No. 12-1173

In the Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST, ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

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

BRIEF FOR THE CATO INSTITUTE AND THE NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*. This case is important to Cato because the Tenth Circuit's decision unsettles long-established property interests and allows the federal government to take property from individual owners without the just compensation required by the Fifth Amendment.

The National Association of Reversionary Property Owners is a Washington State non-profit 501(c)(3) educational foundation, whose primary purpose is to assist property owners in the education and defense of their property rights, particularly their ownership of

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[1] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, *amici curiae* provided counsel for all parties ten days notice of the filing of this brief, and all parties have consented to such filing.

property subject to railroad right-of-way easements.[2] Since its founding in 1989, the Association has assisted over ten thousand property owners and has been extensively involved in litigation concerning landowners' interest in the land subject to active and abandoned railroad rights-of-way easements. *See National Ass'n of Reversionary Property Owners v. Surface Transp. Bd.*, 158 F.3d 135 (D.C. Cir. 1998), and *amicus curiae* in, *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990) ("*Preseault I*").

This case is important to the Association because the Tenth Circuit's decision unsettles long-established property interests and clouds the title of many landowners whose property is (or was) encumbered by a railroad right-of-way easement established under the General Railroad Right-of-Way Act of 1875, 43 U.S.C.

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[2] We use the term "reversionary" as shorthand reference to a landowner's fee estate in land encumbered by an easement granting (in this case) a railroad a right-of-way to operate a railway line across a strip of the owner's land. "We note in passing that as a matter of traditional property law terminology, a termination of the [railroad] easements would not cause anything to 'revert' to the landowner. Rather, the burden of the easement would simply be extinguished, and the landowner's property would be held free and clear of any such burden." *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004). *See also Preseault v. United States*, 100 F.3d 1525, 1533-34 (Fed. Cir. 1996) (en banc) (*Preseault II*) ("Instead of calling the property owner's retained interest a fee simple burdened by an easement, this alternative labels the property owner's retained interest following the creation of an easement as a 'reversion' in fee. Upon the termination, however achieved, of the easement, the 'reversion' is said to become fully possessory; it is sometimes loosely said that the estate 'reverts' to the owner.").

934-939 ("1875 Act"). And because the Tenth Circuit's split from the holding of the Seventh and Federal Circuits, resolution of title disputes will be more costly and time-consuming.

BACKGROUND

Marvin Brandt and his family own land in Wyoming, holding title to this land in a revocable trust. *United States v. Marvin M. Brandt Rev. Tr.*, 2008 WL 7185272 at *1 (D. Wyo. April 8, 2008). The Brandt family bought this property from landowners who traced their title to a land patent the United States issued homesteaders in 1976.[3] *Id.* at *2.

In 1908, when the federal government still owned the land, "the Laramie, Hahn's Peak and Pacific Railroad Company was granted a right-of-way for railroad purposes through the public lands of the United States under the [1875 Act]." *Id.* at *2. The right-of-way was two hundred feet wide and sixty-six miles long. This right-of-way encumbered 1,600 acres of land, including property now owned by the Brandt family.[4]

The 1976 land patent issued to a homestead patentee provided the land was "subject to those rights for railroad purposes as have been granted to the

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[3] The land patent issued February 18, 1976, pursuant to 16 U.S.C. § 485 for 83.32 acres of land. *Brandt*, 2008 WL 7185272 at *2.

[4] Sixty-six miles multiplied by 5,280 feet per mile by 200 feet in width is 69,696,000 square feet, which is 1,600 acres. One U.S. Survey Acre contains 43,560 square feet.

Laramie Hahn's Peak & Pacific Railroad Company, its successors or assigns…under the [1875 Act]." *United States v. Brandt*, 496 Fed. Appx. 822, 824 (10th Cir. 2012) ("*Brandt I*").[5] The land patent contains no provision by which the United States reserved any interest in the land encumbered by the railroad easement. A quarter-century after the land was patented to homesteaders, the railroad abandoned the right-of-way.[6]

In *Great Northern Railway Co. v. United States*, 315 U.S. 262, 271 (1942), this Court explained:

> The Act of March 3, 1875, from which [the Railroad's] rights stem, clearly grants only an easement, and not a fee. Section 1 indicates that the right is one of passage, since it grants 'the,' not a, 'right of way through the public lands of the United States.' Section 2 adds to the conclusion that the right granted is one of use and occupancy only, rather than the land itself.…'

The Railroad, thus, "has only an easement in its rights of way acquired under the Act of 1875." *Id.* at 277.

