No. 18-______

In The
Supreme Court of the United States

HAVASUPAI TRIBE,

Petitioner,

v.

HEATHER C. PROVENCIO, Forest Supervisor, Kaibab National Forest; UNITED STATES FOREST SERVICE, an agency in the U.S. Department of Agriculture, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 106 of the National Historic Preservation Act ("NHPA"), 54 U.S.C. § 306108, requires federal agencies to consult with Indian tribes and other interested parties to assess and mitigate the potential adverse impacts that a project requiring federal approval may have on sites of historic and cultural significance.

The question presented here is whether the NHPA imposes a continuing obligation upon federal agencies to engage in consultation under Section 106 when an agency maintains supervision of an ongoing project, and has the opportunity to require changes to mitigate adverse impacts after the initial approval.

PARTIES TO THE PROCEEDING

Petitioner Havasupai Tribe was a plaintiff-appellant below.

Respondents Heather C. Provencio, Forest Supervisor, Kaibab National Forest and the United States Forest Service, an agency in the U.S. Department of Agriculture, were defendants-appellees below.

Respondents Energy Fuels Resources (USA), Inc. and Energy Fuels Arizona Strip LLC were intervenor-defendants-appellees below.

Respondents Grand Canyon Trust, Center for Biological Diversity and Sierra Club were plaintiff-appellants below.

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PETITION FOR A WRIT OF CERTIORARI

The Havasupai Tribe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 906 F.3d 1155. Pet. App. 1–23. The District Court's opinion is reported at 98 F. Supp. 3d 1044. Pet. App. 24–84.

JURISDICTION

The Ninth Circuit entered its initial opinion on December 12, 2017. The Ninth Circuit denied the Havasupai Tribe's petition for rehearing *en banc* on October 25, 2018, but issued a new opinion on that date and withdrew its previous opinion. *See* Pet. App. 3–4. On January 3, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including March 24, 2019. *See* No. 18A694. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the National Historic Preservation Act ("NHPA"), 54 U.S.C. §§ 300101, *et seq.*, the relevant portions of which are reproduced at Pet. App. 86–87. The relevant portions of the NHPA regulations, 36 C.F.R. Part 800, are reproduced at Pet. App. 87–95.

INTRODUCTION

Section 106 of the National Historic Preservation Act ("NHPA"), 54 U.S.C. § 306108, requires federal

agencies to consult with Indian tribes and other interested parties regarding the potential adverse impacts that federally-approved or federally-funded projects, referred to in the statute as "undertakings," may have on sites of historic or cultural significance, that have been listed or identified as eligible for listing on the National Register of Historic Places ("historic properties"). The goal of the consultation is to develop measures to "avoid, minimize, or mitigate the adverse effects on the historic properties." 36 C.F.R. § 800.6(a). It is through this Section 106 consultation process that the NHPA accomplishes its purpose of preserving "sites and structures of historic, architectural, or cultural significance." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 108 n.1 (1978); *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 787 (9th Cir. 2006).

Four federal circuit courts have held that when an undertaking is ongoing, Section 106 imposes a *continuing* obligation upon federal agencies to conduct consultation at each juncture at which the undertaking could be modified to limit its adverse impacts. *See Vieux Carré Prop. Owners v. Brown*, 948 F.2d 1436, 1445 (5th Cir 1991); *Morris Cty. Tr. for Historic Pres. v. Pierce*, 714 F.2d 271, 280 (3d Cir. 1983); *Romero-Barcelo v. Brown*, 643 F.2d 835, 859 n.50 (1st Cir. 1981), *rev'd on other grounds sub nom. Weinberger v. Romero-Barcelo*, 456 U.S. 305, 320 (1982); *WATCH (Waterbury Action to Conserve Our Heritage Inc.) v. Harris*, 603 F.2d 310, 326 (2d Cir. 1979). These courts have found that NHPA continues to impose obligations on federal agencies as long as the agency "has the ability to

require changes that could conceivably mitigate any adverse impact the project might have on historic preservation goals." *Vieux Carré*, 948 F.2d at 1445; *see also Morris Cty.*, 714 F.2d at 280. These rulings are based upon the language of NHPA, its historic-preservation goals, and the regulations promulgated by the Advisory Council on Historic Preservation ("ACHP") to implement Section 106.

