 1 (2019).....20

1 St. G. Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, App. 283–86 (1803; 1969 reprint).....22

THE FEDERALIST No. 43 (Earle ed. (1937)).....24

U.S. Dep't of Agric., *Land Management Plan for the Inyo National Forest* (Sept. 2019), *available at* https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd664404.pdf.....15

TABLE OF AUTHORITIES—Continued

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U.S. Forest Serv., *Continental Divide National Scenic Trail (CDT) Recommended Forest Plan Components*, Nov. 16, 2017; https://www.fs.fed.us/sites/default/files/fs_media/fs_document/CDT_RecommendedPlanDirection_updatedv11.22.2017.pdf 15

U.S. Forest Serv., *Cut and Sold Report, Cumulative FY 2019*, Nov. 25, 2019, https://www.fs.fed.us/forestmanagement/documents/sold-harvest/reports/2019/2019_Q1-Q4_CandS_SW.pdf 16

U.S. Forest Serv., *FY 1905-2017 National Summary Cut and Sold Data and Graphs*, https://www.fs.fed.us/forestmanagement/documents/sold-harvest/documents/1905-2017_Natl_Summary_Graph.pdf 16

U.S. Forest Serv., *History of Forest Planning*, at https://www.fs.usda.gov/main/planningrule/history (last visited December 3, 2019).....17

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are associations that represent forest products businesses that depend on healthy federal forests for their livelihoods.

The American Forest Resource Council (AFRC) is a regional trade association whose purpose is to advocate for sustained-yield timber harvests on public timberlands throughout the West to enhance forest health and resistance to fire, insects, and disease. AFRC promotes active management to attain productive public forests, protect the value and integrity of adjoining private forests, and assure community stability. It works to improve federal and state laws, regulations, policies and decisions regarding access to and management of public forest lands and protection of all forest lands. AFRC represents over 50 forest product businesses and forest landowners throughout California, Idaho, Montana, Oregon, and Washington. These businesses provide tens of thousands of family-wage jobs in rural communities.

Federal Forest Resource Coalition, Intermountain Forestry Association, American Walnut Manufacturers Association, Colorado Timber Industry Association, Douglas Timber Operators, Montana Wood Products

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[1] All parties have consented in writing to the filing of this brief. *See* Sup. Ct. R. 37.3(a). No counsel for a 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 curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.6.

Association, Minnesota Forest Industries, Missouri Forest Products Association, and New Mexico Forest Industry Association are voluntary non-profit trade associations who work to promote long-term management of National Forests, provide opportunities for open discussion and appropriate interchange of information concerning all facets of the forest products industry, and accumulate and disseminate information regarding the forest products industry in order to foster the best interests of the industry and public. *Amici* include the majority of purchasers of commercial timber from Federally-owned forests throughout the country.

Associated California Loggers, Associated Logging Contractors-Idaho, Associated Oregon Loggers, Great Lakes Timber Professionals Association, Montana Logging Association, and Washington Contract Loggers Association, work to provide a strong, cohesive voice before agencies, legislatures, the public, and the courts on behalf of their members who are engaged in the business of harvesting and transporting timber from forest to mill across the West. They also work to enhance safety and professional standards for their members by offering educational and safety services programs.

Many of *amici*'s members work in or adjacent to federal and forestlands, and the management of these lands ultimately dictates not only the viability of their businesses, but also the economic health of the communities themselves. With much of the National Forest landscape in poor health, active management is badly needed throughout the country to reduce the risk of

catastrophic wildfire as well as insect and disease outbreaks. *Amici* have a strong interest in maintaining the ability of the Forest Service to conduct active management without judicial imposition of undue constraints. The effect of the decision below is not limited to pipelines. It also affects *amici*'s interests because it raises questions about thousands of existing and potential future rights-of-ways, easements, and share-cost agreements across federal and non-federal lands on federally designated trails for other purposes. It also abruptly changes the management regime that has been applied to trails and adjacent lands under the complex process of forest planning.

SUMMARY OF ARGUMENT

The Fourth Circuit's holding effectively transfers a more than 2,000-mile corridor of land from the Forest Service to the National Park Service. It does so in contravention of the plain text of the Trails Act and wholly inconsistent with the existing legal structure and management framework of the National Forest System. The court of appeals fundamentally misapprehended the task before it. Federal lands are replete with overlapping jurisdictions, agencies, and statutory mandates, an artifact of the role these lands played in building the Nation. Public land laws must be construed with an eye to this context, paying special attention to the varied types of agency power and authority. The Fourth Circuit elided all of these concerns, facilely equating the Appalachian Trail, a "unit"

of the National Trails System, with "lands" within the National Park System.

