No. 16-

IN THE

Supreme Court of the United States

ROMANOFF EQUITIES, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When the Court of Appeals confronts a novel or unsettled question of state law, should the court certify the question to the state's highest court or should the federal court make an *Erie*-guess about how the state's highest court might decide the issue?

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OPINIONS BELOW

The Federal Circuit's opinion (App. 25a) is reported at 815 F.3d 809 (2016). The Federal Circuit's denial of rehearing is at App. 1a. The Court of Federal Claims' (CFC's) decision (App. 39a) is reported at 119 Fed. Cl. 76 (2014).

JURISDICTION

The Federal Circuit entered judgment on March 10, 2016. The Federal Circuit denied rehearing July 28, 2016. App. 1a. This Court's jurisdiction is timely invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides "No person shall * * * be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The National Trails System Act Amendments of 1983, Pub. L. 98-11, 16 U.S.C. 1241, *et seq.*, provide the United States may establish public recreational trails across otherwise abandoned railroad rights-of-way. Relevant excerpts are at App. 57a.

The Tucker Act, 28 U.S.C. 1491, grants the CFC jurisdiction to, *inter alia*, award damages against the United States for claims arising under the Constitution, including the Fifth Amendment Takings Clause.

INTRODUCTION

Federalism directs that federal courts confronting an unsettled question of state law refer the state law question to the state's highest court for a definitive answer. Allowing state courts to decide questions of state law promotes federalism because, when a federal court chooses to decide "a novel state [law question] not yet reviewed by the State's highest court," it "risks friction-generating error." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 78-79 (1997).

Contrary to this Court's guidance in *Arizonans*, *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and *Railroad Comm'n of Tex.* v. *Pullman*, 312 U.S. 496 (1941), the Federal Circuit did not certify (or abstain from deciding) a novel question of New York property law. (The lower court decisions turned upon whether New York recognized the concept of an "easement-for-anything.") Instead of certifying this question the Federal Circuit made an *Erie*-guess about how it believed New York's highest court might decide this unsettled question of New York law.

The Federal Circuit erred by not certifying this admittedly-novel question of state law to the New York Court of Appeals. The Federal Circuit erred further when it wrongly guessed how New York's highest court may decide this question of New York property law. In doing so, the Federal Circuit unsettled New York property law and undermined the certainty of land title contrary to this Court's admonition in *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 687-88 (1979) ("This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate

some ill-defined power to construct public thoroughfares without compensation.").

This Court should grant certiorari because the Federal Circuit (a) failed to follow this Court's guidance; (b) unsettled New York property law; and, (c) split with the other circuits which do certify such novel questions of state law to the state's highest court.

Granting certiorari is also important because the Federal Circuit sits as a court of national jurisdiction hearing *every* appeal of *every* Fifth Amendment taking case against the United States. In this capacity the Federal Circuit must resolve questions of state property law. There are hundreds of pending cases before the Federal Circuit (and the CFC and district courts, all of which are subject to review by the Federal Circuit) in which the dispositive issue turns upon state law. And many of these cases involve novel issues of state law.

STATEMENT OF THE CASE

This is a Trails Act taking case. The federal government converted an otherwise abandoned railroad right-of-way into a public park. But for the federal government's order, the Romanoff family would have enjoyed unencumbered title to, and exclusive possession of, their land. But, because the government invoked §1247(d) of the Trails Act, the Romanoff family lost their state law right to their land.

The Highline railroad viaduct was created in the late 1920s to separate railway lines from street-level pedestrian traffic. In the 1920s trains were hitting and killing pedestrians and motorists in Manhattan. The

problem was so severe that, in 1928, New York enacted the New York City Grade Crossing Elimination Act, L. 1928, ch. 677. The "undisputed legislative intent" of this law was "to eliminate dangerous rail crossings at grade (*i.e.*, street level) that posed a serious public health risk in urban areas." *New York City Council* v. *City of New York*, 4 A.D.3d 85, 98 (2004) (citation omitted).

> Before the High Line became the park in the sky, before it was abandoned, before trains ran goods along its once thirteen-mile length, before its massive, trunk-like beams sprouted from the cobblestones to suspend its metal canopy above the streets below, the West Side of New York churned with reckless energy. Freight trains ran at grade up and down the middle of 10th Avenue, tracks inserted between cobbles, to ferry goods to and from the factories of the Meatpacking District. This interplay of heavy machinery and humanity proved a dangerous mix; the stretch of road became known as "Death Avenue."
>
> Clay Grable,
> *The West Side Cowboys of Death Avenue.*[1]

In furtherance of this policy and legislation New York Central Railroad acquired easements to construct and operate an elevated railroad viaduct spanning more than twenty-five city blocks. See App. 3a. The railroad obtained "easements for the construction, equipment, maintenance and operation of the railroad of the Railroad

1. <www.thehighline.org/blog-tags/west-side-cowboy> (last visited October 13, 2016).

Company … as shown upon the Enlarged Plan, upon a viaduct structure." *Id.*

The Romanoff family's predecessor-in-title, Realty Company, owned a tract of land across which New York Central wanted to construct its elevated railroad viaduct. In June 1932 Realty Company granted New York Central Railroad an easement to construct and maintain an elevated railroad viaduct through Realty Company's land. The easement agreement is a detailed ten-page instrument granting New York Central Railroad a right to "construct, maintain and operate" a railway line across an elevated viaduct through Realty Company's property. The entire 1932 Easement is reprinted in App. 3a-24a. The 1932 Easement includes the following provisions:

> [Realty Company] does hereby grant and convey unto the Railroad Company, its successors and assigns forever, the permanent and perpetual rights and easements *to construct, maintain and operate, without interference or right of interference, its railroad* and appurtenances within those portions of the parcels of land herein described . . . [for] the exclusive use of the portion of the parcels of land herein described *. . . for railroad purposes and for such other purposes as the Railroad Company its successors and assigns may from time to time or at any time or time desire to make use of the same*, subject only to the permanent rights and easement herein specifically reserved to [Realty Company] its successors and assigns.
>
> App. 4a (emphasis added).

