Nos. 99-989 and 99-1000

In the Supreme Court of the United States

CARL E. BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

HAROLD M. ARMSTRONG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the National Park Service may regulate commercial tour-boat operations on Rainy Lake within Voyageurs National Park.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 186 F.3d 1055.[1] The orders and opinions of the district court and magistrate judge (Pet. App. 21a-41a) are not yet reported.

[1] The citations to "Pet. App." refer to the petition appendix in No. 99-989.

JURISDICTION

The judgment of the court of appeals (Pet. App. 20a) was entered on July 28, 1999. A petition for rehearing was denied on September 10, 1999 (Pet. App. 54a). The petitions for a writ of certiorari were filed on December 9, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial before a magistrate judge in the United States District Court for the District of Minnesota, petitioners were convicted of conducting commercial operations on the waters of Voyageurs National Park in violation of 16 U.S.C. 3 and 36 C.F.R. 5.3. Petitioner Brown was sentenced to 60 days' imprisonment and fined $5000, while petitioner Armstrong was sentenced to 30 days' imprisonment and fined $300. See 16 U.S.C. 3; 18 U.S.C. 3559, 3571. Petitioners' terms of imprisonment and a portion of the fines were stayed on condition that they comply with the terms of their unsupervised probation. See Pet. App. 6a-7a, 28a-30a.

1. In 1970, Congress enacted the Voyageurs National Park Act, which authorized the Secretary of the Interior to establish a 219,000-acre national park within the State of Minnesota along the United States-Canada border. 16 U.S.C. 160 *et seq.* Congress took that action to preserve "the outstanding scenery, geological conditions, and waterway system which constituted a part of the historic route of the Voyageurs who contributed significantly to the opening of the Northwestern United States." 16 U.S.C. 160.

Congress directed the Secretary of the Interior to establish Voyageurs National Park "at such time as the Secretary deems sufficient interests in lands or waters

have been acquired for administration," and it made the establishment contingent on Minnesota's donation of state-owned lands within the park boundaries. 16 U.S.C. 160a. Minnesota, which had long sought national park designation for the area, enacted legislation donating the necessary lands. See Minn. Stat. § 84B.01-10 (1971). The Secretary of the Interior officially established Voyageurs National Park in 1975. See 40 Fed. Reg. 15,921-15,922 (1975).

Congress has authorized the Secretary of the Interior to promulgate regulations governing the use of lands and waters within the National Park System. 16 U.S.C. 1a-2(h), 3. Since at least 1966, the National Park Service has prohibited "[e]ngaging in or soliciting any business in park areas, except in accordance with the provisions of a permit." 36 C.F.R. 5.3. Congress has made the violation of National Park Service regulations, including 36 C.F.R. 5.3, punishable as a criminal offense. See 16 U.S.C. 3.

2. In August 1996, petitioners were apprehended while operating tour boats, without permits, within the boundaries of Voyageurs National Park, in violation of 36 C.F.R. 5.3. Petitioner Brown deliberately engaged in the illegal activity to express his longstanding view that the National Park Service lacks any authority to regulate commercial activity on Rainy Lake within the boundaries of Voyageurs National Park. See Pet. App. 33a-34a. Petitioner Armstrong, a Canadian citizen and acquaintance of Brown, joined in that activity. See *ibid.* Petitioners were convicted of violating 36 C.F.R. 5.3. Brown has twice previously been convicted of wilfully violating National Park Service regulations under similar circumstances. See *United States* v. *Brown*, 552 F.2d 817 (8th Cir.), cert. denied, 431 U.S. 949 (1977) (*Brown I*); *United States* v. *Brown*, Violation Notice

No. P363422 (D. Minn. Mar. 29, 1994) (*Brown II*), *reprinted at* Pet. App. 42a-53a.

3. The court of appeals affirmed petitioners' convictions, rejecting their argument that the United States lacks authority to regulate commercial activity on Rainy Lake within Voyageurs National Park. Pet. App. 1a-19a. The court first reaffirmed its prior ruling in *Brown I* that "Minnesota consented to the [National Park Service's] exercise of jurisdiction over business operations within [Voyageurs National Park], including the operation of tour boats." Pet App. 8a-9a. The court additionally concluded that, in any event, Congress properly exercised its authority under the Property Clause, U.S. Const. Art. IV, § 3, Cl. 2, to enact 16 U.S.C. 1a-2(h), which authorizes the National Park Service to "promulgate and enforce regulations concerning boating and other activities on or relating to waters located within areas of the National Park System." Pet. App. 12a-13a. Congress's enactment of 16 U.S.C. 1a-2(h) accordingly provided "an 'additional basis for jurisdiction' independent of the jurisdiction Minnesota ceded to the United States." Pet. App. 13a. Finally, the court rejected petitioners' arguments that two international treaties—the Root-Bryce Treaty, Jan. 11, 1909, U.S.-Gr. Brit., 36 Stat. 2448, and the Webster-Ashburton Treaty, Aug. 9, 1842, U.S.-Gr. Brit., 8 Stat. 572—prohibited the United States from regulating tour boats on boundary waters within Voyageurs National Park. The court concluded that those treaties, which preserve "free" navigation on boundary waters, do not prevent the United States or Canada

from enacting non-discriminatory rules and regulations respecting tour boat operators. Pet. App. 16a.[2]

