Docket No. SJC-13300

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

SMILEY FIRST, LLC,

Plaintiff-Appellant,

v.

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

On Appeal from a Judgment of the
Superior Court Department of the Trial Court
Civil Action No. 2020-CV-00222
Transferred from the Appeals Court of the
Commonwealth of Massachusetts

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE APPELLANT AND REVERSAL

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Mass. R.A.P. 17, Pacific Legal Foundation (PLF) submits this brief *amicus curiae* in support of plaintiff-appellant Smiley First, LLC. PLF is a nonprofit, public interest legal foundation established nearly 50 years ago to advance the principles of individual rights and limited government at all levels of state and federal courts. PLF attorneys have litigated takings claims before the U.S. Supreme Court and several lower federal courts, including in *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021); *Knick v. Twp. of Scott*, 139 S.Ct. 2162 (2019); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); and *Wilkins v. United States*, 13 F.4th 791 (9th Cir. 2021), *cert. granted*, 142 S.Ct. 2776 (2022). PLF has also participated before this Court as *amicus curiae*. *See, e.g.*, *Pepin v. Div. of Fisheries and Wildlife*, 467 Mass. 210 (2014); and *Medina v. Hochberg*, 465 Mass. 102 (2013). PLF recently submitted an *amicus* brief in a case before the Pennsylvania Supreme

[1] Pursuant to Mass. R.A.P. 17, *amicus curiae* affirms 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 *amicus curiae* Pacific Legal Foundation, its members, or its counsel made a monetary contribution to its preparation or submission.

Court similarly involving the need to protect private property rights against government overreach in asserting claims to easements. *See Bindas v. Pa. Dep't of Transp.*, Pa.S.Ct. No. 184 WAL 2021 (filed July 19, 2022). PLF believes that its perspective and expertise in property rights and eminent domain law will aid this Court in its consideration of the issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case centers on a state agency's attempt to redefine property to avoid complying with the self-executing nature of the Fifth Amendment's Takings Clause. *See Knick*, 139 S.Ct. at 2171 (noting self-executing character). Rather than denote its 2018 new and intensified uses for what they are—a *new* easement requiring the payment of *new* just compensation—the state characterizes these unforeseen and previously undisclosed uses as integral to its 1991 easement. Massachusetts law, and courts inside and beyond the Commonwealth, disagree. New uses or the intensification of existing uses effect new takings. And "the government must pay for what it takes." *Cedar Point*, 141 S.Ct. at 2071. Many state and federal courts addressing this issue have reached the same conclusion.

Notably, when aviation moved from propeller-driven aircraft to the jet age, owners of property below flight paths, whether or not already subject to overflight (or "avigation") easements, sought, and frequently received, compensation for these *new* takings. Courts in most of these cases reasoned that changing aircraft types effectively established fresh easements requiring new just compensation, due to the vastly increased noise, vibration, and exhaust fumes caused by escalating numbers of jet planes flying at low altitudes. *See, e.g.*, *Griggs v. Allegheny County*, 369 U.S. 84, 89–90 (1962); *Avery v. United States*, 330 F.2d 640, 643 (Ct. Cl. 1964); *Jensen v. United States*, 305 F.2d 444, 448 (Ct. Cl. 1962); *City of Jacksonville v. Schumann*, 199 So.2d 727, 730 (Fla. Dist. Ct. App. 1967). Courts have extended this underlying rationale to other easement types, including highway public utilities easements and rails-to-trails easements, requiring just compensation for new takings where the original's functional scope had become "misused and overburdened." *Richardson v. Cox*, 34 P.3d 828, 829 (Wash. App. 2001). *See also Hicks v. Franklin Cnty. Auditor*, 514 N.W.2d 431, 439 (Iowa 1994) ("We continue to objectively examine the facts and circumstances of each drainage case. We believe the legislature intended to differentiate between a repair and

an improvement on the basis of the nature and purpose of the work done.").