Realty Company and New York Central described the intent and purpose for which they created this easement.

> WHEREAS, the Realty Company is the owner of the parcels of land herein described and the Railroad Company is desirous of constructing and maintaining an elevated structure upon and over said parcels supporting the tracks, structures, appliances and facilities to be constructed, maintained and operated by the Railroad Company, its successors and assigns thereon, and the Realty Company is desirous of constructing and maintaining a building or buildings above and/or below the spaces to be used for the purposes of said tracks, structures, appliances and facilities of the Railroad Company as aforesaid; and [the parties] … have likewise agreed upon the easements to be granted to the Railroad Company.

App. 3a-4a.

The 1932 Easement allowed New York Central to construct and maintain structures "necessary or convenient for the support of the tracks, structures, appliances and facilities to be constructed and maintained by the Railroad Company." App. 9a. The 1932 Easement contains ten single-spaced pages of provisions discussing the construction, maintenance and operation of an elevated railway. The 1932 Easement contains absolutely no mention of using the property for "public space," such as recreation, concerts, art displays, wine and cheese bars, taco trucks, food vendors, or stargazing. The CFC noted, "the parties at the time the easement was granted could

not foresee use of the corridor for a public trail and park." App. 50a-51a.

Further, in 1932, as now, using railroad rights-of-way for public recreation was not only incompatible with the operation of a railroad, it was illegal. See N.Y. Penal Code §140.10(g) ("A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully [upon] a right-of-way or yard of a railroad.…").

When the railroad no longer used the viaduct for operation of a railway the railroad was required to tear down the viaduct. *Consolidated Rail Corp.* v. *I.C.C.*, 29 F.3d 706, 709-10 (D.C. Cir. 1994). The elevated railway line was abandoned in the 1980s and the viaduct was scheduled to be demolished. By the 1980s, New York Central's successor railroad, Conrail, no longer used the Highline. The owners whose land was encumbered by the derelict viaduct sued Conrail to force Conrail to remove the decrepit structure. *Consolidated Rail Corp.*, 29 F.3d at 709. Conrail removed the stations and certain tracks from the viaduct and abandoned all use of the easement. See *id.* at 709-10.

In 1992, at the landowners' request, the ICC authorized the railway line to be abandoned. By the early 2000s, the viaduct "ha[d] deteriorated to a point where it ha[d] become a danger to the community." *New York City Council* v. *City of New York*, 4 A.D.3d 85, 87-88 (N.Y.A.D. 2004). Conrail was required to demolish the viaduct and the owners would regain their right to unencumbered title and exclusive possession of the land. See *id.* at 88; *Consolidated Rail Corp.*, 29 F.3d at 710. The ICC concluded that there was no possibility of future railroad

traffic on the Highline. *Id.* The ICC further ruled that public convenience and necessity permitted abandonment. *Id.* at 712.

Conrail appealed the ICC's decision to the DC Circuit. The DC Circuit upheld the ICC's decision. *Consolidated Rail Corp.*, 29 F.3d at 710. The DC Circuit found the Highline had not been used for a railroad in more than ten years. *Id.* at 711. The Highline "fell into disuse during the 1970s," and the railroad "ceased operations over the Highline in the mid-1970s." *Id.* at 709. "By 1982 Conrail eliminated from the line all stations and team tracks." *Id.* The DC Circuit agreed with the ICC, property owners and New York City, the Highline rail corridor "did not serve the public convenience and necessity." *Id.* at 712.

In *New York City Council*, the court found (1) the landowners held title to the fee estate in the land under the viaduct and the railroad had only an easement to use the property; (2) the railroad viaduct was not a public park; and, (3) the Highline was "abandoned." *Id.* at 87, 96.

New York City, under the Giuliani Administration, supported the landowners and joined their efforts to have the abandoned railroad viaduct demolished. But, when Mayor Bloomberg was elected, the City changed its position and now wanted the Highline converted into "public space" under the federal Trails Act. "As an alternative to demolition, petitioners propose that the Highline be utilized as an elevated pedestrian park, a proposal that has garnered some support from local public officials." *New York City Council*, 4 A.D.3d at 87. The City asked the STB to issue an order invoking §1247(d) of the National Trails System Act. See App. 44a. The STB

agreed and, in June 2005, invoked §1247(d). *Id.*; see also App. 57a.

The Highline is now a popular public park built across the 1.45 mile-long, abandoned viaduct from Gansevoort Street in the Meatpacking District to West 34th Street, between 10th and 11th Avenues. The viaduct was rebuilt and is now used for a "specialty coffee shop" with "a full espresso bar," an "open air café offer[ing] New York State beers and wine," and features a "Taco Truck."[2] All equipment needed to operate a railroad is gone and in its place are garden tours, stargazing,[3] "weekly Tai Chi and Meditation sessions" and "a series of dynamic live performances and participatory activities …. [f]rom dance parties to the beat of Latin rhythms to poetry and spoken word festivals.…"[4] On Tuesday nights, astronomers gather to "[p]eer through high-powered telescopes provided by the knowledgeable members of the Amateur Astronomers Association of New York to see rare celestial sights."[5] Between its opening and July 2014, more than 20 million people have visited the Highline.[6]

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2. See <https://www.thehighline.org/visit/#/fooddrink/233> (last visited October 12, 2016.

3. See <https://www.thehighline.org/activities> (last visited October 12, 2016).

4. See <https://www.thehighline.org/activities/cultural_events> (last visited October 12, 2016).

5. See <https://www.thehighline.org/activities/stargazing> (last visited October 12, 2016).

6. See <http://files.thehighline.org/pdf/high_line_fact_sheet.pdf> (last visited October 8, 2016).

Coffee bars, taco trucks, Latin dancing, stargazing, and the many other uses now made of this property are all delightful public amenities popular with New York City residents and tourists. But these new uses of the Romanoff property have absolutely nothing to do with operating a railroad – the purpose for which the 1932 Easement was created. These new uses of the Romanoff's property are not authorized by the 1932 Easement, nor were such uses even remotely within the contemplation of New York Central Railroad and Realty Company when the 1932 Easement was created.

