**No. 2015-5034**

# United States Court of Appeals for the Federal Circuit

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ROMANOFF EQUITIES, INC.,

*Plaintiff-Appellant*,

437-51 WEST 13TH STREET, LLC and LIRON REALTY, INC.,

*Plaintiffs*,

vs.

UNITED STATES OF AMERICA,

*Defendant-Appellee*.

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APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
NO. 1:11CV374 (HON. NANCY B. FIRESTONE)

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**MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF OWNERS' COUNSEL OF AMERICA, NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND CITIZEN ADVOCACY CENTER IN SUPPORT OF APPELLANT ROMANOFF EQUITIES, INC.'S CORRECTED COMBINED PETITION FOR REHEARING BY PANEL AND EN BANC**

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## MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Amici Curiae Owners' Counsel of America, National Association of Reversionary Property Owners, National Federation of Independent Business Small Business Legal Center, and Citizen Advocacy Center respectfully move this court pursuant to Circuit Rule 35(g) for leave to file a brief amici curiae in support of the Corrected Combined Petition for Rehearing by Panel and En Banc, filed on April 22, 2016 by Plaintiff-Appellant Romanoff Equities, Inc. A copy of the proposed amici brief is attached.

All parties to this appeal have been notified of amici's intention to file this brief, and do not object.

In the proposed brief, amici will make two arguments. First, property rights are the basis of a free society, and the foundation on which all other civil rights stand. Property owners' rights to be secure in their property are only as secure as the judiciary's recognition of settled expectations. Second, the panel decision undermined certainty and predictability by failing to certify the question to the New York Court of Appeals, and instead concluding that the words in the Romanoff conveyance mean something other than what they say.

# I. INTEREST AND IDENTITY OF AMICI

## A. Owners' Counsel of America

OCA is an invitation-only national network of experienced eminent domain and property rights attorneys. 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 (3d ed. 2008). 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 germane to this case, 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). OCA mem-

bers have also authored and edited treatises, books, and law review articles on property law and property rights.

### B. National Association of Reversionary Property Owners

NARPO is a Washington State non-profit 501(c)(3) educational foundation whose primary purpose is to educate property owners on the defense of their property rights, particularly their ownership of property subject to railroad right-of-way easements. Since its founding in 1989, NARPO has assisted over ten thousand property owners and has been involved in litigation concerning landowners' interests in land subject to active and abandoned railroad right-of-way easements. *See*, *e.g.*, *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990) (amicus curiae); *Nat'l Ass'n of Reversionary Property Owners v. Surface Transp. Bd.*, 158 F.3d 135 (D.C. Cir. 1998).

### C. National Federation of Independent Business 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, rep-

resenting members in Washington, D.C., and all 50 state capitols. 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 325,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor 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. Because small business owners typically invest substantial assets into acquisition of property for their entrepreneurial endeavors—often including their personal savings—it is imperative to ensure that their property rights and their right to be treated equally, are guaranteed meaningful protections.

**D. Citizen Advocacy Center**

CAC is a non-profit, non-partisan, free community legal organization. Founded in 1994, CAC's mission is to build democracy for the 21st

Century by strengthening the citizenry's capacities, resources, and institutions for self-governance. CAC operates through the use of community lawyers who protect the public's assets and promote meaningful participation in the democratic process.

## II. IMPORTANCE OF THE ISSUES TO AMICI

Amici seek leave to participate in this case because it involves fundamental questions about settled expectations in property law, interpreting words of instruments conveying property, and the role of federal courts in interpreting and applying state property law. Amici believe that their viewpoints and arguments will be helpful to the court, and respectfully request that their leave to file the attached brief be granted.

DATED: Honolulu, Hawaii, May 5, 2016.

Respectfully submitted,

*/s/ Robert H. Thomas*

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing documents with the Clerk of the Court of the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system, and that participants in the case who are registered CM/ECF users will be served by the system.

DATED: Honolulu, Hawaii, May 5, 2016.

