Nos. 2025-1179, -1459

United States Court of Appeals for the Federal Circuit

DEBORAH E. BARRON, JOHN BUENAVENTURA BAEZ, JAMES ACHILLE, JONATHAN ACHILLE, THE ALB REVOCABLE TRUST, THE RPB REVOCABLE TRUST, COURTYARD VILLAS, L.L.C., RONALD NOURSE, OLD FOREST LAKES OWNERS ASSOCIATION, GILDA PASCUAL, STEPHEN STILLER, CHRISTOPHER WORMWOOD, SHARON KRUEGER, JAMES MUSSELWHITE, ENOS WEAVER, JR., ANNA MARY WEAVER, WILLIS MARTIN, ALTA MARTIN, JAMES MYERS, KATHERINE MYERS, JUNE SHUMWAY, DANIEL J. MALLON, IRENE A. MALLON, as Trustees of the Mallon Family Trust under agreement dated October 3, 2007,

Plaintiffs-Appellants,

ALEXANDRINE L. BOSWELL, Trustee of the ALB Revocable Trust, dated July 21, 2003, ROMAN P. BOSWELL, Trustee of the RPB Revocable Trust, dated August 31, 2004, JACEK GATKIEWICZ, HANNA GATKIEWICZ, JONATHAN LESTER, ANAPAULA V. LESTER,

Plaintiffs,

v.

UNITED STATES,

Defendant-Appellee

On Appeal from the United States Court of Federal Claims in No. 1:21-cv-02181-EHM, Judge Edward H. Meyers

4023 SAWYER ROAD I, LLC, DOUGLAS ABBOTT, CYNTHIA G. ABBOTT, JULIA R. ADKINS, AUSTIN C. MURPHY, RONALD S. ALBRITTON, JOYCE S. ALBRITTON, LOUIS J. ALDERMAN, JR., as Trustee of LOUIS L. ALDERMAN 2013 REVOCABLE TRUST, NEAL ATCHLEY, JO ATCHLEY, JEFFREY DOYLE,

Plaintiffs,

JOHN M. ALVIS, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee

On Appeal from the United States Court of Federal Claims in No. 1:19-cv-00757-EHM, Judge Edward H. Meyers

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, PROFESSOR OF PROPERTY LAW JAMES W. ELY, JR., AND NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS IN SUPPORT OF APPELLANTS URGING REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 25-1179, -1459

Short Case Caption Barron v. United States; 4023 Sawyer Road I LLC v. United States

Filing Party/Entity Amici curiae Pacific Legal Foundation

Instructions:

1. Complete each section of the form and select none or N/A if appropriate.
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I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: May 5, 2025

Signature: /s/ Robert H. Thomas

Name: Robert H. Thomas

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Pacific Legal Foundation		
Prof. James W. Ely, Jr.		
National Association of Reversionary Property Owners		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☑ None/Not Applicable ☐ Additional pages attached

5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

☐ Yes (file separate notice; see below) ☐ No ☑ N/A (amicus/movant)

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). **Please do not duplicate information.** This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

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IDENTIFICATION AND INTEREST OF AMICI CURIAE[1]

Pacific Legal Foundation ("PLF") is a nonprofit corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. PLF has argued and won many cases before the U.S. Supreme Court and other courts in defense of property rights. *See, e.g.*, *Tyler v. Hennepin Cnty.*, 598 U.S. 631 (2023) ("private property" in the Fifth Amendment is not entirely defined by state law); *Wilkins v. United States*, 598 U.S. 152 (2023) (Quiet Title Act's statute of limitations is not jurisdictional); *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021) (state granting union representatives access to private property is a taking); *Knick v. Twp. of Scott*, 588 U.S. 180, 189 (2019) (reopening federal courts to takings claimants).

[1] All parties have consented to the filing of this brief, which is not authored, in whole or part, by any party's counsel. No party, party's counsel, or person, other than amici or its counsel, contributed money intended to fund the preparation or submission of this brief. PLF's Board of Trustees authorized the filing of this brief on behalf of Pacific Legal Foundation. James W. Ely, Jr., authorized the filing of this brief on his own behalf. The president of the National Association of Reversionary Property Owners authorized the filing of this brief on behalf of that organization. Prior to July 31, 2024, undersigned counsel Stephen S. Davis was co-counsel for the Plaintiff-Appellants in the court below.

