No. 12-1173

In the Supreme Court of the United States

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

v.

UNITED STATES,
Respondent.

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

BRIEF FOR THE NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

CECILIA FEX
Counsel of Record
MICHAEL AMBERG
Ackerson Kauffman Fex, PC
1701 K Street, NW, Suite 1050
Washington, DC 20006
(202) 833-8833
fex@ackersonlaw.com
michael@ackersonlaw.com

Counsel for Amicus Curiae National Association of Reversionary Property Owners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF AMICUS CURIAE[1]

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

This case is important to NARPO because the Tenth Circuit has split from the holdings of the Seventh and Federal Circuits, which (1) unsettles long-established property interests and clouds the title of many landowners whose property was (and is) encumbered by a railroad right-of-way easement established under the General Railroad Right-of-Way Act of 1875, ch. 152, 18 Stat. 492 (codified at 43 U.S.C. §§ 934-939) ("1875 Act"), and (2) will make resolution of title disputes more costly and time-consuming.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution toward the preparation and submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

For more than a century after passage of the 1875 Act, the administrative agency responsible for patenting public lands to private landowners issued patents without reserving any interests in the rights of way granted under the Act. This policy was consistent with the terms of the Act, the intent of Congress, and this Court's precedent, including its unequivocal ruling in *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942): the 1875 Act granted merely easements, not limited fees with an implied condition of reverter.[2]

Accordingly, affirming the Tenth Circuit's decision in *United States v. Brandt*, 496 Fed. App'x 822, 824 (2012), would reverse the historical disposition of the property interests like the ones at issue here—likely in excess of a million acres.

The result would not merely revest ownership in the United States long after it disposed of the lands in question. It would correspondingly divest ownership from thousands of property owners who, for generations, have sold their lands under warranty deeds, unaware of the unstated reversionary rights only relatively recently claimed by the United States.

And in abandoned corridors, strips of farm fields and backyards located throughout the nation would, in the stroke of a pen, be transformed back into public

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[2] NARPO concurs with the analysis and discussion of law presented by Petitioners. To avoid repetition, this brief focuses primarily on the historical disposition of 1875 Act interests and on the only cogent construction of 43 U.S.C. § 912.

lands. Private owners who have built valuable structures on these properties, fenced them off, paid property taxes on them, and possessed them as their own for decades would have their title upended.

The question then is whether this Court, the Department of the Interior, and the historical records for the last part of the 19th century and most of the 20th century all have it wrong. Of course the answer is "no."

First, the *Brandt* decision conflicts with the terms of the 1875 Act, well-settled law concerning the interpretation and sanctity of land patents,[3] and this Court's precedent on the 1875 Act itself. As a result, if *Brandt* is affirmed, such a decision would eviscerate titles that have vested in landowners nationwide. This is true for the owners of hundreds of thousands of acres[4] of former corridors that have already been fully

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[3] (*See* Br. of Pet'rs 31, 36-38.)

[4] All estimates of mileage or acreage in this brief are based on the estimates in *Preseault*. *See* 494 U.S. at 5 ("In 1920, the Nation's railway system reached its peak of 272,000 miles; today [1990] only about 141,000 miles are in use ….."). Because these are estimates, we will assume for ease of reference that roughly 130,000 miles have been abandoned, although "experts predict[ed] that 3,000 miles [would] be abandoned every year through the end of [last] century." *Id*. These right-of-way corridors are composed, in large part, of federal grants of land or of rights of way, including 1875 Act rights of way, interspersed with privately-granted interests. *See Hash v. United States*, No. CV 99–324–S–MHW, 2001 WL 35986188, at *1 & n.1 (D. Idaho Nov. 27, 2001) (1875 Act parcels comprised 60% of the acreage in the corridor, totaling 895

abandoned. It is equally true for the thousands of owners of untold acres of land that are being transformed into linear parks every year pursuant to the National Trails System Act.[5] 16 U.S.C. §§ 1241-51 ("Trails Act").

Second, § 912[6] did not define or alter the 1875 Act grants. Section 912 was enacted almost half a century after the passage of the 1875 Act for the express purpose of disposing of any abandoned railroad interests in which the United States still held title. Further, § 912 facilitated, rather than impeded, the efficient disposal of abandoned strips of land.

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acres); *Idaho v. Or. Short Line R.R. Co.*, 617 F. Supp. 207, 208 (D. Idaho 1985) (1875 Act parcels comprised 82% of acreage in the corridor).

[5] We focus here on the hundreds of thousands of acres of 1875 Act tracts that were abandoned in the 1900s. Additionally, thousands of acres of 1875 Act tracts have been and will be put to recreational trail use. The Federal Circuit and the Court of Federal Claims have repeatedly held that the conversion of 1875 Act easements into linear parks causes a Fifth Amendment taking for which just compensation is due. A thorough review of the issue can be found in *Beres v. United States*, 104 Fed. Cl. 408, 443-57 (2011) ("*Beres II*").

[6] Railroad Right-of-Way Abandonment Act of March 8, 1922, ch. 94, 42 Stat. 414 (codified at 43 U.S.C. § 912) ("Section 912").

ARGUMENT

I. For one hundred and five years, the United States issued land patents subject to 1875 Act easements without reserving unto itself any interest in railroad corridors.

Ultimately at stake here are approximately 1.5 million acres of land,[7] roughly half of which were abandoned in the 1900s. When railroads abandoned these easements, the burden on fee title was extinguished and full rights were restored to the land. Although the United States typically retained certain interests, such as canals and minerals, when it patented public lands to private landowners, patents often made no mention of 1875 Act interests at all. *See Hash v. United States*, 403 F.3d 1308, 1314 (Fed. Cir. 2005) (the land patents from the early 1900s listed reservation of certain rights, including rights of way for ditches or canals, but none mentioned the 1875 Act interests); *Beres v. United States*, 64 Fed. Cl. 403, 413 (2005) ("*Beres I*") (noting in an 1892 patent only water and minerals rights were reserved, but not 1875 Act interests).

