2019-1793

United States Court of Appeals for the Federal Circuit

WILLIAM C. HARDY, BERTIE ANN HARDY,
DOROTHY SCHAEFFER, and EMMA TRIMBLE,
for Themselves and as Representatives of a Class of Similarly Situated Persons,

Plaintiffs – Appellees,

v.

UNITED STATES,

Defendant – Appellant.

On Appeal from the United States Court of Federal Claims
in No. 1:14CV388, Chief Judge Margaret M. Sweeney

BRIEF FOR NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS, PROFESSOR JAMES W. ELY, JR., CATO INSTITUTE, AND SOUTHEASTERN LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEES URGING AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

William C. Hardy, et al. **v.** United States

Case No. 2019-1793

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ☒ (amicus) ☐ (name of party)
National Assoc. of Reversionary Property Owners and Professor James W. Ely, Jr.
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
National Association of Reversionary Prop. Owners	Same	None
Prof. James W. Ely, Jr.	Same	None
Cato Institute	Same	None
Southeastern Legal Foundation	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: None. Counsel for amici curiae, Mark F. (Thor) Hearne, II, and Stephen S. Davis, serve as counsel for plaintiffs in a related case, Jackson v. United States, No. 14-397, pending in the U.S. Court of Federal Claims.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect of be directly affected by this court's decision in the pending appeal. See Fed. Cir. R. 47(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary.) This appeal may potentially affect the claims filed in the U.S. Court of Federal Claims in the following cases: Jackson v. United States, No. 14-397; Defoor Hills v. United States, 18-706; Albano v. United States, No. 19-558; Mastin v. United States, No. 19-1224.

Mark F. (Thor) Hearne, II, and Stephen S. Davis (counsel for amici National Association of Reversionary Property Owners, Prof. James W. Ely, Jr., and Southeastern Legal Foundation) also serve as counsel for plaintiffs in Jackson v. United States, No. 14-397.

November 6, 2019
Date

/s/ Mark F. (Thor) Hearne, II
Signature of counsel

Mark F. (Thor) Hearne, II
Printed name of counsel

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Reversionary Property Owners is a foundation defending landowners' Fifth Amendment right to compensation when the government takes private property under the federal Trails Act.[2] See, *e.g.*, *NARPO v. Surface Transp. Bd.,* 158 F.3d 135 (DC Cir. 1998), and *amicus curiae* in *Preseault v. I.C.C.*, 494 U.S. 1 (1990) (*Preseault I*), and *Brandt Rev. Trust* v. *United States*, 572 U.S. 93 (2014).

Professor James W. Ely, Jr., is the Milton R. Underwood Professor of Law Emeritus and Professor of History Emeritus at Vanderbilt University. Professor Ely co-authored with Jon Bruce the leading treatise, *The Law of Easements and Licenses in Land* (revised ed. 2019), and is the author of, *inter alia*, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3rd ed. 2008), and *Railroads & American Law* (2001).

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore

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[1] This brief is not authored, in whole or part, by any party's counsel. No party, party's counsel, or person other than *amici curiae*, their members or counsel contributed money intended to fund the preparation or submission of this brief. Each amicus party has authorized the filing of this brief on behalf of himself or the amicus organization. All parties have consented to the filing of this brief.

[2] National Trails System Act of 1968, as amended in 1983, 16 U.S.C. §1241, *et seq.*

the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

Southeastern Legal Foundation is a Georgia-based, national, nonprofit, public-interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. For over forty years, Southeastern Legal Foundation has advocated for the protection of private property interests from unconstitutional takings.

BACKGROUND

A. In the 1890s, Georgia landowners granted the railroad a right-of-way easement.

The Eatonton & Machen Railroad Company was chartered in September 1889. A month later it changed its name to the Middle Georgia & Atlantic Railway Company. The railroad's charter is available at Appx0253-0256. After the railroad surveyed a right-of-way across privately-owned land, many (but not all) owners executed a pre-printed "Right of Way Deed" drafted by the railroad. An example is the available at Appx0695-0698.

Most of these original conveyances share the following features: (1) they describe the instrument as a "Right of Way" deed and declare the purpose "for a right-of-way of said railroad;" (2) the land is described by reference to a survey of a railroad right-of-way established *before* the deed was executed; (3) many are for nominal consideration; (4) many describe the right-of-way as passing "through" or "across" the owner's land; (5) most contain a restriction on the railroad's use of the right-of-way; and (6) the deeds are on typeset forms the railroad drafted.