These courts demonstrate a healthy skepticism towards governmental narratives that new or intensified uses are within an earlier easement's scope. Careful scrutiny is essential to upholding the U.S. Supreme Court's understanding that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). *Amicus* PLF urges this Court to reverse the lower court and find a new taking, rejecting MassDOT's claim that the 2018 changes to, and intensification of, its Smiley First easement are within the scope of its 1991 condemnation.

ARGUMENT

Massachusetts law requires that a condemned easement "show on its face the specific purpose to which the land appropriated to public uses is to be devoted." *Byfield v. City of Newton*, 247 Mass. 46, 57 (1923). More is at stake here, though, than the particulars of Smiley First and MassDOT's dispute. If courts approve expansive new uses or the

intensification of uses of easements acquired through eminent domain, and do so without a searching inquiry, governments will simply wordsmith their way to placing these within the ambit of their original prescribed uses with the object of avoiding paying the just compensation the government owes for new or intensified uses. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992) ("the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations."). Uncompensated easements betray the constitutional rule, confirmed by the Supreme Court, that "when the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate . . .". *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002). *See also Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) ("[E]ven if the Government physically invades only an easement in property, it must nonetheless pay just compensation.").

I. A FRAMEWORK FOR DETERMINING WHEN DISTINCT OR INTENSIFIED EASEMENT USES EFFECT NEW TAKINGS REQUIRING JUST COMPENSATION

Property rights are the beating heart of the Anglo-American legal tradition. They are, as Professor James Ely put it, the "guardian of every

other right." *See generally* James W. Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (3d ed. 2007). Allegations that government has taken private property without paying just compensation demand careful judicial scrutiny equivalent to that applied to incursions on other fundamental rights. *See Knick*, 139 S.Ct. at 2170; *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). Material changes to an easement's use or intensity works a *new taking* when (a) the new uses are, by reasonable inference, separate and distinct from the original ones, or (b) the intensified accommodation of an old purpose imposes burdens on the servient estate that were not factored into the original compensation. The Iowa Supreme Court developed a useful formula along these lines:

> To determine the scope of the easement, this court compares the language of the easement with the proposed use. Three considerations are: (1) the physical character of past use compared to the proposed use; (2) the purpose of the easement compared to the purpose of the proposed use; and (3) the additional burden imposed on the servient land by the proposed use.

Keokuk Junction Ry. Co. v. IES Indus., Inc., 618 N.W.2d 352, 356 (Iowa 2002) (internal citations omitted).

This Court has similarly held that "the wording of an" easement's declaration "prevents any *material* change in the use of the retained rights from the conditions existing" when first created. *Com. Wharf E. Condo. Ass'n v. Waterfront Parking Corp.*, 407 Mass. 123, 138 (1990) (emphasis added). For example, an easement for a footpath may not be transformed into a general highway simply because both serve the purposes of transporting people from one place to another. *Lawless v. Trumbull*, 343 Mass. 561, 564 (1962). "Such a ruling would permit virtually unlimited use of the way by vehicles, with the attendant noise, wear and tear on the path, and traffic hazards. As compared with the prior infrequent transportation of firewood by teams and trucks, this change in use would be *substantial*." *Id.* (emphasis added). Thus, a "material" or "substantial" change to the use, or intensification of the prescribed use is a *new* easement requiring *new* just compensation.

Even if a new use was contemplated at the time of the original taking, a sufficiently increased burden likewise serves as a basis for a new easement and requires its *own* just compensation.[2] This case

[2] Cases to the contrary are marked by excessive deference to the government's broad characterization of the scope of its easement and lack

contains elements of both a new use entirely and the intensification of uses for which the Commonwealth took its easement in the first place.

II. NEW EASEMENT USES OR THE INTENSIFICATION OF EXISTING USES EFFECT NEW TAKINGS REQUIRING JUST COMPENSATION

A new use need not involve intensification to be a taking—indeed, it can be *less* burdensome on the owner than the original. *See infra* Section II.B (discussing rails-to-trails). But when government intensifies the means employed to achieve *an existing use* beyond what was foreseen and previously paid for, it materially alters the terms of the original taking and creates a new easement that requires its *own* just compensation.