Professor James W. Ely, Jr., is the Milton R. Underwood Professor of Law Emeritus at Vanderbilt University Law School. Professor Ely is a renowned property law expert and legal historian and is the co-author of the leading treatise on easements, *The Law of Easements & Licenses in Land* (revised ed. 2021) ("*Ely on Easements*"). The U.S. Supreme Court and twenty-one other federal courts have relied upon Professor Ely's scholarship. *See*, *e.g.*, *Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 96 (2014), *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 590 U.S. 604 (2020), *Sveen v. Melin*, 584 U.S. 811, 830 (2018) (Gorsuch, J., dissenting), and *Sheetz v. County of El Dorado*, 601 U.S. 267, 277 (2024). This Court followed his "leading treatise" on easements in *Preseault v. United States*, 100 F.3d 1525, 1542 (Fed. Cir. 1996) (en banc) (*Preseault II)* (quoting *Ely on Easements* ¶ 8.02[1]). Courts in 41 states and territories have cited Professor's Ely's work, including 29 nine state supreme courts. Professor Ely is also the author of several books that have received widespread critical acclaim from legal scholars and historians, including *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008) ("*Ely on Property*

Rights"), *Railroads & American Law* (2001) ("*Ely on Railroads*"), and *The Contract Clause: A Constitutional History* (2016).

National Association of Reversionary Property Owners ("NARPO") is a Washington State not-for-profit educational foundation whose purpose is to educate property owners concerning the defense of their property rights. NARPO has assisted thousands of property owners nationwide and has been involved in litigation protecting an individual's constitutional right to due process and just compensation as guaranteed by the Fifth Amendment for decades. *See, e.g.*, *Nat'l Ass'n of Reversionary Prop. Owners v. Surface Transp. Bd.*, 158 F.3d 135 (D.C. Cir. 1998); *Preseault v. Interstate Com. Comm'n*, 494 U.S. 1 (1990); *Marvin M. Brandt Rev. Tr. v. United States*, 572 U.S. 93 (2014).

SUMMARY OF ARGUMENT

As recently reaffirmed by the Supreme Court in *Tyler*, the definition of "private property" in the Fifth Amendment is determined by traditional property law principles, historical practice, and the Supreme Court's precedents. These fundamental and longstanding property law principles make plain that in 1926, Tampa Southern Railroad obtained

only an easement for railroad purposes when it condemned a "right of way" to use a strip of land for the operation of a railway line.

This brief also places the government's arguments redefining long-settled property rights into their broader context. This case represents the latest manifestation of the government's longstanding strategy to deny property owners just compensation after the U.S. Supreme Court and this Court held that because the Trails Act interferes with the usual operation of state property law by allowing an abandoned rail line to be converted to a public park instead of reverting to the owner of the servient estate, the Fifth Amendment requires just compensation.

ARGUMENT

Words have meaning. Especially words that determine property rights. After all, private property is the foundation of security and prosperity, and is "the guardian of every other right." *Ely on Property Rights* at 26 (quoting Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain* 14 (4th ed. 1775)). The words of the Fifth Amendment confirm that an owner's "private property" is protected, by ensuring that it may only be taken "for public use" and with "just compensation." U.S. Const. amend. V.

Thus, as the Supreme Court reminded, words about property must be viewed in light of the "special need for certainty and predictability where land titles are concerned[.]" *Leo Sheep Co. v. United States*, 440 U.S. 668, 687–88 (1979). Certain and understandable property rules and definitions do not exist for their own sake, *sui generis*, but promote the stability and predictability that are a basis of a free society. But an owner's right to be secure in his or her private property is only as safe as the government's—most importantly the judiciary's—fealty to what the Supreme Court describes as "settled expectations" of land title. *Id.* The CFC's remarkable—and utterly counterintuitive—conclusion that "right of way" did not mean that the railroad acquired an easement to use Appellants' lands but instead obtained the "fee simple absolute" interest from their predecessors, undermines the very certainty and predictability that property's traditional rules are designed to protect.

In 1926, Tampa Southern Railroad condemned a "right of way" to operate a rail line. *Barron v. United States*, 174 Fed. Cl. 114, 132 (2024). The CFC correctly concluded that the task of defining the scope of these interests is mostly assigned to state legislatures and courts. *See*, *e.g.*, *Damon v. Hawaii*, 194 U.S. 154, 157 (1904) (local law defines "property").

