

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES FOREST SERVICE,)
ET AL.,)
 Petitioners,)
 v.) No. 18-1584
COWPASTURE RIVER PRESERVATION)
ASSOCIATION, ET AL.,)
 Respondents.)

ATLANTIC COAST PIPELINE, LLC,)
 Petitioner,)
 v.) No. 18-1587
COWPASTURE RIVER PRESERVATION)
ASSOCIATION, ET AL.,)
 Respondents.)

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17 - - - - -
18
19 Washington, D.C.
20 Monday, February 24, 2020
21
22 The above-entitled matter came on for
23 oral argument before the Supreme Court of the
24 United States at 10:07 a.m.
25

1 APPEARANCES:
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4 on behalf of the Petitioners in 18-1584.
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6 on behalf of the Petitioner in 18-1587.
7 MICHAEL K. KELLOGG, Washington, D.C. ;
8 on behalf of the Respondents.

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P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 18-1584, the United States Forest Service versus Cowpasture River Preservation Association, and the consolidated case.

Mr. Yang.

ORAL ARGUMENT OF ANTHONY A. YANG
ON BEHALF OF THE PETITIONERS IN 18-1584

MR. YANG: Mr. Chief Justice, and may it please the Court:

The issue in this case is whether the Trails Act converts all federal, state, and private lands traversed by the Appalachian Trail into lands administered by the Park Service. It does not.

The Act simply charges the Secretary of the Interior with overall administration of a trail. It repeatedly distinguishes between the agency administering the trail and the land managing agencies administering the land. The Park Service thus coordinates -- or -- agencies and organizations responsible for their own segments of the trail, and informs certain

1 trail-wide responsibilities, but the land
2 managing agencies ultimately -- ultimately take
3 care of the trail on their lands.

4 If a tree falls on Forest lands over
5 the trail, it's the Forest Service that's
6 responsible for it. You don't call the nine
7 Park Service employees at Harpers Ferry and ask
8 them to come out and fix the tree.

9 Respondents' theory is inconsistent
10 with the Act and would dramatically change the
11 national trail system. Respondents, for
12 instance, argue that the trail is land and it's
13 administered by the Park Service. So their
14 position is that the entire trail is federally
15 administered -- a federally administered area of
16 land.

17 But if you look at page 14a, this is
18 Section 1246(h)(1), it requires that the
19 Secretary shall encourage states to operate,
20 develop, and maintain portions of such trails --
21 and this is scenic trails -- located outside the
22 boundaries of federally-administrated areas.

23 If they're right, there is no thing,
24 nothing, outside the -- the trail outside the
25 federally-administrated areas because the trail

1 is a federally-administered area. Their reading
2 cannot be right.

3 Second -- it would also dramatically
4 increase -- dramatically change the trail system
5 by transferring vast amounts of land into the
6 National Park Service, which the Park -- the
7 Park System, which the Park Service administers
8 and regulates to conserve the natural
9 environment. Not only would TVA's two
10 hydroelectric dams be put in the system; nearly
11 a thousand miles of the Forest Service lands,
12 more than a dozen towns, including Hanover, New
13 Hampshire and Dartmouth College, which crosses
14 straight through, numerous bridges over rivers,
15 including the bridge over the Hudson near West
16 Point, over 600 roads, a hundred interstates and
17 other highways. And until this case, no one has
18 ever thought that such all lands and waters
19 under the trails were --

20 JUSTICE GINSBURG: Mr. Yang, may I ask
21 you a preliminary --

22 MR. YANG: Sure.

23 JUSTICE GINSBURG: -- preliminary
24 question? This issue of the Mineral Leasing Act
25 is the third of the issues that the Fourth

1 Circuit dealt with, and it was the one to which
2 they devoted the least number of pages.

3 This case, in any event, am I right,
4 is going back for reconsideration of the
5 environmental consequences, going back under the
6 Forest Management Act and the National -- NEPA?

7 MR. YANG: Correct.

8 JUSTICE GINSBURG: So, since those
9 reviews will be going on, is there the potential
10 that the Mineral Leasing Act question will be
11 moot because the decision might be that under
12 that legislation, the environmental legislation,
13 this crossing over of the -- the trail is
14 impermissible?

15 MR. YANG: Yeah, it -- the case --
16 that issue is not moot now. It could
17 potentially be moot, but that is true about
18 inter- -- any interlocutory case that this --
19 the Court takes up. Things can change that --
20 that make the issue before the Court no longer
21 necessary at the end of the day.

22 But the Court already considered that
23 at the cert stage. The reason that this is an
24 important issue is because if the trail cannot
25 be -- the right-of-way cannot cross 600 feet

1 under the trail and come in and out not on Park
2 Service or Forest Service property but on
3 private land, then the whole enterprise is done.
4 We're done. They have to start over.

5 So that is an important and nationally
6 significant issue that the Court granted cert
7 on. So that's why we're here.

8 JUSTICE GINSBURG: But then what do we
9 make of the line in the reply brief that says
10 "no one doubts that the trail is in the National
11 Park System"?

12 MR. YANG: I think what we're saying
13 is that the trail is administered by the Park
14 Service. It's not lands in the National Park
15 System.

16 One of the main issues in this case is
17 whether -- in stating that the Secretary of the
18 Interior shall primarily administer the trail as
19 a foot -- the Appalachian Trail as a footpath,
20 whether that delegation, which Congress then
21 said concerns the overall administration of the
22 trail, whether that confers authority to
23 administer the lands over which the trail
24 passes.

25 And our answer is that is not the

1 case, and it's inconsistent, not only with the
2 text of the statute, but the way that the
3 statute has been implemented, as well as the way
4 that the Appalachian Trail has existed even
5 before the statute.

6 JUSTICE GINSBURG: Well --

7 JUSTICE SOTOMAYOR: Mr. Yang, you --

8 JUSTICE GINSBURG: -- is it
9 inconsistent with the statutory provision that
10 says the National Park System -- well, first
11 we're told, yes, this trail is in the National
12 Park System, and then the statutory definition
13 of the National Park System says it consists of
14 certain areas of land and water. So how is the
15 trail not land if it's in the National Park
16 System?

17 MR. YANG: What -- what part of the
18 reply? I'm trying to -- I don't remember --

19 JUSTICE GINSBURG: The --

20 MR. YANG: -- it saying that.

21 JUSTICE GINSBURG: -- reply brief, 17,
22 says, "No one doubts that the trail" -- I think
23 it's toward the end of the page -- "no one
24 doubts that the trail is in the National Park
25 System."

1 MR. YANG: I'm not seeing -- is this
2 our reply brief?

3 JUSTICE GINSBURG: No, it's the other
4 reply brief.

5 MR. YANG: Oh. I think, Mr.
6 Clement -- I don't have that in front of me
7 right now. I think Mr. --

8 JUSTICE GINSBURG: Then maybe we'll
9 ask Mr. Clement.

10 MR. YANG: Mr. Clement may be able to
11 address that. But I think our -- our view, and
12 I think it's shared by Mr. Clement, that the --
13 the trail is not land and certainly not land
14 that's administered within the meaning of the
15 Mineral --

16 JUSTICE KAGAN: It's a --

17 MR. YANG: -- Leasing Act.

18 JUSTICE KAGAN: -- difficult
19 distinction to wrap one's head around, Mr. Yang.
20 You know, I -- I would understand -- if you said
21 to me the trail traverses the forest, everybody
22 would understand what that meant. There's some
23 broader forest and the trail cuts a path through
24 it.

25 But you're saying that the trail is

1 distinct from the trail. I mean, from the --
2 from the land that is the trail. I don't know
3 really quite how to say it except that nobody
4 makes this distinction in real life.

5 MR. YANG: I -- I don't know if
6 that's --

7 JUSTICE KAGAN: When you walk on the
8 trail, when you bike on the trail, when you
9 backpack on the trail, you're backpacking and
10 biking and walking on land, aren't you?

11 MR. YANG: You're certainly sometimes
12 walking on land. You're also walking on things
13 like bridges. You're also walking on -- for
14 instance, trails include waterways.

15 So Congress recently enacted, expanded
16 the Lewis and Clark Trail to include the Ohio
17 River. All of the Ohio River from Pittsburgh to
18 the Mississippi, then the Missouri up to
19 St. Louis, and all the way to the -- to the West
20 Coast from there. No one thinks that those
21 waters are all in the National Park Service.
22 And that's because the trail traverses the lands
23 and waters, and when you move a trail -- these
24 trails get relocated for all kinds of reasons
25 small or -- or large.

1 JUSTICE KAGAN: They might get
2 relocated, but that just means that the -- now
3 there's different land. And it just --

4 MR. YANG: But that means that the
5 trail isn't --

6 JUSTICE KAGAN: As a matter of plain
7 English -- I mean, both of your briefs -- and
8 you're great brief writers and you're great
9 writers, and -- and the briefs are -- are
10 strange to read because you can't ever just say
11 what you mean, which is that the trail is a
12 piece of land, so you find yourself wrapped up
13 in these strange locutions about the trail
14 traversing land.