In Petitioners' case, the patent expressly retained certain interests, but not the 1875 Act corridor, stating merely the grant was "subject to" the railroad's right of way. This was the practice of the Department of

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[7] Due to the great magnitude of abandonments of railway corridors throughout the 1900s, hundreds of thousands of acres of land, unburdened by these easements, are vested in landowners. The 1.5 million-acre figure is an estimate which includes the acreage of the 140,000 or so miles of corridors that are not abandoned. *See* n.4, *supra*.

Interior[8] from 1875 to mid-1980. *See* 45 Fed. Reg. 44,518 (July 1, 1980) (rescinding earlier regulation which directed that no 1875 Act interests should be retained).

Thus, the United States issued land patents to generations of landowners across the nation without withholding any implied reversionary interests. *See Hash,* 403 F.3d at 1313-18 (1875 Act withheld no reversionary interests nor did land patents); *Beres v. United States*, 104 Fed. Cl. 408, 443-57 (2011) ("*Beres II*") (same); *Ellamae Phillips Co. v. United States*, 99 Fed. Cl. 483, 485 (2011) (same); *Beres I*, 64 Fed. Cl. at 418 (same); *Brown v. N. Hills Reg'l R.R. Auth.*, 732 N.W.2d 732, 739-40 (S.D. 2007) (same).

In *Great Northern*, this Court noted with approval the DOI's consistent policy of treating the 1875 Act rights of way as easements and issuing land patents without reserving any railroad rights of way whatsoever. 315 U.S. at 275-76. This Court approved of the policy after construing the statute itself and reviewing relevant legislative history, its earlier decisions concerning analogous acts, and the context in which Congress passed the Act. *Id.* at 271-75.

Three main points emerge from this Court's analysis in *Great Northern*, and from the authority upon which it relied, which are applicable here: (1) the 1875 Act granted merely easements, (2) those

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[8] Within the Department of the Interior, the Bureau of Land Management succeeded the General Land Office in administering the disposition of public lands, including issuing land patents. Order 2225 of Sec'y of Dep't of Interior, July 15, 1946. We refer to the agencies collectively as "DOI."

easements remained on the public lands while still in the United States' possession, and (3) fee title to the lands underlying those easements transferred in land patents to the private landowners without reservation. Chronicling the parade of authority as it marches through the decades throws the United States' errant view into stark relief:

- **1875 Act**: "Sec. 4. That any railroad company desiring to secure the benefits of this act, shall … file with the register of the land office … a profile of its road; and upon approval thereof … *thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way*."[9]

- **1878 decision from this Court**: "[W]hen the act was passed, we do not doubt that *the intention of Congress was to grant* to the company *a present beneficial easement* in the particular way over which the designated routes lay, capable, however, of enjoyment only when the way granted was actually located, and, in good faith, appropriated for the purposes contemplated by the charter of the company, and the act of Congress."[10]

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[9] General Railroad Right-of-Way Act of 1875, § 4, ch. 152, 18 Stat. 492 (emphasis added).

[10] *Railway Co. v. Alling*, 99 U.S. 463, 475 (1878) (emphases added) (construing an analogous act); *see also Great Northern*, 315 U.S. at 279 (citing *Alling* as one of two cases construing materially identical right-of-way statutes and noting *Alling* was "[f]ar more

- **1888 DOI regulation**: "The act of March 3, 1875, is not in the nature of a grant of lands; it does not convey an estate in fee, either in the 'right of way' or the grounds selected for depot purposes. It is a right of use only, the title still remaining in the United States …. *All persons settling on public lands to which a railroad right of way has attached, take the same* subject to such right of way and must pay for the full area of the subdivision entered, there being no authority to make deductions in such cases."[11]

- **1891 DOI decision**: "Again it may be stated as a general proposition, that if an easement is granted for a particular purpose, when that purpose ceases to exist, there is an end of the easement …. It is not the fee but the right to use the public lands for railroad purposes which was granted, and, in my opinion, an easement only was intended to pass to the railroad company."[12]

- **1893 decision from this Court**: "Doubtless whoever obtained title from the government to any quarter section of land through which ran this right of way would acquire a fee to the whole tract subject to the easement of the

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persuasive" than the later Supreme Court cases, *Rio Grande Western Railway Co. v. Stringham,* 239 U.S. 44 (1915) and the decisions that followed *Stringham*).

[11] 12 L.D. 423, 428 (Jan. 13, 1888) (emphasis added).

[12] *Pensacola & Louisville R.R. Co.*, 19 Pub. Lands Dec. 386, 387-88 (Nov. 30, 1891) (discussing a materially similar railroad right of way grant in special legislation of June 8, 1872.)

company; and *if ever the use of that right of way was abandoned by the railroad company the easement would cease,* and *the full title to that right of way would vest in the patentee of the land*."[13]

- **1894 DOI decision**: "That the right of way granted by the act in question is a mere easement can not be questioned, for the fourth section provides that 'thereafter all such lands, over which such right of way shall pass, shall be disposed of, subject to such right of way.'"[14]

- **1895 DOI decision**: "[C]learly … the estate granted by said act is … an easement and not the land." Also explaining that no mention or reservation of the right of way in a land patent was necessary because the 1875 Act preserved whatever rights the railroad possessed to the railroad: "The insertion of the right of way clause would answer no purpose except to embarrass the settler, and leaving it out does not affect the rights of any railroad company under said act."[15]

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[13] *Smith v. Townsend*, 148 U.S. 490, 499 (1893) (emphases added) (construing an analogous act); *see Great Northern*, 315 U.S. at 279 (citing *Smith* as the second "[f]ar more persuasive" case to construe the 1875 Act).