The effect of the ruling below is not limited to this pipeline, or any pipeline, or this trail. It threatens to impede the ability of land-management agencies to issue rights-of-way for other purposes and to disrupt the process for forest management that is already complex—too complex, if one takes recent Congressional enactments at their word. These include roads to access forest management project areas throughout the 193-million-acre National Forest System. At a time where forest health is in a state of emergency, and the need for active management is broadly recognized to reduce risk of severe fire, the decision below could have grave consequences. It should not stand.

For these reasons *amici* respectfully request that the Court reverse the judgment of the court of appeals.

ARGUMENT

I. THE PARK SERVICE'S ADMINISTRATION OF THE APPALACHIAN TRAIL DOES NOT CONVERT THE TRAIL FOOTPRINT INTO "LAND WITHIN THE NATIONAL PARK SYSTEM."

The Fourth Circuit vacated the Forest Service's grant of a special use permit enabling a pipeline to cross under the right-of-way of the Appalachian Trail. The court of appeals held that the administration of the trail by the National Park Service operated as a

transfer of jurisdiction. It found the portion of the George Washington National Forest hosting the trail to be converted to "lands in the National Park System," where the Mineral Leasing Act (MLA) does not permit rights-of-way for pipeline projects. Pet. App. 55a, 57a; 30 U.S.C. §185(b)(1). This was despite the admonition in the National Trails System Act that "[n]othing contained in this chapter shall be deemed to transfer among Federal agencies any management responsibilities established under any other law. . . ." 16 U.S.C. §1246(a)(1)(A).

The National Park Service "primarily" administers the Appalachian Trail "in consultation" with the Forest Service. *See* 16 U.S.C. §1244(a)(1). The court of appeals found that the trail is therefore a "unit" of the National Park System. Pet. App. 57a. This led the court to conclude that the trail's footprint constitutes "lands within the National Park System" wherein pipeline rights-of-way are prohibited. *Id.* (citing 30 U.S.C. §§185(a), 185(b)(1)).

The court over simplified the governing statutory scheme. Activities of the National Park Service are guided by its Organic Act, 54 U.S.C. §§100101-104909. The Forest Service works within three framework statutes: its Organic Act of 1897, 16 U.S.C. §§475 *et seq*., the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§528-531, and the National Forest Management Act of 1976 (NFMA), 16 U.S.C. §§1600-1614. Historically, the Forest Service's Organic Act also delegated to the President the authority to designate forest reserves, now incorporated into the National

Forest System. *Former* 16 U.S.C. §471 (1964); *see* 16 U.S.C. §1609(a); *Herrera v. Wyoming*, 139 S. Ct. 1686, 1691–93, 1702 (2019) (recounting creation of the Bighorn National Forest). Both the Trails Act and MLA are function-based statutes which overlie the public lands. And there are laws of more general applicability such as the National Environmental Policy Act, 42 U.S.C. §4332, and Administrative Procedure Act, 5 U.S.C. §§500 *et seq*.

The court of appeals imposed its own superficial understanding upon a multifaceted statutory scheme. It started with the MLA's preclusion of pipeline rights-of-way on "lands in the National Park System." 30 U.S.C. §185(b)(1). Relying on comments the Park Service submitted on the record, the court found that the Appalachian Trail "is a unit of the National Park System." Pet. App. 57a. The court inferred, without explaining, that a "unit" of the Park System necessarily contains "lands in the National Park System." *Ibid.* The inference was unwarranted. The Appalachian Trail is part of the National *Trails* System, not the Park System. 16 U.S.C. §1242. Indeed, in deliberations on the National Parks and Recreation Act of 1978, the last major legislation in this arena, Congress referred to the separate "National Park and National Trail *Systems*," plural. H.R. Rep. No. 95–1165, 95th Cong., 2d Sess., at 58 (May 15, 1978) (emphasis added).

The Fourth Circuit's opinion in effect renders much of the Trails Act superfluous, including the section which clarifies that trail administration is not a transfer of general authority or jurisdiction, 16 U.S.C.