15 It -- it's like you're imagining some
16 thing that goes on top of it somehow.

17 MR. YANG: I don't believe so. This
18 -- the Trails Act needs to be read in the
19 context of all the statutes that deal with land
20 administration. This is a large area of the
21 law.

22 Those trails -- those -- those
23 statutes make very clear when Congress wants to
24 shift administrative responsibility over land.
25 So, for instance, the Rivers Act enacted the

1 very same day --

2 JUSTICE KAGAN: Let me ask you a
3 question, Mr. Yang, because you said, and this
4 would be very meaningful to me, you said you
5 would call the Forest Service if there -- if a
6 -- if a tree fell over the path.

7 MR. YANG: Yep.

8 JUSTICE KAGAN: I -- I guess I -- when
9 I looked at these regulations, what strikes me
10 about them is that on the Appalachian Trail, it
11 seems to me that the National Park Service -- it
12 would be different on the Pacific Trail, which
13 is a weirdness of its own, but -- but on -- in
14 the -- on the Appalachian Trail, it's the
15 National Park Service that regulates uses along
16 the trail, vehicles on the trail, development
17 and maintenance of the trail.

18 In other words, it's the National Park
19 Service that basically does land use regulation
20 and the land is the trail.

21 MR. YANG: The regulation I believe
22 you are talking about is in a(i), this -- the
23 authority that you're talking about?

24 JUSTICE KAGAN: This is -- this is
25 1246 -- it's the statute, 1246(c).

1 MR. YANG: Right.

2 JUSTICE KAGAN: 1246(f) --

3 MR. YANG: Well --

4 JUSTICE KAGAN: 1246(h)(1), 1246(i) --

5 MR. YANG: (i) requires that the --

6 JUSTICE KAGAN: Excuse me. It

7 basically puts the director of the Park Service

8 in charge of regulating land use on the trail,

9 on the land.

10 MR. YANG: I don't think that's

11 correct. It does provide for certain things.

12 Trail markers, if you're looking at (c), it --

13 Congress forbids cars on trails.

14 When you're looking at regulatory

15 authority, that's under (i), there it requires

16 the concurrence of the heads of any other

17 federal agencies administering the lands. And,

18 in fact, the way this has been implemented is

19 the -- the Park Service has enacted a regulation

20 at 36 CFR 7.100, that applies only on Park

21 Service-administered land.

22 JUSTICE KAGAN: I will just give you

23 an example and you can tell me what you make of

24 it because it would seem to me to cover the case

25 where the tree falls on the trail.

1 It says, this is 1246(h)(1): "The
2 Secretary charged with the administration" --
3 which here is the Secretary of Interior --
4 "shall provide for the development and
5 maintenance of these trails."

6 MR. YANG: Yes. And it says "shall
7 provide for," not do it. The way that that's
8 provided for is the way it's always been
9 provided for, which is through a memorandum of
10 agreement with the land managing agencies. So
11 the Forest Service has a memorandum of agreement
12 that dates back to 1970 and it requires the
13 Forest Service --

14 JUSTICE SOTOMAYOR: Mr. Yang, before
15 your time goes on, because it's inherent in how
16 you're answering Justice Kagan, why is it that
17 two agencies can't have simultaneous
18 administration, and even possibly management
19 responsibilities?

20 I -- I'm -- was taken with the NRDC's
21 amicus brief, and the Mineral Leasing Act has an
22 entire provision devoted to when are two
23 agencies responsible to administer a piece of
24 land.

25 MR. YANG: That --

1 JUSTICE SOTOMAYOR: Let me finish my
2 question. And assuming that I accept that two
3 agencies can both administer, wouldn't the Trail
4 Act supersede the mineral -- the Forest
5 Department's permission to grant a right-of-way
6 for pipes, because doesn't the Trail Act
7 supersede any other permission?

8 MR. YANG: The answer is no, there
9 needs to be more clarity. Congress acts clearly
10 when it does that, but let me address --

11 JUSTICE SOTOMAYOR: Well, it has, it
12 has, but why can't two agencies have
13 simultaneous or coexistent responsibilities?

14 CHIEF JUSTICE ROBERTS: Your -- your
15 time has expired but I will allow you to very
16 briefly respond.

17 MR. YANG: There is three types of
18 instances where that happens. Two separate
19 trails, parcels administered separately. A
20 right-of-way goes through it. That's one.

21 There's another instance where land's
22 withdrawn from the public lands and provided for
23 a military use. That is in some ways dual, but
24 it's not in the relevant sense because it is
25 temporarily separated.

1 And then, third, sometimes you take
2 mineral rights and leave it with the underlying
3 agency, but nothing like this with
4 contemporaneous and coterminous administration
5 of the land.

6 You're requiring two agency heads with
7 different agencies managing --

8 CHIEF JUSTICE ROBERTS: Thank you.

9 MR. YANG: -- different systems to --
10 to regulate the same thing.

11 CHIEF JUSTICE ROBERTS: Thank you, Mr.
12 -- Mr. Yang.

13 Mr. Clement.

14 ORAL ARGUMENT OF PAUL D. CLEMENT ON
15 BEHALF OF THE PETITIONER IN 18-1587

16 MR. CLEMENT: Mr. Chief Justice and
17 may it please the Court:

18 Respondents' effort to convert all of
19 the land traversed by a Park
20 Service-administered trail into lands in the
21 National Park Service fails for reasons of text,
22 context, and consequences.

23 First, as a matter of text, multiple
24 provisions of the Trails Act draw a distinction
25 between the trail and the land it traverses and

1 makes clear that administrative authority is
2 granted only over the former and leaves the
3 latter jurisdiction over the lands themselves
4 undisturbed.

5 Moreover, the Trails Act itself makes
6 clear that the trail can be moved. It makes
7 sense for a trail or a trail route to move every
8 time a tree falls. It doesn't make sense for
9 the status of lands to change every time the
10 route moves.

11 The context powerfully reinforces this
12 key distinction. If you want to see a model of
13 a statute that transfers land between federal
14 agencies and makes the land subject to the
15 Organic Act, you need look no further than the
16 Rivers Act passed the same day by the same
17 Congress.

18 The reason, though, when it did that
19 in the Rivers Act it did exactly what you'd
20 expect it to do when it transfers land, it
21 talked about the width of the land transferred,
22 the acreage involved and then left no doubt that
23 if the land was transferred to the Park Service,
24 it became subject to the Organic Act.

25 And then, of course, there are the

1 untenable consequences of Respondents' tradition
2 -- position. Thousands and thousands of acres
3 of park land gets transferred to the Forest
4 Service and these thousand mile trails get
5 converted into barriers to pipeline development.

6 JUSTICE BREYER: Where is the
7 pipeline? I'm -- I'm trying to -- not in two
8 dimensions, but in three. I mean, think of a
9 trail -- what I couldn't get out of the briefs,
10 I mean, there's a trail --

11 MR. CLEMENT: Yeah.

12 JUSTICE BREYER: -- and say it's going
13 across a ridge. It's going along a ridge.

14 Now, they don't want to put the
15 pipeline on the trail. They want to put it
16 somewhere underground. Well, how far from where
17 the trail is up here, how far below is the
18 pipeline supposed to go?

19 MR. CLEMENT: Six hundred feet.

20 JUSTICE BREYER: Six hundred feet
21 below.

22 MR. CLEMENT: So --

23 JUSTICE BREYER: And where does it
24 enter? Does it enter on -- on, you know, there
25 is an easement or something for views and so

1 forth?

2 MR. CLEMENT: Right, right.

3 JUSTICE BREYER: Does it enter the
4 ground within the area that is within that
5 easement or before and it comes out after?

6 MR. CLEMENT: It enters and exits on
7 private land, not on Forest Service land.

8 JUSTICE BREYER: I see. Okay.

9 MR. CLEMENT: The problem with briefs
10 --

11 JUSTICE BREYER: Got it.

12 MR. CLEMENT: -- is they're
13 two-dimensional.

14 JUSTICE BREYER: Got it. Got it.
15 Yeah.

16 MR. CLEMENT: But, I mean, the way to
17 understand this, there is a ridge line. Up here
18 on the top of the ridge is the Appalachian Trail
19 and the Blue Ridge Parkway. And then the
20 pipeline route goes under both, 600 feet below
21 the trail and probably 800 feet below the
22 parkway, because the parkway's a little bit
23 higher --

24 JUSTICE BREYER: And it enters --

25 MR. CLEMENT: -- on that --

1 JUSTICE BREYER: -- before you get to
2 the area --

3 MR. CLEMENT: Exactly.

4 JUSTICE BREYER: -- and leaves after
5 the area? Which is reserved to the trail or the
6 views.

7 MR. CLEMENT: Exactly. Which is why
8 both the Park Service and the Forest Service who
9 care very much about the experience on both the
10 trail and the Parkway could conclude that this
11 particular pipeline, given how far below all of
12 the action it was crossing, did not disturb the
13 experience --

14 JUSTICE ALITO: Well --

15 MR. CLEMENT: -- of the trail or the
16 pipeline.

17 JUSTICE ALITO: Now I had the same
18 thought as Justice Breyer, but maybe there's
19 something wrong with this simple way of looking
20 at the case. When I think of a trail, I think
21 of something that is on top of the earth.

