No. 12-1173

In The
Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST
AND MARVIN M. BRANDT, TRUSTEE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF OWNERS' COUNSEL OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESSES SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS

ROBERT H. THOMAS
Counsel of Record
MARK M. MURAKAMI
BETHANY C.K. ACE
Damon Key Leong
Kupchak Hastert
1003 Bishop Street
1600 Pauahi Tower
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

KAREN R. HARNED
LUKE A. WAKE
NFIB Small Business
Legal Center
1201 F Street, NW, Suite 200
Washington, D.C. 20004
(202) 314-2048
karen.harned@nfib.org
luke.wake@nfib.org

Counsel for Amici Curiae

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to this Court's Rule 37.3(b), Owners' Counsel of America (OCA) and National Federation of Independent Businesses Small Business Legal Center (NFIB Legal Center) respectfully request leave of the Court to file the attached brief *amici curiae* in support of the Petitioners. *Amici* have received the consent of Petitioners, but Respondent has not responded to *amici*'s request for consent. OCA participated as *amicus* at the certiorari stage of this case, filing a similar brief in support of the Petitioners.

The background and experience of *amici* are detailed in the attached brief. They submit this brief to assist the Court in its consideration of the case by detailing how redefinition of railroad right of way from "easement" to "implied reversionary interest" would undermine an entire class of rails-to-trails takings claims and the ability of property owners nationwide to recover just compensation when their private property has been pressed into public service as a recreational trail. If left standing, the Tenth Circuit's decision will wipe out well-settled expectations of owners whose property interests are based on grants subject to the General Railroad Right of Way Act of 1875, 43 U.S.C. § 934, and the common conception of what it means to own property subject to a right of way for railroad purposes.

OCA and NFIB Legal Center believe their long experience in advocating for property owners and protecting their constitutional rights will provide an additional, valuable viewpoint on the issues presented to the Court.

For the foregoing reasons, the motion of OCA and NFIB Legal Center to file a brief *amici curiae* should be granted.

Respectfully submitted.

ROBERT H. THOMAS
Counsel of Record
MARK M. MURAKAMI
BETHANY C.K. ACE
Damon Key Leong
Kupchak Hastert
1003 Bishop Street
1600 Pauahi Tower
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

KAREN R. HARNED
LUKE A. WAKE
NFIB Small Business
Legal Center
1201 F Street, NW, Suite 200
Washington, D.C. 20004
(202) 314-2048
karen.harned@nfib.org
luke.wake@nfib.org

Counsel for Amici Curiae

NOVEMBER 2013.

QUESTION PRESENTED

This case involves the General Railroad Right-of-Way Act of 1875 ("1875 Act"), under which thousands of miles of rights-of-way exist across the United States. In *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942), this Court held that 1875 Act rights-of-way are easements and not limited fees with an implied reversionary interest. Based upon the 1875 Act and this Court's decisions, the Federal and Seventh Circuits have concluded that the United States did not retain an implied reversionary interest in 1875 Act rights-of-way after the underlying lands were patented into private ownership. In this case, the Tenth Circuit reached the opposite conclusion and acknowledged that its decision would continue a circuit split. The question presented is:

Did the United States retain an implied reversionary interest in 1875 Act rights-of-way after the underlying lands were patented into private ownership?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

CONSTITUTIONS, STATUTES, AND RULES

LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

INTEREST OF THE *AMICI CURIAE*

Owners' Counsel of America (OCA) is an invitation-only national network of the most experienced eminent domain and property rights attorneys.[1] They have joined together to advance, preserve and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights (2d ed. 1998). As the lawyers on the front lines of property law and property rights, OCA members understand the importance of the issues in this case, and how redefinition of railroad right of way from "easement" to "implied reversionary interest" would undermine an entire class of rails-to-trails takings claims, and the ability of property owners nationwide to recover just compensation when their private property has been pressed into public service as a recreational trail. If left standing, the Tenth Circuit's decision will wipe out well-settled expectations of owners whose property interests are based on grants subject to the General Railroad Right of Way Act of 1875, 43 U.S.C. § 934 (1875 Act), and the common conception of what it means to own property subject to a right of way for railroad purposes.