*/s/ Robert H. Thomas*

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# UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Romanoff Equities, Inc., Plaintiff-Appellatn v. United States of America, Defendant-Appellee

Case No. 2015-5034

## CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ☒ (amicus) ☐ (name of party)

certifies the following (use "None" if applicable; use extra sheets if necessary):

| 1. Full Name of Party Represented by me | 2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is: | 3. Parent corporations and publicly held companies that own 10 % or more of stock in the party |
|---|---|---|
| Owners' Counsel of America | same | None |
| National Association of Reversionary | | |
| Property Owners | same | None |
| National Federation of Independent | | |
| Business Small Business Legal Center | same | None |
| Citizen Advocacy Center | same | None |
| | | |

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

May 5, 2016
Date

Signature of counsel

Please Note: All questions must be answered

Robert H. Thomas
Printed name of counsel

cc:

Reset Fields

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## IDENTITY AND INTEREST OF AMICI

The identity and interest of the amici are set forth in the Motion for Leave to File Brief Amici Curiae.[1]

## SUMMARY OF ARGUMENT

Words have meaning. Especially words in a document conveying an interest in real property. These words must be viewed in light of the intent of the parties as expressed by the terms of the instrument, state law, and the "special need for certainty and predictability where land titles are concerned."[2] Certainty and predictability in property is not a rule that exists for its own sake, *sui generis*, but one which forms the foundation of every other civil right. The panel, however, violated these principles when instead of certifying the question to the New York courts, it discovered in the Romanoff conveyance something never before seen in New York law (or the law of any other jurisdiction): a "gen-

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[1] In accordance with Fed. R. App. P. 29(c)(5), amici state that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than amici curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

[2] *Leo Sheep Co. v. United States,* 440 U.S. 668, 687-88 (1979).

eral easement," which can be used "for any purpose for which the grantee wishes."[3] In doing so, it permitted the Romanoff family's property which its predecessors conveyed for railroad purposes, to be impressed into public service as a recreational space without compensation.

This brief makes two points. *First*, property rights are the basis of a free society, and the foundation on which all other civil rights stand. Property owners' rights to be secure in their property are only as secure as the judiciary's recognition of settled expectations. *Second*, the panel decision undermined certainty and predictability by failing to certify the question to the New York Court of Appeals, and instead concluding that the words in the Romanoff conveyance mean something other than what they say.

## ARGUMENT

### I. THE NATIONAL GOVERNMENT WAS FORMED IN LARGE MEASURE TO PROTECT OWNERS' RIGHT TO BE SECURE IN THEIR PROPERTY

The Fifth Amendment provides, "nor shall private property be taken for public use, without just compensation," and recently, the Su-

[3] *Romanoff Equities, Inc. v. United States*, 815 F.3d 809, ___, 2016 U.S. App. LEXIS 4436, *10-11 (Fed. Cir. 2016). This concept has not been recognized by any New York court, and the panel made its best guess. *Id.* at *12 (noting the "*closest* New York case *suggests* . . . ") (emphasis added).

preme Court affirmed this "essential principle: Individual freedom finds tangible expression in property rights."[4] The Court has also observed, "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . That rights in property are basic civil rights has long been recognized."[5] The Framers recognized that the right to own and use property is "the guardian of every other right" and the basis of a free society,[6] and the Constitution embraces the Lockean view that "preservation of property [is] the end of government, and that for which men enter into society."[7]

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[4] U.S. Const. amend. V. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993). The Court also recently held, in a case similar to the present that railroad right-of-way easements are common law easements granted for the specific purpose of operating a railroad, and when no longer used for that purpose the easement terminates. *Marvin M. Brandt Rev. Trust v. United States*, 134 S. Ct. 1257 (2014).

[5] *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (citations omitted).

[6] *See* James W. Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights (3d ed. 2008) (noting John Adams' proclamation that "property must be secured or liberty cannot exist").

[7] John Locke, Second Treatise on Civil Government, XI § 138. *See* Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985). James Madison declared, "Government is instituted to protect property of every sort. … This being the end of government, that alone is a *just* government, which *impartially* secures to every man,

We begin from these foundational principles because the Fifth Amendment right to be secure in our property is undermined—or, as in the present case, forfeited entirely—when title to land is not governed by established rules of property and principles of common law. It is essential that courts faithfully and consistently apply settled principles of property to secure an owner's fundamental rights. Settled expectations lie at the core of the protection of civil rights, and the Supreme Court has recognized that the means to protect this foundation is a system which fosters "certainty and predictability" in land titles.[8] State courts also recognize this principle. For example, the Michigan Supreme Court held that "stability, predictability, and continuity" are the foundations of property law because they induce reliance, and that "[j]udicial 'rules of property' create value, and the passage of time induces a belief in their stability that generates commitments of human energy and capital."[9] This is not limited to the United States. Peruvian economist Her-

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whatever is his own." The Complete Madison 267-68 (Saul K. Padover ed., 1953) published in National Gazette (March 29, 1792).