22 And when I think of a pipeline that is
23 600 feet below the surface, that doesn't seem
24 like a trail. So instead of having to draw this
25 distinction between the trail and the land, why

1 can't we just say that the trail is on the
2 surface and something that happens 600 feet
3 below the surface is not the trail?

4 MR. CLEMENT: You could do that,
5 Justice Alito, and I suppose my clients would be
6 perfectly happy to win this case on that ground.
7 I do think, though, that there is a critical
8 difference between administrative authority over
9 that trail up there and administrative authority
10 over the lands.

11 And it may be a little bit hard to
12 square with your first reading of 1246(h)(1),
13 but it is the case that when a tree falls in the
14 national forest in Georgia or in New Hampshire,
15 the nine or ten federal employees who are the
16 entire total of the park unit in -- that
17 administers the trail from Harpers Ferry, West
18 Virginia do not get on a plane and fly up to New
19 Hampshire and Georgia and deal with it.

20 JUSTICE ALITO: So --

21 MR. CLEMENT: It's the Forest Service.

22 JUSTICE ALITO: So what is the
23 practical difference between viewing the case in
24 those two ways, surface, 600 feet below, trail,
25 land. What -- what is the difference between

1 those?

2 MR. CLEMENT: So for pipelines, I
3 suppose, because most of them are going to go
4 pretty far under, I -- I think you could draw
5 that distinction. I think, though, as a
6 practical matter, you would still have
7 differences.

8 I mean, I'll give you just one very
9 practical example. In the national forest up in
10 New Hampshire, one of -- because national
11 forests are for multi-uses, unlike the Park
12 Service's, which are supposed --

13 JUSTICE ALITO: I know.

14 MR. CLEMENT: -- to be conserved and
15 unimpaired, so Park -- Forest land can be used
16 for multiple purposes.

17 One of the purposes that is allowed in
18 New Hampshire is to tap the maple trees to get
19 sap out of the trees. The sap lines run across
20 the surface of the trail.

21 And they do that with the permission
22 of the Forest Service. So that's something
23 that, you know, I think if you were to construe
24 all of a sudden that the surface is in -- is
25 lands in the National Park Service, that would

1 all of a sudden --

2 JUSTICE BREYER: No, but that --

3 MR. CLEMENT: -- be under the Park
4 Service jurisdiction.

5 JUSTICE BREYER: I think that isn't
6 quite the question. I mean, we don't have to
7 decide every issue, you know, in the Park
8 Service. And if the people who make the sap
9 want to challenge it or somebody, fine. The
10 question was what harm would we do if we just
11 restrict this to the question that answers it,
12 that -- in your view? You'd win, you'd said,
13 but it would have to do with pipelines, and it
14 would have to do with things you cannot see from
15 the trail, and it would have to do with things
16 that are well below the ground.

17 And on those, which is before -- you
18 see, that's, I think, the point. And we don't
19 -- why decide cases in this Court that have all
20 kinds of implications which we can't quite see,
21 like that one? If somebody wants to challenge
22 the Park Service coming and removing a tree, let
23 them.

24 MR. CLEMENT: So, Justice Breyer, I
25 represent the Atlantic Coast Pipeline. It's not

1 my job to resist winning this case on a narrow
2 ground.

3 (Laughter.)

4 MR. CLEMENT: So I am not going to do
5 that.

6 JUSTICE SOTOMAYOR: Mr. Clement --

7 JUSTICE BREYER: Yeah.

8 JUSTICE SOTOMAYOR: Mr. Clement, I'm
9 very grateful you said that. I think that there
10 are, aren't there, some problems with that view
11 inherent in the language of the Act and in
12 definitions?

13 Doesn't the Act give the Park Service
14 the right for easements below or on top of the
15 trail?

16 MR. CLEMENT: That's not how we read
17 that provision, Justice Sotomayor. I mean, we
18 agree with the government in its reply brief
19 that the right way to read 1248(a) is that if
20 it's on Forest Service land, it's the Forest
21 Service that could grant an easement and if it's
22 --

23 JUSTICE SOTOMAYOR: Then let me take a
24 different --

25 MR. CLEMENT: -- on Park Service land

1 --

2 JUSTICE SOTOMAYOR: -- tact.

3 Generally, when you speak of land, surface land,
4 you're talking about the land underneath it?
5 That's what the cases mostly say, if -- almost
6 always, unless you separate out the two?

7 MR. CLEMENT: Well, Justice Sotomayor,
8 I'm not going to spend too much time disagreeing
9 with you because there is a reason we briefed
10 the case the way we briefed it.

11 JUSTICE SOTOMAYOR: So why don't you
12 explain that reason? Why -- there is a
13 superficial appeal -- I -- after reading --

14 MR. CLEMENT: Sure.

15 JUSTICE SOTOMAYOR: -- the briefs and
16 looking at the statute, didn't think it was
17 viable. You didn't either, or you would have
18 briefed it this way.

19 MR. CLEMENT: Well, I -- I think it's
20 viable. And I would say one --

21 JUSTICE SOTOMAYOR: It's just --

22 MR. CLEMENT: If I could say one thing
23 in limited defense of it, which is to say when
24 you have -- and we have a case that we cite to
25 this effect, and it's a case of this Court in

1 our reply brief, that generally speaking if you
2 grant a right-of-way, which is one way of
3 thinking about the trail, it doesn't affect
4 subsurface rights. So that actually does
5 support this way of thinking about it.

6 But here's why we briefed it in the
7 more straightforward way that you do have to
8 maintain the difference between the trail and
9 the lands. And that is because the argument on
10 the other side is not limited to the Appalachian
11 Trail. It's not even limited to federal lands.
12 It says that all of the lands -- because the
13 Park Service administers the whole trail. And
14 it's not just the Appalachian Trail. There's
15 about two dozen trails that the Park Service
16 administers.

17 And they not only go over bridges and
18 roads; some of them are downtown. I mean, the
19 Park Service administers the Selma to Montgomery
20 National Historical Trail. Now, if that trail
21 is lands in the Park Service because we just
22 can't get our head around the idea that trails
23 are different from land, then parts of downtown
24 Selma, downtown Montgomery are lands of the
25 National Park Service.

1 The Oregon National Historical Trail,
2 also administered by the Park Service, starts in
3 downtown Kansas City, ends up in downtown
4 Portland, Oregon. I don't think downtown Kansas
5 City or Portland, Oregon are lands in the
6 National Park Service.

7 JUSTICE KAGAN: Mr. Clement, could --
8 if -- if we go back to Justice Alito's idea,
9 which was also the way I thought about it, that
10 that was the way to cut this -- but then I
11 started looking around and the -- the mineral --
12 I wondered whether you can win under that
13 approach.

14 So here's is the argument that you
15 can't win under the surface/subsurface approach,
16 is that -- is that the Mineral Leasing Act gives
17 the authority to do rights-of-way, including
18 pipelines, to the -- to the -- to the secretary
19 that has -- it talks about the surface. It says
20 where the surface of all the federal lands
21 involved in a proposed right-of-way is under the
22 jurisdiction of one federal agency, the agency
23 head is authorized to grant the right-of-way.

24 So that suggests under the MLA, that
25 the right-of-way, the substratum, is given to

1 the person with control over the surface. Is
2 that not true?

3 MR. CLEMENT: So if I were going to
4 warm to the topic of trying to win this case on
5 the alternative ground, what I would tell you
6 about that is I would say that's not how I
7 actually read the provisions together. That's
8 -- that's sort of a subsidiary provision that
9 says how you deal with pipeline rights-of-way
10 when you have two agencies with jurisdiction
11 over the surface. And it uses that formulation,
12 but when it's really trying to figure out what's
13 the right agency head, it asks which agency head
14 has jurisdiction over the lands. And I think
15 that that -- it doesn't say surface in that
16 provision. And I think that's the critical
17 provision.

18 But with one more word about sort of
19 the theory we've actually articulated, I do
20 think if you look at all of these trails, you'll
21 see why Congress picked a different term. And I
22 think it's important to know, it's not like we
23 don't have a term in the statute for the trails.
24 They are components in the national trail
25 system. And that's what Congress called them

1 that.