---

1. Petitioners' counsel consented to the filing of this brief, and Respondent has not responded to *amici*'s request for consent. Pursuant to this Court's Rule 37, counsel states this brief was not authored in any part by counsel for either party, and no person or entity other than *amici* made a monetary contribution intended to fund the preparation or submission of this brief.

OCA brings unique expertise to this task. OCA is a non-profit 501(c)(6) organization sustained solely by its members. Only one member lawyer is admitted from each state. Since its founding, OCA has sought to use its members' combined knowledge and experience as a resource in the defense of private property ownership, and OCA member attorneys have been involved in landmark property law cases in nearly every jurisdiction nationwide. Additionally, OCA members and their firms have been counsel for a party or *amicus* in many of the property cases this Court has considered in the past forty years, including *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990), and most recently *Arkansas Game and Fish Comm'n v. United States*, 133 S. Ct. 511 (2012), and *Koontz v. St. Johns River Water Mgmt Dist.*, 133 S. Ct. 2586 (2013).[2] OCA members have also authored and edited treatises, books, and law review articles on property law and property rights.[3]

---

2. *See also Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection*, 130 S. Ct. 2592 (2010); *Winter v. Natural Resources Def. Council*, 555 U.S. 7 (2008); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

3. *See*, *e.g.*, Michael M. Berger, Taking Sides on Takings Issues (Am. Bar Ass'n 2002) (chapter on *What's "Normal" About Planning Delay?*); Michael M. Berger, *Supreme Bait & Switch: The*

The National Federation of Independent Businesses Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor

---

Ripeness Ruse in Regulatory Takings, 3 Wash. U.J.L. & Policy 99 (2000); Michael M. Berger & Gideon Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 9 Loy. L.A.L. Rev. 685 (1986); William G. Blake, The Law of Eminent Domain—A Fifty State Survey (Am. Bar Ass'n 2012) (editor); Leslie A. Fields, Colorado Eminent Domain Practice (2008); John Hamilton, Kansas Real Estate Practice And Procedure Handbook (2009) (chapter on *Eminent Domain Practice and Procedure*); John Hamilton & David M. Rapp, Law and Procedure of Eminent Domain in the 50 States (Am. Bar Ass'n 2010) (Kansas chapter); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of Penn Central Transportation Co. v. City of New York*, 13 Wm. & Mary Bill of Rts. J. 679 (2005); Dwight H. Merriam, Eminent Domain Use and Abuse: *Kelo* in Context (Am. Bar Ass'n 2006) (coeditor); Michael Rikon, *Moving the Cat into the Hat: The Pursuit of Fairness in Condemnation, or, Whatever Happened to Creating a "Partnership of Planning?"*, 4 Alb. Gov't L. Rev. 154 (2011); Randall A. Smith, *Eminent Domain After Kelo and Katrina*, 53 La. Bar J. 363 (2006); (chapters on *Prelitigation Process* and *Flooding and Erosion*).

enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact small businesses.

NFIB Legal Center has participated in numerous takings cases in recent years to defend the constitutional principle that private property cannot be taken without payment of just compensation. *See, e.g.*, *Koontz v. St. Johns River Water Mgmt Dist.*, 133 S. Ct. 2586 (2013) and *Arkansas Game and Fish Comm'n v. United States*, 133 S. Ct. 511 (2012). In this case NFIB Legal Center files to voice concerns over an interpretation of federal law that would effectively extinguish an entire class of takings claims. Previously the NFIB Legal Center filed in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection*, 130 S. Ct. 2592 (2010), raising a similar concern over interpreting a property interest in a manner that would effectively extinguish a viable takings claim. Moreover, the NFIB Legal Center has filed numerous briefs in support of petitions for certiorari asking the Court to review theories that effectively extinguish takings claims when title to a property is transferred between owners. *See e.g.*, *Mehaffy v. United States*, No. 12-1416 (2013) (concerning the Federal Circuit's rule that *Penn Central* takings claims are extinguished on transfer of title).