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[5] *Brandt v. United States*, 710 F.3d 1369 (Fed. Cir. 2013) ("*Brandt II*") is discussed below.

[6] The Wyoming-Colorado Railroad Company was the successor to the Laramie, Hahn's Peak & Pacific Railroad Company. *Brandt*, 2008 WL 7185272 at *2. In May 2001, the Wyoming-Colorado Railroad Company filed a Notice of Intent to Abandon Rail Service with the Surface Transportation Board ("STB"). *Id.*

When the government patents land to private owners–absent an express provision to the contrary–the private owner obtains the entirety of that interest the government held–the fee simple estate. The private owners' interest is limited, if at all, by (a) a prior grant of an interest in the land which the government made to a different entity; or, (b) an interest the government itself expressly reserved in the land patent. *See, e.g.*, *Boesche v. Udall*, 373 U.S. 472, 477 (1963) (a land patent "divests the government of title"), *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 49 n.9 (1983) (holding that once the land patent issued, the government had no recourse, even when the patent was erroneously issued), and *Swendig v. Washington Water Power Co.*, 265 U.S. 322, 329, 331 (1924) ("it is true as a general rule, that when…entry is made and certificate given, the land covered ceased to be a part of the public lands…[and] all title and control of the land passes from the United States"). S*ee also Witherspoon v. Duncan*, 71 U.S. 210, 219 (1866), and *United States v. Schurz*, 102 U.S. 378, 397 (1880).

In neither the 1875 Act nor the 1976 land patent did the government reserve any interest in that strip of land encumbered by the right-of-way easement granted the railroad. Thus, when the government issued the 1976 land patent conveying this property to private owners (the Brandt family's predecessors in title), these private owners took title to this land subject only to that easement the railroad then held to operate a railway line across this strip of land. And, in 2001, when the railroad abandoned this railway line, the easement terminated, and the Brandt family—as owner of the underlying fee estate—owned their land unencumbered by any easement.

SUMMARY OF ARGUMENT

The Tenth Circuit's decision in *Brandt I* is inconsistent with this Court's 1875 Act jurisprudence and is directly contrary to the holding of the Federal and Seventh Circuits. *Brandt I* upsets long-established title to potentially millions of acres of land owned by tens of thousands of landowners. *Brandt I* will result in decades of costly litigation with inconsistent outcomes depending upon the circuit with jurisdiction. For these reasons, this Court should grant the Brandts' petition for review.

ARGUMENT

I. THE TENTH CIRCUIT SPLIT FROM THE FEDERAL AND SEVENTH CIRCUITS.

Every Circuit to consider the issue—other than the Tenth Circuit—has held the federal government did not retain any "implied" interest in land encumbered by a railroad right-of-way easement established under the 1875 Act.

A. The Federal Circuit's *Hash v. United States* decision in favor of the reversionary landowner.

The Federal Circuit considered this question in *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005) (Newman, J.). *Hash* involved an 1875 Act right-of-way across land of "approximately two hundred Idaho landowners." *Id.* at 1310. The Federal Circuit stated:

> The primary issue is whether the…landowner owns the estate underlying the Railroad right-of-way, or whether the underlying estate never left its ownership by the United States, or whether the estate was deeded in fee to the Railroad.

Id. at 1312. After reviewing this Court's jurisprudence, the Federal Circuit concluded:

> The rights acquired by the homestead patentee are governed by the Act of 1875, which granted to the railroad the right to traverse the land and build stations and other railway structures, and provided that disposition of the land would be subject to the right-of-way. The district court erred in holding that the United States retained the reversionary interest to the land underlying these rights-of-way after disposing of the land grant patent under the Homestead Act.