§1246(a)(1)(A); the detailed procedure for transfer of such authority, 16 U.S.C. §1246(a)(1)(B); the proviso that designated uses shall not supersede any other authorized uses, 16 U.S.C. §1246(j); the Forest's Service's explicit role in administering the Appalachian Trail, 16 U.S.C. §1244(a)(1); and the retention by the Park Service and Forest Service of all other authorities for the purposes of trail administration, 16 U.S.C. §1246(i). The court of appeals thus violated a "cardinal principle of statutory construction," that a court must seek "to save and not to destroy." *United States v. Menasche*, 348 U.S. 528, 538–39, (1955) (quoting *Nat'l Labor Relats. Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)). It is a court's duty "to give effect, if possible, to every clause and word of a statute." *Menasche*, 348 U.S. at 538–39 (quoting *Inhabs. of Montclair Twp. v. Ramsdell*, 107 U.S. (17 Otto) 147, 152 (1883)).

The treatment of section 1246(a)(1) of the Trails Act stands out. Subsection (a)(1)(A)'s limitation on transfers of underlying management authority is rendered superfluous, and its limitation of such transfers to those complying with subsection (a)(1)(B), is written out of the statute. This Court rejected a similar statutory reading in *Bennett v. Spear*, 520 U.S. 154, 173 (1997), holding that the Government's reading of section 10(g)(1)(A) of the Endangered Species Act, 16 U.S.C. §1540(g)(1)(A), "is simply incompatible with the existence of another section of the same Act." The Court found the related provision "would be superfluous—and, worse still, its careful limitation to §1533 would be nullified—" under that reading, and so

rejected it. *Bennett*, 520 U.S. 154 at 173. The decision below is similarly unmoored, as it fails to take account of the statutory scheme, misreads the language of the statute, and nullifies a particular section and the careful limitations therein.

The Trail is not in fact a "unit" of the Park System. Park System units, as defined by the Organic Act, "include any area of land and water administered by the Secretary, acting through the Director, for park, monument, historic, parkway, recreational, or other purposes." 54 U.S.C. §100501; *see* 54 U.S.C. §100102(6). The Park System does not explicitly include trails, which are part of their own system. *See* USFS Pet. 21 ("the Trail itself is a footpath on the surface of the land it crosses"; Br. for United States at 17). The court erred by assuming that reference to the Trail as part of the Park System had legal significance.

The Fourth Circuit made other unwarranted inferences. Assuming the Trail is a unit of the Park System, and noting that the Trails Act indicates the Appalachian Trail "shall be administered primarily as a footpath by the Secretary of the Interior," 16 U.S.C. §1244(a)(1), the court concluded the Trail is "land" administered by the Park Service. The court of appeals' logical leap was not justified. A footpath is not park land; it is only a designated use of the surface. The MLA exception must be given an appropriately narrow reading to fit within the layered statutory scheme.

The court of appeals failed to recognize the separate structure of the Trails Act, which is on equal

footing with the Park Service Organic Act. Instead, it subsumed the Trails Act into the Organic Act. This violated the Trails Act's instruction that "[n]othing contained in this chapter shall be deemed to transfer among Federal agencies any management responsibilities established under any other law for federally administered lands which are components of the National Trails System." 16 U.S.C. §1246(a)(1)(A). The Trails Act explicitly provides that the Forest Service retains its authorities both under the MLA and its own foundational statutes.

The court of appeals' further errors flow from its fundamental mistake. It rejected the Government's interpretation of the MLA because to do so "would give the Forest Service more authority than NPS on National Park System land." Pet. App. 57a. This is backwards, as the land belongs to the Forest Service. The Fourth Circuit's interpretation unduly restricts the Forest Service's own power and duty to manage Forest Service land, giving undue power to the Park Service instead.

The court also found the Chief of the Forest Service is not a "head of an appropriate agency" within the meaning of MLA section 185(a), defined as "the head of *any* Federal department or independent Federal office or agency . . . which has jurisdiction over Federal lands." 30 U.S.C. §185(b)(3) (emphasis added). The court reasoned that the Forest Service was merely "managing" land underlying the Trail and lacked "administration" responsibilities over the Trail. Pet. App. 58a. Again, this inverts the proper structure. The Forest Service

has jurisdiction over the portion of the George Washington National Forest overlaid by the Trail, which is not taken away by the Trails Act.

Because the Trails Act does not purport to transfer land from the Forest Service to the Park Service, the court of appeals wrongly found that the Forest Service lost its general authority under the MLA to issue a right-of-way.