OCA and NFIB Legal Center believe their long experience in advocating for property owners and protecting their constitutional rights will provide an additional, valuable viewpoint on the issues presented to the Court.

SUMMARY OF ARGUMENT

Unable to prevail on a variety of theories in rails-to-trails takings cases in the Court of Federal Claims (CFC) and the Federal Circuit for more than a decade, the Government appears to have switched tracks. Instead of continuing its fruitless frontal attacks on these takings claims—attacks which the courts have repeatedly rebuffed—the Government in this case has sought to undermine the very notion of property ownership by redefining the rights of way granted for railway uses under the 1875 Act from easements that are extinguished when no longer used for a railroad, to "implied reversionary interests."

This brief makes two points. First, the Tenth Circuit's conclusion if accepted and applied nationwide as the Government urges, will eliminate an entire class of takings claims, and is nothing more than a backdoor way to avoid paying just compensation in cases that the Government keeps losing. Second, this Court's decision in *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942)—holding that 1875 Act rights of way are easements—is supported by the common law definition of right of way prevailing at the time that the 1875 Act was adopted. In the absence of an express indication of contrary intent, statutory terms used by Congress should be interpreted as having the meaning commonly assigned to

them at the time. This case presents the Court with the opportunity to provide definitive guidance that terms in a federal statute that are not expressly defined by Congress—but which have a commonly understood meaning—are not wholly malleable.

OCA and NFIB Legal Center respectfully ask this Court to reverse the Tenth Circuit and hold that railroad rights of way under the 1875 Act are easements, and the reversionary owners are entitled to continue to pursue claims for just compensation when their property is taken for public recreational trails.

ARGUMENT

I. DERAILING 1875 ACT TAKINGS CASES

Facing a string of adverse decisions in the CFC and Federal Circuit, the Government instituted this quiet title action as part of its apparent strategy to eliminate an entire class of rails-to-trails cases by securing a ruling that owners of land subject to 1875 Act rights of way do not own "property," and thus cannot state a takings claim. In *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990) (*Preseault I*), this Court sustained the federal rails-to-trails program[4] as a valid exercise of the federal commerce power, but concluded that converting an abandoned railroad right of way to trail use may "giv[e] rise to just compensation claims" under the Takings Clause. *Id*. at 13. Justices O'Connor, Scalia, and Kennedy elaborated, concluding that the conversion to trail

4. National Trails System Act, 16 U.S.C. § 1241, *et seq*.

use "may delay property owners' enjoyment of their reversionary interests, but that delay burdens and defeats the property interest rather than suspends or defers the vesting of those property rights." *Id*. at 22 (O'Connor, J., concurring). In the subsequent Tucker Act case, the Federal Circuit held the Government liable for compensation when recreational trail use exceeds the scope of the original railroad right of way. *Preseault v. United States*, 100 F.3d 1525, 1541 (Fed. Cir. 1996) (en banc) (*Preseault II*). That decision set out the elements of a rails-to-trails takings case:

> Under *Preseault II*, the determinative issues for takings liability are (1) who owns the strip of land involved, specifically, whether the railroad acquired only an easement or obtained a fee simple estate; (2) if the railroad acquired only an easement, were the terms of the easement limited to use for railroad purposes, or did they include future use as a public recreational trail (scope of the easement); and (3) even if the grant of the railroad's easement was broad enough to encompass a recreational trail, had this easement terminated prior to the alleged taking so that the property owner at the time held a fee simple unencumbered by the easement (abandonment of the easement).

Ellamae Phillips Co. v. United States, 564 F.3d 1367, 1372-73 (Fed. Cir. 2009) (citing *Preseault II*, 100 F.3d at 1533).