Id. at 1318.

The Federal Circuit reached this holding by expressly relying upon this Court's decisions in *Great Northern*, *Boesche*, *Swendig*, *Watt, Witherspoon*, and *Leo Sheep Co. v. United States,* 440 U.S. 668, 687-88 (1979), among other cases.

The Federal Circuit noted this Court's policy of "consistently preserv[ing] the integrity of the land grant patent, in its review and application of the statutes before and after the 1875 Act." *Hash*, 403 F.3d at 1315. The subordinate Court of Federal Claims ("CFC") has followed the Federal Circuit. *See, e.g.*, *Beres v. United States*, 64 Fed. Cl. 403, 425-28 (2005).

B. The Seventh Circuit's *Samuel C. Johnson* decision in favor of the reversionary landowner.

The Seventh Circuit reached the same conclusion. In *Samuel C. Johnson 1988 Trust v. Bayfield County*, 649 F.3d 799, 803 (7th Cir. 2011) (Posner, J.), the court ruled that the railroad held only an easement, and when the government patented the land to a private owner, the private owner took full fee simple ownership of the property. "[T]ermination of an easement restores to the owner of the fee simple full rights over the part of his land formerly occupied by the right of way created by the easement." *Id.* (citing RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.4, comments a, c, f (2000), and numerous federal acts and decrees).

The Seventh Circuit also considered the Tenth Circuit's contrary opinion in *Marshall v. Chicago & Northwestern Transportation Co.*, 31 F.3d 1028, 1031 (10th Cir. 1994), and the scant authority (a district court decision and a law review article) upon which the Tenth Circuit premised its decision. The Seventh Circuit concluded that the Federal Circuit's decision in *Hash* "make[s] better sense than [the Tenth Circuit's decision in] *Marshall*…." *Samuel C. Johnson*, 649 F.3d at 803. And, the Seventh Circuit said, *Hash* was "supported by the characterization…of the rights of way created under the 1875 Act as 'easements'" by this Court in *Great Northern. Id*.

Following this Court's analysis in *Great Northern*, Judge Posner continued:

> The [1875] Act does not hint at a reversionary interest, and who searching the chain of title of a lot never owned by a railroad would suspect a lurking governmental right so unsettling to the security of private property rights?

Id.

The Seventh Circuit then reversed the district court's decision, which wrongly held the federal government retained an "implied" reversionary interest in land subject to 1875 Act railroad rights-of-way.[7]

In 2009, before the Seventh Circuit reversed the district court's decision, the American Land Title Association named the district court's decision one of the six most important court decisions with "significant ramifications on the title insurance industry." *See Top Lawsuits Impacting the Title Industry*, ALTA TITLE COUNSEL COMMITTEE, TITLE NEWS, vol. 89, no. 5 (May 2010), p. 10. The land title association did so because "many title examiners have relied on the acts of a U.S. agency and the direct acts of the U.S. to insure titles free of the interest of the U.S. and those claiming under them. [The district court's decision] could prove that reliance misplaced." *Id.* at 13.

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[7] In *Samuel C. Johnson*, the federal government had supposedly conveyed this implied reversionary interest to the county for a snowmobile trail.

C. The Tenth Circuit ruled to the contrary in *Brandt I*.

The Tenth Circuit explained, "[t]hough we recognize that the Seventh Circuit, the Federal Circuit and the Court of Federal Claims have concluded that the United States did not retain any reversionary interest in these railroad rights-of-way, we are bound by our precedent." *Brandt I*, 496 Fed. Appx. at 824-25. The Tenth Circuit then held, on the basis of its prior decision in *Marshall,* that "the United States retained an *implied* reversionary interest" in land. *Id*. at 824. (emphasis supplied). The Tenth Circuit concluded that this "implied" reversionary interest arose by reason of federal legislation enacted *after* the land patent, to wit, the 1988 modification to 16 U.S.C. § 1248(c). *Id*. at 824-25.