For example, in *Richardson v. Cox*, a Washington State appeals court found that the defendant's use, with county approval, of a right of way across the plaintiffs' land changed to become "misused and overburdened" with "heavy, commercial truck traffic." 108 Wash.App. 881, 892 (2001) (combined trespass and taking). Therefore, the defendant

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careful judicial scrutiny. *See, e.g.*, *Eyde Bros. Dev. Co. v. Eaton Cnty. Drain Comm'r*, 427 Mich. 271, 297 (1986); *Pickett v. Cal. Pac. Utils.*, 619 P.2d 325, 327 (Utah 1980); *Hall v. Lea Cnty. Elec. Coop.*, 78 N.M. 792, 795 (1968).

and the county overstepped the functional limitations placed on the original easement, entitling the property owner to just compensation for the new one, a payment separate and distinct from the amount remitted for the original taking. *Id*.

As shown in the following analogous scenarios, MassDOT's expanded use of its Smiley First easement beyond "railroad purposes only" requires new just compensation. Not just as a matter of constitutional law, but to ensure that state agencies like MassDOT in the future abstain from "plac[ing] a greater burden on the servient estate than was contemplated at the time of formation." *Keokuk Junction*, 618 N.W.2d at 355.

A. Avigation Easements

Governments originally purchased avigation easements to accommodate propellor-driven aircraft flying into newly created airstrips and airports. Landowners in the flight path accustomed to the relatively muted sounds of these old models were rattled from their beds when newfangled jet aircraft took to the skies. With increased volume, speed, and frequency of flights, these owners and their animals suffered from excessive noise, vibration, glare, and other disruptions.

Most famously, in *United States v. Causby*, 328 U.S. 256, 259 (1946), military bomber, fighter, and transport overflights completely destroyed a nearby chicken farm, as frightened birds flew into walls, many dying from their injuries. The landowners successfully argued that the military overflights amounted to a regulatory taking. *Id*. In holding for the burdened owners, the Court noted that even when some value in the land beneath a flight path remains, the effect of constant jet-powered overflights could "reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field." *Id.* at 262. While the federal government did not have a preexisting easement in *Causby*, the Court's vivid description of the harm jet aircraft caused underlies similar cases in which government expanded earlier avigation easements limited to propellor aircraft to include jet-powered aircraft, causing new and more severe burdens along the way.

Crucial to the holdings in *Causby* and like cases are the courts' exacting and "duty-bound" appraisal of government's depictions of new or intensified uses as minor, owner-foreseen variations of those originally prescribed. Free of "internal and external sources of bias," these courts concluded, instead, that the new or intensified uses materially altered

the terms of the original condemnation and thereby effected new takings altogether. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 122 (2015) (Thomas, J., concurring) ("[T]he judiciary, insulated from both internal and external sources of bias, is duty bound to exercise independent judgment in applying the law."). As the U.S. Court of Claims (now the Court of Federal Claims) explained:

> The point when that stage [preexisting to new use] is passed depends on a *particularized judgment* evaluating such factors as the frequency and level of the flights; the type of planes; the accompanying effects, such as noise or falling objects; the uses of the property; the effect on values; the reasonable reactions of the humans below; and the impact upon animals and vegetable life.

Jensen, 305 F.2d at 447 (emphasis added).

In *Kupster Realty Corp. v. New York*, the New York Court of Claims acknowledged its obligation to undertake undeferential analysis instead of relying on either party's depiction of events. The court observed that while the landowners beneath overflight easements had not *yet* shown that the externalities produced by newer aircraft were intense enough to warrant just compensation, there would *have* to be a point, varying by context, at which upticks in volume, frequency, and pollution create new easements. 404 N.Y.S.2d 225, 235 (N.Y. Ct. Cl. 1978). *See also City of*

Jacksonville v. Schumann, 199 So.2d at 729, 390 U.S. 981 (1968) (owners of existing avigation easements entitled to just compensation for "unexpected new aggravations" related to changes in the operation and extension of the nearby airport); *Cochran v. Charlotte*, 53 N.C.App. 390, 392–93 (1981) (property owners with avigation easements over their land were entitled to compensation after runway extensions significantly increased the frequency of overflights and the introduction of new types of aircraft). As in any takings context, holding government accountable for new or intensified uses in these and similar circumstances is vital to the protection of property rights in general:

> [T]o construe these easements as giving the [s]tate the right to make whatever noise is necessary and incidental to overflights by whatever type of aircraft it may hereafter permit to land and take off . . . would be giving [the state] the right to destroy most, if not all, of the value of the subject properties.