However, the Government refused to accept the situation and undertook an approach that recently led the Federal Circuit to wonder aloud "exactly what this *sturm und drang* is about" in rails-to-trails cases. *Evans v. United States*, 694 F.3d 1377, 1381 &

n.7 (Fed. Cir. 2012) (citing Friedrich Maximilian Klinger, Der Wirrwarr, oder Sturm und Drang (1776)). The court in that case criticized the Government's borderline frivolous strategy:

> And even more puzzling is why the Government, after *Bright* was decided, pursued the course it chose in the district courts and in this appeal, seeking with every possible argument—even if so thin as to border on the frivolous—to avoid acquiescing in plaintiffs' effort to have the district court judgments put aside and to proceed on the merits in the Court of Federal Claims.

Evans, 694 F.3d at 1381 (citing *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010)). This is not an isolated example of the "scorched earth" approach. In 2002 Congress held hearings into rails-to-trails takings cases, and directed the Government to resolve these cases more quickly and more fairly than it had been. *See Litigation and Its Effect on the Rails-to-Trails Program: Hearing Before the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary*, 107th Cong.June 20, 2002), *available at* http://commdocs.house.gov/committees/judiciary/hju80320.000/hju80320_0f.htm. As described by a noted property owners' lawyer in a recent law review article, "[i]n the first several years following the *Preseault II* decision, the Department of Justice (DOJ) continued to challenge the United States' liability by recycling the unsuccessful argument it has made in *Preseault II*." Cecilia Fex, *The Elements of Liability in a Trails Act Taking: A Guide to the Analysis*, 38 Ecol. L. Q. 673, 675-76 & n.6 (2011) (citations omitted). The article continues:

> After losing several liability arguments, culminating in a second Federal Circuit decision, *Toews v. United States*, the DOJ's challenges to the government's liability subsided. Beginning around 2003, the DOJ started stipulating to liability—or waiving the issue—instead of pursuing challenges in the courts. But the reprieve was brief.
>
> The DOJ has resurrected its challenges to the government's liability in recent years. In an apparent coordinated litigation strategy, the DOJ now routinely raises arguments that the Federal Circuit previously rejected. Worse for the attorneys and courts who do not typically deal with these Tucker Act cases, the DOJ advances these arguments without acknowledging the contrary law that was established during its earlier attempts to escape the government's liability.
>
> The DOJ's strategy relies on the marginalization of *Preseault II* as purportedly being limited to the facts in that case, glancing over the fundamental principles laid out in *Preseault I*, and ignoring *Toews* altogether. Accordingly, by recycling the arguments it made in *Preseault II* and *Toews*, the government persists in arguing in various guises that recreational use is no different from railroad use, or that railbanking is a "railroad purpose," so that nothing was taken from the landowner when the right of way became a recreational trail. In arguing that hikers and bikers are the same as railroad locomotives, the government sweeps several decades of contrary law under the rug.

Id. at 676 (citing *Toews v. United States*, 376 F.3d 1371 (Fed. Cir. 2004)). The courts have not been convinced by the Government's approach, concluding

it is "obvious,"[5] and that there is a "clear consensus" that trail use is "fundamentally different"[6] and "clearly different"[7] than a railway. *See also Howard v. United States*, 964 N.E.2d 779, 780-81 (Ind. 2012) (under Indiana law, railbanking and interim trail use are not within scope of railway easements).

Unsuccessful in rehashing the losing *Preseault II* arguments on liability, the Government shifted to making the same argument in the context of calculating just compensation, claiming that owners are

5. *Anna F. Nordhus Trust v. United States*, 98 Fed. Cl. 331, 338 (2011) ("To state the obvious, removing tracks to establish recreational trails is not consistent with a railroad purpose, and cannot be regarded as incidental to the operation of trains.").