And were the CFC to have looked no further than Florida law, it should have easily concluded the parties are dealing with an easement, as Plaintiffs-Appellants' Opening Brief details.[2]

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[2] It seems extremely doubtful that a Florida court—were it given the opportunity to consider the question—would conclude that in 1926, a private railroad condemnor exercising eminent domain power, delegated to it by the state to take a "right of way" only for railroad purposes across a strip of land, instead acquired absolute title to a narrow corridor on multiple parcels in fee simple absolute, and along with it the right to do anything with the land and not just use it for a railroad, when the narrow strip-and-gore corridor was unusable for anything but a rail corridor, and the servient parcels were cut in two. *See Castillo v. United States*, 952 F.3d 1311, 1320 (Fed. Cir. 2020) ("[W]e conclude that the centerline presumption applies to railroad rights-of-way that serve as boundaries of a plot," but the "centerline presumption can be rebutted" when "a party can show that 'the strip of land being claimed is titled in someone else.'") (quoting *Rogers v. United States*, 184 So. 3d 1087, 1098 (Fla. 2015)). The 1926 condemnation was a private taking by a railroad delegated the sovereign power of eminent domain, which limited the railroad's power to take only for railroad purposes. That statutory delegation, then and now, would be interpreted by Florida's courts strictly. As the Florida Supreme Court emphasized:

> The power of eminent domain is an attribute of the sovereign. It is not a vesture of the state conferred by constitution or statute. It is circumscribed by the constitution and statute in order that cherished rights of the individual may be safeguarded. It is one of the most harsh proceedings known to the law, consequently when the sovereign delegates the power to a political unit or agency a strict construction will be given against the agency asserting the power. Over the past several centuries the general principles of our law of eminent domain have taken form from the pattern of a democratic state.

The U.S. Supreme Court confirms. It has concluded that when the federal government patented land to a private owner subject to a railroad "right of way," it was describing an easement and not a fee simple interest. *Brandt*, 572 U.S. at 104. Historic practice also confirms. To operate railways, railroads didn't need to own land, and most commonly didn't want to. Rather, they needed to *use* land for their rail lines. The power to use the property of another is an easement.[3] As the Supreme Court explains, "easements are not land, they merely burden land that continues to be owned by another." *Cowpasture River*, 590 U.S. at 613–614 (citing *Ely on Easements* § 1:1) ("An easement is commonly defined as a nonpossessory interest in land of another.")).

Amici make two essential points. First, we emphasize that the 1926 condemnation of a "right of way" must be viewed through the strict lens of the Fifth Amendment, which—both today and a century ago—limit

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Peavy-Wilson Lumber Co. v. Brevard Cnty., 31 So. 2d 483, 485 (1947) (citations omitted).

[3] For a widely-accepted definition of roughly contemporaneous with the 1926 condemnation 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").

Tampa Southern's power to take the property of Plaintiffs-Appellants' predecessors "for public use." The term "right of way" cannot be read as an acquisition of the fee simple estate because the only public use or purpose supporting Tampa Southern's 1926 taking of small and otherwise unusable strips-and-gores of land was a taking for a rail bed. Taking this property for anything else or anything more would have been unconstitutional, and courts today should not view long-settled involuntary deprivations of private property interests accomplished by eminent domain in a way that would have rendered the transfer unconstitutional.

Second, we provide the Court with the context in which the issues in the case arise by summarizing the government's general approach to Trails Act just compensation cases—a strategy that once led this Court to ask "exactly what this *sturm und drang* is about" in these cases. *See Evans v. United States*, 694 F.3d 1377, 1381 & n.7 (Fed. Cir. 2012) (citing Friedrich Maximilian Klinger, *Der Wirrwarr, oder Sturm und Drang* (1776)). The Supreme Court (and this Court) long ago confirmed that converting an abandoned railroad to a public park requires

compensation, but in this case and others, property owners who claim their rights are met with denial, delay, and derailment.