In the decision below, the Ninth Circuit Court of Appeals departed from every other circuit court that has considered this question and found that a Section 106 consultation was only required when an undertaking was initially approved. In this case, the Forest Service had approved a Plan of Operations for a uranium mine, to be known as the Canyon Mine, in 1986, and the Ninth Circuit ruled that this initial approval "was the only 'undertaking' requiring a consultation under the NHPA." Pet. App. 15. Before any significant development had occurred, the mine was shut down, and the site remained dormant for twenty years. During that time, the site of the mine and the surrounding area was recognized as a traditional cultural property ("TCP") protected under NHPA, due to its tremendous religious and cultural significance to the Havasupai Tribe. But when the mining company decided that it wanted to reopen the mine, which triggered new Forest Service review and action, the Forest Service decided that only "emergency" consultation was required by Section 106, and the Ninth Circuit ruled that the Forest Service was not required to undertake any consultation whatsoever.

The Third Circuit's decision in *Morris County* and the Second Circuit's decision in *WATCH* both expressly rejected the view that a federal agency's Section 106 obligations terminated after the agency's initial approval or funding of a project, but the Ninth Circuit's decision does not address or distinguish those rulings. Instead, the decision was based upon a clear misapplication of NHPA's terms. The Ninth Circuit ruled that the Forest Service's approval of the Plan of Operations for the mine "was the only 'undertaking' requiring a consultation under the NHPA." Pet. App. 15. But both the NHPA itself and regulations expressly define an "undertaking" to be the "project, activity or program" approved or funded by the federal agency. 54 U.S.C. § 300320; 36 C.F.R. § 800.16(y). Thus, the "undertaking" in this case is clearly the mining operation, not the agency's approval of the Plan of Operations, as the Ninth Circuit erroneously ruled. Because the "undertaking" is ongoing, the Court should have found that the agency's NHPA obligations were ongoing as well.

In addition to creating a circuit split, the Ninth Circuit's ruling presents an issue of importance because it will result in the destruction of sites and buildings of historic and cultural significance that can never be replaced. Many federally approved or funded projects are ongoing for years or even decades, just like the uranium mine at issue in this case, and, as here, the agency often has occasion to revisit its initial approval. If an agency's NHPA consultation obligations end after the initial approval, as the Ninth Circuit ruled, the NHPA will provide no protection for historic

properties that were only recognized as eligible for protection after the time of that initial approval, and these historic properties will likely be damaged or destroyed as a result. While this case has been pending, for example, a 1,400-foot-deep mine shaft has been sunk in in the midst of an extremely sacred site of the Havasupai Tribe, which damages the Tribe's religious and cultural traditions in ways that can never be undone. This is precisely the type of harm that Congress sought to avoid when it passed NHPA. The Ninth Circuit's interpretation of NHPA in this case thus defeats the historic-preservation goals of the NHPA, and will result in the destruction of irreplaceable sites of historic and cultural significance.

This Court should thus grant certiorari and reverse the decision below.

STATEMENT OF THE CASE

A. Section 106 NHPA Consultations

The purpose of the NHPA is to "encourage preservation of sites and structures of historic, architectural, or cultural significance." *Penn Cent. Transp. Co.*, 438 U.S. at 108 n.1; *Pit River Tribe*, 469 F.3d at 787. This objective is accomplished through the Section 106 consultation process, which requires agencies to consult with Indian tribes that attach religious and cultural significance to historic properties that may be affected by an undertaking. *See* 36 C.F.R. §§ 800.3–800.13. The Section 106 regulations set forth a detailed process by

which this consultation occurs. *Id.* Among other things, the federal agency must identify the relevant parties for consultation, including Indian tribes that "might attach religious and cultural significance to historic properties," *id.* § 800.3(f)(2), identify and evaluate the significance of historic properties within the area of potential effects of an undertaking, *id.* § 800.4, assess the potential adverse effects on the historic properties, *id.* § 800.5, and work with the tribes and other consulting parties to implement "alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties," *id.* § 800.6(a).