6. *Ellamae Phillips Co. v. United States*, 99 Fed. Cl. 483, 487 (2011) ("There is clear consensus that recreational trail use is fundamentally different in nature than railroad use.").

7. *Ybanez v. United States*, 98 Fed. Cl. 659 (2011) ("The original parties to railroad conveyances between 1887 and 1891 would not likely have contemplated use of the right-of-way as a recreational trail. Such a use would be 'clearly different' from railway operations."). *See also Biery v. United States*, 99 Fed. Cl. 565, 576 (2011) ("Indeed, a recreational trail is only viable where the operation of trains has ceased. As such, recreational trail use is outside the scope of a railroad purpose easement."); *Capreal, Inc. v. United States*, 99 Fed. Cl. 133, 145 (2011) ("A railroad . . . has the primary purpose of transporting goods and people. The purpose of a recreational trail is fundamentally different. A bicycle trail does not exist to transport people but rather to allow the public to engage in recreation and enjoy the outdoors. The two uses are distinct and an easement for a recreational trail is not like in kind to an easement for railroads."); *Farmers Co-op. Co. v. United States*, 98 Fed. Cl. 797, 804 (2011) (railway purposes "are distinct from, and inconsistent with, use of the right-of-way as a recreational trail"); *Macy Elevator v. United States*, 97 Fed. Cl. 708, 730 (2011) ("The taking arises because recreational trail use does not fall within the scope of the original railroad easement.").

entitled only to recover the value of the land as if it were encumbered by a trail easement. This too was rejected by the CFC. *See*, *e.g.*, *Ingram v. United States*, 105 Fed. Cl. 518, 530 (2012) ("The measure of just compensation to the plaintiffs for the takings of plaintiffs' property should capture the value of the reversionary interests in their 'before taken' condition, unencumbered by the easements."); *Ybanez v. United States*, 102 Fed. Cl. 82, 88 (2011) ("The measure of just compensation is the difference between the value of plaintiffs' land unencumbered by a railroad easement, and the value of plaintiffs' land encumbered by a perpetual easement for recreational trail use."); *Rogers v. United States*, 101 Fed. Cl. 287, 294 (2011) (measure of compensation is the difference between the land unencumbered by a railroad easement, and the land encumbered by an easement for recreational trail use and railbanking); *Raulerson v. United States*, 99 Fed. Cl. 9, 12 (2011) (same). The most recent example of a pointless argument surfaced in *Ladd v. United States*, 713 F.3d 648 (Fed. Cir. 2013), in which the Federal Circuit soundly rejected the Government's argument the statute of limitations had started even though the Government had not informed owners of the Notice of Interim Trail Use (NITU), the action triggering their right to institute a claim for just compensation. The Government itself was unaware of the NITU, yet it claimed the owners should have been.[8]

---

8. The Government's rails-to-trails strategy has also needlessly increased the cost of resolving many of these cases, often beyond reason. For example, in *Hash v. United States*, No. 1:99-CV-00324-MHW, 2012 WL 1252624 (D. Idaho Apr. 13, 2012), the court awarded the property owners $2.24 million in attorney's fees and costs under the Uniform Relocation Assistance and Real Estate Acquisition Act, 42 U.S.C. § 4601 *et. seq*. Which

Taking advantage of a lower court split of authority and lack of recent guidance from this Court about the meaning of right of way,[9] the Government instituted this quiet title case. This litigation must be viewed in light of the Government's failed strategies, because the foundational issue in rails-to-trails compensation cases under *Preseault II*—indeed all takings cases—is whether the plaintiff possessed "property." If, as the Tenth Circuit concluded, property owners are deemed to not own anything, then their takings claims and their right to just compensation magically vanish. *Preseault II*, 100 F.3d at 1533. This issue turns on "the nature of the original conveyance that established the railroad's right to operate a railroad on the property at issue." *Ellamae Phillips Co.*, 564 F.3d at 1373–74. *See also Preseault I*, 494 U.S. at 21 (O'Connor, J., concurring) ("[d]etermining what interest petitioners would have enjoyed under [state] law, in the absence of the ICC's recent actions, will establish whether petitioners possess the predicate property interest that must underlie any takings claim."). *See also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992)

---

means that to secure an $883,312 just compensation award, it cost the plaintiffs more than two-and-a-half times that amount, and the taxpayers even more.