I. The Fifth Amendment's Public Use Clause Limited the Railroad to Taking Only What It Needed for a Public Purpose—a Right of Use for a Railroad and No More

Generally speaking, when a railroad is forcibly acquiring an interest in an owner's property for a rail line, it may only take what is necessary to accomplish its public use or purpose. The leading treatise on railroad law from the age of American railroads notes that "the power of a railroad to take lands is limited to what is necessary in order that it may fulfill its public duties." 2 Byron K. Elliott, *A Treatise on the Law of Railroads* § 954 (2d ed.1907). Professor Elliott continued:

> The legislature is the sole judge of the estate to be taken in lands required for the construction of a public work, and may authorize the taking of the fee, or of any less interest. *But where, as is usually true in the case of railroads, an easement only is required, no greater estate can be taken unless the power to take the fee is expressly conferred*. Thus, where the act provided that the corporation should be "seized and possessed of the land" taken, it was held that an easement only was acquired by condemnation.

Id. § 972. (emphasis added). It is also axiomatic that taking more than is necessary to accomplish the public use or purpose supporting a taking exceeds the condemnor's power and violates the Fifth Amendment. *See* E. L. Strobin, *Annotation*, *Right to condemn property in excess of needs*

for a particular public purpose, 6 A.L.R.3d 297 (1966) ("The authorities agree in their recognition of the principle that the power of eminent domain may not be used to condemn land in excess of the needs for public purposes[.]").

Thus, the consensus among American railroad and property law scholars (including amicus Professor Ely) is that a railroad could wield its delegated eminent domain authority to obtain only the narrowest property interest it needed to carry out its public purpose. The leading railroad law scholar of the 19th Century (who also served as the chief justice of the Vermont Supreme Court) noted, "upon general principles … a railroad … could acquire no absolute fee-simple, but only the right to use the land for their purpose." 1 Isaac F. Redfield, *The Law of Railways* 247–48 (1869). *See also Ely on Railroads* at 197–98 (citing Simeon F. Baldwin, *American Railroad Law* 77 (1904)); Leonard A. Jones, *A Treatise on the Law of Easements* 178 (1898) ("[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"). As Professor Ely writes,

> Judicial decisions tended to adopt this line of analysis. … It was settled in most jurisdictions that the public acquired an easement in land taken for highways. The court then readily concluded that the railroad obtained only an easement, and

> that the original landowner retained the rights to the trees and minerals on the land. This trend to construe strictly the authority of railroads to acquire land through eminent domain accelerated in the decades following the Civil War.

Ely on Railroads at 197–98 (citations omitted). This trend culminated with the "Granger movement," in which midwestern farmers successfully advocated for state legislative restrictions on railroads' powers, including limiting the interest that could be acquired by eminent domain. *Id.* at 86–87. This is not to say a railroad could not obtain a fee simple estate for a purpose other than a railway line such as a train depot or office building, only that railroads didn't need—and were not authorized—to take fee simple interests for uses like rail beds.

Amici are not suggesting that here, the CFC was required to call into question the constitutionality of Tampa Southern's 1926 acquisition of a railroad "right of way." Rather, our point is to demonstrate that Tampa Southern's 1926 condemnation of a "right of way" must be viewed as what it plainly appears to have been—a rather routine and unextraordinary exercise of eminent domain for a public use or purpose limited to the taking of a right to use the land *for a railroad line*. And that's an easement.

In *Tampa Southern Railroad Co. v. Tankersley*, the railroad sought to forcibly acquire a "right of way" "over and through" the land owned by Tankersley and Davis "for purposes necessary for its use as a railroad" where the railroad had already surveyed and "located its line of railroad." Judgment, *Tampa S. R.R. Co. v. Tankersley* (S.D. Fla. Mar. 18, 1926) (Appx1295). Notably, it did it seek to condemn a fee interest, using the words that plainly and unequivocally have meant all the sticks in the property bundle since the time of William the Conqueror: "fee simple absolute." Instead, Tampa Southern asked only for the right to *use* the land of Tankersley and Davis for the necessary purpose of constructing and operating a "line of railroad."[4] This should be enough to show that

[4] The condemnation action had likewise asserted that the landowner's property was being "taken for use as a right of way by the Tampa Southern Railroad Company ...." Appx1250. The railroad further asserted that it was "authorized, under the laws of the State of Florida, to take and condemn real estate for purposes necessary for its use as a railroad," that it had "duly located its line of railroad and intends in good faith to construct the same over and through the property hereinafter described," and that "it desire[d] to condemn [the strip of land] for use as a right of way ...." Appx1296–98. The railroad added, "the taking of the said property ... is for the purpose of its *use as a right of way* for the construction of its railroad, and that the said property is necessary for that purpose," and that the railroad had "made all reasonable efforts to *purchase a right of way through the said property* from the owners thereof, but that all negotiations for such purchase have failed." Appx1298 (emphasis added).