The Tenth Circuit acknowledged its holding was directly contrary to decisions of the Federal Circuit, the Seventh Circuit, and the CFC. *Brandt I*, 496 Fed. Appx. at 825. The Tenth Circuit rejected the view of these other courts, looking instead to *Marshall*, which was premised on a single 1985 opinion by a district court judge *and a law review article*:

> Relying upon *Idaho v. Oregon Short Line R.R.*, 617 F. Supp 207 (D. Idaho 1985), we concluded that the United States retained an implied reversionary interest. *Marshall* at 1032.

Id. The Tenth Circuit's deference to a district court's 1985 decision—instead of the well-reasoned unanimous opinions of two sister circuits—is more than passing strange.

Even odder was the Tenth Circuit's reliance on a law review article: Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress's '1871 Shift,'"* 82 U. COLO. L. REV. 85, 150-64 (2011). *See Brandt I*, 496 Fed. Appx. at 825. Mr. Roberts is neither a historian nor scholar; he is a lawyer with the U.S. Attorney's office. *See* Roberts, *Legal History* at n.a1.

The Tenth Circuit never explained why an article written by a government lawyer is more compelling authority than unanimous opinions authored by Judge Newman of the Federal Circuit and Judge Posner of the Seventh Circuit.

Further, Mr. Robert's law review article, on which the Tenth Circuit relies, is premised on a demonstrably false historical premise. As his title suggests, Mr. Roberts contends Congress's 1870s shift in policy concerning railroad land grants is a "myth." Roberts, U. COLO. L. REV. at 85. But, if a "myth," it is a "myth" embraced and affirmed by extraordinarily credible authorities—including this Court.

In *Great Northern*, this Court explained the 1875 Act was the result of a "sharp change in Congressional policy with respect to railroad grants after 1871." 315 U.S. at 275.

Before 1871, Congress made generous land grants to individual railroad companies. Congress wanted to encourage railroads to build a transcontinental railway line and provided the railroads land for a right-of-way as well as fee title to alternating tracts of land the railroad could sell to finance construction of the

railroad. This Court described the railroad's interest in the right-of-way land, upon which it built railway lines under these pre-1871 grants, as a "limited fee." *See, e.g.*, *Northern Pacific Railway Co. v. Townsend*, 190 U.S. 267, 271 (1903).

This federal largesse to powerful and politically connected railroad interests resulted in scandal and public outrage. The most notorious was the Credit Mobilier Scandal. Congress responded by dramatically changing its land grant policy.

This Court explained Congress's 1871 "shift" in policy:

> Beginning in 1850 Congress embarked on a policy of subsidizing railroad construction by lavish grants from the public domain. This policy incurred great public disfavor which was crystallized in the following resolution adopted by the House of Representatives on March 11, 1872:[8]
>
> After 1871 outright grants of public lands to private railroad companies seem to have been discontinued. But, to encourage development of

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[8] "Resolved, that in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law. Cong. Globe, 42d Cong., 2d Sess., 1585 (1872)."

> the Western vastnesses, Congress had to grant rights to lay track across the public domain….

In the early 1870s, Congress initially passed separate "special acts" for each grant of a right-of-way to a railroad. This Court ruled these acts granted the railroad a right-of-way easement, not title to the land itself. *Id* at 274. But passing special legislation for each railroad right-of-way was burdensome, so Congress passed the 1875 Act which was a "general right of way statute" that applied to all railroad rights-of-way across land then owned by the federal government.

This Court held the 1875 Act granted the railroad only a "right of passage" across the land:

> Since *it was a product of the sharp change in Congressional policy with respect to railroad grants after 1871*, it is improbable that Congress intended by it to grant more than a right of passage, let alone mineral riches…. [Section 4] *strongly indicates that Congress was carrying into effect its changed policy* regarding railroad grants.

Great Northern, 315 U.S. at 273-75 (footnotes omitted) (emphasis supplied).[9]

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[9] *See also* James W. Ely, Jr., RAILROADS AND AMERICAN LAW, University Press of Kansas (2001), pp. 51-64 ("As a consequence [of scandals such as Credit Mobilier], Congress began to shift priorities with respect to the transcontinental project.").