This process is not a mere formality. Federal agencies have an "obligation[] to minimize the adverse effect" of an undertaking on historic properties. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 809 (9th Cir. 1999). The intended product of the consultation is a memorandum of agreement that will govern the undertaking, 36 C.F.R. § 800.6(c), and which is legally enforceable, *see Tyler v. Cuomo*, 236 F.3d 1124, 1134–35 (9th Cir. 2000). The NHPA also specifically requires that the Section 106 process be completed *before* the agency acts to allow the undertaking to go forward. *See* 54 U.S.C. § 306108 (requiring consideration of the effect of an undertaking "*prior to*" the approval of expenditure of federal funds or the issuance of any license) (emphasis added). This requirement ensures that mitigation measures can be implemented before destructive activities occur.

B. Factual Background

The mine at issue in this case is located in a small meadow located six miles south of Grand Canyon National Park. The meadow is called *Mit taav Tiivjuudva* by the Havasupai, and it has tremendous religious and cultural importance to the Tribe. Since time immemorial it has been a sacred place used by the Havasupai for pilgrimages, ceremonies, gathering of medicinal plants, and prayer. The meadow's significance is inexorably tied to Red Butte, *Wii gdwiisa*, a prominent, thousand-foot-high butte that towers over the meadow, four miles to the south. Both Red Butte and the meadow are highly significant sites in the religion or "Way" of the Havasupai Tribe. Much of the Havasupai's aboriginal territory, including Red Butte and the meadow, was taken from the Havasupai during the western expansion of the United States, and Red Butte and the meadow are now located in the Kaibab National Forest.

In 1986, the Forest Service approved a Plan of Operations for a 1,400-foot-deep breccia pipe uranium mine to be located in the meadow, and to be known as the "Canyon Mine." The Havasupai Tribe strongly objected to the mine, and subsequently challenged the Forest Service's decision on religious freedom and other grounds, but the Tribe was unsuccessful. *See Havasupai Tribe v. Robertson*, 943 F.2d 32, 35 (9th Cir. 1991). At the time the Forest Service approved the Plan of Operations, it did not conduct a Section 106 consultation to determine the potential adverse impacts on Red Butte or the meadow because at that time

tribal cultural sites were thought not to qualify as "historic properties" eligible for listing on the National Register and therefore protected under NHPA. The Plan of Operations required the Forest Service to monitor many aspects of the mining operation, and the 1986 Record of Decision permitted the agency to do further consultations with the Tribe and to require mitigation measures to address unforeseen impacts of the mining.

After the development of a few surface structures, the mine was placed on standby status in 1992, due to a fall in the price of uranium. The mine shaft had only been sunk fifty feet of the planned 1,400-foot depth. The mine remained shut down for twenty years. In 1992, during that period of inactivity, NHPA was amended to recognize tribal cultural sites as eligible for listing on the National Register, and thus eligible for protection as "historic properties." *See* 54 U.S.C. § 302706(a). Then, in 2010, the Forest Service issued a formal determination that Red Butte and the surrounding area, including the meadow in which the Canyon Mine is located, constituted a TCP, eligible for listing on the National Register, due to its cultural and religious significance to the Havasupai and several other Indian tribes.