Kupster, 404 N.Y.S.2d at 235.

B. Rails-to-Trails Easements

"Rails-to-trails" is shorthand for long-ago conveyances of *railroad-only* easements that governments have wrongfully repurposed as public

recreational paths. *Preseault v. I.C.C.*, 494 U.S. 1, 4 (1990).[3] Recreational trails are a less "intense" use of land than trains rumbling down a track, yet the new use still works a taking. Successors to the original conveyors challenged these schemes on the grounds that government cannot simply shift from one public use to another by refashioning an existing easement taken for entirely different purposes. Many courts agree, holding that property owners are entitled to new just compensation for a material change in use, since such a change effects an entirely new easement.

In *Howard v. United States*, for example, the Indiana Supreme Court flatly rejected the federal government's "shifting public use" argument, holding that while "the installation of utility or gas lines along railroad and highway easements generally does not constitute an additional burden," this is qualitatively different than, "the use of those easements as public recreational trails." 964 N.E.2d 779, 783 (Ind. 2021). The court explained that "the purpose for which the property is acquired . . . determines the scope of the easement, and the holder of the easement

[3] Governments often repurposed these easements to avoid a judicial ruling of abandonment of the easement that results in reversion to the land's titleholder. *Preseault*, 494 U.S. at 4 (noting enactment of federal law in response to this trend).

cannot impose a *different* or extra burden upon the landowner." *Id*. at 782 (emphasis added) (internal citations omitted). The court reiterated that "the focus remains on the *purpose* of the easement at the *time of its acquisition*." *Id.* at 783 (emphasis added).

In *Eldridge v. City of Greenwood*, a South Carolina appeals court took a similar tack when a railroad conveyed its easement in land beneath its abandoned railway to the city and county governments, which in turn sold it to the state for non-railway purposes. But these transfers violated the landowners' retained reversion right in the event the original railroad use were abandoned. 331 S.C. 398, 406 (Ct. App. 1998). The court agreed, describing the issue as "whether technological and social changes over time have created such 'shifting public uses' as to allow use of the railroad's right of way for a public highway, which admittedly has nothing to do with railroad purposes." *Id*. at 418 n.10.

The court then held that "statutory grants of eminent domain should be strictly construed" and rejected the government's claim that it could "shift public use" and retain ownership of the easement, even though it had abandoned the easement's original purpose. *Id.* at 420. Where "there has been such a shift away from railroads"—or from one

use to *any* unlike use, for that matter—the condemnor or grantee has seized what they were neither legally nor contractually entitled to take. *Id.* at 422. In concluding that the use had "shifted away from railroads," the court in *Eldridge* read the language of the grant strictly to "mean[] exactly what it says": that "*only railroad uses* are permitted." *Id.* at 421. "To hold otherwise," the court explained, "would effectively gut the longstanding rule that an easement is extinguished upon the railroad's abandonment of the right of way for railway purposes." *Id.* at 422. *See also Com. Wharf*, 407 Mass. at 138; *Lawless*, 343 Mass. at 564 (similar).

C. Public Utilities Easements

Public utilities have often sought to take advantage of existing highway or other transit-related easements to erect transmission poles and wires on private property. In response, many courts have held that repurposing an existing easement in such a way creates a *new* easement requiring its *own* just compensation.

In *Cathey v. Ark. Power & Light Co.*, for example, the state took a portion of an owner's land for use as a public highway. Subsequently, a public utility erected power-transmission poles on the condemned land. The Arkansas Supreme Court agreed with the owner that this use

extended beyond the easement's exclusive highway mandate, observing that while "the condemnation of land for a highway . . . gives the public a right to use it as a highway," Arkansas Power & Light, "having erected its poles and wires on appellant's land, was a trespasser." 97 S.W.2d 624, 626 (Ark. 1936).