Tampa Southern didn't need to obtain fee simple ownership of the narrow strips of land underlying its tracks in order to build and operate its railway line. The Southern District's condemnation judgment confirmed, by awarding the railroad the right to "use" a right of way: "[i]t is considered by the Court that the property therein described be appropriated by the Tampa Southern Railroad Company for *use* as a right of way for said Railroad Company, upon the petitioner paying ... the compensation ...." Appx1360(emphasis added).

The CFC, therefore, undertook an unnecessary task: rather than examining the words of the 1926 judgment ("use") and the words defining the limitations on Tampa Southern's power to take in their plain and ordinary meaning, the court attempted to divine what the parties intended 100 years ago. The CFC found it not only significant, but seemingly dispositive, that the condemnation decree referenced "*land* about to be taken," in addition to and distinguished from the decree's express condemnation of a "right of way" for "use." *Barron*, 174 Fed. Cl. at 135. The CFC wrongly considered this as evidence regarding the intent of the parties "that the landowners thought that the property the railroad was condemning would be taken from the land that they would retain[,

which] indicat[ed] that the condemnation action would result in the taking of property [(the owners' "land")], not an easement to use that property." *Id.* None of this was necessary to understand what a railroad "right of way" for "use" as a rail line meant.

The CFC's contrary conclusion introduced uncertainty and unpredictability into a long-settled property acquisition which, as a consequence, has now reached across the span of a century to undermine the property rights of the landowners today, the very thing the Supreme Court warned about: "[t]his 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*, 440 U.S. at 687–88,

II. Redefining "Right of Way" to Fee Simple Is the Latest Government Strategy To Derail Trails Act Just Compensation Claims

In *Preseault v. Interstate Commerce Commission*, 494 U.S. at 2 (*Preseault I*), the Supreme Court upheld the federal rails-to-trails program as a valid exercise of the federal commerce power, but concluded that converting an abandoned railroad right of way to trail use may

"giv[e] rise to just compensation claims" under the Takings Clause. Several Justices elaborated, concluding that the conversion to trail use "may delay property owners' enjoyment of their reversionary interests, but that delay burdens and defeats the property interest rather than suspends or defers the vesting of those property rights." *Id.* at 22 (O'Connor, J., concurring).

In the subsequent appeal on remand, this Court held the government liable for compensation when recreational trail use exceeds the scope of the original railroad right of way. *Preseault II*, 100 F.3d at 1541. That decision set out the elements of a rails-to-trails takings case and explained how conveyances of property interests, including through direct condemnation, should be examined in light of the "eminent domain flavor" baked into every Trails Act taking claim, regardless of whether conveyance to the railroad at issue in the claim is by condemnation, prescription, or deed. *Id.* at 1537.

The government apparently was not satisfied with that outcome. It appears to have refused to accept it, and it instead implemented a strategy this Court once described as "*sturm und drang*." *Evans*, 694 F.3d at 1381 & n.7 (citing Klinger, *Der Wirrwarr, oder Sturm und Drang*). In

that case, this Court criticized the government's borderline-frivolous strategy:

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

Id. at 1381 (citing *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010)).

This, unfortunately, was not an isolated example of its retrograde approach. As described by a noted property owners' lawyer, "[i]n the first several years following the *Preseault II* decision, the Department of Justice (DOJ) continued to challenge the United States' liability by recycling the unsuccessful arguments it had made in *Preseault II*." Cecilia Fex, *The Elements of Liability in a Trails Act Taking: A Guide to the Analysis*, 38 Ecol. L. Q. 673, 675–76 & n.6 (2011) (citations omitted). The courts were not convinced by the government's approach of recycling unsuccessful arguments, arguing contrary to its former position, and re-litigating settled precedent.