In August of 2011, the mine operator notified the Forest Service that it intended to recommence development of the Canyon Mine. The Forest Service informed the company that the agency was required to determine if the company had "valid existing rights" before mining operations could resume, because the

Secretary of the Interior had withdrawn approximately one million acres of public land surrounding Grand Canyon National Park, including the site of the Canyon Mine, from location and entry under the mining law, subject only to valid existing rights. The Forest Service then spent ten months preparing a mineral validity report, which found that the mining company possessed valid existing rights. The Forest Service also prepared a Canyon Uranium Mine Review, a lengthy memorandum that concluded that no modifications were required to the previously-approved Plan of Operations at the Canyon Mine. In this Mine Review, the Forest Service determined that it was not required to undertake an ordinary Section 106 consultation to determine the possible adverse effects of the mine on the Red Butte TCP. However, it did decide that an abbreviated "emergency" consultation process under 36 C.F.R. § 800.13(b)(3) was applicable. On June 25, 2012, the Forest Service allowed mining operations to resume at the Canyon Mine, and on this same day, the Forest Service sent "consultation initiation letters" to the Tribe, other nearby tribes, and the ACHP.

The Havasupai, the ACHP, the Arizona State Historic Preservation Office, and other nearby tribes objected to the expedited Section 800.13(b)(3) process and instead urged that the Forest Service was required to undertake a full Section 106 consultation, which should occur before destructive mining activities resumed. The Forest Service disregarded these views. Instead, its "consultation" ultimately amounted to little more than an exchange of letters and one meeting at

the Canyon Mine site, which occurred seven months after the Forest Service had allowed mine development to resume.

C. Procedural Background

In March, 2013, the Tribe and three environmental groups sued the Forest Service under the Administrative Procedure Act, 5 U.S.C. § 706, for failure to comply with the NHPA, the National Environmental Protection Act, 42 U.S.C. §§ 4321, *et seq*. ("NEPA"), and other federal statutes. Jurisdiction was based on 28 U.S.C. § 1331. The Plaintiffs immediately moved for a preliminary injunction to halt ongoing destructive mining activities. The District Court denied that motion, and the plaintiffs appealed the denial to the Ninth Circuit. While that appeal was pending, Energy Fuels again voluntarily suspended operations at the mine due to depressed uranium prices. The case returned to District Court.

On April 7, 2015, the District Court granted the Forest Service's and Energy Fuels' motions for summary judgment and denied the Plaintiffs' motion for summary judgment. Pet. App. 24–85. The Tribe appealed the dismissal of its NHPA claims, and the environmental groups separately appealed the dismissal of the claims under NEPA and other federal statutes. The Ninth Circuit consolidated the appeals and denied the Plaintiffs' motions for an injunction pending appeal on June 30, 2015. Mining operations briefly resumed at the Canyon Mine and were then again suspended.

On December 12, 2017, the Ninth Circuit affirmed the District Court's ruling. The Tribe and the environmental groups filed separate petitions for a rehearing *en banc*. On October 25, 2018, the Ninth Circuit issued a new opinion which denied the petitions for rehearing *en banc* but withdrew the opinion filed December 12, 2017, and held that the District Court had erred in ruling that the environmental Plaintiffs lacked standing with respect to claims brought under the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701 *et seq.*, but it affirmed dismissal of all of the Tribe's claims under the NHPA. *See* Pet. App. 1–23.

This petition followed.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Creates an Inter-Circuit Split.

The Ninth Circuit's decision in this case creates an inter-circuit split. Prior to the Ninth Circuit's ruling, the Third Circuit, Fifth Circuit, Second Circuit, and First Circuit had all expressly recognized that the NHPA imposes *continuing* obligations upon federal agencies to engage in consultation to consider the potential adverse effects an ongoing undertaking may have on historic properties.