B. The railroad abandoned this right-of-way.

In 2013 Norfolk Southern Railway petitioned the Surface Transportation Board (the Board) to allow its subsidiary, the Central of Georgia Railway, to abandon this fifteen-mile-long railway line. The railroad told the Board, "[r]ail service over the subject line was legally discontinued in 2010, and the line has remained inactive since." Appx0126. The railroad sought "to abandon approximately 14.90 miles of rail line…located in Newton County, Georgia." Appx0109. The railroad "certifie[d] that the Line satisfies the criteria for abandonment…." Appx0108. The railroad said it would remove the "rail and track material" from the existing roadbed and "arrange for the removal of the bridges on the line." Appx0135. The railroad certified that no traffic had moved over the line for two years and said, "[t]he proposed abandonment will be consummated on or after August 20, 2013." Appx0109. The railroad also represented that it "may not own all of the right-of-way underlying the line proposed for abandonment…." Appx0110. The railroad's filings were verified and certified as "true and correct" by a "qualified and authorized" official. Appx0113-0115.

In August 2013 Newton County Trail Path Foundation asked the Board to invoke section 8(d) of the National Trails System Act of 1968, as amended in 1983, (codified at 16 U.S.C. §1247(d)). The Board agreed. In August 2013, the Board issued a Notice of Interim Trail Use or Abandonment (NITU) invoking section 8(d),

allowing the Trail Path Foundation (or another non-railroad trail-sponsor) to acquire a right-of-way across these owners' land for use as a public recreational trail. Appx0173.

The owners whose land was subject to the Board's order sought compensation in the Court of Federal Claims (CFC). Chief Judge Sweeney held the railroad had only an easement to use the owners' land for operation of a railroad and the Board's invocation of section 8(d) was a compensable taking of private property.

ARGUMENT

I. Georgia law defines these owners' property.

The government may not redefine established property interests without compensating the owner. "This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation." *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979).

In *Preseault v. I.C.C.*, 494 U.S. 1, 8 (1990) (*Preseault I*), the Supreme Court held the Trails Act "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." The Court explained that "While the terms of these easements and applicable state law vary, frequently the easements

provide that the property reverts to the abutting landowner upon abandonment of rail operations." *Id.*

Justice O'Connor, joined by Justices Scalia and Kennedy, concurred to emphasize the "basic axiom that '[p]roperty interests…are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Preseault I*, 494 U.S. at 20 (quoting *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1001 (1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). "[A] sovereign, 'by *ipse dixit,* may not transform private property into public property without compensation.... This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.'" *Id.* at 22-23. See also *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot*., 560 U.S. 702, 713, 715 (2010) ("States effect a taking if they recharacterize as public property what was previously private property."). This year the Supreme Court reaffirmed this principle, stating, "We explained that government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.' …A property owner acquires an irrevocable right to just compensation immediately upon the taking." *Knick v. Scott Township*, 139 S.Ct. 2162, 2172 (2019) (citing *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 321 (1987)).

This Court held, "[i]t is elementary law that if the Government uses…an existing railroad easement for purposes and in a manner not allowed by the terms of the grant of the easement, the Government has taken the landowner's property for the new use." *Toews v. United States*, 376 F.3d 1371, 1376-77 (Fed. Cir. 2004).

The Board's order invoking section 8(d) "destroyed" and "effectively eliminated" these owners' state-law right to their land. See *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010) ("It is settled law that a Fifth Amendment taking occurs in Rails-to-Trails cases when government action *destroys* state-defined property rights by converting a railway easement to a recreational trail, if trail use is outside the scope of the original railway easement.") (emphasis added) (citing *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009)). See also *Caldwell v. United States*, 391 F.3d 1226, 1228 (Fed. Cir. 2004) ("We have previously held that a Fifth Amendment taking occurs when, pursuant to the Trails Act, state law reversionary interests are *effectively eliminated* in connection with a conversion of a railroad right-of-way to trail use.") (emphasis added)) (citing *Preseault v. United States*, 100 F.3d 1525, 1543 (Fed. Cir. 1996) (*en banc*) (*Preseault II*)).

As this Court explained in *Ladd*, "[t]he [Board's order invoking §8(d)] is the government action that prevents the landowners from [having] possession of their property unencumbered by the easement." 630 F.3d at 1023. In *Bright v. United*

States, 603 F.3d 1273, 1276 (Fed. Cir. 2010), this Court held, "[t]he effect of the [Board's invocation of section 8(d)]….was to accrue an action for compensation by any affected landowners based on a Fifth Amendment taking." In *Navajo Nation v. United States*, 631 F.3d 1268, 1274-75 (Fed. Cir. 2010), this Court reaffirmed *Ladd*, *Caldwell*, *Barclay v. United States*, 443 F.3d 1368, 1373 (Fed. Cir. 2006), and *Illig v. United States*, 274 Fed. Appx. 883 (Fed. Cir. 2008). The Department of Justice confirmed and sustained this Court's holdings in this line of cases. See Brief for the United States in Opposition to Petition for Writ of Certiorari in *Illig*, 2009 WL 1526939, *12-13. Then-Solicitor General Elena Kagan wrote, "When the NITU is issued, all the events have occurred that entitle the claimant to institute an action based on federal-law interference with reversionary interests, and any takings claim premised on such interference therefore accrues on that date." *Id.*

Georgia law defines these owners' property interest. And, under settled Georgia law, these owners held title to the fee estate in the land and would enjoy unemcumbered ownership of their land but for the Board's invocation of section 8(d), which imposed new easements across these owners' land. "Precedent that creates a rule of property…is generally treated as inviolate." Bryan A. Garner, *et al.*, *The Law of Judicial Precedent* (2016), p. 421 (contributing authors include Justices Gorsuch and Kavanaugh). *Judicial Precedent* notes, "The [rule-of-property] doctrine holds that stare decisis applies with 'particular force and

strictness' to decisions governing real property [and] vested rights…." "Stability in rules governing property interests is particularly important because those rules create unusually strong reliance interests…." *Id.* at 421-22.