[14] *Fremont, Elkhorn & Mo. Valley Ry. Co.*, 19 Pub. Lands Dec. 588, 590 (Dec. 28, 1894).

[15] *Mary G. Arnett*, 20 Pub. Lands Dec. 131, 132-34 (Feb. 23, 1895)

- **1898 DOI regulation**: "The grant made by this act does not convey an estate in fee in the lands used for right of way or station grounds. The grant is merely a right of use for the necessary and legitimate purposes of the roads, the fee remaining in the United States. All persons entering the public lands, to part of which a right of way has attached, take the same subject to such right of way, the latter being computed as a part of the area of the tract entered."[16]

- **1903 DOI decision**: "It is well established that the right of way through the public lands granted to railroads … under [the 1875 Act] is in the nature of a mere easement."[17]

- **1904 DOI regulation**: "The act of March 3, 1875, is not in the nature of a grant of lands; but it is a base or qualified fee, giving the possession and right of use of the land for the purposes contemplated by the law, *a reversionary interest remaining in the United States, to be conveyed by it to the person to whom the land may be patented*, whose rights will be subject to those of the grantee of the right of way."[18]

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[16] 27 L.D. 663, 664 (Nov. 4, 1898).

[17] *John W. When*, 32 Pub. Lands Dec. 33, 34 (Mar. 3, 1903).

[18] Regulations Concerning Railroad Right of Way Over the Public Lands, 32 L.D. 481, 482-83 (Feb. 11, 1904) (emphasis added). This Court in *Great Northern* noted the momentary "shift in interpretation" by the Land Department in describing the right as a "base or qualified fee." 315 U.S. at 276. Even so, the regulation plainly stated the "reversionary interest" was to be "conveyed by

- **1906 House Committee Report**: "'*The right* as originally conferred [under the 1875 Act] and as proposed to be protected by this bill *simply grants an easement or use for railroad purposes*. Under the present law whenever the railroad passes through a tract of public land *the entire tract is patented to the settler or entryman, subject only to this easement*.'"[19]

- **1906 and 1909 Acts disposing of forfeited 1875 Act interests**: Forfeiture of "such easement … *shall*, without need of further assurance or conveyance, *inure to the benefit of any owner or owners of land conveyed by the United States* prior to such date subject to any such grant of right of way or station grounds."[20]

[the United States] to the person to whom the land may be patented." 32 L.D. at 482-83.

[19] *See Great Northern*, 315 U.S. at 277 (emphases added) (quoting H.R. Rep. No. 59-4777, at 2 (1906), a report on an act that confirmed a grant under the 1875 Act to certain railroads).

[20] Act of June 26, 1906, 34 Stat. 482 ("Forfeiture Act of 1906") (emphases added); Act of February 25, 1909, 35 Stat. 647 (codified at 43 U.S.C. § 940) ("Forfeiture Act of 1909") (emphases added). The United States argues these acts support its argument that the interests were reversionary or else there would have been no need for such language. (Br. for U.S. on Pet. for Cert. 14-15.) This is false. The statutes were enacted for the purpose of reclaiming to the United States *forfeited*—i.e., un-built—lines. The language concerning private lands ensured landowners received the interests to which they were already entitled. *See Hash,* 403 F.3d at 1315 (referring to the government's construction as "strained").

- **1909 DOI regulation**: "*Nature of [1875 Act] Grant*. [A railroad company] obtains only the right to use the land for the purposes for which it is granted and for no other purpose, and may hold such possession, if it is necessary to that use, as long and only as long as that use continues. The Government conveys the fee simple title in the land over which the right of way is granted to the person to whom patent issues for the legal subdivision on which the right of way is located, and *such patentee takes the fee, subject only to the railroad company's right of use and possession*."[21]

- **1938 DOI regulation (identical to 1909)**:[22] "*Nature of [1875 Act] Grant*. [A railroad company] obtains only the right to use the land for the purposes for which it is granted and for no other purpose, and may hold such possession, if it is necessary to that use, as long and only as long as that use continues. The Government conveys the fee simple title in the land over which the right of way is granted to the person to whom patent issues for the legal subdivision on which the right of way is located, and *such*

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[21] 43 C.F.R. § 2842(a) (1909) (second emphasis added).

[22] This regulation is post-*Stringham* and preceded *Great Northern*, yet the DOI maintained a clear policy of divesting any interests the United States may have held in 1875 Act rights of way. *See Great Northern*, 315 U.S. at 276, 279 (overruling *Rio Grande W. Ry. Co. v. Stringham*, 239 U.S. 44 (1915)).

patentee takes the fee, subject only to the railroad company's right of use and possession."[23]

- **1942 brief of the United States in *Great Northern***: "[I]t scarcely can be said that the purpose of the 1875 grant will be frustrated if it be construed as conveying an easement rather than a fee. This will merely give to the grant the same meaning which is commonly given to deeds conveying a right of way for railroad purposes."[24]
- **1942 in *Great Northern***: construing the 1875 Act, noting "'[a]pter words to indicate the intent to convey an easement would be difficult to find,'"[25] and rejecting the *Stringham*[26] line of reasoning that the Act granted implied reversionary interests.[27]
- **1957 in *Union Pacific***: "In [*Great Northern*] we noted that a great shift in congressional policy occurred in 1871: that after that period only an easement for railroad purposes was granted."[28]

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[23] 43 C.F.R. § 243.2 (1938) (second emphasis added).

[24] Br. for the United States, *Great N. Ry. Co. v. United States*, No. 149, 1942 WL 54245, at *14 (Jan. 5, 1942).

[25] 315 U.S. at 271 (quoting *MacDonald v. United States*, 119 F.2d 821, 825 (9th Cir. 1941)).

[26] 239 U.S. 44 (1915).