II. THE DECISION BELOW UPSETS SETTLED EXPECTATIONS REGARDING MANAGEMENT OF NATIONAL FORESTS.

Not only is the Fourth Circuit's decision inconsistent with the Trails Act, it sets up a regime that would seriously disrupt the process of forest planning and plan implementation, transferring lengthy cross-sections of National Forest lands to the Park Service without regard for the underlying land-use framework. This would upset the settled expectations of those who rely on lands designated for timber production under the relevant Forest Plan. It would also undercut expectations of other stakeholders to the forest planning process. Extreme structural change should not be implied from the superficial resemblance between a "trail" and "lands."

As the Court has recognized, the National Forest System "itself is vast. It includes 155 national forests, 20 national grasslands, 8 land utilization projects, and other lands that together occupy nearly 300,000 square miles of land located in 44 States, Puerto Rico, and the

Virgin Islands." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 728 (1998). In section 11 of the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by NFMA, Congress declared that "the National Forest System consists of units of federally owned forest, range, and related lands throughout the United States and its territories, *united* into a nationally significant system dedicated to the long-term benefit for present and future generations, and that it is the purpose of this section to include all such areas into *one integral system*." 16 U.S.C. §1609(a) (emphasis added). The Fourth Circuit's approach would frustrate this statutory purpose, moving toward fragmentation of authority and management.

While not all the trails administered through the Secretary of the Interior pass through National Forest System lands, most do. Fifteen of these trails stretch almost 38,000 miles across 32 states, and affect 60 different National Forests, Grasslands, Scenic Areas, and Management Units. Maps prepared by the Park Service show where trails cross National Forest System Lands. National Park Service, *National Historic Trails & Routes*, https://imgis.nps.gov/html/?viewer=nht (last visited June 7, 2019).

For example, the North County National Scenic Trail crosses eight different states, and 872 of its 4,600 miles are within National Forest System units, from Vermont's Green Mountain National Forest to the Sheyenne National Grassland in North Dakota. It crosses through the Chippewa and Chequamegon-Nicolet National Forests in Minnesota and Wisconsin, which are

foundational to those states' forest economies. Similarly, the Lewis and Clark National Historic Trail crosses 13 National Forest System Units in its journey from Ohio's Wayne National Forest to the Columbia River Gorge National Scenic Area in Oregon and Washington. Transferring these trails to the Park Service would create massive lines of disruption across the publicly-owned landscape.

There are 30 National Scenic or Historic Trails designated by the Trails Act. 16 U.S.C. §1244(a). An additional 24 trail routes are identified for study. 16 U.S.C. §1244(c). Of the 30 currently-designated trails, 24 are primarily administered by the Secretary of the Interior through the Park Service. 16 U.S.C. §§1244(a)(1), (3), (4), (6)–(12), (15)–(26), (28)–(29).

National Forests are multiple-use areas, "as authorized by a layered set of national forest management laws reaching back more than a century." *Ark Init. v. Tidwell*, 816 F.3d 119, 122 (D.C. Cir. 2016). Planning and administration of the National Forests is governed by NFMA, Pub. L. No. 94–588, 90 Stat. 2949 (1976); 16 U.S.C. §§1600-1614. Section 6 of NFMA directs the Forest Service to "develop, maintain, and, as appropriate, revise [Forest Plans] for units of the National Forest System." *Ibid.* §1604(a). A Forest Plan is a general planning tool that establishes the overall management direction for a forest. *See Ohio Forestry Ass'n*, 523 U.S. at 729. "These plans operate like zoning ordinances, defining broadly the uses allowed in various forest regions, setting goals and limits on various uses (from logging to road construction), but do not

directly compel specific actions, such as cutting of trees in a particular area or construction of a specific road." *All. for the Wild Rockies v. Peña*, 865 F.3d 1211, 1214–15 (9th Cir. 2017) (quoting *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 966 (9th Cir. 2003)); *accord Ark Inst. v. Tidwell*, 816 F.3d 119, 123 (D.C. Cir. 2016).

NFMA "establishes both substantive and procedural requirements for the development and implementation of forest management plans under the Act . . . including the requirement that each forest plan comply with [Multiple Use-Sustained Yield Act's] multiple-use mandate. . . ." *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1222 (10th Cir. 2011). The statute directs that the agency "use a systematic interdisciplinary approach to achieve *integrated* consideration of physical, biological, economic, and other sciences." 16 U.S.C. §1604(b) (emphasis added).