Judicial Precedent illustrates this point with "[a] classic example applying the rule-of-property doctrine…."

> Heyert [ ] held title to land that extended underneath the town road running over her property. She had presumptively granted the town an easement…. When the town authorized a utility company to install gas pipes under the street, Heyert brought a takings claim, arguing the town's easements…were only "reservation[s] of a mere 'right of way' and so, without more, include[ed] only the right of passage over the surface of the land" …Although the use of public streets had evolved, "thousands of deeds conveying rights of way…ha[d] been made under this rule, which ha[d] existed since the common law began…. This "long succession of decisions…fits the classic definition of a rule of property," the court said. Declining to overrule all that horizontal precedent, the court held that Heyert was entitled to recover for the appropriation of her land for the gas mains.

Id. at 423-24.[3]

[3] Citing and quoting *Heyert v. Orange & Rockland Utils., Inc.*, 218 N.E.2d 263, 269 (N.Y. 1966).

II. The Court of Federal Claims faithfully applied Georgia law when it held the railroad was granted an easement in the 1890s.

A. Georgia limits the railroad's interest to an easement.

1. Under Georgia statute, the railroad obtained only an easement.

The Eatonton & Machen Railroad Company was chartered with "the right and authority to construct, lay, maintain, equip and operate a line of railroad from the town of Eatonton, in Putnam county, to the town of Machen…." Appx0254. To change the route of its railroad, or even to change its name, required an act of the Georgia General Assembly. See Appx0257 ("An Act to change the name of the Eatonton and Machen Railroad Company"). See also Appx0258 (Ga. Code §1689 (1880)) and *Leverett v. Middle Georgia & A. Ry.*, 24 S.E. 154 (Ga. 1895). The railroad's charter provides, "section 1689(1) of the Code of this State, concerning the acquisition of rights-of-way and other property for the construction of railroads…be…made a part of this charter and incorporated into the same…." Appx0254.

Georgia granted railroads the extraordinary power of eminent domain. See Ga. Code §1689. See also Simeon E. Baldwin, *American Railroad Law* (1904), p. 80 ("Railroad companies are generally empowered by law to make an entry [upon an owner's land] for that purpose [surveying a right-of-way], without the consent or against the will of the landowner, and without making preliminary compensation.");

Byron & William Elliott, *A Treatise on the Law of Railroads* (2nd ed. 1907) §925, p. 392 ("Railroad companies are given power by the statutes of almost all of the states to enter…upon the land of any person, and cause an examination and survey of the proposed route to be made.…").

But Georgia balanced its grant of eminent domain power with a limitation upon the interest a railroad could obtain when it acquires a right-of-way under this eminent domain authority. This limitation applies not only to land the railroad condemned but also to rights-of-way granted "voluntarily."

> A [railroad corporation] shall be empowered, first, to cause such examinations and surveys to be made of the proposed railroad as shall be necessary to the selection of the most advantageous route.… Second, to take and hold such voluntary grants of real estate and other property as may be made to it, to aid in the construction, maintenance and accommodation of its road, ***but the real estate received by voluntary grant shall be held and used for the purposes of such grant only.***
>
> Ga. Code §1689 (Appx0261) (emphasis added).

Georgia further provides "[w]henever the corporation or person shall cease using the property taken for the purpose of conducting their business, said property shall revert to the person from whom taken, his heirs or assigns." Ga. Code §5233 (1910).

These provisions are not unique to Georgia. The Kansas Supreme Court, applying a statute identical to §1689, stated, "[t]his Court has uniformly held that railroads do not own fee titles to narrow strips taken as right-of-way, regardless of