[27] *Great Northern*, 315 U.S. at 276, 279.

[28] *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 119 (1957).

- **1976 DOI regulation (identical to 1909 and 1938)**: "*Nature of [1875 Act] Grant*. [A railroad company] obtains only the right to use the land for the purposes for which it is granted and for no other purpose, and may hold such possession, if it is necessary to that use, as long and only as long as that use continues. The Government conveys the fee simple title in the land over which the right of way is granted to the person to whom patent issues for the legal subdivision on which the right of way is located, and *such patentee takes the fee, subject only to the railroad company's right of use and possession*."[29]

Given the context in which the United States created the 1875 Act grants, it is unremarkable that this Court and the DOI determined they were easements for railroad purposes only, with the underlying fee title passing to patentees. The Act was the "product of a period." *Great Northern*, 315 U.S. at 273. No longer were the exigencies of the Civil War or difficulties with Britain the driving force behind right-of-way grants. *United States v. Union Pac. R.R. Co.*, 91 U.S. 72, 79-80 (1875) (providing a detailed history of the period leading to land and railroad right-of-way grants). Rather, the period saw a "sharp change" in policy, and Congress resolved that "the public lands should be held for the purpose of securing homesteads to actual settlers." *Great Northern*, 315 U.S. at 275.

For these reasons, this Court overruled its earlier

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[29] 43 C.F.R. § 2842.1(a) (1976) (second emphasis added) (specifying the 1875 Act).

decision in *Stringham* and its progeny on which *Brandt* relied:

> The conclusion [in *Stringham*] that the railroad was the owner of a 'limited fee' was based on cases arising under the land-grant acts passed prior to 1871 and it does not appear that Congress' change of policy after 1871 was brought to the Court's attention. That conclusion is inconsistent with the language of the Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation. We therefore do not regard it as controlling. Statements in [subsequent cases] that the 1875 Act conveyed a limited fee are dicta based on the *Stringham* case and entitled to no more weight than the statements in that case.

Great Northern, 315 U.S. at 279 (citations omitted).

Accordingly, under the overwhelming body of federal authority that controls this analysis, railroads obtained easements restricted to the right to use the land for the purposes for which they were granted and for no other purpose; and in subsequent patents issued to landowners, the United States divested itself of all rights and title to that land.

Only in the last decade or so has the United States argued that it silently withheld this particular stick from the bundle when conveying fee title to patentees. And despite having repeatedly litigated (and lost on)

the issue presented here,[30] the United States has never produced any statutes, DOI decisions, regulations, legislative histories, or land patents that can reasonably be interpreted to show the United States reserved these interests when issuing patents to settlers.

Indeed, in 1942, the United States agreed with Petitioners' position here, arguing that the 1875 Act granted easements no different from common law easements, Br. for the United States, *Great Northern*, No. 149, 1942 WL 54245, at *14, labeling the *Stringham* interpretation "contrary dictum," *id*. at *5, and urging that the DOI's construction of the 1875 Act should not be overturned, *id*. at *20-21 (citations omitted) (DOI's interpretation of the 1875 Act, "especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned.").

As a result of everyone's understanding of the law and as a result of the DOI's policies, hundreds of thousands of acres of former right-of-way lands were long ago abandoned and recorded as private lands.

But in the mid-1980s, one oddly reasoned district court decision started the ball rolling on the road to the Circuit split that led to this case. In *Idaho v. Oregon Short Line Railroad Co.*, the U.S. District Court for the

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[30] *See Samuel C. Johnson 1988 Trust v. Bayfield Cnty.*, 649 F.3d 799, 803-04 (7th Cir. 2011) ("*S.C. Johnson*"); *Hash*, 403 F.3d at 1313-18; *Schneider v. United States*, No. 8:99-CV-0315, 2008 WL 160921, at *2-3 (D. Neb. Jan. 15, 2008); *Ellamae Phillips*, 99 Fed. Cl. at 485; *Beres II*, 104 Fed. Cl. at 443-57; *Beres I*, 64 Fed. Cl. at 418; *cf. Blendu v. United States*, 75 Fed. Cl. 543 (2007).

District of Idaho surmised that the 1875 Act granted not easements grounded in common law, but rather a different type of easement with implied reversionary properties, which had silently been retained by the federal government and which the State could put to highway use. 617 F. Supp. 207, 208-09 (1985). The court relied in part on precedent which had been expressly discredited by this Court and on a statute enacted in 1922, while essentially marginalizing the terms of the 1875 Act and omitting mention of any relevant land patent that had transferred public land to landowners.

A few other courts have followed *Oregon Short Line* without much additional analysis, including the Ninth Circuit in *Vieux v. East Bay Regional Park District*, 906 F.2d 1330, 1335-36 (1990) (dictum), and the Tenth Circuit in *Marshall v. Chicago & Northwestern Transportation Co.*, 31 F.3d 1028 (1994), which the Tenth Circuit decided it was compelled to follow in *Brandt*, 496 Fed. App'x at 824-25.[31]

More recently, however, the Federal Circuit and the Seventh Circuit, and the Court of Federal Claims have

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[31] *See also Mauler v. Bayfield Cnty.*, 309 F.3d 997, 1002 (7th Cir. 2002) (dicta); *Barney v. Burlington N. R.R. Co.*, 490 N.W.2d 726 (S.D. 1992). However, both the Seventh Circuit and the Supreme Court of South Dakota have since overruled their earlier decisions on point, concluding that the *Beres* and *Hash* decisions were better reasoned. *S.C. Johnson*, 649 F.3d at 803; *Brown*, 732 N.W.2d at 738-39.

eschewed the line of reasoning in *Oregon Short Line*.[32] These courts instead construed the terms of the 1875 Act, reviewed the terms of the land patents issued by the government to determine whether the United States had retained any interests in the 1875 Act grants, and relied on relevant precedent set by this Court and the DOI. Each court concluded that the railroads acquired mere easements which inured to the benefit of landowners when abandoned.