The reports of decisions contain stark examples. In *Ladd v. United States*, 630 F.3d 1015, 1023 (Fed. Cir. 2010) (*Ladd I*), this Court rejected the government's argument that directly contradicted what this Court labeled a "bright-line rule," and "settled law." *Id.* In *Caquelin v. United States*, 959 F.3d 1360, 1366, 1370 (Fed. Cir. 2020), this Court similarly rejected the government's argument that *Ladd I* should be abandoned, despite it being "governing precedent[.]" *Id.* Other reported decisions of this Court and the CFC reveal a similar strategy. For example, when a rails-to-trail claim accrues by the filing of a Notice of Interim Trail Use, the government refuses to provide notice of the NITU to affected landowners and, rather than directly condemning their property for imposing a new public recreational trial easement across their land, shifts the burden upon the landowners to sue the government in order to be compensated for the government taking. *See United States v. Clarke*, 445 U.S. 253, 257 (1980) ("There are also important practical differences between condemnation proceedings and actions by landowners to recover compensation for 'inverse condemnation' …. Such a taking … shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation."). Then, if and when the

landowners have enough notice to realize their property rights are in jeopardy, the government often deploys what might charitably be characterized as "scorched earth" tactics, driving up the cost of the litigation (which the government eventually must reimburse to the landowners), wastes the resources of all parties and those of the court, and causes an inordinate amount of delay to resolve these claims. *See, e.g.*, *McCarty v. United States*, 142 Fed. Cl. 616, 625 (2019) ("Given [the government]'s aggressive litigation of this aspect of the case, [the landowners] cannot be faulted for defending their fee request and responding to [the government]'s filings."); *Hippely v. United States*, 173 Fed. Cl. 389, 399 (2024) (noting recent Trails Act cases, such as *Caquelin*, 959 F.3d at 1362 (government reimbursed the landowners over $1 million in fees where the underlying amount of damages was only $900), and *Memmer v. United States*, 50 F.4th 136 (Fed. Cir. 2022) (government reimbursed $1.7 million in fees and costs where the government's taking was valued at $29,000)). *Hyatt v. United States*, 174 Fed. Cl. 643, 656 (2025) ("Plaintiffs state ... 'the government cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff in response.' ... (quoting *City of Riverside*[*v. Rivera*], 477 U.S.

[561,] 580, n.11 [(1986)]). The Court agrees. While it may be more convenient for the government to dictate what opposing counsel should do in response to the government's litigation tactics, that is neither the law, nor prudent.").

Perhaps most prominently, in *Brandt*, the Supreme Court took the federal government to task for its about-face in arguing that a railroad right-of-way is not an easement:

> More than 70 years ago, the Government argued before this Court that a right of way granted under the 1875 Act was a simple easement. The Court was persuaded, and so ruled. Now the Government argues that such a right of way is tantamount to a limited fee with an implied reversionary interest. We decline to endorse such a stark change in position, especially given "the special need for certainty and predictability where land titles are concerned."

Brandt, 572 U.S. at 110 (quoting *Leo Sheep*, 440 U.S. at 687).

A final example reveals a tactic similar to the government's arguments here. *Romanoff Equities, Inc. v. United States*, 119 Fed. Cl. 76, 79 (2014), *aff'd*, 815 F.3d 809 (Fed. Cir. 2016), was a Trails Act case involving an abandoned elevated railway for freight trains in Manhattan. The government, as here, successfully derailed the claim for just compensation for the owner's loss of the right to recover the property when the railroad ceased operations by arguing that the reversionary

owner did not own property, even though the government acknowledged that the railroad was abandoning an easement. Instead, it argued for an interest unknown in law—a "general easement" that could be used for any purpose (easements, by definition, are for a limited purpose)—meaning the scope of this easement was broad enough to include future recreational trail use and railbanking and the claimants were owed nothing. That claim resulted in an interpretation that obliterated the traditional and historic definition of "easement" and "right-of-way," depriving these words of all meaning and these owners of their constitutional right to just compensation. *See Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 279 (2024) (government's actions "'relegat[e the just compensation requirement] to the status of a poor relation' to other constitutional rights") (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994)).

CONCLUSION

Because Tampa Southern could only have acquired an easement by eminent domain, the landowners possess a reversionary private property interest that must be justly compensated. This Court should reverse.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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DATED: May 30, 2025.

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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 4,464 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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