Importantly, this Court also noted the animating objective underlying Congress's shift in policy was that "*public lands should be held for the purpose of securing homesteads to actual settlers.*" (*See supra* note 7.)

Thus, in the 1870s there was a "sharp change in Congressional policy with respect to railroad grants," this new policy was intended to hold public lands "for the purpose of securing homesteads to actual settlers," and the 1875 Act was adopted as part of this new congressional policy. The property interests of the railroad, the federal government, and the homesteaders who actually settled the land must be determined consistent with this policy.

The Tenth Circuit, however, relying on a law review article that called "the sharp change in Congressional policy" a "myth," broke with the Seventh and Federal Circuits. Instead, the Tenth Circuit found that the federal government retained an "implied" interest in the land patented to homesteaders which had been encumbered by an 1875 Act railroad right-of-way. This was so, the Tenth Circuit ruled, even though the land patent itself did not contain any provision by which the federal government retained an interest to this land.

The Brandt family requested the Tenth Circuit to rehear this issue *en banc*. The Tenth Circuit denied rehearing. *See* Order of December 26, 2012, *United States v. Brandt*, No. 09-8047, Doc. No. 01018973423 (10th Cir. 2012).

II. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT BY REVERSING *BRANDT I*.

A. *Brandt I* undermines this Court's interest in the "special need for certainty and predictability where land titles are concerned."

In *Leo Sheep*, 440 U.S. at 687-88 (Rehnquist, J.), this Court directed lower courts to recognize "the special need for certainty and predictability where land titles are concerned" and be "unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation."

A citizen's right to be secure in ownership of their property is one of the primary objects for which the national government was formed.[10] In *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) (Stewart, J.), this Court observed, "[T]he 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."

The Tenth Circuit's decision in *Brandt I* is exactly what this Court admonished lower courts to avoid in *Leo Sheep*. It is not just that *Brandt I* held the government retained an "implied" reversionary interest in land subject to the 1875 Act. Even worse, the Tenth

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[10] *See* James W. Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT–A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS, 2d ed., Oxford University Press (1998).

Circuit held this was so because of legislation Congress passed decades *after* the property had been patented to private owners.

When a district court reached a similar holding in *Samuel C. Johnson*, the American Land Title Association named the case one of the six most important lawsuits with ramifications for the land title industry. ALTA TITLE COUNSEL COMMITTEE, *supra* at 9. They did so because, should the United States be found to have retained an "implied" interest in land underlying 1875 Act railroad rights-of-way, it was contrary to how land titles had been insured. *Id.* at 13. Title examiners "insured titles free of the interest of the U.S. and those claiming under the U.S [and federal agencies]." *Id*. The district court decision in *Samuel C. Johnson*, like the Tenth Circuit in *Brandt I*, unsettled the reliance title examiners placed upon land patents involving property encumbered by a 1875 Act railroad right-of-way.

As Judge Posner noted in *Samuel C. Johnson*, the 1875 Act did not provide even a "hint" by which an owner "would suspect a lurking governmental right so unsettling to the security of private property rights." 649 F.3d at 803. The Tenth Circuit's opinion is especially "unsettling" because it retroactively redefines property interests granted in a 1976 land patent on the basis of a 1988 revision to a different federal statute.

How many acres of privately-owned land are encumbered by railroad rights-of-way established under the 1875 Act that have been (or will be)

abandoned is difficult to determine, but it is no small number. In *Preseault I*, this Court noted:

> In 1920, the Nation's railway system reached its peak of 272,000 miles; today only about 141,000 miles are in use, and experts predict that 3,000 miles will be abandoned every year through the end of this century.[11]

494 U.S. at 1.

The Library of Congress reports:

> [B]eginning in the early 1870s, railroad construction in the United States increased dramatically. Prior to 1871, approximately 45,000 miles of track had been laid. Between 1871 and 1900, another 170,000 miles were added to the nation's growing railroad system.[12]

During the same time railroads were expanding westward across public and private land, much of the public land was being patented to private owners under the Homestead Act of 1862, 12 Stat. 392, codified at 43 U.S.C. § 161 (repealed, 90 Stat. 2787 (1976)). The

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[11] Citing *Comment, Rails to Trails: Converting America's Abandoned Railroads into Nature Trails*, 22 AKRON L. REV. 645 (1989)); *see also* 102 *ICC Ann. Rep*. 44-45 (1988); 101 *ICC Ann. Rep*. 37-38 (1987).