The circumstances in the Seventh Circuit case exemplify the magnitude of the issue presented here. In *Samuel C. Johnson 1988 Trust v. Bayfield County*, 649 F.3d 799 (7th Cir. 2011) ("*S.C. Johnson*"), the corridor had been abandoned over three decades earlier. *Id*. at 806. Thousands of acres in the corridor had been absorbed into private lands. Nonetheless, Bayfield County claimed the right to turn the nonexistent corridor, which had previously crisscrossed private property, into a trail for ATV and snowmobile use. *Id*. at 802.

Predicated in part on the theory that portions of the corridor had been assembled pursuant to the 1875 Act, the county claimed the interest was an implied reversionary interest held by the United States, which, it alleged, had been preserved in perpetuity since 1980 for the county's use pursuant to § 912 of the Railroad Right-of-Way Abandonment Act of March 8, 1922. *Id*. at 802.

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[32] *See S.C. Johnson*, 649 F.3d at 803-04; *Hash*, 403 F.3d at 1313-18; *Ellamae Phillips*, 99 Fed. Cl. at 485; *Beres II*, 104 Fed. Cl. at 443-57; *Beres I*, 64 Fed. Cl. at 418.

If the Seventh Circuit had agreed—it did not[33]—people who had built improvements on the lands crossed by the former railroad, and who had paid taxes on those lands for several decades, suddenly would have become trespassers on federal property if the Unites States' construction of § 912 were correct.[34]

The circumstances in *S.C. Johnson* are not unique. Since the early 1900s, 130,000 miles of railroad right of way have been abandoned nationwide,[35] and while the government did not tabulate the mileage, history shows that a significant portion of those abandoned corridors were constructed under the 1875 Act.[36]

Thus, more than a century since the 1875 Act was passed and contrary to DOI policy, today a different division of the executive branch—the Department of Justice—is claiming reversionary rights in abandoned tracts of land comprising hundreds of thousands of acres. Likely, the newly-minted DOJ policy stems from an aversion to paying just compensation for the taking of private property when converting railroad easements intended strictly for railroad use into recreational trail

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[33] *S.C. Johnson*, 649 F.3d at 803-04 (holding that property vested in the original settler a few weeks before 1875 Act interests could vest in the railroad, but additionally analyzing the 1875 Act to further hold that even if the railroad got there first, the interest was not reversionary, but rather merely an easement.)

[34] *But see* § II.B, *infra*, discussing how 43 U.S.C. § 912 operated to efficiently dispose of any retained federal interests that had been abandoned by the railroad.

[35] *See* n.4, *supra*.

[36] *See id*.

use.[37] But a 21st-century buyer's remorse should have no influence in the construction of a 19th-century statute, nor should it reverse over one hundred years of the DOI's implementation of the Act. Moreover, the lion's share of the acres at issue were already fully abandoned beyond the reach of the Trails Act in the 1900s.

On much of the land at issue, railroad tracks are long gone; the grades have been leveled and the full widths of the right-of-way footprints are populated by homes, garages, commercial buildings, and other countless improvements. In short, the abandoned corridors are gone both as a legal and historical matter. They are often no longer visible to the naked eye; the lands belong to the landowners.

II. Enacted forty-seven years later for the purpose of efficiently divesting the United States of any interests it might still hold in abandoned rights of way, § 912 neither defined nor altered the terms of the 1875 Act.

Section 912 of the Railroad Right-of-Way Abandonment Act of March 8, 1922 concerned strictly abandoned lands—or lands to be abandoned in the future—in which the United States still held title. The statute was designed to dispose efficiently of federal reversionary interests by transferring them into

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[37] *See* n.30, *supra* (citing Federal Circuit and Court of Federal Claims cases); (*see also* Br. for U.S. on Pet. for Cert. 20 (hazarding that paying just compensation in the Fifth Amendment takings cases "could impose considerable financial liability on the United States and the public fisc.")).

private hands if not dedicated to highway use within one year of the railroad abandonment.[38] There are no terms in the statute which operate to create a retained government interest in 1875 Act rights of way:

> [W]henever public lands of the United States have been … granted to any railroad company for use as a right of way for its railroad …, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon *all right, title, interest, and estate of the United States in said lands* shall [be vested in the owner of the land traversed by the right of way], *except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment* …, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever ….

43 U.S.C. § 912 (emphases added).

Contrary to the United States' contention (Br. for U.S. on Pet. for Cert. 2-3, 15), (1) the statute neither defined nor revised the terms of the 1875 Act—it simply does not apply to 1875 Act easements—and (2) for any retained federal interests to which § 912 does apply, the statute operated to *dispose of* abandoned interests, not impede their disposal or block

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[38] (*See* Br. for U.S. on Pet. for Cert. 17.)

their abandonment. *See S.C. Johnson*, 649 F.3d at 805-08 (noting § 912 did not operate to warehouse federal reversionary interests to be claimed by the county (or the United States) a quarter of a century after they were abandoned; § 912 disposed of reversionary interests if not "embraced" by a highway one year after abandonment).[39]

A. Section 912 did not define, revise, or apply to the 1875 Act.

The United States relies heavily on § 912, contending that Congress passed it to affirm that the government retained implied reversionary interests or to otherwise redefine those interests. (Br. for U.S. on Pet. for Cert. 2-3, 15-16.)

