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

BRIEF OF *AMICI CURIAE* ALASKANS FOR PROPERTY RIGHTS IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTION PRESENTED

As said by the petitioner, whether railroad rights-of-way reserved under the 1914 Alaska Railroad Act are nonpossessory "simple easements" like other railroad rights-of-way conveyed after 1871 or "exclusive-use" easements as defined by a 1983 statute.

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IDENTITIES AND INTERESTS OF *AMICI CURAE*[*]

Alaskans for Property Rights are property owners who have come together asking the Court to review this case and reject the lower court's conclusion, *see* Pet.App.21a, that Congress reserved for the Alaska Railroad and its owner/operator, the Alaska Railroad Corporation, a right to exclude property owners like these Alaskans from the railroad easement that sits on their properties.

As the petitioner correctly said, the lower court's "decision affects more than Flying Crown. It restricts the ability of residents and businesses across Alaska to reasonably use their property." Pet. 11. The Alaskans for Property Rights are some of those residents, and they are harmed by the lower court's decision.

In 2014, the Court held that in laws like the laws at issue here—generally, laws arising per the General Railroad Right-of-Way Act of 1875—Congress granted "only an easement" to entities like the Railroad Corporation. *Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 103 (2014).

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[*] No counsel for a party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. *See* Rule 37.6. No person other than the *amici curiae* or their counsel made a monetary contribution for the brief either. *See id.* And counsel of record for all parties received notice of *amici curiae*'s intention to file this brief at least 10 days prior to the due date for the brief. *See* Rule 37.2.

Back then, the petitioners further argued that Congress not only created easements rather than reversionary interests, but also used language "demonstrat[ing] that 1875 Act rights-of-way granted ***non-exclusive*** use and occupancy . . . ." Reply Br. for Pet'rs at 9, *Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93 (2014) (No. 12-1173), 2014 WL 1154184, at *9 (emphasis added).

But while the Court ruled in the petitioners' favor on the easement-vs.-reversionary-interest question, there is a clear dispute whether the Court reached the further contention that those easements convey "non-exclusive use and occupancy" rights. *Compare* Pet. 21–22 (contending that the Court's use of the term "simple easement" resolved the further question) *with* Pet.App.28a, Pet.App.39a (deciding otherwise). The Alaskans for Property Rights agree with the petitioner that the Court resolved the "exclusive easement" question a decade ago, and for the reasons the petitioner presents. *See* Pet. 15–26. Either way though, whether the lower court decided this important, further federal question in a way that conflicts with *Marvin M. Brandt Revocable Trust*, *see* Pet. 11, or just decided this important further question of federal law that has not been, but should be, settled by this Court, there is a compelling reason for the Court to grant the petition for the writ of certiorari. *See* Rule 10(c).

Here, the Court can address the further contention, and these Alaskans for Property Rights write separately asking the Court to do so. Each of these Alaskans owns property along the Alaska Railroad and within the railroad easement. For some, the properties that they own were conveyed through

land patents that were previously granted to qualified individuals under statutes such as the Homestead Act of 1862. Those patents did not purport to create any exclusivity for operation of the Alaska Railroad, and neither "common law principles, the sovereign grantor canon, [nor a correct] interpretation of the 1875 Act" made the easements along the Alaska Railroad exclusive. *Contra* Pet.App.19a–20a.

Nevertheless, the lower court held that the Alaska Railroad Corporation can exclude property owners like these Alaskans from enjoying *their own* properties and further charge them exorbitant fees to use their own properties, even if their uses of their properties do not prevent the operation of the Railroad. *See* Pet.App.39a–40a. In doing so, the lower court either got *Marvin M. Brandt Revocable Trust* wrong or teed up the "exclusivity" question for this Court—each reason is sufficiently compelling to justify the Court's review of this case. *See* Rule 10(c). And the Alaskans for Property Rights respectfully ask the Court to step in to review this case.

SUMMARY OF THE ARGUMENT

There is no question that the Alaska Railroad Corporation owns, at most, an easement. The Court clarified that a decade ago but arguably left open the further question whether railroad companies could exclude underlying property owners from *their own* properties burdened by railroad easements. The lower court's decision here that the Railroad Corporation *can* exclude Alaskans from their own properties will only amplify harms that the property owners already suffer at the Railroad Corporation's hands.

ARGUMENT

I. The Railroad Corporation only owns an easement.

In *Marvin M. Brandt Revocable Trust*, 572 U.S. at 94, the Court concluded that the right-of-way Congress granted under the General Railroad Right-of-Way Act of 1875, 43 U.S.C. § 934, "was an easement that was terminated by the railroad's abandonment, leaving Brandt's land unburdened." While the further question, "what type of easement is it?" was before the Court, this case shows that there is a dispute whether the Court answered that follow-up inquiry. *Compare* Pet. 21–22 *with* Pet.App.28a, Pet.App.39a. Either way, it is an important question—it could have been, and it should be, settled by this Court. *See* Rule 10(c).