Forest Plan development requires administrative process in excess of simple notice-and-comment; plans must be available to the public for at least three months and the agency must hold public meetings or "comparable processes at locations that foster public participation in the review of such plans or revisions." 16 U.S.C. §1604(d)(1). NFMA also provides highly detailed substantive guidance. 16 U.S.C. §§1604(e), (f), (g), (m). If that were not enough, the Forest Service has issued further detailed planning regulations. 36 C.F.R. Part 219. Among the regulatory requirements is to identify which lands are suitable, or not, for timber production, and calculation of the maximum amount of

timber which may be produced there consistent with sustained-yield principles. 36 C.F.R. §§219.11(b), (d). Each Forest Plan is to "form one *integrated* plan for each unit of the National Forest System." 16 U.S.C. §1604(f)(1) (emphasis added).

The Forest Service's governing statutes also provide ample authority to issue rights-of-way for road access and to conduct forest management across the National Forest System. The National Forest Roads and Trails Act authorizes "permanent or temporary easements for . . . road rights-of-way . . . over national forest lands and other lands administered by the Forest Service." 16 U.S.C. §533. Further, the Secretary of Agriculture is "authorized to provide for the acquisition, construction, and maintenance of forest development roads within and near the national forests and other lands administered by the Forest Service in locations and according to specifications which will permit maximum economy in harvesting timber." 16 U.S.C. §535. The Forest Service may conduct land management activities, including those that produce commercial timber, consistent with its governing land use plans. 16 U.S.C. §§1604(i), 1611.

By contrast, if National Forest land were considered part of the Park System, the available management authorities are not as extensive. The Park Service does not have a mandate for multiple use but for resource preservation. 54 U.S.C. §§100101(a), 100701, 100706. Accordingly, the provisions of the Park Service Act regarding roads and rights-of-way are narrow, 54 U.S.C. §§101511, 100902(a)(3), and timber management is

severely restricted. 54 U.S.C. §100753. The Park Service Act's authorities must be narrowly construed "and shall not be exercised in derogation of the values and purposes for which the System units have been established. . . ." 54 U.S.C. §100101(b).

National Scenic and Historic Trails already play a significant role in forest planning, as management of such trails *in the context of a Forest Plan* is a subject of ongoing debate. The Forest Service works to situate trails within the context of its multiple-use mandate. *See*, *e.g.*, U.S. Dep't of Agric.*, Land Management Plan for the Inyo National Forest*, at 95-99, 108 (Sept. 2019), *available at* https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd664404.pdf (setting forth Plan components regarding management of the Pacific Crest National Scenic Trail). At the same time, the flexibility and discretion afforded to the Forest Service ensures that the mere presence of a trail will not undermine its overall mission to manage the land. Using its authorities, for example, the Forest Service constructed "A Framework with Built-in Flexibility" for management of the Continental Divide National Scenic Trail. U.S. Forest Serv., *Continental Divide National Scenic Trail (CDT) Recommended Forest Plan Components*, Nov. 16, 2017; https://www.fs.fed.us/sites/default/files/fs_media/fs_document/CDT_RecommendedPlanDirection_updatedv11.22.2017.pdf Under that framework, "[i]ndividual [Forest Service] units may develop additional plan components, remove those that are not applicable, [and] adjust them to respond to local conditions and public input." *Ibid.* None of this flexibility—in managing a dynamic, ever-changing forest

landscape—would be available if trails were abruptly transferred to the Park Service.

The National Forests are extremely important to rural Americans. The National Forest System's 193 million acres make up 30% of the landholdings of the Federal Government, and thus about 8.5% of the Nation's land area. C.H. Vincent et al., *Federal Land Ownership: Overview and Data*, Cong. Research Serv. R 42346 (Mar. 3, 2017), at Summary; *available at* https://fas.org/sgp/crs/misc/R42346.pdf. Since Federal ownership is concentrated in the West, National Forests unsurprisingly make up nearly 20% of the area of the States west of the 100th Meridian. *Id.* at 21. And they constitute 22% of Colorado, 25% of Oregon, and nearly 39% of Idaho. *See ibid.* at 7-10.