[8] *See Leo Sheep,* 440 U.S. at 687-88.

[9] *2000 Baum Family Trust v. Babel*, 793 N.W.2d 633, 655 (Mich. 2010) (internal citations omitted).

nando de Soto Polar has argued that capitalism's success "depended largely on a formal system of documented property—the key to unlocking capital,"[10] and has written that the "Arab Spring" was not a revolution fueled by politics, but "was economics," because it was a cry for the establishment of systems to validate property rights, which would allow all to prosper.[11] This principle is at its zenith in cases such as this, in which the Romanoffs' predecessor-in-title voluntarily conveyed its interest in the land with the understanding that if the railroad uses which it permitted ever ceased, the property would be restored to the owners, and not impressed into public service as a recreational venue, or any use which the grantee desired. After all, as Justice Holmes reminded us, "a strong public desire to improve the public condition is not

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[10] *Time to give meaning to land ownership*, Live Mint (Apr. 12, 2016) ("Ill-defined property rights and high transaction costs in land market have become one of the most significant factors depressing [India]'s ease of doing business."), *available at* http://www.livemint.com/Opinion/XC8uj9GE7vwMyxyL5VA6rI/Time-to-give-meaning-to-land-ownership.html (last visited May 5, 2016).

[11] *See* Hernando de Soto Polar, *The Real Mohammed Bouazizi*, Foreign Policy (Dec. 16, 2011), *available at* http://foreignpolicy.com/2011/12/16/the-real-mohamed-bouazizi/ (last visited Apr. 24, 2016).

enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[12]

## II. CREATING A "GENERAL EASEMENT"—NO DIFFERENT THAN A FEE INTEREST—UNDERMINED CERTAINTY AND PREDICTABILITY

Owners' rights to be secure in their property are only as secure as the government's—primarily the judiciary's—fealty to what the Court in *Leo Sheep* described as "settled expectations" of land title.[13] The task of defining the scope of these interests is mostly assigned to state legislatures and courts.[14] It is highly doubtful that a New York court—were it given the opportunity to consider the question—would conclude than an interest labeled by the grantor as an "easement" (usually defined as use for a "*special* purpose"), is a "general easement" that contemplated

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[12] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). The Supreme Court reaffirmed that principle in *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 8 (1990), which held the National Trails System Act, 16 U.S.C. § 1241, *et seq*., "gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests."

[13] *Leo Sheep*, 440 U.S. at 687-88.

[14] *See*, *e.g*., *Damon v. Hawaii*, 194 U.S. 154, 157 (1904) (local law defines "property").

use for *any* purpose,[15] especially uses as admittedly unrelated to the easement's main railroad purpose as tai chi, "gender bending performances from the club and theater stage," garden tours, and "stargazing."[16] Here, we have a very specific easement which was for railroad purposes to eliminate at-grade crossings.[17] But even if the easement was granted in general terms, the rule of construction is to construe the extent of its use only as is "necessary and convenient for the purpose for which it is created."[18] An easement to do anything the grantee wants for as long as it wants isn't really an "easement," it is a grant of fee simple by another name. The panel's ruling has effectively converted the grant of an easement for railroad purposes into a fee simple estate, contrary

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[15] *See* Jon W. Bruce and James W. Ely, Jr., The Law of Easements and Licenses in Land § 1:1 (2016 ed.). For a widely-accepted definition of roughly contemporaneous with the original conveyance here, see 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").

[16] *See*, *e.g.*, *Upcoming Events*, Friends of the High Line, *available at* http://www.thehighline.org/activities (last visited Apr. 24, 2016).

[17] The history of the Highline's use as a 13-mile elevated rail line to eliminate at-grade railroad crossings is detailed in *New York City Council v. City of New York,* 770 N.Y.S.2d 346, 348-49 (App. Div. 2004).