2 And they called them that on the same
3 day they passed the Rivers Act, where they
4 actually talked about transferring jurisdiction,
5 they talked about acreage. There's a separate
6 section of the Rivers Act, section 1280, that
7 talks about the interaction of the Rivers Act
8 and the Mineral Leasing Act. All of that was
9 necessary because Congress knew what it was
10 doing and it was transferring land and making
11 new lands in the National Park System subject to
12 the Organic Act. It said it in haec verba.

13 It was doing no such thing in the
14 Trails Act. Congress isn't crazy. They were
15 creating tens of thousands of miles of trails,
16 most of which would be administered by the Park
17 Service. They were under no delusion that they
18 were, like, quadrupling -- I don't know,
19 probably 40 times increasing the size of the
20 lands in the National Park System.

21 If you look at those two maps at the
22 back of our reply brief, you can see the
23 difference in the implications of the theories.
24 It's very modest to look at the second map,
25 which shows you sort of what I would have called

1 before I got involved in this case the true
2 National Park System. Easy enough to steer a
3 pipeline around that.

4 If you look at the national trails
5 system, it would be a huge barrier to pipeline
6 development. And if you're ever going to apply
7 the elephants-in-the-mouse-hole-type approach to
8 a statute, this is one where it really calls
9 out -- especially if you think about the Trails
10 Act, it's got those wonderful quaint provisions
11 that are getting into the details of whether the
12 Park Service or the Forest Service or the
13 private landowners are the ones that should
14 blaze the trail.

15 A statute that addresses those kind of
16 details in that kind of granular specificity
17 should not be interpreted to have these
18 transformative effects sub silentio. And don't
19 forget -- I mean, I know you said it's -- well,
20 there is that Pacific Crest Trail, there's also
21 the Continental Divide Trail, there's also the
22 Pacific Northwest Trail, who are all
23 administered by the Forest Service.

24 JUSTICE GINSBURG: What do you do with
25 your line that I asked Mr. Yang about?

1 MR. CLEMENT: So --

2 JUSTICE GINSBURG: Because you have
3 said that the trail is in the National Park
4 System.

5 MR. CLEMENT: So, Justice Ginsburg,
6 with all respect, what I do with that line is I
7 keep reading, because it says no one doubts that
8 the trail is in the Park System to the extent
9 that the Park System administers the trail.

10 And to that extent, it is in the
11 National Park System. There are nine or ten
12 rangers sitting in Harpers Ferry, West Virginia,
13 and they have Park Service uniforms. So it --
14 and -- and there probably are statements,
15 offhanded statements, in documents by the Park
16 Service that says, yeah, the trail -- the entire
17 trail is in the Park Service. But that doesn't
18 make all of the lands traversed by the trail
19 lands in the National Park Service pursuant to
20 the Organic Act.

21 That view of the statute creates all
22 sorts of anomalies. All of the other lands of
23 the National Park Service are subject to
24 regulation by the Secretary of Interior the way
25 you would expect it to, without having to get

1 any assent from another agency.

2 JUSTICE ALITO: When the statute says
3 that the Park System consists of lands
4 administered by the Park Service, does it mean
5 administered in full, administered exclusively
6 by the Park Service, or administered in any
7 sense by the Park Service?

8 MR. CLEMENT: I think if it has to
9 mean one of those things, it probably means
10 administered in full. But what I think it
11 really, really means is lands.

12 And I think that -- I mean, although
13 it -- you know, I don't really think it's as
14 metaphysical as you think. I mean, the -- the
15 philosophers at the Park Service and the Forest
16 Service haven't had any problem with this for 50
17 years. They have dealt with the reality that
18 the trail is, in an administrative sense, under
19 the Park Service, but on a day-to-day basis, the
20 lands stay where they are. The Park Service --

21 JUSTICE ALITO: Let me -- let me ask
22 you this --

23 MR. CLEMENT: Sure.

24 JUSTICE ALITO: -- before your time
25 runs out. Is the office of the Park Service --

1 I assume the Park Service has an office here in
2 Washington?

3 MR. CLEMENT: Yes.

4 JUSTICE ALITO: Is that part of the --
5 is that part of the Park System?

6 MR. CLEMENT: I don't think it's an
7 area of land administered by the Park Service.

8 JUSTICE ALITO: But the -- but it's
9 administered by the Park Service, isn't it?

10 MR. CLEMENT: No, you're right. And
11 it's in the National Park system in some sense.

12 JUSTICE ALITO: It is?

13 MR. CLEMENT: Yeah, but I don't think
14 they have to maintain that building in its
15 unimpaired national state -- natural state,
16 which just goes to show not everything that's in
17 the Park System in some loose sense is subject
18 to the restrictions of the Organic Act, which
19 required the system -- the Service to keep them
20 in an unimpaired state. Many thanks.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Mr. Clement.

23 Mr. Kellogg.

24

25

1 ORAL ARGUMENT OF MICHAEL K. KELLOGG
2 ON BEHALF OF THE RESPONDENTS

3 MR. KELLOGG: Mr. Chief Justice, and
4 may it please the Court:

5 I want to go directly to the question
6 of whether there's an easy out in this case by
7 saying it's 600 feet under the ground, so it
8 doesn't count. I'll call the Court's attention
9 to 1248(a), which specifically says that rights
10 of ways are to be granted by the Secretary of
11 the Interior in this case for anything,
12 "rights-of-ways upon, over, under, across, or
13 along any components" of the Appalachian Trail.

14 So "under" counts, as Justice Kagan
15 pointed out, the Mineral Leasing Act itself
16 talks about who has jurisdiction over the
17 surface lands. Obviously the pipeline is going
18 to go under those lands, but it's the one who
19 administers the surface of the lands.

20 And we know that the Park Service
21 administer these lands because Congress made
22 that very clear in the three interlocking
23 statutes at issue here.

24 The Trails Act in 1968 says, without
25 any equivocation, the Appalachian Trail shall be

1 administered by the Secretary of the Interior
2 who has delegated that to the Park Service. The
3 General Authorities Act two years later said all
4 areas administered by the Park Service, without
5 limitation, are part of one National Park
6 System.

7 If it's administered by the Park
8 Service, it is an area of land or water.
9 Whether it's a historic building, whether it's a
10 monument, whether it's a parkway, or whether
11 it's a trail, it is -- if it's administered, it
12 counts as an area of land, which the Court in
13 the Sturgeon case pointed out it's up to
14 Congress to decide how broadly to use the term
15 "land" in a statute.

16 And, finally, the Mineral Leasing Act
17 makes it absolutely clear that it extends the
18 rights for oil and gas pipelines to all federal
19 lands, except lands in the National Park System.

20 CHIEF JUSTICE ROBERTS: Mr. Kellogg --

21 JUSTICE KAGAN: Counsel, could you --

22 CHIEF JUSTICE ROBERTS: -- if you have
23 an easement over land, is there anything unusual
24 about that that someone, a separation, in other
25 words, before traversing over the land and

1 recognition that the land itself belongs to
2 somebody else?

3 MR. KELLOGG: Well, we're not saying
4 if there's -- let's say we have an easement for
5 the trail over private land or state land. The
6 Mineral Leasing Act doesn't cover those.

7 CHIEF JUSTICE ROBERTS: No, no, I
8 know, I'm not talking -- I'm speaking --

9 MR. KELLOGG: They can build a
10 pipeline under private lands or under state
11 lands and, in fact, they have done two of that
12 under the Appalachian Trail in just the past
13 five years.

14 CHIEF JUSTICE ROBERTS: I'm thinking
15 more, there seems to be a debate on some
16 metaphysical level about whether you can have a
17 trail, whether you can have land under it, or
18 interests in land that are different. I just --
19 it doesn't strike me as that unusual a concept
20 that there are property rights that are distinct
21 from rights in the land.

22 But that still -- I mean, if I give
23 somebody an easement to walk across my backyard
24 to get somewhere, I -- I don't think that I'm
25 giving up the land. It's still my land.

1 MR. KELLOGG: Well, that -- as we
2 point out in the brief, there are two
3 definitions of right-of-way. One is an abstract
4 right of passage over somebody else's land. And
5 the other refers to the strip of land itself
6 over which passage is maintained.

7 The Trails Act repeatedly uses the
8 second definition, when it says you are going to
9 require rights of ways for the trail. You can
10 use condemnation proceedings to acquire land for
11 the trail.

12 And most importantly of all, when it
13 says you can grant, the Secretary -- the Park
14 Service grant a right-of-way over the trail. So
15 even using the first definition as a right of
16 passage over land, it's indicating that the
17 trail itself is land.

18 JUSTICE ALITO: When the -- when the
19 trail crosses private land, what property rights
20 do you think the Park Service has with respect
21 to those private lands?

22 MR. KELLOGG: I wouldn't say that they
23 have property rights, but as with any in-holding
24 of the National Park System or the Forest
25 Service, which has lots of in-holdings of

1 private land, there is still certain regulations
2 that can be established for those lands.

3 JUSTICE ALITO: Well, I don't think
4 that answers my question. Do they have any
5 property rights over the private land?