In *Morris County*, the Department of Housing and Urban Development ("HUD") approved an urban renewal plan that provided for the demolition of a

number of buildings, including a building called the Old Stone Academy. 714 F.2d at 273. Plaintiff brought suit to enjoin demolition of the Old Stone Academy due to HUD's failure to comply with NHPA and NEPA. *Id.* at 273–74. HUD argued that it had complied with NHPA because the Old Stone Academy was neither listed nor deemed eligible for listing on the National Register when the plan had been approved. *Id.* at 279. It had later been determined to be eligible. The Third Circuit ruled that "NHPA is applicable to an ongoing project at any stage where a Federal agency has authority to approve or disapprove Federal funding and to provide meaningful review of both historic preservation and community development goals." *Id.* at 280. The Third Circuit found that although the Act did not expressly mention ongoing projects, this interpretation was consistent with the purpose of the statute and was also supported by the regulations promulgated by the ACHP. *Id.* The Third Circuit then determined that HUD maintained continuing supervision over the project at issue and had had three opportunities to demand alterations, and thus it should have complied with the procedural requirements of NHPA on at least one of those occasions. *Id.* at 281–82. The Court therefore affirmed an injunction enjoining demolition of the Old Stone Academy until the agency completed an historic review under NHPA. *Id.* at 282.

Similarly, in *WATCH*, the plaintiffs sued HUD for not conducting a consultation under Section 106 for an urban renewal project that would result in the demolition of eighty-three buildings in Waterbury,

Connecticut. 603 F.2d at 311–15. The district court found that NHPA did not impose any duties on HUD because when HUD signed the contract funding the project, none of the buildings were listed on the National Register or deemed eligible for listing. *Id.* at 316. The Second Circuit reversed, finding that review was required under Section 106 of NHPA as long as HUD retained authority to make funding approvals pursuant to the grant and loan contract, and was not cut off when the original contract was signed. *Id.* at 325–26. The Court concluded that HUD had violated NHPA because it did not comply with Section 106 after one of the buildings in the project had been determined to be eligible for the National Register, and the Second Circuit enjoined demolition of the buildings until HUD complied with NHPA and NEPA. *Id.* at 326, 327.

In *Vieux Carré*, the plaintiffs challenged the Army Corps of Engineers' (the "Corps'") decision to allow the construction of a riverside park on the Bienville Street Wharf in New Orleans without conducting consultation under Section 106. 948 F.2d at 1438. While litigation was ongoing, the project was substantially completed, and the district court concluded that the case was moot because there was no authority for requiring a historic review of a completed project. *Id.* at 1442. But the Fifth Circuit reversed, finding that as long as the project is "under federal license and the Corps has the ability to require changes that could conceivably mitigate any adverse impact the project might have on historic preservation goals, the park project remains a federal undertaking and NHPA review is

required." *Id.* at 1445. The Fifth Circuit relied upon *Morris County* and *WATCH* as recognizing that NHPA "applied to ongoing federal actions." *Id.* at 1444–45, n.27. The Fifth Circuit also rejected the district court's concern that NHPA review would penalize the non-federal developers because the circuit court found that the developers' interests would also be taken into consideration in the Section 106 process. *Id.* at 1445. Finally, the Fifth Circuit noted that if, on remand, the district court determined that the suit was moot because the Corps no longer had jurisdiction over the park, the district court should then determine whether the Corps' jurisdiction over the Bienville Street Wharf would allow it to order changes in the park project. *Id.* at 1449. The Fifth Circuit reiterated that "NHPA review is required as long as a federal agency has the ability, under any statute or regulation, to require changes to the federal license authorizing a project." *Id.*

Lastly, in *Romero-Barcelo v. Brown*, the Commonwealth of Puerto Rico sought to enjoin military training operations on the Island of Vieques due to, among other things, the Navy's failure to comply with Section 106. 643 F.2d at 837–40. The First Circuit found that the Navy had failed to satisfy its obligations under NHPA because the Navy had not completed a survey to identify all sites that appeared to qualify for listing on the National Register. *Id.* at 860. In reaching this conclusion, the First Circuit also expressly found that Section 106 applied to the ongoing project because, like NEPA, it applies to "ongoing federal activities." *Id.* at

859 n.50. This Court subsequently reversed this decision on other grounds. *See Weinberger*, 456 U.S. at 320.