Whether for better or worse, this Court's settlement of that question will help property owners across the West, such as these Alaskans for Property Rights, know where they stand vis-à-vis the railroads who laid or later came to own (like the Alaska Railroad Corporation) tracks across the West. Here, the Railroad Corporation is using its alleged "exclusivity" to muscle what amounts to a shakedown of the property owners. *See* Pet. 2–3, 5. By taking this case, the property owners like these Alaskans for Property Rights will at least be able to learn whether the Railroad Corporation has the Court's blessing to extort them.

This is a matter of federal law, and it affects whether these Alaskans and other property owners can actually use the properties they own, or whether the railroads can exclude them from their own

properties even when the property owners are not interfering with ownership or operation of railroads.

II. The lower court's decision harms Alaskans who own property along the Alaska Railroad.

a. John Haxby

John Haxby has held property that backs up along the railroad easement for over twenty years. And he now owns two adjacent residential lots that back up along the railroad easement. Recently, Mr. Haxby learned that the Municipality of Anchorage and the State of Alaska Department of Transportation would ask the Alaska Railroad Corporation for permission to create a bike path in the railroad easement. The proposed path would go through Mr. Haxby's backyard, approximately twenty feet from the rear wall of his house. In other words, never mind that Mr. Haxby owns the property or that the Railroad Corporation claims authority to exclude Mr. Haxby from his own property—the government actors and the Railroad Corporation have decided that they can also *put* people on his property due to the alleged "heightened" easement-exclusivity rights.

Investigating further details of the project, Mr. Haxby learned that an estimated one thousand people per day would use the path, of which, five to ten percent likely would be homeless. When Mr. Haxby asked what authority the State had to put homeless persons in his backyard, the State told him that the Railroad Corporation retains the ability to issue permits for activities like this . . . end of story.

That is taking things too far; and a holding from this Court that the Railroad Corporation does not hold an "exclusive" easement would reinforce the principle that Mr. Haxby can also keep strangers off his property. While the Railroad Corporation can enforce the easement to keep Mr. Haxby from interfering with railroad operations, it cannot enforce the easement to keep Mr. Haxby from enjoying his own backyard.

Mr. Haxby, in his efforts to keep the State from creating the proposed path, met with other property owners and the Railroad Corporation to express disdain for the situation. At the meeting, a question was raised about the scope of the easement, and the Railroad Corporation's general counsel made it clear that the Railroad Corporation's purportedly "exclusive use" easement was broad enough to allow it to use the easement for *any* purpose and exclude Mr. Haxby from using his property at all.

b. John Pletcher

John Pletcher has lived in his home abutting the Alaska Railroad for over 55 years. The part of the railroad easement on his property is proposed to be part of "The Long Trail," a project to create a 500-mile uninterrupted hiking and motorized-recreation trail running from Seward to Fairbanks.

Meanwhile, Mr. Pletcher has spent years keeping his beautifully manicured lawn and building a garden with a greenhouse that welcomes all walks of wildlife during the summer months in Alaska. For example, this is a picture Mr. Pletcher took of a moose calf taking a stroll through the bushes in his garden:

The garden has been a part of Mr. Pletcher's backyard since 1980. But recently the Alaska Railroad Corporation has threatened to charge him a per-square-foot fee—amounting to roughly $2,000 per year—in return for "allowing" Mr. Pletcher to use and enjoy his garden because it falls within the railroad easement. If the Railroad Corporation can exclude Mr. Pletcher (or worse, *charge* him) while it instead uses the railroad easement for any purpose it deems appropriate, beautifully maintained gardens and other properties that help support wildlife such as this moose calf will be destroyed.

When Mr. Pletcher and his family moved into his property, the federal government still held the railroad easement. However, in 1982 with the passage of the Alaska Railroad Transfer Act, the federal government transferred its interest in the easement to the Railroad Corporation. The lower court's elevation of the exclusive-use language in that transfer is not consistent with the development of federal law governing the West, as was argued to the

Court a decade ago. *See* Reply Br. for Pet'rs at 9, *Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93 (2014) (No. 12-1173), 2014 WL 1154184, at *9 (emphasis added). And the Railroad Corporation's overbroad interpretation results in Alaskans, like Mr. Pletcher, being unable to use properties that they own to support the longstanding purposes they have been enjoying on their properties for decades.

c. Hugh Ashlock

Hugh Ashlock is another citizen of Anchorage, Alaska, whom the Alaska Railroad Corporation has excluded from his own property. He owns a twenty-acre property conveyed through a homestead patent. Mr. Ashlock and his family, through the years, have proved themselves as business owners; they not only built a large commercial shopping mall on the property, but also built and currently keep a hotel on the property. Unfortunately for Mr. Ashlock and his family, approximately one thousand feet of his property fall within the railroad easement.