From this System, the Forest Service sold over 3.2 billion board feet (bbf) of commercial timber in the last Fiscal Year. U.S. Forest Serv., *Cut and Sold Report, Cumulative FY 2019*, Nov. 25, 2019, https://www.fs.fed.us/forestmanagement/documents/sold-harvest/reports/2019/2019_Q1-Q4_CandS_SW.pdf. It is generally held that each million board feet harvested supports at least 11 direct or indirect forest products industry jobs, Ore. Forest Res. Inst., *Oregon Forest Facts 2019-20*, at 22; *available at* https://oregonforests.org/sites/default/files/2019-01/OFRI_2019-20_ForestFacts_WEB.pdf. The timber provided by the Forest System therefore supports, in itself, over 35,000 living-wage jobs in rural communities. As recently as 1990, total annual sales exceeded 9 bbf, which would in turn support about 100,000 jobs. U.S. Forest Serv., *FY 1905-2017 National*

Summary Cut and Sold Data and Graphs, https://www.fs.fed.us/forestmanagement/documents/sold-harvest/documents/1905-2017_Natl_Summary_Graph.pdf.

Communities and companies near National Forests have a keen interest in the forests' administration. Congress recognized the connection, directing Forest Service offices "shall be so situated as to provide the optimum level of convenient, useful services to the public, giving priority to the maintenance and location of facilities in rural areas and towns near the national forest and Forest Service program locations in accordance with the standards in section 2204b-1(b) of Title 7." 16 U.S.C. §1609(b) (citing the Agricultural Act of 1970).

Forest planning is a complex process and one that takes significant time. The agency did not complete the first cycle of plans until 1995, nineteen years after NFMA's passage. U.S. Forest Serv., *History of Forest Planning*, at https://www.fs.usda.gov/main/planningrule/history (last visited December 3, 2019). Although the Forest Service must formally revise the plans at least once every 15 years, Congress has repeatedly extended the 15–year deadlines in recognition of the complexity of the process. *Ibid.* §1604(f)(5); *e.g.*, Pub. L. No. 111–8, §410, 123 Stat. 524 (2009). *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 227 (D.C. Cir. 2009) (Kavanaugh, J.).

The Fourth Circuit's approach would balkanize the National Forest System in direct opposition to NFMA. It would short-circuit the measure of stability

achieved in the two decades since the first cycle of Plans.

III. THE DECISION BELOW WOULD IMPEDE FUELS REDUCTION WORK AND OTHER MEASURES TO COMBAT THE FOREST HEALTH CRISIS.

Petitioners describe significant adverse consequences from the decision below along the Eastern Seaboard, particularly to the development of energy infrastructure. Br. of United States 36–41; Br. of Atl. Coast Pipeline 41–50. They also point out the barriers the decision could impose on land management in the East.

Should the decision stand, moreover, and other courts follow the Fourth Circuit's misadventure, the consequences on forest health, rural economies, and public safety could be severe. The National Forests are in a state of crisis. As the Chief of the Forest Service remarked, "The challenges to forest health . . . are as great as any the Forest Service has faced in our 113-year history." Remarks of Interim Chief Vicki Christiansen, U.S. Forest Service, "Envisioning Healthy Forests for Families and Communities," Mar. 26, 2018. These challenges include "growing severity and duration of wildfires and fire seasons" and a total of 80 million acres at risk and in need of active management. *Ibid*. Due to these growing threats, Congress has enacted several statutory provisions since 2014 to expedite forest treatments. 16 U.S.C. §§6591a-6591e.

Congress recognized that the current system has not been sufficient to manage the pace and scale of the forest health crisis. *Ctr. for Biological Diversity v. Ilano*, 928 F.3d 774, 777–78 (9th Cir. 2019).

Successive Governors of California have declared emergencies relating to forest mortality and wildfire risk. Gov. E.G. Brown, Jr., Procl. of a State of Emergency, Oct. 30, 2015; Calif. Exec. Order B-52-18 (directing agencies to "double the statewide rate of forest treatments"); Gov. G. Newsom, Procl. of a State of Emergency, Mar. 22, 2019. Similarly, the President has directed Federal agencies to use their authorities to increase active management. Exec. Order No. 13855 of Dec. 21, 2018, 84 Fed. Reg. 45 (Jan. 7, 2019). "Active management of vegetation is needed to treat . . . dangerous conditions on Federal lands. . . ." *Ibid.* The past year has seen some of the worst fires in recent memory, underscoring the urgency of fuels reduction across the landscape. *See* J. Mooallem, *'We Have Fire Everywhere': Escaping California's Deadliest Blaze*, N.Y. TIMES MAGAZINE, July 31, 2019.