ARGUMENT

The court of appeals correctly ruled that the National Park Service may regulate commercial tour-boat operations on lakes within Voyageurs National Park. That ruling does not conflict with any decision of this Court or another court of appeals and does not warrant further review.

1. Petitioners contend that the court of appeals' decision conflicts with decisions of this Court and other courts of appeals "regarding the sovereign rights of states under the Constitution." See 99-989 Pet. 12-19; see also 99-1000 Pet. 17. They essentially contend that the court of appeals erred in ruling that Minnesota consented to the United States' exercise of regulatory jurisdiction within Voyageurs National Park and that express consent is an essential prerequisite before the National Park Service may regulate commercial activities on navigable waters within a national park. See 99-989 Pet. 21-27.

The court of appeals answered petitioners' challenge to the National Park Service's power to regulate commercial activities on navigable waters within Voya-

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[2] The court of appeals also considered petitioner Brown's challenge to his sentence. The court rejected Brown's argument that the sentence was excessive and "cruel and unusual" except insofar as it prohibited Brown, as a condition of probation, from entering Voyageurs National Park to pursue non-business activities. The court of appeals remanded the case to the district court with instructions to modify petitioner Brown's conditions of probation to make clear that Brown could "visit [Voyageurs National Park] to engage in the same recreational and educational activities as other visitors to [the Park]." Pet. App. 19a.

geurs National Park by reaffirming that court's 1977 ruling in *Brown I* that "the state of Minnesota consented to the [National Park Service's] exercise of jurisdiction over business operations within [the Park], including the operation of tour boats." Pet. App. 8a-9a. This Court denied Brown's previous petition for a writ of certiorari in *Brown I* involving the same issue and virtually identical facts. See *Brown* v. *United States*, 431 U.S. 949 (1977). There is no reason for this Court to engage in further review of that fact-bound, case-specific question, the effects of which are limited to one national park contained wholly within the jurisdiction of one court of appeals.

In any event, petitioners' challenge is premised on a misunderstanding of the relevant law. Petitioners appear to believe that the National Park Service can regulate activities on navigable waters within Voyageurs National Park only if the State has expressly conveyed its "sovereign" interests in those waters and the underlying submerged lands. See 99-989 Pet. 12-13, 16-17. As the court of appeals correctly recognized, however, the National Park Service's power to regulate commercial activities on navigable waters within Voyageurs National Park does not depend on whether the State has ceded it legislative jurisdiction over the waters in question or, for that matter, whether the State has conveyed its title to the submerged lands beneath those waters. See Pet. App. 12a-15a. The Property Clause of the Constitution empowers Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, Cl. 2. Congress, in turn, has lawfully authorized the National Park Service to "[p]romulgate and enforce regulations concerning boating and other activities on

or relating to waters located within areas of the National Park System." 16 U.S.C. 1a-2(h). The National Park Service accordingly has authority, derived from Congress's exercise of its Property Clause powers, to promulgate and enforce the regulations at issue here.

This Court addressed the scope of the Property Clause in *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976). In that case, the Court rejected New Mexico's contention that the Property Clause provides an insufficient basis for Congress to enact legislation to protect free roaming horses and burros found on federal lands. The Court stated at the outset:

> The question under the Property Clause is whether [Congress's] determination can be sustained as a "needful" regulation "respecting" the public lands. In answering this question, we must remain mindful that, while courts must eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress.

426 U.S. at 536 (citations omitted). The Court rejected as "without merit" the argument, which New Mexico pressed in *Kleppe* and petitioners assert in this case (99-989 Pet. 16-17), that Congress cannot regulate the matters in question unless it first obtains the State's consent through a grant of legislative jurisdiction. See *Kleppe*, 426 U.S. at 541-543.

Of particular relevance here, the Court rejected the notion that Congress cannot employ its Property Clause powers unless it first acquires "a property interest" in the subject of the regulation or the location where the regulated activity takes place. *Kleppe*, 426 U.S. at 537. To the contrary, Congress has "power to regulate conduct on *private* land that affects the public

lands." *Id.* at 538 (emphasis in original). See also *ibid.* ("the Property Clause is broad enough to reach beyond territorial limits"); *id.* at 546 ("it is clear that regulations under the Property Clause may have some effect on private lands not otherwise under federal control").