whether they are taken by condemnation or right-of-way deed. The rule…gives full effect to the intent of the parties who execute right-of-way deeds rather than going through lengthy and expensive condemnation proceedings." *Harvest Queen Mill & Elevator Co. v. Sanders*, 370 P.2d 419, 423 (Kan. 1962) (citations omitted). See also *Brown v. Weare*, 152 S.W.2d 649, 652 (Mo. 1941) (the "law is settled in this state that where a railroad acquires a right of way whether by condemnation, by voluntary grant or by a conveyance in fee upon a valuable consideration the railroad takes but a mere easement over the land and not the fee") (citations omitted); *Illinois Cent. R.R. Co. v. Roberts*, 928 S.W.2d 822, 825 (Ky. Ct. App. 1996) (where "land is purportedly conveyed to a railroad company for the laying of a rail line, the presence of language referring in some manner to a 'right of way' operates to convey a mere easement notwithstanding additional language evidencing the conveyance of a fee"); *Ross, Inc. v. Legler*, 199 N.E.2d 346, 348 (Ind. 1964) ("[p]ublic policy does not favor the conveyance of strips of land by simple titles to railroad companies for right-of-way purposes, either by deed or condemnation"); *Michigan Dep't of Natural Res. v. Carmody-Lahti Real Estate, Inc.*, 699 N.W.2d 272, 280 (Mich. 2005) ("a deed granting a right-of-way typically conveys an easement"); *Pollnow v. State Dep't of Natural Res.*, 276 N.W.2d 738, 744 (Wis. 1979) ("normally a right of way condemned by a railway would only constitute an easement"); *Neider v. Shaw*, 65

P.3d 525, 530 (Idaho 2003) ("use of the term right-of-way in the substantive portions of a conveyance instrument creates an easement").

This Court noted in *Preseault II* that, because railroads possess the power to acquire a right-of-way by eminent domain, even voluntary transfers from a landowner "retained its eminent domain flavor." 100 F.3d. at 1537. "Thus it is that a railroad that proceeds to acquire a right-of-way for its road acquires only that estate, typically an easement, necessary for its limited purposes…." *Id*.

Professor Ely explained, "[p]rominent experts took the position that, absent statutory provisions expressly authorizing the taking of a fee simple, railroads should receive just an easement in land condemned for their use." *Railroads and American Law*, pp. 197-98 (citing Simeon F. Baldwin, *American Railroad Law* (1904), p. 77).[4] Professor Ely continued:

> "It is certain, in this country, upon general principles," Redfield declared, "that a railway company, by virtue of their compulsory powers, in taking lands, could acquire no absolute fee-simple, but only the right to use the land for their purposes." Judicial decisions tended to adopt this line of analysis.

Id. at 198.

[4] The Supreme Court relied upon Professor Ely's scholarship in *Brandt*, 572 U.S. at 96-97. So, too, the Supreme Court of Georgia, in *Fulton County v. City of Sandy Springs*, 757 S.E.2d 123 (Ga. 2014), and this Court in its *en banc* decision in *Preseault II*, 100 F.3d at 1542.

This Court held "the act of survey and location is the *operative determinant*, and not the particular form of transfer." *Preseault II*, 100 F.3d at 1537 (emphasis added). "[P]ractically without regard to the documentation and manner of acquisition, when a railroad for its purposes acquires an estate in land for laying track and operating railroad equipment thereon, the estate acquired is no more than that needed for the purpose, and that typically means an easement, not a fee simple estate." *Id.* at 1535.

2. Georgia common law limits the railroad's interest to an easement.

Georgia follows the common law "strips and gores" doctrine, which holds strips of land used for railroads are easements. In *Paine v. Consumers' Forwarding & Storage*, 71 F. 626, 629-30, 632 (6th Cir. 1895), Judge Taft (later President and Chief Justice Taft) wrote: "[The] existence of 'strips or gores' of land…to which the title may be held in abeyance for indefinite periods of time, is as great an evil as are 'strips and gores' of land along highways or running streams." Judge Taft continued, "The litigation that may arise therefrom after long years…[is] vexatious…. [P]ublic policy [seeks] to prevent this by a construction [of a deed] that would carry the title to the center of a highway, running stream, or non-navigable lake that may be made a boundary of the lands." *Id.*

Judge Posner explained:

> The presumption is that a deed to a railroad…conveys a right of way, that is, an easement, terminable when the acquirer's use terminates, rather than a fee simple…. [R]ailroads and other right of way companies have eminent domain powers, and they should not be encouraged to use those powers to take more than they need of another person's property – more, that is, than a right of way.
>
> *Penn Cent. Corp. v. U.S. R.R. Vest Corp.*, 955 F.2d 1158, 1160 (7th Cir. 1992) (citations omitted).

The Supreme Court of Georgia similarly holds:

> It is favorable to the general public interest that *the fee in all roads should be vested either exclusively in the owner of the adjacent land on one side of the road, or in him as to one half of the road, and as to the other half, in the proprietor of the land on the opposite side of the road*. This is much better than that the fee in long and narrow strips or gores of land scattered all over the country and occupied or intended to be occupied by roads, should belong to persons other than the adjacent owners. In the main, the fee in such property under such detached ownership would be and forever continue unproductive and valueless.
>
> *Fambro v. Davis*, 348 S.E.2d 882, 884 (Ga. 1986).[5]

In *Descendants of Bulloch, Bussey & Co. v. Fowler*, 475 S.E.2d 587, 589 (Ga. 1996) (*Bulloch*), the Supreme Court of Georgia reaffirmed that this doctrine applies to railroad rights-of-way:

> The rule avoids the undesirable result of having long, narrow strips of land owned by people other than the adjacent landowner. Pindar asserts that this rule of construction also should govern the construction of deeds that designate a railroad right-of-way as a boundary. This Court has, in fact, already applied it to language in a will to determine title to

[5] Emphasis added. Quoting *Johnson v. Arnold*, 18 S.E. 370 (Ga. 1893).