6 MR. KELLOGG: They have --

7 JUSTICE ALITO: Can the Trail Act take
8 any property rights away from private
9 landowners, other than the -- essentially an
10 easement?

11 MR. KELLOGG: Essentially what they
12 have is an easement. But this Court has made
13 clear -- first of all, I should point out that
14 the Forest Service regulations specifically
15 exclude private and state lands from the
16 applicability of their regulations, with a few
17 exceptions.

18 Like in 36 CFR 6.2 it says you can't
19 put solid waste in these private lands.

20 JUSTICE ALITO: Well, if you have only
21 --

22 MR. KELLOGG: So there is some
23 restrictions.

24 JUSTICE ALITO: If you have only an
25 easement over private land, do you have anything

1 more over land that is administered by the
2 Forest Service?

3 MR. KELLOGG: The land is administered
4 by the Park Service. And that's absolutely
5 clear in the Trails Act when it says such things
6 as the Park Service gets to select and choose
7 the route, they decide the width of the trail,
8 they establish the acreage for the trail, which
9 they've done here, which is 250,000 acres along
10 the entire length of the trail. All of which
11 they say is a unit of the Park System.

12 JUSTICE ALITO: Your --

13 JUSTICE KAGAN: Once the trail is the
14 trail, who regulates its use and who takes care
15 of it?

16 MR. KELLOGG: Well, authority can be
17 divided. Overall administration authority is by
18 the Park Service, but specific management
19 responsibility can be delegated to particular
20 other federal agencies or even to volunteer
21 groups or state groups.

22 JUSTICE KAGAN: And -- and -- and what
23 -- what actually is the case here? Suppose
24 there were a regulation that said there shall be
25 no snowmobiling on the trail. Where would that

1 regulation come from?

2 MR. KELLOGG: It would be in 36 CFR,
3 which is the Park Service regulations. 1246(i)
4 specifically says it's up to the Park Service to
5 establish regulations governing units of --
6 governing the trail.

7 Just as the Park System Organic Act
8 says it's up to the Park Service to decide what
9 regulations --

10 JUSTICE SOTOMAYOR: Mr. Kellogg --

11 MR. KELLOGG: -- govern the Park
12 System.

13 JUSTICE SOTOMAYOR: -- let's go back
14 to -- let's go back to what the other side
15 argued was the nightmare of this case. I'm not
16 sure you have quite answered Justice Alito and
17 getting to what you're asking -- answering to
18 Justice Kagan.

19 It runs through cities, the trail. It
20 runs through downtown Selma. I think we were
21 told in downtown somewhere else. Can the --
22 does the Park Service, can it regulate the use
23 of that area? Can it put, at -- at a halt,
24 everything that happens in downtown Selma?

25 MR. KELLOGG: Certainly not.

1 JUSTICE SOTOMAYOR: So --

2 MR. KELLOGG: But to the extent to
3 which you can regulate, that's a question the
4 Court left open in the Sturgeon case for
5 in-holdings, how much -- if it's part of the
6 Park Service, part of the Forest Service, how
7 much can you regulate private in-holdings?

8 And I think there's severe limitations
9 on that, which is why the Park Service has said
10 we're not regulating that.

11 JUSTICE GORSUCH: So is downtown Selma
12 an in-holding in the Park Service?

13 MR. KELLOGG: I'm sorry?

14 JUSTICE GORSUCH: Is downtown Selma an
15 in-holding on the Park Service in your theory of
16 the case?

17 MR. KELLOGG: If there's a -- for
18 example, if there is a national historic trail
19 through that area --

20 JUSTICE GORSUCH: There is. We know
21 that to be true.

22 MR. KELLOGG: Yes, there is. Congress
23 in the National Historic Trails Act specifically
24 said that there is no regulatory power on -- on
25 national historic trails for private, state, and

1 local lands.

2 They said exactly the opposite in the
3 Trails Act when they said -- -

4 JUSTICE GORSUCH: Wouldn't -- go
5 ahead, please.

6 JUSTICE KAVANAUGH: Keep going, sorry.

7 MR. KELLOGG: I was going to say they
8 said exactly the opposite in the Trails Act
9 where they said that the Secretary administers
10 the entire trail.

11 JUSTICE BREYER: What about the --
12 what about that?

13 JUSTICE GORSUCH: Please.

14 JUSTICE BREYER: Just take the same
15 question and apply it to one of these kinds of
16 trails.

17 JUSTICE GORSUCH: Yeah.

18 JUSTICE BREYER: I mean, maybe it's
19 not Selma. Maybe it's Hanover, New Hampshire,
20 exactly the same question.

21 JUSTICE GORSUCH: Or Kansas City. You
22 choose.

23 JUSTICE BREYER: Kansas City. Is
24 there like a barrier across -- I mean, that's
25 what's a little bit tough on your side. The

1 statutes, you know, it's like ping pong, you
2 know, they have this, you have that.

3 But the thing that I -- is worrying me
4 the most is just what was asked. So all you
5 have to do is take the same question, okay, you
6 got it?

7 MR. KELLOGG: Yep.

8 JUSTICE BREYER: Okay. What's the
9 answer?

10 (Laughter.)

11 MR. KELLOGG: Okay. So the answer is
12 they can't go into downtown Hanover and say
13 we're the federal government and we're going to
14 control how you use the sidewalks, et cetera.
15 But they are going to --

16 JUSTICE BREYER: Not the sidewalks.
17 What happened is this is a -- a national -- a
18 state park, and under the ground are some Native
19 American remains, you know, and they would like
20 to have access to those. It isn't going to
21 affect the trail and so forth, and they don't
22 want to ask anybody. They just want to do it.
23 All right?

24 So -- so what now?

25 MR. KELLOGG: Unless there is another

1 federal law --

2 JUSTICE BREYER: No.

3 MR. KELLOGG: -- that applies to
4 digging up Indian remains, then they could do
5 it, because --

6 JUSTICE BREYER: Why?

7 MR. KELLOGG: They could do it because
8 the Park Service has control over the trail on
9 federal lands, but its regulations do not extend
10 to the trail where it goes over state --

11 JUSTICE BREYER: As far as the statute
12 is concerned, can they do it? We get a Park
13 Service that doesn't like X. They don't want to
14 do it. Can they do it? I mean, and it's
15 underground. In other words --

16 MR. KELLOGG: If they are taking --

17 JUSTICE BREYER: No, no. What it is,
18 it's more like an easement. If you see it more
19 like an easement, more like an easement, or
20 covering the surface, then, of course, if it
21 goes across private land or it goes across a
22 state park or goes across a city, then the state
23 or the city or the -- whatever it is, has a
24 right to use their land as they wish.

25 If it's part going down into the earth

1 a thousand feet or to the center of the earth, I
2 don't know where these things go, but if that's
3 the case, maybe they can do it, but only if the
4 Park Service agrees. See, is that -- that's --

5 JUSTICE GORSUCH: Well, I -- I think
6 that's right. I mean, I think -- the easement
7 is very easy to understand how this would work,
8 but if it's -- property actually belongs to the
9 Park Service, is in the Park Service system,
10 then I think Justice Breyer has an interesting
11 point.

12 And, relatedly, I'm -- I'm having --
13 I'm struggling with understanding how -- what
14 the answer to this question is: Congress, when
15 it -- when it set out who's going to administer
16 these trails, said that the Park Service gets to
17 administer the ones in the east, where the
18 Forest Service owns the land, and the Forest
19 Service gets to administer the ones in the west,
20 where the Park Service owns the land. It was
21 kind of a -- you can understand that if it's
22 easements, again, you can understand that.
23 Everybody's getting a little bit of something in
24 each other's territory.

25 But if the land goes with the -- the

1 assignment of the management authority for the
2 trail, then you have the circumstance that a lot
3 of western national parks: Sequoia, Yosemite,
4 others, there are now ribbons throughout those
5 national parks that belong to the Forest Service
6 and that would be at least open to pipeline
7 development.

8 So while you might thwart a pipeline
9 here, you -- it's not a costless -- it's not a
10 zero-sum gain. You're going to invite pipelines
11 elsewhere. Now, you might tell me nobody is
12 seeking a pipeline there, but that's not a very
13 good answer, is it?

14 So on what account, I guess I'm
15 asking, would a rational Congress have opened up
16 western national parks to development like this?

17 MR. KELLOGG: Well, first of all, I
18 don't think that has happened, Your Honor,
19 because --

20 JUSTICE GORSUCH: I -- I -- I knew you
21 were going to say that.

22 (Laughter.)

23 MR. KELLOGG: If -- take the Pacific
24 Crest Trail. It runs through certain portions
25 that are, as you point out, national parks.

1 They could not build a pipeline across those
2 because you can't go under the National Park
3 Service land, even if the trail is administered
4 by the Forest Service. Where it runs across
5 Forest Service lands, where it runs across
6 state, local, or private lands, then the -- the
7 Mineral Leasing Act would allow a pipeline to
8 run.