In each of these cases, the federal circuit courts recognized that federal agencies have continuing obligations under NHPA where projects are ongoing, and where the agencies have opportunities to require mitigation of adverse impacts on historic properties. Relying on these cases, district courts, including the District Court in this case, have also recognized the continuing nature of a federal agency's consultation obligations under the NHPA. *See*, *e.g.*, *Battle Mountain Band v. Bureau of Land Mgmt.*, No. 3:16-CV-0268-LRH-WGC, 2016 WL 4497756, at *8 (D. Nev. Aug. 26, 2016) (discussing circumstances when an "ongoing obligation" under Section 106 is triggered); *Grand Canyon Tr. v. Williams*, 38 F. Supp. 3d 1073, 1082 (D. Ariz. 2014) (citing case law establishing "ongoing" nature of NHPA obligations); *N. Oakland Voters All. v. City of Oakland*, No. C-92-0743 MHP, 1992 WL 367096, at *10 (N.D. Cal. Oct. 6, 1992) (finding agency had continuing obligation to complete Section 106 consultation for ongoing undertaking).

The Ninth Circuit's decision in this case, however, departed from this unbroken line of rulings of the other circuit courts. The Ninth Circuit ruled that the Forest Service's initial approval of the Plan of Operations for the mine in 1986 "was the only 'undertaking' requiring consultation under the NHPA." Pet. App. 15. Further, the Ninth Circuit ruled that the definition of an "undertaking" under the NHPA did not "encompass[] a continuing obligation to evaluate previously

approved projects." Pet. App. 16. The Ninth Circuit thus interpreted the NHPA to only require the Forest Service to conduct a Section 106 consultation for the initial approval of the mine, regardless of the fact that the area encompassing Red Butte and the mine site was later recognized as a TCP, and regardless of the fact that when the company decided to reopen the operation, the Forest Service had a new opportunity to make changes to the Plan of Operations.

This ruling is directly contrary to both *Morris County* and *WATCH*, which specifically found that federal agencies' NHPA obligations were not limited to the initial approval of the project. In both of those cases, just as here, the historic properties at issue had only become eligible or been listed on the National Register after the initial approval by the federal agency. But the Ninth Circuit did not discuss or distinguish these contrary rulings from other circuit courts.

The Ninth Circuit's justification for its ruling that Section 106 only applied to the initial approval of the mine was based upon a cursory description of the history of the definition of the term "undertaking" in Section 106 and the regulations issued under it. Pet. App. 16. But the Court's decision misapplied this defined term by stating that the Forest Service's approval of the Plan of Operations was "the only 'undertaking' requiring a consultation under the NHPA." Pet App. 15. This is clearly incorrect because both the statute and regulations define the term "undertaking" as the "project, activity or program" approved or funded by the federal agency. 54 U.S.C. § 300320; 36 C.F.R.

§ 800.16(y). The ongoing mining operation at the Canyon Mine is thus the "undertaking" in this case, not the *approval* by the federal agency. The undertaking was thus ongoing, and in fact stopped for 20 years then was proposed to restart, and so the Ninth Circuit should have found that the Forest Services' NHPA obligations were ongoing and were triggered anew by the company's decision to reopen operations.

The Ninth Circuit did not consider the factors that the other circuit courts had relied upon in interpreting NHPA, including the purpose of the statute and other language in the statute and regulations that indicate Congress intended that agencies' obligations under the NHPA would be continuing. Nor did the Ninth Circuit identify any statements in the legislative history or rulemaking process indicating that Congress or the ACHP intended the definition of an "undertaking" to exclude ongoing or continuing projects.

The fact that the Ninth Circuit has interpreted NHPA differently from other circuit courts, leading to dramatically different results, and offered differing justifications for its interpretation, calls for an exercise of this Court's supervisory power. *See* Supreme Court Rule 10(a).