Both the Court of Appeals for the Federal Circuit and the Court of Federal Claims have rejected the government's arguments. In *Hash*, Judge Newman found them unavailing:

> The government argues that this supports the position that the government tacitly

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[39] In *S.C. Johnson*, there were two sets of interests at issue, both of which the defendant claimed were reversionary interests. 649 F.3d at 801-04; 804-05. The court ruled that neither of the two were reversionary interests, effectively overruling its earlier decision in *Mauler v. Bayfield County*, 309 F.3d 997 (7th Cir. 2002). *Id*. at 804-05. Nonetheless, the parties had fully briefed the construction of § 912 and the court construed § 912 at great length, perhaps to correct its earlier statements concerning the statute in *Mauler*, and perhaps to contribute in general to the jurisprudence on the statute because it disagreed with the analysis in the lower court and with the analysis and holding in the Ninth Circuit in *Avista Corp. v. Wolfe*, 549 F.3d 1239 (9th Cir. 2008). *Id*. at 806-07.

> intended to retain ownership of the servient estate whenever land patents were granted to lands traversed by a previously granted railway right-of-way. The statute does not support this position. The statute requires the United States to convey any rights it may have, to the patentee of the land traversed by the abandoned right-of-way; it does not say what rights the United States had after the land patent was granted. Indeed, if the United States did have residual rights despite the patented land grant, then the statute required that the rights be conveyed to the private owner. Such an interpretation does not weaken the position of the landowners herein. Neither section 912 nor 913 purported to establish governmental ownership of land that had been granted to homesteaders subject to a right-of-way easement.

403 F.3d at 1317-18.

In *Beres I*, the Court of Federal Claims also disagreed with the government's arguments. As explained by the court,

> [w]hen [§ 912] was passed in 1922, Congress, perhaps in response to confusing and misleading language included in federal court decisions,[40] reconfirmed the absence of such a reversionary interest in the United States and the congressional intent, as indicated in the

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[40] 64 Fed. Cl. at 419 ("It would appear that the language of the 1922 Act was intended to address, clarify, and resolve issues created by the imprecise language employed by [*Stringham*] ….").

> legislative history of the 1875 Act, that the land should be reserved for homesteaders ….

64 Fed. Cl. at 428.

Drawing on canons of statutory interpretation, *Beres I* concluded that courts should hesitate to rely on later legislation (and the legislative history of that later legislation) in divining the purpose behind earlier legislation:

> Because legislative goals change over the years, the risk of using subsequent legislation or subsequent legislative history to interpret the intent of an earlier congressional enactment is intuitively obvious. Resort to using subsequent congressional activity of any variety to interpret earlier legislation should be cautiously approached, especially if more direct means are available, such as the clear meaning of the statute. Silence or omission in a statute is an intentional act and can be just as significant as specific statutory direction.

Id. at 416 (citing *W. Va. Univ. Hosps., Inc. v. Casey,* 499 U.S. 83, 101 (1991).

Here, as to the 1875 Act and § 912, the government is not asking for "a construction of a statute, but, in effect, an enlargement of [both statutes] by the court, so that what was omitted, presumably by inadvertence [under the United States' theory], may be included within its scope. To supply omissions transcends the judicial function." *See W. Va. Univ. Hosps., Inc. v. Casey,* 499 U.S. 83, 101 (1991).

Regardless, § 912 was specifically enacted to *dispose of*, not *retain*, unwanted "strips" of land that were considered "of little or no value" to the government. H.R. Rep. No. 67-217 at 2 (1921); *see also Wyoming v. Andrus*, 602 F.2d 1379, 1384 (10th Cir. 1979); *City of Aberdeen v. Chicago & N.W. Transp. Co.*, 602 F. Supp. 589, 592 (D.S.D. 1984); *Marlow v. Malone*, 734 N.E.2d 195, 198-99 (Ill. App. Ct. 2000); *City of Buckley v. Burlington N. R.R. Corp.*, 723 P.2d 434, 437 (Wash. 1986) ("By making the reversion automatic, Congress obviated the need for the drafting of additional legal instruments by the federal government, or for resolving disputes over each abandoned right-of-way on a case-by-case basis in the courts.").

This purpose does not support a contrary inference that Congress in 1875 intended to retain the interests. It was an afterthought that it might be useful if some railways could be converted to highways within a year of abandonment. H.R. Rep. 67-217 ("attention of the committee was called … to the fact that in some cases … it might be desirable to establish highways on [lines that] may be abandoned in the future"). Such an afterthought does not alter the fact that in the first instance these strips were considered "of little or no value," making disposal of these interests the primary objective. *See id*.

Thus, the 1922 legislation—and the modern-day policy objective of converting the abandoned rights of way into recreational trails[41]—cannot support an

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[41] The United States also argues that 16 U.S.C. § 1248(c) (1988) similarly supports construction of the 1875 Act. (Br. for U.S. on Pet. for Cert. 15.)

inference that, in 1875, Congress intended to retain the 1875 Act easements.

B. Section 912 operated to dispose of federal reversionary interests upon abandonment, not warehouse them in perpetuity.

Because *Brandt* and the United States rely heavily on § 912 in their analyses, this Court will be called upon to construe the statute and, in doing so, will likely address the manner in which § 912 operated to dispose of any federal reversionary interests to private owners. This construction will have implications not only for cases similar to this one, but will also have far-reaching consequences for the owners of private property crossed by tens of thousands of miles of rights of way that were abandoned before 1988 and which were subject to § 912.[42] For this reason, we provide an in-depth analysis of how § 912 operated between 1922 and 1988.

The government characterizes § 912 as (1) preventing a railroad from "relinquish[ing]" its "right-of-way" until after "'forfeiture' or 'abandonment' was 'declared or decreed by a court of competent jurisdiction or by Act of Congress,'" and (2) disposing of federal reversionary interests only after that court decree or act of Congress had issued. (Br. for U.S. on Pet. for Cert. 2-3.) Under the DOJ's construction, § 912 completely blocked the railroad from abandoning the interests and impeded the divestment and transfer of

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[42] In 1988, Congress, in a separate statute, modified § 912 so that abandoned rights of way were retained, not disposed, by the government, although the interests could still be "embraced" in a public highway. 16 U.S.C. § 1248(c).

federal reversionary interests until the abandonment was "declared" or "decreed." This construction, however, is nonsensical. It would conflict with the Interstate Commerce Commission's exclusive and plenary power to fully regulate abandonments (as delegated by Congress only two years prior), and it would unravel a century of precedent and practice.