Courts elsewhere have drawn similar conclusions. In Louisiana, property owners abutting a state highway sued when the roadway was widened, requiring the removal of existing power poles that, with the highway department's permission, originally sat within the easement but now were moved to privately owned land outside the easement. *La. Power & Light Co. v. Dileo*, 79 So.2d 150, 154 (La. App. 1955). The court held that the power company was required to obtain permission from both the easement-holding highway department *and* the property owners because the described scope of the highway easement did not include power poles. *Id.* at 155. These uses are not equivalent, nor can one be subsumed under the other. The appellate court explained,

> The requirements for and the results of use of the two servitudes may be very different. The power line servitude, permitting the placing of power line poles on the front lawns of homes with attendant trimming of shrubs and trees, may be very much more onerous than the highway servitude of right of way.

Id.[4]

In sum, the Takings Clause overrides governmental actions that recharacterize old uses to encompass wholly new uses or intensifications of use inconsistent with an easement's original purpose and scope. And the Supreme Court recently admonished states not to make these sorts of recharacterizations. *See Murr v. Wisconsin*, 137 S.Ct. 1933, 1945 (2017) (states do not have unrestricted power to change property definitions and thereby avoid a taking).

* * *

Slight adjustments to an easement's use or intensity will not require just compensation. In the end, logic dictates. Seemingly new uses that instead fulfill the original purpose and impose burdens on the servient estate that were factored into the original payment will *not* amount to a new taking requiring just compensation. *See, e.g.*, *Wright v. Horse Creek Ranches*, 697 P.2d 384, 388–89 (Colo. 1985) (regarding

[4] The Louisiana Court of Appeals' consideration of the property owners' expectations regarding use of the property foreshadowed the "distinct investment-backed expectations" prong of *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (a factor to consider whether a governmental interference with a private right or interest rises to a "regulatory taking").

overuse of a prescriptive road easement, courts "recognize[d] that human behavior and the circumstances which influence it inevitably change" but that "[t]his flexibility of use is limited . . . by concern for the degree to which the variance further burdens the servient estate."); *SRB Inv. Co. v. Spencer*, 463 P.3d 654, 663 (Utah 2020) ("In considering changes to the use of an easement . . . we apply a flexible rule that seeks to accommodate reasonable changes in use" and "a reasonable change in use is any change that does not materially increase the burden on the servient estate or materially restrict the use of the easement.").

There is little danger to the public fisc from a rule requiring payment for materially new uses of an easement, even within the original's physical boundaries, because the scope of an easement can *always* be adjusted without cost "in the face of changing times to *serve the original purpose* . . . ." *Preseault v. United States*, 100 F.3d 1525, 1542 (Fed. Cir. 1996) (citing Richard R. Powell, 3 POWELL ON REAL PROPERTY § 34.12[2] (Patrick J. Rohan ed., 1996)). The Federal Circuit in *Preseault* illustrated this rule with an Oregon Supreme Court ruling that a logging access easement had not been abandoned due to the switch from railroads to trucks because "the owners of the servient estate did not claim that

the new use had subjected their property to any additional servitude." *Id.* (citing *Bernards v. Link*, 199 Or. 579, 592–604 (1952)). As with avigation easements, making new or intensified use of railway easements without paying is not entirely foreclosed, though the vast majority of rails-to-trails conversions most certainly are. Government can make adjustments *if* (a) these changes are foreseeable from the start—as with inevitable technological advancement in general—*and* (b) they do not impose new, undue burdens on the servient estate, in which case the original compensation is still just. In view of the cases herein discussed, *neither* is true of MassDOT's recent changes to its Smiley First easement.

CONCLUSION

As demonstrated in Smiley First's briefs, MassDOT's 2018 changes to the use of its easement significantly expands its uses of the Smiley First easement. It is a *new taking* warranting *new just compensation*.

The decision below should be reversed.

DATED: September 19, 2022.

Respectfully submitted,

/s/ Jonathan M. Houghton

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