Petitioner notes that although the Ninth Circuit found that the NHPA did not require consultation after the initial approval, the circuit court did recognize that the NHPA regulations impose a more limited set of continuing obligations under 36 C.F.R. § 800.13(b). Pet. App. 16–18. The regulations in Section 800.13(b) apply

when "historic properties are discovered or unanticipated effects on historic properties [are] found after the agency official has completed the section 106 process." 36 C.F.R. § 800.13(b). This section would apply if, for example, the ruins of a historic building were unexpectedly discovered during a federally-approved construction project. But the Ninth Circuit's decision strongly suggested that this provision of the regulations did not apply in this case because a change in Red Butte's eligibility for inclusion on the National Register is "not exactly a 'discovery.'" Pet. App. 18. Further, the Ninth Circuit stated that "there is no other regulation requiring an agency to consider the impact on newly eligible sites after an undertaking is approved," and thus the Forest Service's decision to apply Section 800.13(b) in this case "may have given the Tribe more than it was entitled to demand." *Id*. The strong implication of these statements is that even the abbreviated "emergency" consultation process that the Forest Service claimed was applicable (and which was not even commenced until after destructive activities were allowed to resume) was not actually required in this case. Again, this interpretation of NHPA and its regulations is directly contrary to the rulings in *Morris County* and *WATCH*, which found that the Section 106 consultation obligations did apply to protect historic properties that became eligible for inclusion on the National Register after the initial approval of a project.

This Court should grant certiorari in order to resolve this split between the circuits as to the correct interpretation of NHPA on this vitally important issue.

B. The Decision Below is Important and Warrants This Court's Immediate Review.

Certiorari should also be granted because of the importance of the question presented. This Court has never had the opportunity to specifically address a dispute arising under the NHPA or to interpret the meaning of the statute. But it has stated that the purpose of NHPA is to "encourage preservation of sites and structures of historic, architectural, or cultural significance." *Penn Cent. Transp. Co.*, 438 U.S. at 108 n.1. The Ninth Circuit's ruling defeats this objective by allowing historically and culturally significant sites to be destroyed by an ongoing undertaking even though the federal agency has the opportunity to make changes to the project to protect these sites. These harms will be irreparable, resulting in a loss of history and culture that cannot be replaced or remedied by later action.

The case at hand demonstrates the type of irreversible harm that will result under the Ninth Circuit's interpretation. Red Butte and the meadow where the mine are located are sites of tremendous religious and cultural significance to the Havasupai Tribe. Havasupai elders provided confidential information in the record in this case about the significance of these sites in the Tribe's religious beliefs, and how the construction and operation of the mine on this site would irreparably harm the Tribe's religious and cultural traditions. The Forest Service did not consider the mine's impact on these sites when it initially approved the Plan of Operations in 1986, however, because at that time the NHPA arguably did not protect sites with

significance to tribes. And the Ninth Circuit has now ruled that the Forest Service was not required to conduct a new Section 106 consultation and implement mitigation measures prior to allowing the resumption of mining activity in 2012, notwithstanding that the agency continued to monitor the mining operation and had the opportunity to require changes to the mine plan.

As a result, irreparable harm has been, and continues to be, inflicted upon this sacred site. While this case has been pending, a 1,400-foot shaft has been sunk into the meadow, damaging this sacred religious and cultural site in ways that can never be undone. Because the highly volatile price of uranium has fallen again, mining operations have again been suspended, meaning that the meadow will remain fenced off and covered in mining buildings and equipment for the indefinite future. An entire generation of Havasupai children have thus been deprived of the opportunity to take pilgrimages to this sacred place, as is the Tribe's tradition. Although the Forest Service now, once again, has an opportunity to conduct a full Section 106 consultation to protect this site, the Ninth Circuit's ruling found that the Forest Service has essentially no obligations under Section 106, which virtually assures that no meaningful consultation will ever occur.

As the cases from other circuit courts demonstrate, the situation in which historic properties were not considered during the initial approval of a project is not unique to the Havasupai. Federally-approved and federally-funded projects may often take years or

even decades to complete, during which time historic and culturally significant buildings and sites may become recognized as eligible for or added to the National Register. The question of whether the NHPA will provide any protection to those historic properties is thus an important issue that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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