[12] Library of Congress, *Rise of Industrial America, 1876-1900: Railroads in the Late Nineteenth Century*, AMERICAN MEMORY (available at: http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/riseind/railroad/)

Bureau of Land Management ("BLM") reported a total of 4 million land claims were filed, 270 million acres were transferred to private ownership, including 45 percent of the entire State of Nebraska.[13] The BLM also said "thousands of miles of 1875 Act [rights-of-way] are estimated to exist on public land in the western United States."[14]

These historical statistics suggest millions of acres of privately-owned land and tens of thousands of individual landowners' property may be encumbered by a railroad right-of-way established under the 1875 Act. Whether the United States does, or does not, hold an "implied" reversionary interest in this land is, thus, a matter of great significance to these owners and the United States.

B. *Brandt I* creates a dilemma because it is directly contrary to how the Court of Federal Claims would rule following *Hash* and *Brandt II*.

F. Hodge O'Neal, former Dean of Washington University Law School, was fond of the story about the older lawyer advising a young lawyer to be wary of the "peculiarities and inequities of the law:"

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[13] Mary Apple, *BLM Commemorates Homestead Act*, U.S. DEPT. OF THE INTERIOR, QUARTERLY STEWARD (Winter 2001) (available at: http://www.blm.gov/mt/st/en/info/newsroom/steward/11winter/pxburn.html)

[14] BLM, INTERIM GUIDANCE RELATING TO THE SCOPE OF A RAILROAD'S AUTHORITY TO APPROVE USES WITHIN RAILROAD RIGHTS-OF-WAY, (Dec. 2, 2011), attachment p. 1.

> The young lawyer said, "Why do you always tell me about the 'peculiarities and inequities of the law'?" The older lawyer said, "Well, fifteen years ago I was right at the top of the profession. I had plenty of clients, they were paying good fees, I had a wonderful family, I had a beautiful blonde secretary who could take shorthand, and all of a sudden the whole thing crumbled around my ears. My wife brought a suit for divorce on the grounds that I was impotent. My secretary brought a paternity action claiming I was the father of her child. And because of the peculiarities and inequities of the law I lost both cases."

F. Hodge O'Neal, *Proceedings*, 43 NEB. L. REV. 410, 422 (1963-64).

Brandt I invites just such a "peculiar and inequitable" outcome; here is why.

Brandt I began as a quiet title case the United States brought against the Brandt family. The Brandt family responded by disputing the government's claim and bringing a Fifth Amendment taking claim. The Tucker Act, 28 U.S.C. § 1491(a)(1), however, vests exclusive jurisdiction for such a taking claim with the CFC.[15]

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[15] The "Little Tucker Act" allows a federal district court to hear claims for less than $10,000. 28 U.S.C. § 1346(a)(2). Any appeal from the district court is lodged with the Federal Circuit. 28 U.S.C. § 1295(a)(2).

The Brandt family pursued their taking claim in the CFC. The CFC dismissed the case as barred under 28 U.S.C. § 1500 and this Court's decision in *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011). The Federal Circuit reversed. *Brandt v. United States*, 710 F.3d 1369 (Fed. Cir. 2013) ("*Brandt II*"). The Brandts' taking claim is now remanded to the CFC for decision on the merits.

The dilemma arises because the CFC is bound to follow *Hash*, in which the Federal Circuit held the United States did not retain any "implied" reversionary interest in land encumbered by railroad rights-of-way established under the 1875 Act. Thus, under *Hash*, the Brandt family—not the government—owns the land. In *Brandt I,* however, the Tenth Circuit held the government—not the Brandt family—owns the land because the United States retained an "implied" reversionary interest under the 1875 Act.

This Court should grant the Brandts' petition to review the Tenth Circuit's decision and prevent *Brandt I* from giving rise to such an idiosyncratic result.