> an abandoned railroad right-of-way. *We now adopt this rule for use in construing deeds that have as a boundary a railroad right-of-way*.[6]

The leading treatise on Georgia property law, *Pindar's Georgia Real Estate Law and Procedure* (7th ed. 2012) (Daniel Hinkel, ed.) §13.18, states, "ordinarily, the [railroad] right-of-way is an easement only, and the base title does not pass to the railway company unless clearly so stated in the deed. And the public policy of avoiding detached ownership of long, narrow gores of land is equally pertinent in the case of railroad boundaries."[7]

B. The text of the 1890s deeds granted the railroad only an easement.

The Supreme Court of Georgia was asked to interpret a deed to a railroad containing language very similar to the deeds here:

> In the proper construction of a writing, its true meaning can only be ascertained by an examination and consideration of the instrument as a whole, including every part of the writing. In cases of doubt, aid in arriving at the true meaning of the instrument may also be derived from the customs of the country and the circumstances of the parties, so far as these are matters of judicial cognizance.
>
> *Duggan v. Dennard*, 156 S.E. 315, 316 (Ga. 1930).[8]

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[6] Emphasis added.

[7] Citing *Jackson v. Sorrells*, 92 S.E.2d 513 (Ga. 1956) (*Sorrells*).

[8] See also *Atlanta Birmingham & Atlantic Railway v. Coffee County*, 110 S.E. 214 (Ga. 1921) (citing *Atlanta v. Jones*, 69 S.E. 571 (Ga. 1910)) ("Where land is given or granted by an owner to a railroad corporation, the rights of the parties with respect to a reversion on abandonment will be determined by the terms of the conveyance.").

The Supreme Court of Georgia explained, "[T]he crucial test in determining whether a conveyance grants an easement in, or conveys title to, land, is the intention of the parties, but in arriving at the intention many elements enter into the question." *Jackson v. Rogers*, 54 S.E.2d 132, 135 (Ga. 1949) (*Rogers*). The court continued, "The whole deed or instrument must be looked to, and not merely disjointed parts of it. The recitals in the deed, the contract, the subject matter, the object, purposes, and nature of the restrictions or limitations, if any, or the absence of such, and the attendant facts and circumstances of the parties at the time of the making of the conveyance are all to be considered. Code, §29-109." *Id.*

In *Duggan* the court concluded, "it seems clear that the deed…was not intended by either party…to convey, and did not in fact transmit, to [the railroad] anything more than a mere easement, a right-of-way for the [railroad] and its successors and assigns, to be used in the operation of a railroad and that this grant was terminable, and reverted to the grantor if the railroad company or its successors or assigns ceased to operate a railroad." 156 S.E. at 316.

The Supreme Court of Georgia directs us to consider the "circumstances of the parties" and the "customs of the country." *Duggan*, 156 S.E. at 316. The instruments at issue here were drafted and executed in the 1890s. In the 1890s it was understood that, "upon general principles…a railroad company…could acquire no absolute fee-simple, but only the right to use the land for their purpose." 1 Isaac

F. Redfield, *Treatise on the Law of Railways* (1869), p. 255.[9] See also Leonard A. Jones, *A Treatise on the Law of Easements* (1898) §211, p. 178 ("[a] grant of a right of way to a railroad company is a grant of an easement merely, and the fee remains in the grantor").

1. The right-of-way deeds by their explicit language granted only an easement.

i. The term "right-of-way" means an easement.

The Supreme Court of Georgia repeatedly holds that the term "right-of-way" means an easement, not title to the fee estate. See *Coffee County*, 110 S.E. at 216; *Duggan*, 156 S.E. at 316; *Rogers v. Pitchford*, 184 S.E. 623 (Ga. 1936) (*Pitchford*); *Louisville & Nashville Railroad v. Maxey*, 77 S.E. 801 (Ga. 1913) (*Maxey*); *Jackson v. Crutchfield*, 191 S.E. 468 (Ga. 1937) (*Crutchfield*); and *Askew v. Spence*, 79 S.E.2d 531 (Ga. 1954).

Furthermore, in one of the few cases in which the Supreme Court of Georgia found a conveyance vested a railroad with title to the fee simple estate in the land, the court recognized that "Nowhere in this instrument is the term 'easement' or 'right

[9] Redfield's text is especially compelling authority. The U.S. Supreme Court and the Supreme Court of Georgia rely upon Judge Redfield. Judge Redfield was not only a national authority on railroad law and author of the leading treatise on railroad law, Judge Redfield was also Chief Justice of Vermont's Supreme Court and authored *Hill v. Western Vermont Railroad*, 32 Vt. 68 (1859). This Court relied upon Judge Redfield's treatise and his decision in *Hill* when it decided *Preseault II*. 100 F.3d at 1536-37, 1568.

of way,' or any other expression used from which an intent to convey merely an easement might be inferred…." *Rogers*, 54 S.E.2d at 136.