In *Preseault* v. *Interstate Commerce Commission*, 494 U.S. 1, 8 (1990) (*Preseault I*), this Court held the Trails Act takes property for which the Fifth Amendment requires the federal government to compensate owners because "many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests … [and] frequently the easements provide that the property reverts to the abutting landowner upon abandonment of railroad operations." The Federal Circuit followed this Court and held that when the STB invokes §1247(d) of the Trails Act it "destroys" and "effectively eliminates" the landowner's state-law right to unencumbered possession of their land.[7] In *Preseault I*

7. *Ladd* v. *United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010) (*Ladd I*) ("[I]t is settled law that a Fifth Amendment taking occurs in Rails-to-Trails cases when government action *destroys* state-defined property rights by converting a railway easement to a recreational trail, if trail use is outside the scope of the original railway easement.") (emphasis added); *Caldwell* v. *United States*, 391 F.3d 1226, 1228 (Fed. Cir. 2004) ("We have previously held that a Fifth Amendment taking occurs when, pursuant to the Trails Act, state law reversionary interests are *effectively eliminated* in

this Court rejected the notion that Congress can redefine existing property interests by *ipsi dixit* without violating the Fifth Amendment's obligation to justly compensate the owner.[8]

More recently, in *Marvin M. Brandt Revocable Trust* v. *United States*, 134 S.Ct. 1257, 1265 (2014), this Court explained that railroad right-of-way easements are common-law easements governed by the same principles of property law that govern all other easements.

> The essential features of easements – including, most important here, what happens when they cease to be used – are well settled as a matter of property law. An easement is a "nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." *Restatement (Third) of Property: Servitudes* §1.2(1) (1998). "Unlike most possessory estates, easements ... may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude." *Id.*

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connection with a conversion of a railroad right-of-way to trail use.") (emphasis added).

8. See also *Preseault v. United States,* 100 F.3d 1525 (Fed Cir. 1996) (*en banc*) at n.13 ("[property] interests were fixed at the time of their creation") (*Preseault II*), and *Stop the Beach Renourishment, Inc.* v. *Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 704 (2010) "[the government] recharacterize[s] as public property what was previously private property." (citing *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 163-65 (1980)).

> §1.2, Comment d; *id.* §7.4, Comments a, f. In other words, if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land. See *Smith* v. *Townsend*, 148 U.S. 490, 499 (1893).

In *Preseault II* the Federal Circuit followed this Court's holding in *Preseault I* and held, "the taking that resulted from the establishment of the recreational trail is properly laid at the doorstep of the Federal Government." 100 F.3d at 1531. The taking for which Romanoff must be compensated is Romanoff's loss of its state-law right to unencumbered title and exclusive possession of its property. See *Boston Chamber of Commerce* v. *City of Boston*, 217 U.S. 189, 195 (1910) ("[T]he question is, what has the owner lost? not, What has the taker gained?"). The Romanoff family lost the right to use and possess their land – a right they enjoyed under New York law. The Romanoff family lost this right to their property because the federal government invoked of the Trails Act which preempted their state law property interest.[9]

In *Preseault I*, Justice O'Connor explained that a government order which "delays property owners' enjoyment of their reversionary interests" operates to "burden[] and defeat[] the property interest" and thus implicates the Fifth Amendment. *Id.* at 22 (O'Connor, J.,

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9. *Citizens Against Rails-to-Trails* v. *Surface Transp. Bd.*, 267 F.3d 1144, 1150 (D.C. Cir. 2001). "By deeming interim trail use to be like discontinuance rather than abandonment, Congress prevented property interests from reverting [to the landowner] under state law." *Preseault I*, 494 U.S. at 8 (citation omitted); see also *Barclay* v. *United States*, 443 F.3d 1368, 1374 (Fed. Cir. 2006).

concurring). In *Preseault I* this Court found the Trails Act constitutional because a landowner could obtain the "just compensation" they are constitutionally guaranteed by bringing an inverse condemnation action against the government.

Romanoff brought an inverse condemnation action in the CFC seeking "just compensation." The government responded by saying Romanoff is owed nothing because, the government contends, the original 1932 Easement was a "general easement" allowing anyone to use Romanoffs' land for anything the easement-holder desired. The CFC embraced the government's argument. App. 51a. "[T]he court finds that use of the easement for a public trail and recreation and for certain other associated activities fits within the broad scope of the subject easement." *Id.* at 51a-52a.

The CFC's decision was premised upon the notion that New York recognized an "easement-for-any thing." Romanoff disputed this conception of New York law and appealed the CFC's decision asking the Federal Circuit to certify the novel question of whether New York recognizes an "easement-for-anything" to New York's highest court.[10]

The Federal Circuit affirmed the CFC's decision and premised its decision upon the supposition that New York recognizes the notion of an easement "for any purpose for which the grantee wishes." The Federal Circuit recognized

10. Under New York's certification statute, it is not possible for the CFC to directly certify this question to the New York Court of Appeals. New York's certification statute only provides for certification from federal district courts or Courts of Appeal. See N.Y. Const., art. 6 §3(b)(9); N.Y. Ct. R. 500.27(a).

this concept is novel and, admitted New York's highest court offers no directly-controlling authority supporting the notion of an easement for "any purpose" the easement-holder desired. The Federal Circuits holding is further inconsistent with New York law because the court found that using the viaduct for "public space" was admittedly beyond the contemplation of the parties that established the original easement. See App. 33a-34a, 50a-51a ("At the time the easement was granted [Realty Company and New York Central Railroad] could not foresee use of the corridor for a public trail and park.").

New York law holds the scope of an easement is that which the original parties creating the easement intended. To recognized the original parties did not contemplate this use and yet hold the easement granted this use is a concept entirely alien to New York law. But the Federal Circuit refused to ask the New York Court of Appeals if New York actually recognized this novel concept of property law.