9 Now, they raise the hypothetical,
10 well, couldn't the -- the Forest Service dig up
11 the entire trail and snake a pipeline through
12 there? I would suggest, no, both as a legal
13 matter and of course as a practical matter, they
14 couldn't. But as a legal matter, they couldn't
15 because they can only allow uses that are
16 consistent with the purposes of the trail. So I
17 think that's a -- that's a false hypothetical.

18 There's no question that back in 1970,
19 Congress -- it was 1968, Congress was saying,
20 okay, we've got -- we want to establish all
21 these national trails. We're going to give some
22 to the Forest Service. We're going to give some
23 to the Park Service. And they're going to be
24 the administrator of those trails, the overall
25 administrators.

1 Every statute that assigns
2 jurisdiction over land to a federal agency uses
3 the word "administration." It's in the --

4 JUSTICE KAVANAUGH: What about the --
5 excuse me. What about the argument that there's
6 -- you have textual arguments, the other side
7 has textual arguments, but your position has
8 significant consequences to it, enormous
9 consequences.

10 And Congress did not use language in
11 this Act like it did in the Rivers Act passed on
12 the same day. And the argument goes, you would
13 expect to see clear language like that to
14 generate the significant consequences that your
15 position has.

16 MR. KELLOGG: You know, I would
17 suggest that Congress used exactly language like
18 that in the Rivers Act. The Rivers Act had to
19 be a little more specific because it put the --
20 the -- Wild and Scenic Rivers along with their
21 adjacent lands directly into the Park Service.
22 And so it had to specify that it was talking
23 about land as well as the water.

24 But it used the same term,
25 "administered by," that you find in the Trails

1 Act, that you find in the Weeks Act, that you
2 find in the Blue Ridge Parkway Act. In every
3 instance where Congress assigns jurisdiction
4 over land, it uses that term.

5 And to be clear, the Forest Service
6 doesn't own the land. The Park Service doesn't
7 own the land. All the land belongs to the
8 federal government. It's administered by
9 agencies designated by Congress, which is
10 exactly what they did in the 1968 Act. And --

11 JUSTICE ALITO: Is there any reason
12 why the Secretary of the Interior had to
13 delegate this to the Park Service?

14 MR. KELLOGG: It did not have to. It
15 was assumed by Congress that it would do so,
16 because throughout the Trails Act, it talks
17 about when it's the Secretary of Interior, you
18 apply the rules applicable to the --

19 JUSTICE ALITO: So if Congress really
20 wanted to bring about the result that you think
21 the statutes commands, why wouldn't it leave
22 that option? Why wouldn't it require that it be
23 administered by the Park Service, rather than by
24 the Secretary of the Interior?

25 MR. KELLOGG: So the initial Trails

1 Act decided the question about pipeline
2 rights-of-ways, et cetera. That took two more
3 steps. It took the 1970 General Authorities
4 Act, in which Congress said we want all these
5 disparate areas that the Park Service
6 administered and we want to treat them on a par.

7 JUSTICE GORSUCH: Mr. Kellogg, I think
8 the question that Justice Alito is getting at
9 troubles me too, and I'm not sure you quite got
10 there.

11 Could the Secretary of the Interior
12 reassign these lands from the Park Service to
13 the Fish and Wildlife Service and then allow --

14 MR. KELLOGG: At this point, I don't
15 think they --

16 JUSTICE GORSUCH: -- and then allow
17 pipelines?

18 MR. KELLOGG: At this point, I don't
19 think so. Once it's in the parks system, it
20 works as -- seems to work as a one-way route.

21 JUSTICE GORSUCH: Okay, but it's --

22 MR. KELLOGG: There's no authority --

23 JUSTICE GORSUCH: Could it -- could --

24 MR. KELLOGG: -- to decommission.

25 JUSTICE GORSUCH: But the Secretary of

1 the Interior could have done so?

2 MR. KELLOGG: Could have done so,
3 that's correct. And, in fact, some trails have
4 been and some scenic rivers have been delegated
5 to the Fish and Wildlife --

6 JUSTICE GORSUCH: And why isn't that a
7 strike against your interpretation? Because if
8 Congress had wanted to ensure that these trails
9 were left undisturbed, it could have simply made
10 that assignment directly.

11 MR. KELLOGG: Because the critical
12 act, from our purposes, is the 1970 Act. Not so
13 much the 1968 Trails Act, but the 1970 General
14 Authorities Act.

15 If you read the government's reply
16 brief at 16-17, they make some concessions that
17 I think essentially concede away the case. They
18 said, back in 1970, the Park Service listed as
19 units the Blue Ridge Parkway, the Appalachian
20 Trail, and the Wild and Scenic Rivers, but it
21 kept those separate and apart in its listing,
22 said these were miscellaneous areas, these are
23 recreation areas; these aren't national parks.

24 And then Congress came along in the
25 General Authorities Act and said: No, no, no,

1 everything you administer is a unit of the Park
2 Service. So as a consequence, two years later,
3 when the Forest Service -- when the Park Service
4 published its new list, it listed the Wild and
5 Scenic Rivers, the Blue Ridge Parkway, and the
6 Appalachian Trail all as units of the Park
7 System on a par --

8 JUSTICE BREYER: So --

9 MR. KELLOGG: -- with national parks.

10 JUSTICE BREYER: So do you -- is this
11 right that you think that -- think of Yosemite.
12 I think that belongs to the federal government,
13 and I think it belongs to the federal government
14 down to the center of the earth. I mean, I
15 don't know how far you go down when you have
16 property. Maybe you go to the center of the
17 earth.

18 Is your position that that's true of
19 all the trails too?

20 MR. KELLOGG: It certainly --

21 JUSTICE BREYER: And if -- that's --
22 that's really what I'm -- yeah, okay. Go ahead,
23 answer.

24 MR. KELLOGG: Yes, it's -- it's my
25 position, it's our position, that if -- whatever

1 agency administers the trail also can award,
2 decide right-of-ways across that trail, but only
3 consistent with their own rules and regulations.

4 CHIEF JUSTICE ROBERTS: So that it --

5 JUSTICE ALITO: Well, then why does
6 the statute --

7 CHIEF JUSTICE ROBERTS: -- really does
8 -- it really does erect a impermeable barrier to
9 any pipeline from the area where the natural
10 gas, those resources are located and to the area
11 east of it where there's more of a need for
12 them?

13 MR. KELLOGG: Absolutely incorrect,
14 Your Honor, I'm sorry, but the -- there's 55
15 pipelines currently running under the
16 Appalachian Trail; 19 of those are on federal
17 land pursuant to permanent easements granted
18 before the Trails Act. The rest of them are on
19 state and local lands. Two --

20 CHIEF JUSTICE ROBERTS: I guess maybe
21 -- maybe I'm not entirely incorrect, but that
22 seems to suggest if it is not the Appalachian
23 Trail land that runs through private property or
24 were preexisting, that to the extent it is, I'll
25 call, regular Appalachian Trail land, it does

1 operate as a barrier?

2 MR. KELLOGG: Only on federal land.

3 JUSTICE BREYER: Why?

4 CHIEF JUSTICE ROBERTS: Well, that's
5 what we're talking about.

6 MR. KELLOGG: Because the Mineral
7 Leasing Act only applies to federal land, and it
8 only exempts land in the National Park Service
9 from the definition of federal land.

10 So state, local, and private lands are
11 unaffected. The --

12 JUSTICE GORSUCH: State -- state,
13 local -- state, local, private lands are
14 unaffected. Forest Service lands, through which
15 the trails run, are unaffected. The only thing
16 affected is where there happens to be a trail?

17 MR. KELLOGG: Is the trail, plus its
18 protective corridor, which is about a thousand
19 feet wide, and which the Park Service, despite
20 their efforts in the reply brief to walk that
21 back, if you look at page 97 of the Joint
22 Appendix, they run through the numbers.

23 You know, it's 2,190 miles long. It's
24 a thousand feet wide. And they say that's
25 250,000 acres in the National Park System.

1 Those acres are included in their calculation of
2 the 89 million acres that are part of the --

3 JUSTICE BREYER: But -- but you see --

4 JUSTICE KAGAN: Mr. Kellogg do you
5 think --

6 JUSTICE BREYER: Go back for just a
7 second. Because once you said yes to the center
8 of the earth. Okay. Now, I'm -- I'm quite
9 pleased, I guess as a person, not a judge, that
10 Yosemite does go down as far as, but it worries
11 me, because what you answered the Chief Justice
12 and the others is, well, Congress has an Act
13 that takes care of that.

14 It exempts the private people. But I
15 think we're here concerned not with Congress's
16 statutes so much -- of course we are -- but --
17 but you see, if you're saying it goes down to
18 the center of the earth, then there are all
19 kinds of things some other Congress might do.
20 This land belongs to the federal government down
21 to the center of the earth.