9. As the CFC noted:

> Since the Supreme Court's decision in *Great Northern*, cases have generally defined the right-of-way interest in 1875 Act as an easement. Unfortunately, however, the Supreme Court, in *Great Northern*, and in subsequent cases, has not provided a more specific definition of the term "easement" in the 1875 Act context.

Beres v. United States, 64 Fed. Cl. 403, 422 (2005) (footnote omitted).

(independent sources such as federal and state law define the range of interests that qualify for protection as property); *Almota Farmers Elevator Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1973) (only those with a valid property interest are entitled to compensation). The Tenth Circuit's conclusion in this case swallowed up every rails-to-trails takings case where the property owner's rights are based on a grant subject to the 1875 Act. The Government now urges this Court to impose this result nationwide.

II. REDEFINING RIGHT OF WAY TO MEAN AN "IMPLIED" REVERSIONARY INTEREST FUNDAMENTALLY DEPARTS FROM ITS LONG UNDERSTOOD MEANING

The Tenth Circuit's conclusion that the term "right of way" meant to signify the conveyance of a fee interest to the railroads with an implied right of reversion to the United States not only conflicts with this Court's ruling in *Great Northern*, but is a fundamental departure from the common law meaning of the term. Congress did not define "right of way" in the 1875 Act. It did not need to: the prevailing understanding at the time of the 1875 Act in the federal courts was that a railroad right of way conveyed only an extinguishable easement. For example, in *Southern Ry. Co. v. City of Memphis*, 97 F. 819 (6th Cir. 1899), the court denied a railroad's request to enjoin the city from removing its tracks because the "conditional easement" granted (limiting use to cars drawn by horse or other animal) was impossible to enjoy, and the easement terminated. The court likened the situation to an easement for a particular purpose, which "[i]f that purpose cease to exist, or its enjoy-

ment become impossible, the grant is at an end." *Id*. at 822 ("Thus, where there was a reservation of a right of way over flats appurtenant to uplands, for water craft, to and from a dock or wharf, the easement was held to be extinguished by the subsequent construction by the city of a public street between the plaintiff's upland and the dock, which made access to the dock and deep water impossible."). The common law understanding of right of way in state courts at the time of the adoption of the 1875 Act was the same, as illustrated by the decision of the Wisconsin Supreme Court concluding that the term described an easement, and not a fee or a reversionary interest:

> "Right of way," in its strict meaning, is "the right of passage over another man's ground," and in its legal and generally accepted meaning, in reference to a rail *way*, it is a mere easement in the lands of others, obtained by lawful condemnation to public use, or by purchase. It would be using the term in an unusual sense, by applying it to an absolute purchase of the fee-simple of lands to be used for a railway or any other kind of way.

Williams v. Western Union Ry. Co., 5 N.W. 482, 484 (Wis. 1880) (citing Henry E. Mills & Augustus L. Abbott, Mills on the Law of Eminent Domain § 110 (1879)). That understanding remains the same today, and many state courts have concluded that a railway right of way is an extinguishable easement. For example, the Washington Supreme Court rejected the argument that a rail right-of-way is a "perpetual public easement," and concluded that under Washington property law, it is an interest terminated when the railroad abandons a line:

> At common law, where a deed is construed to convey a right of way for railroad purposes only, upon abandonment by the railroad of the right of way the land over which the right of way passes reverts to the reversionary interest holder free of the easement.