In addition to ruling contrary to New York law and contrary to the text of the 1932 Easement, the Federal Circuit's decision is contrary to this Court's holding in *East Alabama Ry. Co.* v. *Doe*, 114 U.S. 340, 350-51 (1885). In *East Alabama*, this Court held "the 'assigns' of the railroad [corporation] cannot be construed as extending to any assigns except one who should be assignee of its franchise to establish and run a railroad." New York City is not a railroad and is not using the land for a railroad.

Romanoff sought rehearing and, again, asked the Federal Circuit to certify the Federal Circuit's novel view of New York property law to the New York Court of Appeals. Romanoff also asked the Federal Circuit to

reconsider its construction of the 1932 Easement in light of this Court's decision in *King* v. *Burwell*, 135 S.Ct. 2480, 2489 (2015). In *Burwell*, this Court considered the word *such* in the phrase, "establish and operate *such* Exchange within the State." *Id.* Quoting *Black's Law Dictionary*, this Court held *such* means "[t]hat or those; having just been mentioned."[11] Applying this Court's construction of *such* to the interpretation of the 1932 Easement, *such* modifies the preceding referent "railroad purposes" which means the easement is limited to "railroad purposes" and does not include non-railroad uses like Taco Trucks. The Federal Circuit erred when it said *such* means *any* or *whatever*. The Federal Circuit nonetheless denied rehearing. App. 2a.

WHY CERTIORARI SHOULD BE GRANTED

The Federal Circuit refused to certify an unsettled question of New York state law. The Federal Circuit interpreted New York law in a manner no New York court has interpreted New York law and the Federal Circuit declared the novel proposition that New York recognizes an "easement-for-anything." The Federal Circuit's notion of an "easement-for-anything" has no support in New York law, no support in property law generally and is contrary to this Court's jurisprudence. See *Brandt*, 134 S.Ct. at 1265.

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11. See also *Random House Dictionary of English Language* (2nd ed.). *Such* means "of the kind, character, degree, extent, etc. of that or those indicated or implied … of that particular kind or character." By contrast *any* means "every, all."

But the Federal Circuit inventing novel notions of state property law to defeat the Romanoff family's constitutional right to be justly compensated is not why this Court should grant certiorari. Rather, this Court should grant certiorari because the Federal Circuit violated foundational principles of federalism when it refused to certify a novel issue of state law to the state's highest court.

In a similar Trails Act case Federal Circuit Judge Moore observed "given what an awful job we obviously do of interpreting state law, why don't we just send this [case] to [the state court], so that we don't make another mistake?"[12] The Federal Circuit should have followed Judge Moore's advice.

The Federal Circuit's refusal to certify questions of state law violates this Court's guidance and is out of step with the other circuits. This case provides this Court opportunity to direct lower federal courts when they should (indeed must) certify unsettled questions of state law to the state's highest court. This guidance is especially needed in the Federal Circuit because Congress granted the Federal Circuit exclusive national jurisdiction of every Fifth Amendment taking case against the United States and inverse condemnation cases involve interpretation of state property law.

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12. Oral argument in *Rogers* v. *United States,* No. 2013-5098 (Fed. Cir. July 10, 2014), available at <http://www.cafc.uscourts.gov/oral-argument-records>.

ARGUMENT

I. Federal courts should certify unsettled questions of state law to the state's highest court instead of making an *Erie*-guess about state law.

A. The Federal Circuit was wrong to make an *Erie*-guess about New York state law instead of certifying the question to New York's highest court.

Under *Erie*, a federal court cannot presume to independently declare state law; it must defer to the interpretation of the highest state court. Particularly when state law is unsettled, federalism concerns strongly favor certifying questions of state law to a state's highest court instead guessing how the state's highest court would decide the question.

Long before certification became widely available, this Court held that principles of federalism required federal courts abstain from deciding unsettled questions of state law when a definitive state court determination would allow the federal court to avoid adjudicating a federal constitutional issue. See *Pullman* and *Clay* v. *Sun Ins. Office Ltd.*, 363 U.S. 207 (1960). With the development of certification procedures, the *Pullman* "abstention" doctrine has become a *Pullman* "certification" doctrine because certification is substantially less time consuming and disruptive than traditional abstention. See *Arizonans*, 520 U.S. at 75-76.

This Court's guidance on when certification is appropriate is especially important given the Federal Circuit's exclusive jurisdiction over every Fifth

Amendment taking case against the federal government. Fifth Amendment taking cases frequently involve the intersection of unsettled questions of state property law and important federal constitutional issues—precisely the combination that *Arizonans* held compelled certification. Landowners vindicating their Fifth Amendment right to just compensation against the federal government do not have the option of litigating their constitutional claim in state court or even in a local federal district court. This makes the input state courts can provide through certification all the more valuable. And the concentration of takings cases in a single federal circuit makes this Court's active superintendence even more necessary.

In *Pullman*, this Court required a federal court to abstain from deciding an issue of Texas law because the proper resolution of that issue would avoid "an unnecessary ruling of a federal court." 312 U.S. at 500. As this Court explained, "no matter how seasoned the judgment of the district court may be [on matters of state law], it cannot escape being a forecast rather than a determination." *Id.* at 499.

In the decades since *Pullman*, almost all states adopted procedures allowing federal courts to certify unsettled questions of state law directly to the state's highest court for resolution. See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after* Erie, 145 U. Pa. L. Rev. 1459, 1548 (1997). This Court has urged federal courts to use certification to resolve unsettled questions of state law. See *Lehman Bros.* v. *Schein*, 416 U.S. 386, 390-91 (1974) (reversing a lower federal court's failure to certify an unsettled question of state law).

In *Arizonans* this Court admonished a lower federal court for deciding a challenge to a novel Arizona constitutional amendment (requiring that the state act only in English) without first certifying the meaning of the Arizona law to the Arizona Supreme Court. "Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Arizonans*, 520 U.S. at 78-79.