22 And actually what's worrying me is
23 something with that consequence, perhaps
24 Congress would have done more to make clear.
25 But am I right on my consequence that -- are you

1 following that?

2 MR. KELLOGG: I do, Your Honor.

3 JUSTICE BREYER: And -- and -- and am
4 I right?

5 MR. KELLOGG: That the subsurface
6 lands also belong to the United States?

7 JUSTICE BREYER: Yes. So Congress
8 could do what it wants, in cities, in -- in
9 cities, in private property, et cetera.

10 MR. KELLOGG: No, you are not right --

11 JUSTICE BREYER: Because of the
12 statute or because of something else?

13 MR. KELLOGG: Because the Mineral
14 Leasing Act applies only to federal lands.

15 JUSTICE BREYER: Well --

16 MR. KELLOGG: And the Park Service
17 does not purport to regulate private, state, and
18 local in-holdings. So that's not going to
19 happen.

20 JUSTICE KAGAN: Mr. Kellogg, do you
21 think it's possible that these trails are
22 jointly administered, that there is some kind of
23 joint jurisdiction over them? And if that's
24 what is going on here, what would be the effect
25 of that on this question?

1 MR. KELLOGG: Well, first of all, if
2 that were what's going on, the Court would have
3 to reverse, because under 185(c)(2) of the
4 Mineral Leasing Act, it says that if the -- if
5 the surface lands are administered by either the
6 Secretary of the Interior or by the Secretary
7 and more -- and one or more other agencies, then
8 only the Secretary of the Interior can grant --

9 JUSTICE KAGAN: I guess what I was
10 suggesting is something along the following
11 lines: You have the Weeks Act. And the Trails
12 Act comes along and it does not completely
13 repeal the Weeks Act. It just layers onto the
14 Weeks Act jurisdiction in the Secretary
15 delegated to the Park Service that goes along
16 with the Weeks Act, and then assumes that these
17 two agencies will figure out a sensible
18 distribution of regulatory and other authority.

19 And if that's the case, and that's
20 what happened -- has happened, do you -- does --
21 does -- is it necessarily true that the
22 Secretary has authority over the right-of-way
23 that's at issue here?

24 MR. KELLOGG: Well, 1248(a) says
25 explicitly that it's either the Secretary of the

1 Interior or the Secretary of Agriculture, as the
2 case may be, and as the case may be, we know
3 refers to the Secretary who administers the
4 land.

5 The government in its reply brief
6 recognizes that's a fatal point for them, and so
7 they try to say, no, it's not really mean that,
8 but two provisions before in 1246(i) Congress
9 uses the phrase "as the case may be" in a
10 context that unmistakably refers to the
11 Secretary administering the trail.

12 So that means the Secretary of the
13 Interior, and only the Secretary of the Interior
14 can grant the rights-of-way in question here.
15 So --

16 JUSTICE SOTOMAYOR: Mr. Kellogg --

17 MR. KELLOGG: -- the head of the Forest
18 Service --

19 JUSTICE SOTOMAYOR: -- I'm sorry, did
20 you misspeak? You answered Justice Kagan by
21 saying if we believed there was dual
22 administrative powers, that we had to reverse,
23 but I thought you won below?

24 MR. KELLOGG: I'm sorry, then you'd
25 have to --

1 JUSTICE SOTOMAYOR: Affirm?

2 MR. KELLOGG: I'm sorry, then the
3 Fourth Circuit -- my apologies -- the Fourth
4 Circuit was correct that the Secretary -- that
5 the head of the Forest Service did not have
6 authority to grant this pipeline right-of-way.
7 So you would have to affirm on that basis. My
8 apologies for --

9 JUSTICE SOTOMAYOR: No, you were
10 confusing me, so I -- I don't know that you have
11 fully satisfied the parade of horrors that
12 have been put forth.

13 In my own judgment, the most serious
14 one is the view that if everything the Park
15 Department administers, the entire trail, that
16 that means that it can stop pipelines or other
17 things across the country, the -- the 200,000 or
18 whatever miles that this is.

19 And I -- I don't know that you have
20 actually articulated concisely a -- a response
21 to why that parade of horrors is not likely.

22 MR. KELLOGG: I can -- I can give you
23 --

24 JUSTICE SOTOMAYOR: I don't think it's
25 enough to say that they haven't done it.

1 MR. KELLOGG: I can give you a very
2 concrete example. In the past 50 years, since
3 the Trails Act was passed, there has not been a
4 single new pipeline right-of-way through federal
5 lands under the Appalachian Trail.

6 There have been a number on state,
7 local, and private lands, and the same would
8 apply to other trails. Now, they acknowledge,
9 for example, that the Blue Ridge Parkway is land
10 in the Park System. They acknowledge that wild
11 and scenic rivers are land in the Park System.

12 So the same principle that they would
13 block pipelines would apply to them as well.
14 And there is no reason why a parkway constitutes
15 land but a trail does not or why a wild and
16 scenic river would constitute lands and a trail
17 not.

18 Congress even provided ways in which
19 you could move the trail under certain
20 provisions by acquiring new land on which to run
21 the trail. It did the same thing with the Blue
22 Ridge Parkway.

23 JUSTICE ALITO: Why would Congress
24 allow pipeline under the Blue Ridge Parkway but
25 not under the trail when those two run parallel

1 to each other and are very close in some spots?

2 MR. KELLOGG: That's actually a highly
3 disputed point, whether they have allowed a
4 pipeline under the Appalachian Trail -- under
5 the Blue Ridge Parkway. 460(a)(3), the
6 provision at issue there, is entitled Licensor
7 Permits to Owners of Adjacent Lands.

8 So the one question is, well, is a
9 right-of-way to a pipeline to an owner of an
10 adjacent land, but otherwise it says that it has
11 to be non-consistent with use of such lands for
12 pipeline purposes.

13 So --

14 JUSTICE ALITO: For -- for pipeline
15 purposes?

16 MR. KELLOGG: For pipe -- for parkway
17 purposes.

18 JUSTICE ALITO: Parkway purposes.

19 MR. KELLOGG: And what you look for in
20 the parkway is the Park Service regulations
21 governing the parkway. What you look for for
22 the national -- for the Appalachian Trail is the
23 Park Service regulations governing the trail,
24 which specifically cover the kinds of
25 rights-of-ways and pipelines, et cetera, that

1 can pass over --

2 JUSTICE ALITO: Well, if --

3 MR. KELLOGG: -- or under the trail.

4 JUSTICE ALITO: If the statutes allow
5 it to go under the parkway, is there any reason
6 why Congress would say: Well, you can go this
7 far, but you can't go another thousand feet in
8 some spots and go under the trail?

9 MR. KELLOGG: Because they wanted to
10 keep the Appalachian Trail, insofar as it's on
11 federal land, where the most beautiful parts of
12 the Appalachian Trail are to be found, through
13 the national forest, through the -- through the
14 Park System, Congress drew a bright line.

15 JUSTICE ALITO: Well, I mean, that
16 gets to the fundamental question I have about
17 your argument.

18 There may be all sorts of very good
19 environmental reasons why this pipeline
20 shouldn't be built. And those, I take it, are
21 involved in the other issues in the case, but do
22 you have more than a "gotcha" argument? Do you
23 -- I mean, and -- and sometimes they work, but
24 if you fit these statutes together, this is what
25 they say, and you can't get out of it, but do

1 you really have an argument that this is what
2 Congress intended when it adopted the statutes
3 on which you rely?

4 MR. KELLOGG: I think we do. We know,
5 for example, that they had the General
6 Authorities Act before them when they passed the
7 Mineral Leasing Act and created an exception for
8 lands in the Park System from -- from the
9 pipeline authority that they were granting in
10 that Act.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Yang, two minutes remaining.

14 REBUTTAL ARGUMENT OF ANTHONY A. YANG
15 ON BEHALF OF THE PETITIONER IN 18-1584

16 MR. YANG: Mr. Chief Justice, thank
17 you.

18 The statutory regulation of
19 in-holdings was addressed in Sturgeon,
20 Section 10751. Counsel has not suggested that
21 that broad authority does not apply. This
22 strikes close to home. The Potomac Heritage
23 Scenic Trail runs straight through Alexandria.

24 Counsel suggests that such regulation
25 of lands in the National Park System is limited

1 to purposes of the trail. I would not feel
2 comfortable as a municipal officer given that's
3 the case.

4 And, moreover, that threatens the
5 cooperative management system whereby
6 municipalities have allowed the trail for 50
7 years, and then going fact -- going back to the
8 1920s and '30s to cross their lands without
9 necessarily having easements for the trail.

10 Two, land as a property right going
11 down to the earth, that is a very odd fit for
12 this trail that runs across the surface and that
13 can change locations.