The Court noted in *Kleppe* that New Mexico's "narrow reading of the Property Clause" was inconsistent with the Court's prior decisions. 426 U.S. at 537. For example, in *Camfield* v. *United States*, 167 U.S. 518 (1897), the United States brought suit to compel the removal of a fence, constructed entirely on private property, that enclosed federal property. The government relied on an 1885 statute prohibiting enclosure of public lands. This Court upheld the statute and allowed removal of the fence, holding that the Property Clause conferred on Congress "the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection." 167 U.S. at 526. See *Kleppe*, 426 U.S. at 538.

The Court applied the same rationale in *United States* v. *Alford*, 274 U.S. 264 (1927). Alford was indicted for setting and leaving a fire on private property located near the public domain. The Court rejected the argument that Congress lacked the authority to regulate fires on private property, holding that "Congress may prohibit the doing of acts upon privately owned lands that may imperil the publicly owned forests." *Id.* at 267 (citing *Camfield*).

While petitioners cite this Court's decision in *Kansas* v. *Colorado*, 206 U.S. 46 (1907), as contrary authority, see 99-989 Pet. 20, the Court's decision in *Kleppe* expressly rejected that reading of *Kansas* v. *Colorado*. The Court explained that the language that petitioners

cite "does no more than articulate the obvious: The Property Clause is a grant of power only over federal property. It gives no indication of the kind of 'authority' the Clause gives Congress over its property." 426 U.S. at 537-538. Petitioners' reliance on *Colorado* v. *Toll*, 268 U.S. 228 (1925), see 99-989 Pet. 20, is likewise misplaced. In that case, the Court reversed the dismissal of a State's challenge to a federal park superintendent's claim of exclusive authority over a highway in Rocky Mountain National Park. See 99-989 Pet. 20. The Court's decision in *Kleppe* distinguished that case for reasons equally applicable here: "the Court found that Congress had not purported to assume jurisdiction over highways within the Rocky Mountain National Park, not that it lacked the power to do so under the Property Clause." 426 U.S. at 544.

The court of appeals properly applied this Court's Property Clause principles in this case. See Pet. App. 13a-15a. Congress has created the National Park System, including Voyageurs National Park, "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. 1; see 16 U.S.C. 160, 160f(a). Congress has authorized the Secretary of the Interior to promulgate regulations governing the use of lands and waters within the National Park System, 16 U.S.C. 1a-2(h). The National Park Service's regulation of commercial tour boats in Voyageurs National Park in accordance with Congress's legislative directives under the Property Clause is a lawful exercise of the federal government's power to protect and preserve federal property for the public good. See 16 U.S.C. 3; 36 C.F.R. 5.3.

As the court of appeals recognized, the Property Clause provides an independent basis, apart from state consent, for rejecting petitioners' challenge to the National Park Service's authority. The court of appeals' ruling is not only consistent with this Court's decisions, but it is also consistent with the decisions of other courts of appeals that have addressed analogous issues. Petitioner is unable to identify any court of appeals decisions in conflict with the decision below. To the contrary, the courts of appeals have repeatedly recognized that the Property Clause allows the United States to regulate activities that affect federal lands, even if those activities occur on navigable waters or adjacent state-owned lands. See *Free Enter. Canoe Renters Ass'n* v. *Watt*, 711 F.2d 852, 855-856 (8th Cir. 1983); *United States* v. *Arbo*, 691 F.2d 862, 865 (9th Cir. 1982); *Minnesota* v. *Block*, 660 F.2d 1240, 1249 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982); *United States* v. *Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979); *Brown I*, 552 F.2d at 822; see also *McGrail & Rowley* v. *Babbitt*, 986 F. Supp. 1386, 1394-1395 (S.D. Fla. 1997), appeal docketed, No. 99-10280-BB (11th Cir.).

2. Petitioner Armstrong additionally argues that the National Park Service lacks authority to regulate his activities by virtue of the Webster-Ashburton and Root-Bryce treaties. 99-1000 Pet. 10-16. The court of appeals properly rejected that argument. As the court explained:

> The treaties make clear that both the United States and Canada may adopt laws and regulations not inconsistent with the privileges of free navigation, so long as the laws are applied in a nondiscriminatory manner. Certainly requiring a tour boat operator in a national park to obtain a permit is not

> unreasonable and is not inconsistent with the privileges of free navigation. Moreover, it is clear that the regulations are applied in a nondiscriminatory manner. The regulation is equally applicable to American and Canadian citizens who seek to operate a business operation in [Voyageurs National Park].

Pet. App. 16a. Accord *Block*, 660 F.2d at 1257. This case and *Block* are the only court of appeals cases to address the question, and they are in agreement. There is no warrant for this Court to address Armstrong's novel argument, which presents a narrow question of treaty interpretation that has not generated any conflict among the courts of appeals.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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