In short, "right-of-way" means exactly what it says – the grant of a right of passage over or through a parcel of land. *Webster's New International Dictionary* (2nd ed.) defines "right-of-way" as "a right of passage over another person's ground. See easement." In other words, "right-of-way" is a synonym for "easement."

ii. Describing the right-of-way by reference to an existing railway means an easement was granted.

The "Right of Way Deeds" state the railroad already located its railway line across the land *before* the conveyance was executed. This demonstrates the railroad acted under its eminent domain authority in §1689. Apart from the eminent domain authority granted the railroad in §1689, the railroad had no ability to trespass upon private land to survey a right-of-way across the owner's land. The owner's subsequent execution of the "Right of Way Deed" as a "voluntary conveyance" merely memorialized the location of the already-established right-of-way, which was established under the railroad's eminent domain power. As such, the railroad obtained no interest greater than an easement.

iii. Nominal consideration indicates the owner granted an easement, not title to the fee estate.

Nominal consideration indicates an intent to convey only an easement. In *Sorrells*, 92 S.E.2d at 514, the court noted the nominal consideration meant the deed

conveyed an easement, not title to the fee estate. In *Duggan*, the court held that the consideration of one dollar for a tract of land that completely split a lot in two meant clearly an easement was granted. 156 S.E. at 316. See also *Pitchford*, 184 S.E. at 624 (holding that because only nominal consideration was paid, the deed conveyed only an easement); and *Rogers*, 54 S.E.2d at 132 ("the fact that the consideration was nominal" indicated the deed conveyed an easement).

iv. Describing the right-of-way as "over," "through," or "across" the grantor's land means an easement, not title to the fee estate, was granted.

In *Brandt*, 572 U.S. at 103, Chief Justice Roberts, quoting the Court's earlier decision in *Great Northern Railway v. United States,* 315 U.S. 262, 271 (1942), noted that grants describing the interest conveyed as "over land" was an "especially persuasive" indication that an easement was granted.

> The Court [in *Great Northern*] adopted the United States' position in full, holding that the 1875 Act "clearly grants only an easement, and not a fee." The Court found Section 4 of the Act "especially persuasive," because it provided that "all such lands *over* which such right of way shall pass shall be disposed of *subject to* such right of way." *Ibid.* Calling this language "wholly inconsistent" with the grant of a fee interest, the Court endorsed the lower court's statement that "[a]pter words to indicate the intent to convey an easement would be difficult to find."[10]

[10] 572 U.S. at 103 (emphasis in original).

The word *through* means "admitting free passage; unobstructed; affording right of way along; as, a *through* way, street, road." *Webster's New International Dictionary* (2nd ed.).

Giving the words used in these 1890s instruments their common ordinary meaning, it is clear the railroad was granted only an easement. In *Askew*, 79 S.E.2d at 532, the Supreme Court of Georgia held a deed stating "the right of way is to be upon and over any and all lands of the grantor" meant the deed "conveyed only an easement for railroad purpose, and not the fee simple title to the property therein referred." So, too, here.

v. The grantor's reservation of an interest indicates the grantor intended to only convey only an easement.

Many of the original 1890s deeds contain a reservation. The Supreme Court of Georgia, in *Sorrells*, held deeds to railroads containing restrictions granted only an easement. 92 S.E.2d at 514. *Sorrells* held that, despite purporting to convey "all the land contained within one hundred feet in width on each side of its track…containing one hundred and thirty-seven acres, more or less…forever in fee simple," the deed granted only an easement. *Id.* at 513. The court explained,

> the grantor reserved the right to cultivate the land up to the road bed and required the railroad to keep up all stock gaps. In this respect, the deed in the instant case is similar to the deeds considered in *Gaston v. Gainesville & D. Electric Ry. Co.*, 48 S.E. 188 [(Ga. 1904)]; *Georgia & F. Railway v. Swain*, 90 S.E. 44, *Pitchford*, and *Askew*. In each of

> those cases it was held that the deed conveyed an easement over the lands of the grantor.

Id. at 514.

"It was clearly the intention of the parties…at the time it was executed to convey and to receive an easement to construct and operate a railroad over the lands of the grantor, and that the grantor should retain the use of the land not actually used as a road bed." *Sorrells*, 92 S.E.2d at 514. In *Pitchford*, the court held that because the deed contained a "reservation of the right to farm on the land conveyed until needed for railroad purposes," only an easement was granted. 184 S.E. at 624.