Lawson v State, 730 P.2d 1308, 1311 (Wash. 1986). *See also Pollnow v. State Dep't of Nat. Resources*, 276 N.W.2d 738, 744 (Wis. 1979) ("We hold that the only interest the railroad gained in the right of way by adverse possession was an easement."); *Michigan Dep't of Nat. Resources v. Carmody-Lahti Real Estate, Inc.,* 699 N.W.2d. 272, 280 (Mich. 2005) ("As we recognized over seventy years ago in *Quinn*, a deed granting a right-of-way typically conveys an easement, whereas a deed granting land itself is more appropriately characterized as conveying a fee or some other estate[.]") (citing *Quinn v. Pere Marquette Ry. Co.*, 239 N.W. 376 (Mich. 1931)).

When the 1875 Act was adopted, easements were incorporeal hereditaments only. Although a railroad easement has been described as "more than an ordinary easement[,]" having the "attributes of the fee," *New Mexico v. U.S. Trust Co.*, 172 U.S. 171, 183 (1898), this did not alter a railroad right of way's fundamental nature as an easement. *See id.* ("The easement is not that spoken of in the old law books, but is peculiar to the use of a railroad") (quoting *Smith v. Hall*, 72 N.W. 427 (Iowa 1897)). That a railroad easement may not have precisely the same scope of permitted uses as other easements does not alter the essential nature of the interest granted. As the Tenth Circuit noted in a case under a predecessor statute involving a railroad right of way, "right of

way" was used because unlike common law easements, railway rights of way were generally exclusive:

> For the purposes of this case, we are not impressed with the labels applied to the title of the railroads in their rights-of-way across the public lands of the United States. The concept of "limited fee" was no doubt applied in *Townsend* because under the common law an easement was an incorporeal hereditament which did not give an exclusive right of possession. With the expansion of the meaning of easement to include, so far as railroads are concerned, a right in perpetuity to exclusive use and possession the need for the "limited fee" label disappeared.

Wyoming v. Udall, 379 F.2d 635, 640 (10th Cir.), *cert. denied*, 389 U.S. 985 (1967) (citing *Northern Pac. Ry. Co. v. Townsend*, 190 U.S. 267 (1903)).[10] *See also* Black's Law Dictionary 408-09 (2d ed. 1910) (defining easement as a "right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner"). By contrast, a "limited fee" was understood to be "[a]n estate of inheritance in lands, which is clogged or confined with some sort of condition or qualification." *Id.* at 487.

---

10. Notably, the 1875 Act did not convey a completely exclusive right. Section 2 barred railroad companies whose rights of way passed through areas of limited access, such as canyons, passes, or defiles, from preventing any other railroad company from use and occupancy of these areas, or to impede other forms of transportation in the area needed for public accommodation. 43 U.S.C. § 935.

The 1875 Act did not abrogate these common law principles, because it did not "speak directly" to the question addressed by the common law. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978); *Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981). The burden rests squarely on the Government to show that Congress intended to depart from common understandings. *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989). The Government made no such showing here, and an examination of the legislative history of the 1875 Act reveals no Congressional intent to change the common meaning of "right of way." The 1875 Act was designed to obviate the need for Congress to adopt new legislation for each new railroad, by providing a general statute applicable to all future grants within the territories. 3 Cong. Rec. 404 (1875). By the time Congress considered Senate Bill 378, which eventually became the 1875 Act, it had already ceased its earlier practice of issuing out-and-out land grants to railways. *See* Cong. Globe, 42nd Cong., 2d Sess. 1585 (1872) (resolving to discontinue the practice of granting subsidies in public lands to railroads); *Great Northern*, 315 U.S. at 274 ("the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued") (internal quotations omitted); *Wyoming v. Udall*, 379 F.2d 635, 638 (10th Cir.) (From 1850 to 1871, "Congress subsidized railroad construction by lavish grants from the public domain. . . . In 1871, the policy changed and outright grants were discontinued."), *cert. denied*, 389 U.S. 985 (1967). Thus, the 1875 Act granted railroads only "the right of way through the public lands of the United States" with certain attendant rights to take surface materials from "the public land

adjacent to the line of said road" and use land adjacent to the line for appurtenant station-buildings, depots, and other improvements. *See* 43 U.S.C. § 934.