14 Three, Congress in Section
15 1246(a)(1)(A) specifically says the Interior has
16 overall administration of the trail, but then
17 says there's no transfer of management
18 responsibilities for federally-administered
19 lands. That's the antithesis of the clarity
20 that Congress acts with when it wants to
21 transfer --

22 JUSTICE SOTOMAYOR: Excuse me, Mr.
23 Yang --

24 MR. YANG: -- its exertion of land --

25 JUSTICE SOTOMAYOR: -- that's the

1 problem, which is read that definition.
2 Management and administration have two different
3 meanings. It says we don't transfer management
4 when --

5 MR. YANG: I get the point. But the
6 problem is --

7 JUSTICE SOTOMAYOR: That's the
8 problem.

9 MR. YANG: -- Petitioner -- the first
10 sentence says: "Overall administration is
11 administration and management of the trail." If
12 Petitioner is right that the trail is land, that
13 includes management of the land.

14 But that makes a hash of the second
15 sentence, which says, "no authority over the
16 land management is transferred." So Petitioner
17 also -- or Respondent has a problem with
18 Sections 1246(e) and (h)(1), both of which apply
19 only outside the boundaries of
20 federally-administered land, (h)(1) where the
21 trail is outside, and (e) where the right-of-way
22 is outside.

23 There is no such thing under
24 Respondent's theory because the right-of-way and
25 the trail is federally-administered land. The

1 overall administration -- this is the position
2 of the agencies for 50 years -- that overall
3 administration is spelled out in the Act. It's
4 a continuous route.

5 You select the right-of-way and then
6 you relocate it. That's in A(2) and (b). A
7 uniform marker. You're a backstop for state and
8 local governments acquiring the required
9 right-of-way.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 MR. YANG: Thank you, Mr. Chief.

13 CHIEF JUSTICE ROBERTS: The case is
14 submitted. But before counsel leave, I would
15 like to invite Mr. Clement to return to the
16 lectern.

17 Mr. Clement, our records indicate that
18 this was your 100th oral argument before the
19 Court. That is a rare milestone. I recognize
20 one of the other members of the exclusive club,
21 Mr. Kneedler, at counsel table.

22 Throughout your career, Mr. Clement,
23 you have consistently advocated positions on
24 behalf of the United States and private clients
25 in an exemplary manner.

1 On behalf of the Court, I extend to
2 you our appreciation for your advocacy before
3 the Court and dedicated service as an officer of
4 this Court.

5 We look forward to hearing from you
6 many more times, beginning, I gather, next week
7 as an amicus --

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: -- appointed
10 by this Court. Thank you very much. Thank you,
11 counsel. The case is submitted.

12 (Whereupon, at 11:09 a.m., the case
13 was submitted.)

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1	<p>a(i) ^[1] 13:22 a.m ^[3] 1:24 4:2 68:12 able ^[1] 10:10 above-entitled ^[1] 1:22 absolutely ^[3] 36:17 40:4 54:13 abstract ^[1] 38:3 accept ^[1] 16:2 access ^[1] 44:20 account ^[1] 47:14 acknowledge ^[2] 61:8,10 acquire ^[1] 38:10 acquiring ^[2] 61:20 67:8 acreage ^[3] 18:22 30:5 40:8 acres ^[5] 19:2 40:9 55:25 56:1,2 across ^[14] 19:13 23:19 35:12 37:23 43:24 45:21,21,22 48:1,4,5 54:2 60:17 65:12 Act ^[74] 4:14,18 5:10 6:24 7:6,10 10:17 12:18,25 15:21 16:4,6 17:24 18:5,15,16,19,24 25:11,13 28:16 30:3,6,7,8,12,14 31:10 32:20 34:18 35:15,24 36:3,16 37:6 38:7 39:7 40:5 41:7 42:23 43:3,8 48:7 49:11,11,18,18 50:1,1,2,10,16 51:1,4 52:12,12,13,14,25 54:18 55:7 56:12 57:14 58:4,11,12,13,14,16 61:3 64:6,7,10 67:3 action ^[1] 21:12 acts ^[2] 16:9 65:20 actually ^[9] 27:4 29:7,19 30:4 40:23 46:8 56:22 60:20 62:2 address ^[2] 10:11 16:10 addressed ^[1] 64:19 addresses ^[1] 31:15 adjacent ^[3] 49:21 62:7,10 administer ^[9] 8:18,23 15:23 16:3 35:21 46:15,17,19 53:1 administered ^[30] 4:16 5:13,15,15 8:13 10:14 16:19 28:2 30:16 31:23 33:4,5,5,6,10 34:7,9 36:1,4,7,11 40:1,3 48:3 49:25 50:8,23 51:6 57:22 58:5 administering ^[4] 4:21,22 14:17 59:11 administers ^[11] 6:7 22:17 27:13,16,19 32:9 35:19 43:9 54:1 59:3 60:15 administration ^[14] 4:19 8:21 12:20 15:2,18 17:4 40:17 49:3 65:16 66:2,10,11 67:1,3 administrative ^[6] 12:24 18:1 22:8,9 33:18 59:22 administrator ^[1] 48:24 administrators ^[1] 48:25 adopted ^[1] 64:2 advocacy ^[1] 68:2 advocated ^[1] 67:23 affect ^[2] 27:3 44:21 affected ^[1] 55:16 Affirm ^[2] 60:1,7 agencies ^[17] 4:22,23 5:2 14:17 15:10,17,23 16:3,12 17:7 18:14 29:10 40:20 50:9 58:7,17 67:2 agency ^[10] 4:21 17:3,6 28:22,22</p>	<p>29:13,13 33:1 49:2 54:1 agree ^[1] 25:18 agreement ^[2] 15:10,11 agrees ^[1] 46:4 Agriculture ^[1] 59:1 ahead ^[2] 43:5 53:22 AL ^[3] 1:4,8,15 Alexandria ^[1] 64:23 ALITO ^[29] 21:14,17 22:5,20,22 23:13 33:2,21,24 34:4,8,12 38:18 39:3,7,20,24 40:12 41:16 50:11,19 51:8 54:5 61:23 62:14,18 63:2,4,15 Alito's ^[1] 28:8 allow ^[7] 16:15 48:7,15 51:13,16 61:24 63:4 allowed ^[3] 23:17 62:3 65:6 almost ^[1] 26:5 already ^[1] 7:22 alternative ^[1] 29:5 although ^[1] 33:12 American ^[1] 44:19 amicus ^[2] 15:21 68:7 amounts ^[1] 6:5 anomalies ^[1] 32:22 another ^[4] 16:21 33:1 44:25 63:7 answer ^[7] 8:25 16:8 44:9,11 46:14 47:13 53:23 answered ^[3] 41:16 56:11 59:20 answering ^[2] 15:16 41:17 answers ^[2] 24:11 39:4 ANTHONY ^[5] 2:2 3:3,14 4:9 64:14 antithesis ^[1] 65:19 anybody ^[1] 44:22 apart ^[1] 52:21 apologies ^[2] 60:3,8 Appalachian ^[21] 4:15 8:19 9:4 13:10,14 20:18 27:10,14 35:13,25 37:12 52:19 53:6 54:16,22,25 61:5 62:4,22 63:10,12 appeal ^[1] 26:13 APPEARANCES ^[1] 2:1 Appendix ^[1] 55:22 applicability ^[1] 39:16 applicable ^[1] 50:18 applies ^[4] 14:20 45:3 55:7 57:14 apply ^[7] 31:6 43:15 50:18 61:8,13 64:21 66:18 appointed ^[1] 68:9 appreciation ^[1] 68:2 approach ^[3] 28:13,15 31:7 area ^[13] 5:15 6:1 12:20 20:4 21:2,5 34:7 36:8,12 41:23 42:19 54:9,10 areas ^[7] 5:22,25 9:14 36:4 51:5 52:22,23 aren't ^[3] 11:10 25:10 52:23 argue ^[1] 5:12 argued ^[1] 41:15 argument ^[18] 1:23 3:2,6,10,13 4:4,9 17:14 27:9 28:14 35:1 49:5,12 63:17,22 64:1,14 67:18 arguments ^[2] 49:6,7</p>	<p>around ^[4] 10:19 27:22 28:11 31:3 articulated ^[2] 29:19 60:20 asks ^[1] 29:13 assent ^[1] 33:1 assignment ^[2] 47:1 52:10 assigns ^[2] 49:1 50:3 Assistant ^[1] 2:2 ASSOCIATION ^[3] 1:8,15 4:6 assume ^[1] 34:1 assumed ^[1] 50:15 assumes ^[1] 58:16 assuming ^[1] 16:2 ATLANTIC ^[2] 1:11 24:25 attention ^[1] 35:8 Authorities ^[5] 36:3 51:3 52:14,25 64:6 authority ^[17] 8:22 13:23 14:15 18:1 22:8,9 28:17 40:16,17 47:1 51:22 58:18,22 60:6 64:9,21 66:15 authorized ^[1] 28:23 award ^[1] 54:1 away ^[2] 39:8 52:17</p>
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