The decision below could raise questions about thousands of existing and potential future rights-of-way, easements, and share-cost agreements across federal and non-federal lands on these now-numerous federal designated trails. Most of those thousands of existing and future agreements are subject to periodic amendment, renewal, maintenance, or establishment to serve necessary public and private sector infrastructure and management actions. The disruptive consequences of the decision start with a pipeline but do not end there.

IV. THE FOURTH CIRCUIT MISUNDERSTOOD THE STRUCTURE AND PROPER CONSTRUCTION OF FEDERAL PUBLIC LAND LAWS.

The particular structure of public land laws is an important interpretive tool, and one which the court of appeals failed to deploy. Congress recognized "the public land laws of the United States have developed over a long period of years through a series of Acts of Congress which are not fully correlated with each other. . . ." Former 43 U.S.C. §1392 (1970). The layers of public land law have been characterized as a "briar patch" containing "a diverse assortment of old and new laws that have created a conflicting maze of legal mandates, property rights, and environmental requirements." R. Keiter & M. McKinney, *Public Land and Resources Law in the American West: Time for Another Comprehensive Review?*, 49 Envtl. L. 1, 30 (2019).

Public land statutes operate in at least three dimensions; they can be area-specific, agency-specific, or function-specific. As to the former, Congress has reserved areas of the public domain for particular purposes. These include wilderness areas set aside for public use and enjoyment, 16 U.S.C. §1131, or for Naval petroleum reserves, 10 U.S.C. §8721. They also include areas reserved for sustained-yield timber production, 43 U.S.C. §2601, within a "self-sustaining timber reservoir for the future." *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 914 F.2d 1174, 1184 (9th Cir. 1990). The Park Service and Forest Service governing

laws are good examples of the second category, and the Trails Act of the third.

Traditional rules of statutory construction, particularly when attempting to make sense of an interlocking and multifaceted statutory structure, can quickly lead a court astray, and did so here. The general rule that courts should strive to reconcile potentially conflicting statutes is of "special significance" in the public land context. *Wilderness Soc'y v. Morton*, 479 F.2d 842, 881 (D.C. Cir. 1973). *Wilderness Society* held the MLA's 25-foot restriction on special use permit width for pipeline construction activities did not also constrain issuance of right-of-way for pipeline pumping stations. *Ibid.* at 876 (vacating permit for construction of Trans-Alaska Pipeline due to non-compliance with construction width limitation). The court remarked that "[w]hile the question of a pumping station right-of-way may appear similar to that of construction [permits], close examination reveals the similarity to be merely superficial." *Ibid.*

The thicket of public land laws is "hardly a model of neat organization and uniform planning." *Ibid.* This lack of organization also means that a court will find " 'the presumption of consistent usage readily yields to context,' and a statutory term may mean different things in different places[,]" particularly when a statute "is far from a *chef d'oeuvre* of legislative draftsmanship." *King v. Burwell*, 135 S. Ct. 2480, 2493 n.3 (2015) (quoting *Utility Air Regulatory Group v. E.P.A.*, 573 U.S. 302, 134 S. Ct. 2427, 2441–42 (2014)). Moreover, statutory structure is just as significant as the words

used. *Burwell*, 135 S. Ct. at 2492. "Statutes must 'be read as a whole.'" *United States v. Atl. Research Corp.*, 551 U.S. 128, 135 (2007) (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). Courts must "interpret the relevant words not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'" *Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014) (quoting *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013). But the Fourth Circuit used none of these interpretive guides, preferring a vacuum.

The historical development of the public lands also favors reversal. The Federal Government is by far the largest landowner in the United States, owning "about 650 million acres, or about 28% of all land in the country." G.C. Coggins et al., *Fed. Pub. Land & Res. Law.* 1 (5th ed. 2002). This includes, for example, about half the national softwood timber inventory. *Ibid.* at 12. Federal lands were first acquired after the Revolution, at Congress's suggestion that the States cede their western land claims "for the common benefit of the union." 1 St. G. Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, App. 283–86 (1803; 1969 reprint). The ultimate purpose of the first western cession was to retire the debt incurred to finance the Revolution. *Lessee of Pollard v. Hagan*, 44 U.S. (3 How.) 212, 224 (1845).