In *Coffee County*, the Supreme Court of Georgia held, "where [there] is an implied restriction, as is often the case in regard to the right of way, or the like, of a railroad company, the grant does not ordinarily vest a fee in the company, but vests such as an estate – an easement – as is requisite to effect the purposes of which the property is acquired." 110 S.E. at 216 (quoting 2 *Elliott on Railroads* §400).

vi. Because the railroad drafted the pre-printed forms, any ambiguity is construed against the railroad.

Most of these easements were established using pre-printed "Right of Way Deed" forms typeset by the railroad. Georgia follows the common rule that any ambiguity in an instrument is construed against the drafter – and here the drafter is the railroad. See Ga. Code §13-2-2(5) ("If the construction is doubtful, that which goes most strongly against the party executing the instrument or undertaking the

obligation is generally to be preferred."). See also *Hertz Equipment Rental Corp. v. Evans*, 397 S.E.2d 692, 694 (Ga. 1990) ("Under the statutory rules of contract construction, if a contract is capable of being construed two ways, it will be construed against the preparer and in favor of the non-preparer.").

vii. When a conveyance to a railroad describes a "strip of land," it grants an easement.

The Supreme Court of Georgia holds that a conveyance of a "tract or strip of land" means an easement is granted unless a contrary intention is clearly stated. See Pinder, *Georgia Real Estate Law and Procedure* §13.18. See also *Sorrells*, 92 S.E.2d at 513 (holding a deed for "all the land" conveyed only an easement); *Askew*, 79 S.E.2d at 531 (holding a deed that granted "[a] strip of land" conveyed only an easement); *Byrd v. Goodman*, 25 S.E.2d 34, 34 (Ga. 1943) (holding a deed describing the interest conveyed as a "right of way" and as a "strip, tract or parcel of land" to convey an easement); *Pitchford*, 184 S.E. at 623 (holding a deed that conveyed a "strip of land" conveyed only an easement); *Coffee County*, 110 S.E. at 214 (holding a deed conveying a "strip of land" in "fee simple" granted only an easement); and *Gaston*, 48 S.E. at 188 (holding that a conveyance describing "all the land" to be an easement).

viii. A warranty clause does not mean the grantor intended to convey title to the fee estate.

The government places great weight on the inclusion of a warranty clause in some of these deeds. This is misplaced. A warrant that the owner holds title to the underlying land does not mean the grantor intended to convey title to the fee estate. A warranty clause means what it says – that the grantor warrants that he holds title to the land across which he is granting an interest.

In *Coffee County*, 110 S.E. at 216, the Supreme Court of Georgia observed, "The fact that the right acquired is designated as a fee or that the deed contains a covenant of warranty, is not necessarily controlling. In the construction of deeds, as well as wills, the modern tendency is to give effect to the intention of the parties."[11] *Gaston* similarily held, "The right to construct the railroad over the right of way granted is absolute, and the tenure of the grantee's title is limited only to the use of the land 'for railroad purposes.'" 48 S.E. at 189. The court held this to be so even when a deed to the railroad conveyed "all the land necessary for a roadbed…in fee simple." The court held "[t]he instrument was the conveyance of easement." *Id.*

In *Duggan*, 156 S.E. at 315, the court held a deed containing a warranty clause did not convey a fee estate. A deed describing the interest conveyed "substantially in the terms used in a warranty deed conveying fee-simple title" granted only an

[11] Citing *Jones v. Van Bochove*, 61 N.W. 342 (Mich. 1894).

easement because "it is followed by a qualification which again illustrates the meaning of the words 'right of way' used at the beginning of the description of the property conveyed." The court found that because "right of way" was used to describe the interest conveyed, the warranty clause "could not have been for the purpose of adding to a complete title to the land embraced by the grant." *Id.*

Georgia courts repeatedly hold that deeds to railroads describing the interest conveyed as "fee simple" or as "fee simple forever" grant only an easement. *Rogers*, 54 S.E.2d at 135 (citing *Bale v. Todd*, 50 S.E. 990 (Ga. 1905) ("'[F]orever in fee simple,' does not demand the construction that this instrument conveys to the grantee title to this land, and not a mere easement.").

In *Preseault II* this Court held that the use of a general warranty deed does not mean any interest greater than an easement was granted. 100 F.3d at 1536, 1571 ("property interests in the parcel…conveyed following survey and location by warranty deed, amounted to [an] easement[ ]").

Easements are, by definition, a grant to *use* a specific tract of land for a *specific* purpose. Easements are not a general grant to use the land for any purpose.

> The easements involved here are express easements, meaning that the scope of the easements are set out in express terms, either in the granting documents or as a matter of incorporation and legal construction of the terms of the relevant documents. "The extent of an

> easement created by a conveyance is fixed by the conveyance."[12] In a leading treatise on the subject,[13] the authors state the general rule to be "when precise language is employed to create an easement, such terminology governs the extent of usage."

Preseault II, 100 F.3d at 1542.