This Court stressed that the advantages of certification over abstention only strengthen the case for using certification.

> *Pullman* abstention proved protracted and expensive in practice, for it entailed a full round of litigation in the state court system before any resumption of proceedings in federal court. … Certification procedure, in contrast, allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response.
>
> *Arizonans*, 520 U.S. at 76, 117.[13]

Arizonans ultimately concluded that the lower federal courts should not have decided the constitutionality of the challenged amendment because the case became moot when the plaintiff left her employment with the state. 520

13. Citations omitted.

U.S. at 72. Nonetheless, this Court went out of its way to discuss certification and provide lower federal courts guidance on when to certify a case to local state court to provide local counsel and an explanation.

This Court directed "[a] more cautious approach was in order." *Arizonans*, 520 U.S. at 77. "Given the novelty of the question and its potential importance to the conduct of Arizona's business, … the certification requests merited more respectful consideration than they received in the proceedings below." *Id.* at 78.

Here, if the Federal Circuit had given New York state law "more respectful consideration," it would have certified the unsettled question of state law – whether New York recognizes a "general easement" for "anything the grantee wishes" – before declaring this to be so without any controlling state law on point. Federal courts lack competence to rule definitely on the meaning of state legislation." *Arizonans*, 520 U.S. at 48. When a federal court elects to decide "a novel state [law question] not yet reviewed by the State's highest court," it "risks friction-generating error." *Id.* at 78-79.

Justice O'Connor (sitting by designation on the Second Circuit) reiterated this Court's direction that interpretation of state law is a "job surely best left to the state courts, especially when they 'stand willing to address questions of state law on certification from a federal court.'" *Osterweil* v. *Bartlett*, 706 F.3d 139, 142 (2nd Cir. 2013).[14]

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14. Citing *Arizonans*, 520 U.S. at 79, and quoting *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J.).

New York invites federal courts to certify questions of New York law to its Court of Appeals. See N.Y. Const., art. 6 §3(b)(9); N.Y. Ct. R. 500.27(a). New York's highest court welcomes the opportunity to answer questions of state law certified to it by the federal courts:

> We take this opportunity to underscore the great value in New York's certification procedure where Federal appellate courts … are faced with determinative questions of New York law on which this Court has not previously spoken. Indeed, the certification procedure can provide the requesting court with timely, authoritative answers to open questions of New York law, facilitating the orderly development and fair application of the law and preventing the need for speculation. As shown by actual experience, and by this Court's acceptance of all but a few of the questions that have been certified to us by the Circuit Court, inter-jurisdictional certification is an effective device that can benefit Federal and State courts as well as litigants.

Tunick v. *Safir*,
731 N.E.2d 597, 599 (N.Y. 2000).[15]

15. Citations omitted.

B. The Federal Circuit admits its notion of an "easement-for-anything" is a novel concept of New York property law.

The Federal Circuit admits no New York court recognizes an "easement-for-anything." The Federal Circuit found "the closest" New York case it could find (from 1931) only "signal[ed]" or "suggests" New York would recognize the idea of a "general easement" for "any purpose for which the grantee wishes." App. 34a (discussing *Missionary Society of the Salesian Cong.* v. *Evrotas*, 175 N.E. 523 (NY. 1931)). The Federal Circuit concedes no controlling New York authority recognizes a "general easement" for anything the grantee desires.

The Federal Circuit references three cases for its supposition that New York might recognize such a concept.[16] But, as the Federal Circuit admits, these cases are not controlling authority. At most, the Federal Circuit only says these cases "signal" or "suggest" New York may accept this notion.

The government "urge[d] the Court to look to the *Missionary Society* case," to which Judge Bryson said, "We have, that doesn't quite get you there it seems. That was a related – arguably, a related use, right?"[17] Judge

16. *Missionary Society of the Salesian Cong.* v. *Evrotas*, 175 N.E. 523 (NY. 1931), *Phillips* v. *Jacobsen*, 499 N.Y.S.2d 428 (App. Div. 1986), and *Morgan* v. *Bolsan Realty Corp.*, 369 N.Y.S.2d 544, 546 (App. Div. 1975).

17. *Romanoff* (oral argument at 12:50); see also at 18:49, where Judge Newman stated, "I don't think any of those cases . . . [*Missionary Society* and others] had as explicit a grant as here. . . . And I also don't think the purposes were as broadly unrelated as here."

Bryson was right. *Missionary Society* does not support the notion that New York recognizes an "easement-for-anything." In *Phillips* v. *Jacobsen*, 499 N.Y.S.2d 428, 429 (App. Div. 1986) the court noted New York follows a contrary rule in the interpretation of easements. The court held, "easement granted in general terms must be construed to include any reasonable use to which it may be devoted, *provided the use is lawful and one contemplated by the grant.*"[18] See also *Morgan* v. *Bolsan Realty Corp.*, 369 N.Y.S.2d 544, 546 (App. Div. 1975).

The Federal Circuit's concept of an easement for "any purpose for which the grantee wishes" is a judicial unicorn. But even if a New York court found the phrase "such other purposes" to be "general language," it does not follow that taco trucks and dance parties are a "reasonable," or "legal" use, and they are admittedly not a use "contemplated by the grant" of the 1932 Easement. See App. 34a.

The Federal Circuit should have certified the question of whether New York recognizes an "easement-for-anything" to the New York Court of Appeals. New York's certification procedure - which has been invoked over 200 times by the Second Circuit - allowed the Federal Circuit to avoid hazarding an "*Erie*-guess" as to New York law, risking an unnecessary decision of a federal constitutional question.

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18. *Phillips* held the grantor of an easement through a residential subdivision ending at a town road would have reasonably contemplated the easement would be used as a driveway to access properties in the subdivision. Likewise, *Morgan* construed an easement allowing the right to plant flowers and trees on the easement.

II. The Federal Circuit undermined the certainty of New York land title by failing to follow ordinary rules of construction.

A. By redefining New York property law, the Federal Circuit undermined this Court's "special need for certainty and predictability where land title is concerned."