C. If left to stand, *Brandt I* will make resolving landowners' Trails Act taking claims much more costly and time-consuming.

More than a quarter-century ago, Congress adopted § 1247(d) of the National Trails System Improvement Act.[16] The "Trails Act" allows the STB to take an otherwise abandoned railroad right-of-way easement and use the land for public recreation and so-called "rail-banking." Because these new and different uses of the land are beyond the scope of the original easement, this is a taking of the owner's property. *See Preseault I*, 494 U.S. at 12; *Preseault II*, 100 F.3d at 1525; *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004); *National Wildlife Federation v. I.C.C.*, 850 F.2d 694, 708 (D.C. Cir. 1988); and *Ladd v. United States*, 630 F.3d 1015, 1023-24 (Fed. Cir. 2010).

In *Preseault I*, this Court held:

> [R]ail-to-trail conversions giving rise to just compensation claims are clearly authorized by [§1247(d)]. Although Congress did not explicitly promise to pay for any takings, we have always assumed that the Tucker Act is an "implie[d] promis[e]" to pay just compensation which individual laws need not reiterate.

494 U.S. at 13.

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[16] Pub. L. No. 98-11, 97 Stat. 42, National Trails System Improvement Act of 1998, codified, as amended, at 16 U.S.C. § 1248, *et. seq.* (2006).

Because owners could be compensated by bringing an inverse condemnation action in the CFC, this Court sustained the constitutionality of the Trails Act. But during the two decades since *Preseault I*, landowners seeking to vindicate their Fifth Amendment right to "just compensation," have confronted almost a decade of costly litigation.

More than fifty Trails Act taking cases are now pending in the CFC and federal district courts. Each of these cases includes the consolidated claims of many owners along the abandoned right-of-way easement subject to the STB's order. Many of these cases involve claims of several hundred owners. While it is impossible to state with certainty the total number of landowners whose claims are now pending, it is almost certainly more than ten thousand. And the STB continues to issue orders invoking § 1247(d), taking property from owners who have yet to seek compensation. Many of these owners' claims, like *Hash* and *Beres*, involve rights-of-way established under the 1875 Act.

The United States has chosen to respond to Trails Act taking claims by mounting an aggressive challenge to any landowner seeking compensation. The government requires landowners to run a gauntlet of litigation.[17] The government concedes little, litigates

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[17] *See* M. Hearne, *et al.*, *The Trails Act: Railroading Property Owners and Taxpayers For More Than a Quarter Century*, 45 REAL PROPERTY, TRUST AND ESTATE LAW JOURNAL 115, 118 (Spring 2010).

every point, and recycles the same losing arguments in each case.

For example, the government repeatedly made, and lost, its "railbanking is a railroad" argument. The government claims because a new railroad line could possibly be built across this land in the future, the land is now still being used for a "railroad." The Federal Circuit rejected this argument in *Preseault II*:

> As to the latter, otherwise known as railbanking, . . . [t]he vague notion that the State may at some time in the future return the property to the use for which it was originally granted, does not override its present use of that property inconsistent with the easement. That conversion demands compensation.

100 F.3d at 1554 (Rader, J., concurring). The Federal Circuit rejected this argument a second time in *Toews*, 376 F.3d at 1376.

Though rejected by the Federal Circuit *en banc*, and a second time in *Toews*, the government continues to use this same argument in subsequent Trails Act cases. Not surprisingly, the CFC repeatedly rejects the argument. The government has lost this argument in more than twenty consecutive cases.[18]

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[18] *See, e.g.*, *Glosemeyer v. United States*, 45 Fed. Cl. 771 (2000); *Biery v. United States*, 99 Fed. Cl. 565 (2011); *Rogers v. United States*, 90 Fed. Cl. 418 (2009); *Farmers Co-op. Co. v. United States*, 98 Fed. Cl. 797 (2011); *Ellamae Phillips Co. v. United States*, 99 Fed. Cl. 483 (2011); *Capreal, Inc. v. United States*, 99 Fed. Cl. 133, 146 (2011); *Anna F. Nordhus Trust v. United States*, 98 Fed. Cl.