Congress intended to grant only a limited interest to railroad operators. Discussing the bill, the chair for the Committee of Public Lands noted that during the preceding years, the committee had "been very conservative with regard to the appropriation of public lands to railroads[,]" that the committee had "endeavored to preserve the public lands for the benefit of actual settlers[,]" and that "[a]ll our grants of public lands, therefore, have been narrowed down to rights of way." 3 Cong. Rec. 404 (1875) (remarks of Senator Townsend). *See also* 3 Cong. Rec. 1791 (1875) (Discussing a similar right of way grant to the Puyallup Valley Coal Company, Senator Sprague noted the bill "is merely to give the right of way for a railroad in Oregon . . . with the right to take material within the grant." When asked if it was a land grant, answered "[n]o land grant, not an acre."). One of the major issues Congress grappled with was the issue of what, if any, control the Territories (and later-admitted States) would have over the railroads and the freight to be transported. Senator Hawley described the interests being granted:

> This bill does not propose to charter any corporation. . . . What does it do? It simply and only gives the right of way. It merely grants to such railroad companies as may be chartered the right to lay their tracks and run their trains over the public lands; it does nothing more. This is all that can be got out of it by any possible construction. The simple right being given to locate a road and operate cars upon the track so located[.]

3 Cong. Rec. 407 (1875) (remarks of Senator Hawley). Nothing in the discussions of the bill suggests that Congress intended to grant any form of fee interest or contemplated a possibility of reverter to the United States.

In the absence of an express contrary definition or clear legislative history that reveals otherwise, terms used by Congress arising from the common law should be interpreted as carrying the same meaning. In drafting legislation, Congress is charged with knowing the existence and meaning of these terms. "Congress is understood to legislate against a background of common law . . . principles. Thus, where a common-law principle is well established, the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Astoria Federal Savings and Loan Association v. Solimino*, 501 U.S. 104, 108 (1991) (citations omitted). Further, "[j]ust as longstanding is the principle that '[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.'" *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)). In these cases, Congress "does not write upon a clean slate." *United States v. Texas*, 507 U.S. at 534 (citing *Astoria*, 501 U.S. at 108). This principle is particularly appropriate where the use of the common law would be for "filling a gap left by Congress' silence" as opposed to "rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil*, 436 U.S. at 625. Altering the fundamental

nature of well-established common law understandings should not be read into Congress' mere silence.

In *Shaw v. Railroad Co.*, 101 U.S. 557, 565 (1880), this Court held "[n]o statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." If changes such as the Government urges here and the Tenth Circuit found were intended by Congress, "surely the statute would have said something more." *Id*. Thus, changes to the fundamental, underlying nature of well-established terms cannot be read into Congress' silence. Where Congress adds rights or conditions on top of common law rights, these additions must be read narrowly, and not to cause other changes unaddressed in the legislation.

In the 1875 Act, Congress granted a special type of easement allowing railroads to use land as long as they operated a railway. When that use ceased, the land would become the property of the owner of the underlying tract. Congress did not grant the railroads a fee interest subject to the Government's implied reversion that would spring forth over a century later to wipe out a property owner's right to compensation.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Tenth Circuit.

Respectfully submitted.

ROBERT H. THOMAS
Counsel of Record
MARK M. MURAKAMI
BETHANY C.K. ACE
Damon Key Leong
Kupchak Hastert
1003 Bishop Street
1600 Pauahi Tower
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

KAREN R. HARNED
LUKE A. WAKE
NFIB Small Business
Legal Center
1201 F Street, NW, Suite 200
Washington, D.C. 20004
(202) 314-2048
karen.harned@nfib.org
luke.wake@nfib.org

Counsel for Amici Curiae

NOVEMBER 2013.