This Court directs lower courts to construe land title mindful of a "special need for certainty and predictability." *Leo Sheep*, 440 U.S. at 687-88. In *Brandt,* the Supreme Court affirmed *Leo Sheep* and declared railroad rights-of-way are common law easements governed by those principles of property law that define all easements. 134 S.Ct. at 1265.[19] The Federal Circuit failed to heed this Court's direction and interpreted the 1932 Easement contrary to this Court's jurisprudence, contrary to New York law, and contrary to the text of the 1932 Easement. In doing so the Federal Circuit unsettled the title of all New York landowners whose property is (or was) encumbered by similar railroad right-of-way easements.

An owner's right to be secure in their property is one of the primary objects for which the national government was formed.[20] In *Lynch* v. *Household Fin. Corp.*, 405

19. Citing and quoting *Restatement of Property.* See also *Smith* v. *Townsend,* 148 U.S. 490, 449 (1893) ("if ever the use of the right of way was abandoned by the railroad company the easement would cease, and the full title to the right of way would vest in the [owner] of the land.").

20. *See* James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (2nd ed. 1998).

U.S. 538, 552 (1972), this Court observed "the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. … That rights in property are basic civil rights has long been recognized." *Id.*

Nine distinguished amici asked the Federal Circuit to reconsider the panel's decision.[21] The panel's decision excited these prominent amicis' interest because the Federal Circuit premised its decision upon a notion of property law that is contrary to fundamental principles of property law. The Federal Circuit was certainly wrong. But the amici intervened because the panel's decision unsettles New York law and is contrary to important principles of federalism and has the potential to mislead not only courts, but all those relying on the Federal Circuit's view of New York property law including landowners, title companies and lenders.

Professors Ely and Franzese explain,

> The [Federal Circuit] based its decision upon an incorrect understanding of property law – the notion that there is such thing as an easement 'for any purpose for which the grantee wishes' … The [Federal Circuit]'s decision is wrong as a matter of law and logic. New York law does not recognize the concept of a 'general easement' …. The notion is alien to principles

21. Cato Institute, the National Federation of Independent Businesses, the Property Rights Foundation of America, the Citizen Advocacy Center, National Association of Reversionary Property Owners, Owners' Counsel of America, the Center of the American Experiment, and prominent law professors James Ely and Paula Franzese.

> of property law established before Blackstone. No common law jurisdiction recognizes such an unprecedented concept.
>
> Brief *Amici Curiae* of Property Rights Foundation of America, Professor James W. Ely, and Professor Paula A. Franzese, p. 2.[22]

The Federal Circuit's *Erie*-guess about New York property law conflicts with settled property law in other states. The government asked Judge Sweeny of the CFC to apply the Federal Circuit's holding in *Romanoff* to a Trails Act case in Georgia. Judge Sweeny did not do so becasue she found the Federal Circuit's view discordant with settled principles of property law.

> [T]he Supreme Court of Georgia has held that if a deed conveys land for a railroad's use and indicates that the land is to be utilized "for

22. Professor Ely's view is especially noteworthy because Professor Ely literally wrote the book on easements. See Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land* (2001-2016); and Ely, *Railroads and American Law* (2001). This Court looked to Professor Ely's scholarship on railroad easements in *Brandt*, 134 S.Ct. at 1260-61 (quoting *Railroads and American Law*). New York courts also look to Professor Ely as an authority on easements and property law. See, *e.g.*, *Jankoski* v. *Lake Forest Acres Homeowners, Inc.*, 968 N.Y.S.2d 240, 243 (N.Y.A.D. 2013); and *Perry-Gething Foundation* v. *Stinson*, 631 N.Y.S.2d 170, 172 (N.Y.A.D. 1995). Professor Franzese is likewise a distinguished scholar of property law teaching at Seton Hall University School of Law. Professor Franzese co-authored an amicus brief in *Kelo* v. *City of New London*, 545 U.S. 469 (2005) is co-author of the casebook, *Property Law and the Public Interest* (LexisNexis), and has been elected a Fellow of the American College of Real Estate Lawyers.

> all other purposes," that phrase, in tandem with the "associate language," refers only to purposes related to building and using the railroad. Consequently, while the phrase "for all other purposes" is interpreted [by the Federal Circuit] to include public trail use in New York law, it holds the opposite meaning in Georgia law. The decision in *Romanoff Equities* is therefore inapposite here.
>
> *Hardy* v. *United States*, 127 Fed. Cl. 1, 21 (2016).[23]

Hardy demonstrates the Federal Circuit decision is contrary to, and unsettling of, established principles of property law. If the Federal Circuit's *Erie*-guess is correct in this case, than New York and Georgia would reach opposite results on a foundational principle of property law.

An easement is, by definition, the right to use another's land for a *specific limited and defined purpose.* An easement is not title to the fee estate. The fundamental difference between an easement and title to the fee estate is a principle of property law recognized since before Blackstone.[24] Professors Ely and Bruce observed in *The*

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23. Citations omitted.

24. *Thompson on Real Property* §60.02(a) (An easement is 'an interest in land in the possession of another' that entitles the easement owner to 'limited use or enjoyment' of that land." [A]n easement 'is the right to use the land of another *for a specific purpose* that is not inconsistent with the general use of the property owner.") (emphasis added) (quoting *Restatement of Property*); see also James Kent, *Commentaries on American Law*, Vol. III, Lecture LI.

Law of Easements and Licenses in Land, §1.21, "As one commentator aptly notes, 'An interest so extensive that it amounts to an estate is not an easement.'"

All agree the railroad was granted only an easement. The Federal Circuit, however, lost sight of the fact that it was construing an easement. When Realty Company explicitly described the interest it granted the New York Central Railroad to be an "easement," courts interpreting this grant must construe the interest granted in light of common law principles defining the nature and character of an easement. See *Brandt*, 134 S.Ct. at 1265. It is axiomatic that an easement is for a limited and specific purpose, not anything the easement-holder desires.