[18] *Mandia v. King Libr. & Plywood,* 583 N.Y.S.2d 5 (App. Div. 1992).

to both the terms of the instrument and New York law. The panel failed to follow *New York City Council v. City of New York*, which held that the easement ended by virtue of the New York Central's surrender of the easements relating to the Highline to the 23 owners of the servient estate. That court held the property owners reacquiring the easements simply removed an encumbrance, and because the process of merger represents the extinction—not the conveyance—of an interest in real estate, no acquisition of real property was contemplated.[19] If there was any question about this rule, the panel should have certified the question, rather than take its best guess about how New York courts might view the words "for other such purposes."[20] The certified question process is particularly useful and appropriate in this Circuit, whose jurisdiction is nationwide and not tied to a geographic region, and which

[19] The Court quoted *Alfassa v Herskowitz,* 657 N.Y.2d 10003 (App. Div. 1997), "It is fundamental that where the title in fee to both the dominant and servient tenants become vested in one person, an easement is extinguished (by merger)." *New York City Council*, 770 N.Y.S.2d at 350.

[20] Recently, in a case involving a grant "for railroad purposes and for all other purposes," the Court of Federal Claims held that Georgia property law does not allow a "general easement," and distinguished the *Romanoff* panel decision). *See Hardy v. United States*, No. 14-388L, slip op. at 21 (Fed. Cl. May 4, 2016).

therefore may not be as familiar with local property law as the regional circuit courts.[21] Instead, the panel inverted the inquiry, placing the burden on Romanoff to show that the New York courts have *not* recognized a "general easement" of virtually unlimited scope.[22] The panel

[21] This is especially warranted in rails-to-trails cases, because the question of whether a plaintiff possesses property turns on the nuances of state law. *See*, *e.g.*, *Rogers v. United States*, No. 13-5098 (Fed. Cir. Dec. 28, 2015) (unsettled question of Florida law certified to Florida Supreme Court); *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1372-73 (Fed. Cir. 2009) (one of the elements of a rails-to-trails takings claim is the terms of the easement and whether it included "future use as a public recreational trail (scope of the easement)") (citing *Preseault v. United States*, 100 F.3d 1525, 1541, 1533 (Fed. Cir. 1996) (en banc)).

[22] *Romanoff Equities,* 815 F.3d at ___, 2016 U.S. App. LEXIS at *12 ("Romanoff does not point to any authority that stands for that proposition [that New York law does not recognize a "general easement"].."). However, in the next paragraph, the panel also acknowledged that New York has not considered whether a conveyance which allows the grantee to use the grantor's property literally in any way desired could be considered an "easement," and the "closest New York case" involved the dissimilar situation where the grantees' use was related to the use for which the easement was granted. *Id*. at *12. Here, however, there is no question that the uses which are currently being made of the Romanoffs' property are not at all related to the railroad use for which the easement was originally granted, and indeed, directly contradict the terms of the grant.

should have avoided needlessly wading into this void, and should have certified this question of state law to the New York Court of Appeals.[23]

## CONCLUSION

Amici respectfully requests this Court vacate the panel decision and rehear the appeal, or rehear the appeal en banc.

DATED: Honolulu, Hawaii, May 5, 2016.

Respectfully submitted,

*/s/ Robert H. Thomas*

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[23] Moreover, the panel's supposition about New York law also unnecessarily raised the specter of judicial takings by a federal court. A plurality of the Supreme Court recently recognized that if a state court radically alters its law of property, the state could be liable for a taking. The Court noted, "[i]f a legislature or court declares that what was once an established right of private property no longer exists, it has taken that property no less than if the State had physically appropriated it or destroyed its value by regulation." *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot.*, 130 S. Ct. 2592, 2601 (2010).

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32, amicus curiae states that this brief complies with the type and volume limitations because it is 10 pages in length, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii), and this document has been prepared in a proportionally-spaced typeface in font Century Schoolbook, point sized 14.

DATED: Honolulu, Hawaii, May 5, 2016.

*/s/ Robert H. Thomas*

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing documents with the Clerk of the Court of the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system, and that participants in the case who are registered CM/ECF users will be served by the system.

DATED: Honolulu, Hawaii, May 5, 2016.

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