Georgia law is settled and unequivocal. The CFC rightly applied Georgia law when it concluded the railroad had only an easement. Should this Court be inclined to the government's novel view of Georgia law, the proper approach is not to embrace the government's unorthodox view of Georgia property law but to certify the question to the Supreme Court of Georgia. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 78-79 (1997) (when a federal court chooses to decide "a novel state [law question] not yet reviewed by the State's highest court," it "risks friction-generating error"); Ga. Code §15-2-9; Ga. Sup. Ct. R. 46.

2. These original easements terminated when the railroad no longer operated across the strip of land.

Under Georgia law and the terms of the original grants, the 1890s easements terminated. The Board's invocation of section 8(d) established new easements for public recreation and railbanking across these owners' land. *Preseault II*, 100 F.3d at 1550 ("The taking of possession of the lands owned by the Preseaults for use as a

[12] Quoting 5 *Restatement of Property* (1944) §482.

[13] Quoting Bruce and Ely, *The Law of Easements and Licenses in Land* (1995) ¶8.02[1], at 8-3.

public trail was in effect a taking of a new easement for that new use, for which the landowners are entitled to compensation."). See also *Trevarton v. South Dakota*, 817 F.3d 1081, 1087 (8th Cir. 2016) (citing *Preseault II*), and *Toews*, 376 F.3d at 1376.

Chief Justice Roberts explained railroad right-of-way easements are common law easements.

> The essential features of easements – including, most important here, what happens when they cease to be used – are well settled as a matter of property law. An easement is a "nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." "Unlike most possessory estates, easements…may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude." In other words, if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land.
>
> *Brandt*, 572 U.S. at 104-05.[14]

As Chief Justice Roberts observed, easements are a right to *use* property for a *specific* purpose and when that use ends the easement terminates. In *Atlanta v. Fulton County*, 82 S.E.2d 850, 853-54 (Ga. 1954), the Supreme Court of Georgia explained, "if the use of the condemned property in the business to be served

[14] Citing and quoting *Restatement (Third) of Property: Servitudes* (1998) §1.2(1) §1.2, Comment d, § 7.4, Comments a, f.

permanently ceases, the property is not to be used for other purposes,' and it reverts to the person from whom it was taken, his heirs or assigns."

There is no question that the Central Georgia Railroad abandoned this right-of-way. In Georgia, "to constitute abandonment of an easement acquired by grant acts must be shown of such an unequivocal nature as to indicate a clear intention to abandon, and that mere nonuser will not amount to abandonment." *Coffee County*, 110 S.E. at 216 (holding that such unequivocal intent to abandon was apparent when the railroad removed its tracks from the right-of-way). In *Crutchfield*, 191 S.E. at 468, the Supreme Court of Georgia upheld a jury's finding that a railroad right-of-way had been abandoned when the "railroad tracks have been dismantled, and the rails torn up; that the cross-ties have become rotten; that the roadbed and right of way have grown up in tress; that no trains have been operated over the tracks [for nine years]; and that it is not likely that any trains will ever be operated thereon."

In *Byrd*, the court held, "The deed from [grantor] to the [railroad]…conveyed only a right of way or an easement, which terminated by abandonment or nonuse when the successor railroad company [ceases] to use the land for railroad purpose." 25 S.E.2d at 41 (citations omitted). See also *Giddens v. Barrentine*, 448 S.E.2d 441, 443 (Ga. 1994).

The railroad unequivocally sought to abandon this right-of-way as evidenced by its filings with the Board. The railroad stated, "[Central Georgia Railroad] seeks

to *abandon* approximately 14.90 miles of rail line…." Appx0109 (emphasis added). "[Central Georgia Railroad] certifies that the Line *satisfies the criteria for abandonment* under the class exemption provisions of 49 C.F.R. Part 1152, Subpart F." Appx0108 (emphasis added). The railroad certified no traffic had moved over the line in two years. Appx0109. The railroad stated,"[t]he proposed *abandonment* will be consummated on or after August 20, 2013." *Id.* (emphasis added). The railroad then removed its tracks from the former right-of-way and has since disclaimed any interest in the right-of-way to a non-railroad recreational trail group.

In *Preseault II*, 100 F.3d at 1554, this Court observed, "While it is not disputed that an easement will not be extinguished through mere non-use, removing the tracks and switches from a railway cannot be termed non-use." By the railroad's own account, attested to by sworn pleadings the railroad filed with the Board, the original 1890s right-of-way easements have been unquestionably abandoned.

CONCLUSION

This Court should affirm Chief Judge Sweeney's decision. Judge Sweeney rightly applied Georgia law. The government invites this Court to overturn Judge Sweeney on the basis of a novel view of Georgia law that no Georgia court has embraced. The government's argument is contrary to two centuries of Georgia common law and statutory law and, if accepted, would unsettle established property interests.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On November 6, 2019, the foregoing brief was electronically filed using the Court's CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users, including any of the following:

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and Federal Circuit Rule 32(a) in that the brief contains 6,946 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

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