After losing all of these (and other) cases on liability, the government recast this argument as its "encumbered before taken" argument, now made in the valuation stage. Even though the landowner would have enjoyed unencumbered title and exclusive possession of their property when the railroad easement terminates, the government claims the land should be valued by pretending it is still encumbered by a railroad easement. Every court to consider the argument has rejected it.[19] Yet the government continues to make it!

As the Federal Circuit recently observed, the Justice Department's defense of Trails Act cases has been "puzzling," not only by "foregoing the opportunity to minimize the waste both of its own and plaintiffs' litigation resources, not to mention that of scarce

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331 (2011); *Macy Elevator v. United States*, 97 Fed. Cl. 708, 730 (2011); *Thompson v. United States*, 101 Fed. Cl. 416 (2011); *Hodges v. United States*, 101 Fed. Cl. 549 (2011); *Rhutasel v. United States*, 2012 WL 2373253 (Fed. Cl. June 22, 2012); *Ingram v. United States*, 2012 WL 1943128 (Fed. Cl. May 24, 2012).

[19] *See, e.g.*, *Ladd*, 630 F.3d at 1023, 1025; *Navajo Nation v. United States*, 631 F.3d 1268, 1275 (Fed. Cir. 2011); *Ybanez v. United States*, 98 Fed. Cl. 659 (2011), *Ybanez v. United States*, 102 Fed. Cl. 82 (2011); *Rogers v. United States*, 101 Fed. Cl. 287 (2011); *Raulerson v. United States*, 99 Fed. Cl. 9 (2011); *Ingram*, 2012 WL 1943128; *Macy Elevator, Inc. v. United States*, 2012 WL 2368523 (Fed. Cl. June 21, 2012); *Howard v. United States*, 2012 WL 3554451 (Fed. Cl. Aug. 16, 2012); *Whispell v. United States*, 2012 WL 3591096 (Fed. Cl. Aug. 22, 2012); *Anna F. Nordhus Family Trust v. United States*, 2012 WL 2989967, *3 (Fed. Cl. July 20, 2012); *Adkins v. United States*, Case No. 09-503L, Opinion, Doc. No. 59 (July 10, 2012), p. 23; *Ladd v. United States*, 2013 WL 1069148, *4 (Fed. Cl. March 14, 2013).

judicial resources," but also by advancing arguments "so thin as to border on the frivolous." *Evans v. United States*, 694 F.3d 1377, 1379, 1381 (Fed. Cir. 2012).

Because the Tenth Circuit broke from this Court's analysis in *Great Northern* and directly contradicted the holding of its sister circuits, *Brandt I* creates uncertainty about title to land encumbered by railroad easements established under the 1875 Act, at least in the Tenth Circuit. This uncertainty and the circuit-split will engender more wasteful litigation, needlessly consume judicial resources, further delay landowners being paid that compensation they are due, and require landowners to incur even more substantial litigation costs.

As the Federal Circuit observed in *Evans*, the Justice Department raises every conceivable argument, no matter how frivolous, to frustrate a landowner's right to compensation. The apparent hope seems to be that, by making Trails Act litigation long, arduous and costly, landowners (and their counsel) will be discouraged from seeking the compensation to which they are constitutionally entitled.

Unless addressed by this Court, the Tenth Circuit's poorly-reasoned decision in *Brandt I* and its split with the Federal and Seventh Circuits is another cudgel the government would use to prevent landowners whose property was taken under the Trails Act.

By granting the Brandt family's petition and resolving the circuit-split as to whether the United States may claim an "implied" reversionary interest under the 1875 Act, this Court will have resolved an

issue that allows thousands of other landowners' Fifth Amendment claims to be more efficiently resolved.

CONCLUSION

Brandt I is inconsistent with this Court's opinion in *Great Northern* and is directly contrary to the jurisprudence of the Federal and Seventh Circuits. This Court should grant Petitioner's request for *certiorari* and ultimately reverse and remand the Tenth Circuit's ruling.

Respectfully submitted,

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