The notion of a "general easement" for "anything the easement-holder desires" is a non-sequitur. If the interest granted is an "easement" it cannot, by definition, be for any use the easement-holder desires. No New York court has ever recognized such a concept. Further, there is nothing "general" about the ten-page 1932 Easement. See App. 3a-24a.

New York's highest court holds "easements by express grant are construed *to give effect to the parties' intent*, as manifested by the language of the grant." *Dowd* v. *Ahr*, 583 N.E.2d 198, 200 (N.Y. 1991).[25] When New York courts

25. Emphasis added. "Analysis begins with a timeless first principle in the law of easements…express easements are defined by the intent, or object, of the parties." *Lewis* v. *Young*, 705 N.E.2d 649, 449 (N.Y. 1998). "[T]he rights of an easement holder are measured by the purpose and character of the easement. The owner [of an easement] cannot materially increase the burden of the servient estate or impose new and additional burdens on the servient estate."

consider whether a particular use is within the scope of an easement the court considers whether the specific *use* is necessary to accomplish the *purpose* for which the easement was originally granted.[26]

Two New York cases demonstrate the proper application of this principle to railroad easements. An easement granted for a passenger railroad line did not allow the railroad to use the property for a freight line because freight service "was not within the contemplation of the parties when their agreement was concluded." *Beach Land Amusement Co., Inc.* v. *Staten Island Rapid Transit Ry. Co.*, 153 N.Y.S.2d 692, 697 (N.Y. Sup. Ct. 1956). In *Porter* v. *Int'l Bridge Co.*, 93 N.E. 716, 718-19 (N.Y. 1910), New York's highest court, noted the obvious difference between an easement for "public space" and operating a railroad. *Id.* at 719.[27]

Taco trucks, Latin dancing and public recreation (delightful as they may be) are not uses contemplated by the 1932 Easement, nor are these activities reasonably related to the operation of a railroad. In every other Trails Act case the CFC found that an easement granted for a

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Solow v. *Liebman*, 175 A.D.2d 120, 121 (N.Y.A.D. 1991) (citing 49 N.Y. Jur., *Easements* §114) (citing *Bakeman* v. *Talbot*, 31 N.Y. 366 (N.Y. 1865) and *Dowd*).

26. See *Weschler* v. *New York*, 13 A.D.3d 941, 944 (N.Y.A.D. 2004) (finding a use to be "outside the scope [of an easement when] not necessary to achieve, that purpose [for which the easement was granted]") (emphasis added).

27. "Railroad use is incompatible with what may be termed a public square use, which imports more openness and a greater freedom from obstruction than is permitted by the presence of a railroad bridge and depot."

railroad right-of-way does not encompass public recreation as a matter of state law.[28] Thus, the Federal Circuit's interpretation of the 1932 Easement and the Federal Circuit supposition of an "easement-for-anything" is an entirely novel concept of property law.

B. The Federal Circuit further unsettled land title by failing to follow this Court's rules of construction when it construed land title.

The Federal Circuit further erred (and ruled contrary to this Court's cannons of construction) when it did not give words their ordinary meaning and held "the word 'such' is used to mean 'any' or whatever.'" App. 32a-33a. When a court redefines land title contrary to established principles of property law the court itself violates the Fifth Amendment.[29]

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28. See, *e.g., Rogers* v. *United States*, 90 Fed. Cl. 418, 432 (2009) (Florida); *Ellamae Phillips Co.* v. *United States*, 99 Fed. Cl. 483, 486-87 (2011) (Colorado); *Biery* v. *United States*, 99 Fed. Cl. 565, 576 (2011) (Kansas); *Ybanez* v. *United States*, 98 Fed. Cl. 659, 668 (2011) (Texas); *Capreal, Inc.* v. *United States*, 99 Fed. Cl. 133, 145 (2011) (Massachusetts); *Macy Elevator, Inc.* v. *United States*, 97 Fed. Cl. 708, 730 (2011) (Indiana); *Hardy* v. *United States*, 127 Fed. Cl. 1, 19-22 (2016) (Georgia); *Boyer* v. *United States*, 123 Fed. Cl. 430, 440-41 (2015) (Oregon); *Phipps* v. *United States*, 126 Fed. Cl. 674, 706 (2016) (Iowa); *Haggart* v. *United States*, 108 Fed. Cl. 70, 95 (2012) (Washington); *Geneva Rock Products, Inc.* v. *United States*, 107 Fed. Cl. 166, 170-73(2012) (Utah); *Thomas* v. *United States*, 106 Fed. Cl. 467, 482-86 (2012) (Tennessee); *Buford* v. *United States*, 103 Fed. Cl. 522, 531-33 (2012) (Mississippi); *Hodges* v. *United States*, 101 Fed. Cl. 549, 558-59 (2011) (Michigan); *Glosemeyer* v. *United States*, 45 Fed. Cl. 771, 781 (2000) (Missouri).

29. "If a legislature *or court* declares that what was once an established right of private property no long exists, it has taken that property, no less than if the State had physically appropriated it or

The Federal Circuit did not give words their ordinary meaning. The Federal Circuit says *such* means *any* or *whatever*. App. 32a-33a. The Federal Circuit cites no authority for this proposition, and no authority supports the Federal Circuit's definition of *such*. Indeed, all authority holds the contrary. In *King* v. *Burwell*, 135 S.Ct. 2480, 2489, (2015), this Court considered the word *such* in the phrase, "establish and operate *such* Exchange within the State." Quoting *Black's Law Dictionary*, this Court held *such* means "[t]hat or those; having just been mentioned."[30] Applied here, *such* modifies the preceding referent "railroad purposes."

The Federal Circuit erred and departed from this Court's direction when the Federal Circuit said *such* means *any* or *whatever*. If the drafters of the 1932 easement meant *any* they would not have written *such*. Courts are not free to rewrite the text of an instrument. "A reviewing court's 'task is to apply the text, not to improve upon it.'" *EPA* v. *EME Homer City Generation, L.P.*, 134 S.Ct. 1584, 1600 (2014) (internal citations omitted). And a court interpreting a legal text is required to give words "their ordinary meaning." *Schindler Elevator Corp.* v. *U.S. ex. rel. Kirk*, 563 U.S. 401 (2011).