In good faith and acknowledging the Railroad Corporation's contention that it could exclude Mr. Ashlock from his own property, Mr. Ashlock asked for and received permission from the Railroad Corporation to make significant improvements to his property within the railroad easement. His plan was to use that part of the property to create extra parking spaces that he needed for the shopping center. But after Mr. Ashlock made the improvements to his property within the railroad easement, the Railroad Corporation began to charge Mr. Ashlock exorbitant fees to use the now-improved property—that is, the Railroad Corporation began charging him a fee to use

his own property after he made the improvements. And the Railroad Corporation refused to let Mr. Ashlock use the property that it "let" him improve for parking unless he agreed to pay the fees.

With the lower court's decision in hand, the Railroad Corporation has a judicial imprimatur for the contention that Mr. Ashlock must pay exorbitant fees to use *his* property that *he* improved only after getting the Railroad Corporation's (unnecessary) permission. It can and will do the same to other property owners.

d. Sheila Lankford and Joe Mathis

The Lankfords have a long history in the Susitna Valley of Alaska, which is north of Anchorage. In 1957, Lloyd and Elizabeth Lankford homesteaded a 160-acre parcel of land, generally per the Homestead Act of 1862. Three years later, they bought another 160-acre homestead that adjoined the south boundary of the first parcel. But the railroad easement bisects the neighboring parcel. Over time, the Lankfords subdivided their property, selling some and then gifting some to family members such as son-in-law Mr. Mathis. The various property owners made improvements.

But after passage of the Alaska Railroad Transfer Act in 1982, the property owners' abilities to use and enjoy their lands changed. The Alaska Railroad Corporation began claiming that it had an exclusive-use easement and began asserting a right to charge the Lankfords and Mr. Mathis "permit fees" for their use of an underground power line that *they* had installed at *their own* expense. When confronted about

the permit fees, the Railroad Corporation responded that it had a fee interest to all subsurface rights in the easement, which it did not (and does not) have. In other words, the Railroad Corporation has shown that it will abuse its "exclusive" easement, continuing to expand its claimed bundle of rights to extort property owners like the Lankfords and Mr. Mathis for their own use and enjoyment of their own properties and improvements.

e. Gary Glasgow

Gary Glasgow's *Renfro's Lakeside Retreat* property sits on the picturesque shores of Kenai Lake, which is on the Kenai Peninsula south of Anchorage and near Seward. The Retreat, where Mr. Glasgow rents out cabins and provides a playground, spans eight acres between the Seward Highway and the Lake. But the railroad easement runs directly through the center of the property.

Mr. Glasgow's property was originally part of a single homestead patent that was owned by Andy Simon and later owned by Mike and Sharon Renfro. During the Renfros' ownership of the property, the Alaska Railroad Corporation proposed an annual "access fee" that it would impose on the Renfros and others should they want to cross the railroad easement. The Renfros refused to pay, and later sold the property to Mr. Glasgow in 2011. Upon learning of the "access fee," Mr. Glasgow also refused to pay.

In 2017, the Railroad Corporation sent to Mr. Glasgow a notice that it would now, instead, require him to apply for and pay a "commercial-use permit" to cross the railroad easement on his

property. Why? Because he was running a business on property crossed by the railroad easement. When he refused to pay for the permit to cross the railroad easement on his property, Mr. Glasgow received threats of legal action from the Railroad Corporation.

f. Joanne and Damon Blackburn

The Alaska Railroad Corporation's actions against the Blackburns might be the most egregious. The Blackburns own a five-acre homestead approximately eight miles south of Girdwood, Alaska, which is also south of Anchorage and on the way to the Kenai Peninsula. In 2013, a forest fire encroached on their property. In response, the Girdwood Volunteer Fire Department rushed firefighters, firefighting equipment, and water to the property before the fire could damage structures or harm people. But when *the Volunteer Fire Department* tried to cross the railroad easement, the Railroad Corporation denied the Volunteer Fire Department access because the volunteers had not bought an access easement from the Railroad Corporation to cross *the Blackburns'* property.

CONCLUSION

Power hungry and enabled by the lower court's misinterpretation of the law, the Alaska Railroad Corporation will increasingly and eagerly extort Alaska property owners like these Alaskans for Property Rights.

For the foregoing reasons, these Alaskans respectfully ask the Court to grant the petition for writ of certiorari.

Respectfully submitted,

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