Section 912 sought to dispose of federal interests through a one-year limitations period in which an eligible entity could "embrace" any federally retained interests by dedicating the interest to highway use. If no highway was established within that one-year period, then without "further conveyance or assurance of any kind or nature whatsoever," the interests were to vest in the lands traversed by the right of way. 43 U.S.C. § 912.

For its first six decades, the statute barely made a ripple—only a handful of decisions to address § 912 can be found. *S.C. Johnson*, 649 F.3d at 806. This, during an era when approximately 130,000 miles of right of way were abandoned.[43] If, as the government contends, abandoning a railroad right of way *at any point*—even before 1922—required a court decree or an act of Congress, then the dearth of court decrees or acts of Congress declaring railroads abandoned under § 912 means that, legally, almost all of the tens of thousands of miles of railroad rights of way with federal reversionary interests were never abandoned. The practical implications of this Court adopting the

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[43] *See* n.4, *supra*. By 1988, which is the last year § 912 operated to transfer federal reversionary interests into private ownership, approximately 130,000 miles had been abandoned.

government's interpretation are staggering: railroads could be liable for unpaid property taxes, upkeep, and injuries occurring on their heretofore believed-to-be abandoned rights of way.

These factors are important to a correct understanding of the historical and practical application of § 912, because, whereas historically there appears to have been no controversy, and title was simply reabsorbed by the lands formerly traversed by the easements if not dedicated to highway use within a year, today a split in the courts has emerged on the construction of § 912. Some courts have held that § 912 efficiently disposed of federal reversionary interests, while others have held that § 912 impeded their disposal.

Courts that view § 912 as impeding the disposal of federal interests have varied in their analyses. The district court in *S.C. Johnson* held that an act of Congress or a court decree had to issue before the railroad could abandon its interests at all, so that no interest could revert to the United States to be disposed of by the statute. *Samuel C. Johnson 1988 Trust v. Bayfield County*, 634 F. Supp. 2d 956, 974 (W.D. Wis. 2009) (stating that "in this case, *if* the right-of-way is declared to have been abandoned, it would revert to the United States ...."') (emphasis added) (internal quotation omitted), *rev'd by S.C. Johnson*, 649 F.3d at 806-07 (rejecting appellee's argument, which was identical to the district court's holding).

Reasoning somewhat differently, the Ninth Circuit has held that, while the abandonment was not literally blocked by § 912, the one-year limitations period in § 912, in which a municipality could "embrace" the

interests in a public highway, would not begin to run until a court actually decreed the abandonment (or Congress passed a special act). *Avista Corp. v. Wolfe*, 549 F.3d 1239, 1250-51 (9th Cir. 2008). In the meantime, landowners would be vested with "inchoate reversionary rights" until Congress or a court decreed the right of way abandoned or forfeited. *Id*. at 1247.

In practice, neither analysis is workable. The former analysis would block abandonment of the segments of corridors in which the United States retained reversionary interests, even if the Interstate Commerce Commission ("ICC") had authorized abandonment.[44] In other words, § 912 would have silently and impermissibly usurped the ICC's plenary and exclusive role in regulating the abandonment of railroads (which Congress had ceded to the ICC only two years earlier), by purportedly transferring that authority to courts. *See* Transportation Act of 1920, ch. 91, § 402(18)-(22), 41 Stat. 456, 477-478; *Chicago & N. W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 323 (1981) ("Congress granted to the Commission plenary authority to regulate, in the interest of interstate commerce, rail carriers' cessations of service on their lines. And at least as to abandonments, this authority is exclusive.").

The second unworkable analysis of § 912, detailed in *Avista*, at least lets the abandonment take place and "inchoate reversionary interests" to vest in landowners.

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[44] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, which took effect on January 1, 1996, abolished the ICC and transferred certain functions and proceedings to the Surface Transportation Board.

549 F.3d at 1247. But it also requires a court decree or act of Congress before the one-year limitations period to establish a highway starts running. *Id*. This construction would mean that a municipality could wait twenty, forty, sixty, or eighty years or longer, after a railroad is abandoned and, if no court decree had been issued, the municipality could go to court and request a decree; and only when the decree issued would the one-year clock to establish a highway begin to run. That is not what the statute says;[45] further, it simply makes no sense.

Common to both decisions was the notion that § 912 mandated prospective-only decrees of abandonment so that interests could only vest after a court or Congress got involved.

However, history makes clear that Congress did not have the above construction in mind when it passed § 912 to dispose of unwanted strips of land that "ought in justice" be given back to the underlying landowner: "Granting such relief in reality gives him only the land covered by the original patent." H.R. Rep. No. 67-217 at 1-2. While the committee did add terms to preserve the strip if a highway was desired, *id*., municipalities (or any other qualified entities) had one year to "embrace" the interest after abandonment, not countless decades.

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[45] Without acknowledging it was doing so, *Avista* reworded § 912 to make its holding work. Rather than giving municipalities one year from the date of "said [court] decree ***or*** forfeiture or abandonment," the court held that § 912 provided one year from the date of "said decree ***of*** forfeiture or abandonment." *Compare* 549 F.3d at 1243, *with* 549 F.3d at 1247 (emphases added).

The Seventh Circuit reversed the district court and found *Avista* "unpersuasive." *S.C. Johnson*, 649 F.3d at 807. The court found that several factors support the conclusion that the statute did not require a court decree of abandonment before the interests vested in the neighboring landowners.