Federal ownership of public lands was one of the distinctions between the Articles of Confederation and the Federalism of the Constitution. P.W. Gates, *History*

of Public Land Law Development 3 (1968). Indeed, the controversy over western land ownership was a primary reason the Articles of Confederation were not ratified until 1781. U.S.C.A. Articles of Confederation Historical Notes (West) (stating Maryland "instructed her delegates . . . not to agree to the confederation until matters respecting the western lands should be settled on principles of equity and sound policy").

To that end, the new Constitution vested extremely broad power in the Legislative Branch to administer the public territory. The Property Clause provides: "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." U.S. Const. Art. IV, §3, cl. 2.[2]

The Court has repeatedly declared Congress's Property Clause power to be "without limitation." *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840). Therefore, "neither the courts nor the executive

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[2] The Territory Clause, a subset of the Property Clause, has been given similarly expansive interpretation. "Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a state might legislate within the state." *Simms v. Simms*, 175 U.S. 162, 168 (1899). The Territory Clause is also a subject of this Term. *Financial Oversight & Management Board for Puerto Rico v. Aurelius Investment, LLC*, U.S. No. 18-1334, *consolidated with* Nos. 18-1475, 18-1496, 18-1514 and 18-1521.

agencies, could proceed contrary to an Act of Congress in this congressional area of national power." *United States v. City and County of San Francisco*, 310 U.S. 16, 29-30 (1940). For example, the President's general authority to declare a National Monument under the Antiquities Act of 1906 does not empower a President to unilaterally rescind a Congressional reservation of territory for a particular purpose, such as timber production. *Am. Forest Res. Council v. Hammond*, No. CV 16-1599 (RJL), 2019 WL 6311896, at *5 (D.D.C. Nov. 22, 2019). Instead, a change of a parcel's fundamental purpose must be accomplished by legislation that clearly and unambiguously transfers *jurisdiction* rather than other incidents of it. *See*, *e.g.*, Controverted Lands Act of 1954, Pub. L. No. 83-426, §2, 68 Stat. 270, 271 (1954) (directing departments of Agriculture and the Interior to "exchange administrative jurisdiction" of subject lands).

The expansive interpretation of the Clause gains strength from historical sources. *See*, *e.g.*, 3 J. Story, *Commentaries on the Constitution* §1322 (1833) ("The power of congress over the public territory is clearly exclusive and universal; and their legislation is subject to no control; but is absolute, and unlimited."). Not only did the new Federal lands strengthen the new country, but the nationalization of them helped tamp down factional battles. Madison thus found the Property Clause to establish "a power of very great importance. . . ." which "was probably rendered absolutely necessary by jealousies and questions concerning the Western territory sufficiently known to the public." THE FEDERALIST

No. 43 (Earle ed. (1937) at 281-82). Among these jealousies, ultimately rejected by the Convention, were Gouverneur Morris's efforts to constrain formation of states from the territory in the West, fearful that westerners would not be "equally enlightened, to share in the administration of our common interests." Gates, *supra*, at 74 (quoting M. Farrand, 1 *The Records of the Federal Convention* 583 (1911)).

As the Nation spread westward, additional Federal lands were acquired and many were sold, granted, or otherwise used to encourage settlement. Public Land Law Review Commission, *One Third of the Nation's Land: A Report to the President and to the Congress*, x, 1-7, 19 (1970). New states were seeded with land grants to be held in trust for the benefit of public education, leading to today's "land-grant" universities. *See*, *e.g.*, Omnibus Enabling Act of 1889, 51st Cong., 1st Sess., ch. 180, 25 Stat. 676, §§10, 14 (1889) (granting lands upon admission to Washington, Montana, and the Dakotas); Gates at 804-05. By such "solemn agreement[s]," the Federal Government "agreed to cede some of its land to the State in exchange for a commitment by the State to use the revenues derived from the land to educate the citizenry." *Andrus v. Utah*, 446 U.S. 500, 507 (1980).

By failing to apprehend the need to consider the particular Trail segment as part of interlocking management systems, the court of appeals erred. The Fourth Circuit's judgment flies in the face not only of the text of the applicable statutes, and the structure of forest management laws and regulations, but also the

ingrained structure of public land laws, and of the role of public lands in our Federal system.

CONCLUSION

For the reasons above, *amici* respectfully request that the Court reverse the judgment of the court of appeals.

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