First, history shows that § 912 did not require courts to issue prospective declarations of abandonment if the ICC had authorized abandonment and the railroad had pulled up its tracks. Once the tracks were gone, out of an abundance of caution, landowners could certainly seek an immediate decree of abandonment to claim their property. But, "this formality has not been observed in rail abandonments." *Id.* at 806. If that formality had been required, with some 130,000 miles of abandoned rights of way during the relevant period, and even if only a small fraction included federal reversionary interests, the courts would have been inundated with requests for declaratory relief. Instead, only a handful of cases can be found. *Id*.

Second, after-the-fact adjudications to determine whether and when an abandonment took place on railroad corridors are and were commonplace—as Congress would have understood in 1922. In other words, history is replete with cases in which a court will weigh the law and facts and "decree" that an abandonment took place back in time. *E.g*., *Fritsch v. ICC*, 59 F.3d 248, 253 (D.C. Cir. 1995) (1995 ruling that right of way was abandoned in 1993 pursuant to ICC authority and before trail use was instituted); *Pollnow*

v. State Dep't of Natural Res., 276 N.W.2d 738, 746 (Wis. 1979) (holding abandonment occurred in 1973).[46]

As explained by the Seventh Circuit, "[t]he regulator's (the ICC's or STB's) permission to abandon, coupled with the removal of the tracks (abandonment in fact), was sensibly accepted as adequate proof of abandonment …. A formal declaration was necessary only if contrary proof was presented or surprise claimed." *S.C. Johnson*, 649 F.3d at 806 (citing *Keife v. Logan*, 75 P.3d 357, 358 (Nev. 2003) (per curiam) (affirming an *ex post facto* decree of abandonment in finding interests had vested under § 912)).

Third, this practice would not result in unfair surprise or "arbitrary forfeitures of property rights," as had been held in *Avista*, because the ICC process of abandonment—which required notice be given to local governments—coupled with the pulling up of tracks, would give municipalities ample notice of any abandonment, and they had a one-year statutory period after the tracks were pulled up in which to act. *Id.* at 807 (citing *Avista*, 549 F.3d at 1250).

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[46] *See also Clemmer v. Rowan Water, Inc.*, No. 0:04-CV-165 HRW, 2006 WL 449266, at *1 (E.D. Ky. Feb. 23, 2006) (holding right of way abandoned and interests vested in 1985-86); *Petrus v. Nature Conservancy*, 957 S.W.2d 688, 688-89 (Ark. 1997) (affirming abandonment in 1985); *Forwood v. Delmarva Power & Light Co.*, No. CIV.-A.-10948, 1998 WL 136572, at *5 (Del. Ch. Mar. 16, 1998) (decreeing railroad abandoned in the mid-1970s); *Dowd v. City of Omaha, Douglas Cnty.*, 520 N.W.2d 549, 553 (Neb. Ct. App. 1994) (approving 1988 finding of abandonment in 1981).

Fourth, to the extent there would be any concern that the right of way was not actually abandoned, the court was

> … supported in thinking a prospective judicial declaration of abandonment unnecessary not by a literal reading of section 912 (which isn't possible, because "decree or forfeiture or abandonment" is a garble) but by reflection on how onerous the process for obtaining regulatory authorization to abandon a rail line is, *see* 49 C.F.R. §§ 1152.1 *et seq.*, and how even if authorization is obtained the railroad still must run the gauntlet of judicial review in order to be allowed to abandon a line. A railroad is hardly likely to incur the expense of abandonment proceedings if it doesn't intend to abandon the rail line if given permission to do so—and promptly too, as authority to abandon expires after a year.

Id. (citations omitted).

Fifth, "[w]hen the rare case arises in which there is a dispute over whether a right of way has been abandoned, a claimant who doubts that it has been can sue; but he cannot just claim that the absence of a formal prospective declaration in a judicial opinion or Act of Congress means that the right of way never was abandoned." *Id.* at 808.

The Seventh Circuit's construction of § 912 makes far greater sense than the Ninth Circuit's in *Avista* or the district court's in *S.C. Johnson*: a "literal reading" of § 912—the terms of which are "a garble"—*might* suggest that only after a court decree or act of Congress

could the interest even be abandoned—but this is a "nonsensical" construction. *See id.* at 806. Congress in 1922 would have known that decrees of railway abandonments were always made after the fact. This would not have been considered an impermissible retroactive declaration, but rather the way our courts have always adjudicated and resolved disputes over railway abandonments.

The contrary construction argued by the United States—that § 912 mandated prospective decrees *before* interests could even be abandoned, let alone vest in landowners—(1) would result in tens of thousands of miles of rights of way *not* being abandoned and (2) would have required landowners along those tens of thousands of miles to flood the courts seeking judicial decrees in order to give effect to § 912. When examined through the lens of practical reality, the government's construction is nonsensical.

CONCLUSION

In *Great Northern*, at the urging of the United States, this Court fully endorsed the DOI practice of transferring fee title in a patent to the landowner without reserving any interest in the tracts comprising the 1875 Act grants. This Court so found because the 1875 Act granted merely easements. As a result of the DOI's policy, generations of land patents have issued without the reservation the United States now claims. No matter how compelling modern-day policies favoring the preservation of rights of way may be, a reversal of *Great Northern* would upend decades of justified reliance on established principles of land ownership for over a million acres of land. The Tenth Circuit's decision should be reversed.

Respectfully submitted,

CECILIA FEX
Counsel of Record
MICHAEL AMBERG
ACKERSON KAUFFMAN FEX, PC
1701 K Street, NW, Suite 1050
Washington, DC 20006
(202) 833-8833
fex@ackersonlaw.com
michael@ackersonlaw.com

Counsel for Amicus Curiae
National Association of
Reversionary Property Owners