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destroyed its value by regulation." *Stop the Beach*, 560 U.S. at 715 (emphasis in original) (quoting *Webb's Fabulous Pharmacies*, 440 U.S. at 164 (1980)).

30. See also *Random House Dictionary of English Language* (2nd ed.). *Such* means "of the kind, character, degree, extent, etc. of that or those indicated or implied … of that particular kind or character." By contrast *any* means "every, all."

The Federal Circuit did not follow established canons of construction. The *ejusdem generis* canon provides, "When a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed." *Black's Law Dictionary* (10th ed.). This canon holds the later general term (*such other purposes*) means "only items of the same class as those [previously] listed" (*construct, maintain and operate for railroad purposes*). This Court applied this canon last term in *Lockhart* v. *United States*, 136 S.Ct. 958, 963 (2016).[31]

The Federal Circuit did not consider the whole text of the 1932 Easement and failed to consider the context. Courts are to consider all the language in the instrument. "[T]he proper aim of the court is to arrive at a construction which will give fair meaning to *all* of the language employed by the parties, and to reach a 'practical interpretation of the expressions of the parties to the end that there will be a 'realization of [their] reasonable expectations.'" *Tantleff* v. *Truscelli*, N.Y.S.2d 979, 983 (N.Y. App. Div. 1985) (emphasis in original, internal quotations omitted); see also *Partrick* v. *Guarniere*, 612 N.Y.S.2d 630, 632 (N.Y. App. Div. 1994); and *Joseph* v. *Creek & Pines, Ltd.*, 629 N.Y.S.2d 75, 76 (N.Y. App. Div. 1995) ("it is well-settled that when interpreting a contract, the court should arrive at a construction which will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of

31. This Court held "the last antecedent principle suggests that the phrase … modifies only the phrase that it immediately follows …." 136 S.Ct. at 963. The dissent argued "a modifying phrase refers alike to each of the [preceding] list's terms." *Id.* at 969 (Kagan, J., dissenting).

the parties so that their reasonable expectations will be realized.").

The CFC found the parties never intended the viaduct to be used for public recreation. The entire text of the 1932 Easement and the context in which the easement was created demonstrate that it was established for the operation of a railroad not public recreation.

III. The Federal Circuit split with its sister circuits about when to certify a question of state law to the state's highest court.

The Federal Circuit does not explain how it chooses to certify questions of state law to the respective state's highest court. Compare the Federal Circuit's decision here with its decisions certifying questions of state law. See *Chevy Chase Land Co.* v. *United States*, 158 F.3d 574 (Fed. Cir. 1998); *Klamath Irrigation District* v. *United States*, 532 F.3d 1376, 1377 (Fed. Cir. 2008); and *Rogers* v. *United States*, 814 F.3d 1299 (2015).

Chevy Chase involved a Trails Act taking case involving the interpretation of a deed under Maryland property law. Rather than attempt to interpret Maryland property law, the Federal Circuit certified three questions to the Maryland Court of Appeals. The panel noted the government's Fifth Amendment obligation "depends upon complicated issues of Maryland property law upon which this court discerns an absence of applicable and dispositive Maryland law." *Id.* at 575. See also *Klamath Irrigation District* v. *United States*, 532 F.3d 1376, 1377 (Fed. Cir. 2008) (certifying "complex issues of Oregon property law" to Oregon Supreme Court to avoid addressing the

underlying Fifth Amendment constitutional issue). The Federal Circuit never explained why it did not certify this unique issue of New York law but did certify these issues of Maryland, Oregon and Florida law.

Unlike the Federal Circuit the Second Circuit has employed a more detailed analysis and followed a more consistent standard directing when to certify a questions of state law. In *Allstate Ins. Co.* v. *Serio*, 261 F.3d 143 (2nd Cir. 2001), the Second Circuit considered a First Amendment challenge to a New York law restricting commercial speech. Judge Calabresi, explained that *Pullman* abstention and *Arizonans* certification "can be used by federal courts to avoid (a) premature decisions on questions of federal constitutional law, and (b) erroneous rulings with respect to state law." *Id.* at 150. In a separate opinion, Judge Calabresi specified an even more elaborate six-factor test that he believed was the "composite lesson" of prior decisions in the area. See *Tunick* v. *Safir*, 209 F.3d 67, 81 (2nd Cir. 2000).

The Sixth Circuit has taken a pragmatic approach. In *American Booksellers Foundation for Free Expression* v. *Strickland*, 560 F.3d 443 (6th Cir. 2009), booksellers challenged Ohio's law limiting distribution of materials harmful to juveniles. Citing this Court's prior certification decisions, the Sixth Circuit *sua sponte* decided to employ certification because there was no "authoritative state court construction" of the challenged statute. *Id.* at 447. See also *Planned Parenthood of Cincinnati Region* v. *Strickland*, 531 F.3d 406, 410-11 (6th Cir. 2008) ("Where statutory interpretation is at issue, the United States Supreme Court has instructed the federal courts to employ certification or abstention if the 'unconstrued state statute

is susceptible of a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication…."') (quoting *Bellotti* v. *Baird*, 428 U.S. 132, 146-47 (1976)).

Finally, the Ninth Circuit holds certification is "compelled" when necessary to avoid a federal constitutional issue. In *Perry* v. *Schwarzenegger*, 628 F.3d 1191 (9th Cir. 2011), proponents of same-sex marriage challenged the constitutionality of Proposition 8, California's constitutional amendment banning same-sex marriage. Because state officials declined to defend Proposition 8, the Ninth Circuit had to decide whether the sponsors of the initiative had Article III standing to defend the law as intervenors. The Ninth Circuit thought that this question turned on whether the intervenors had a sufficient interest under state law to defend the amendment. Accordingly, the court found that the certified question was dispositive of its ability to hear the case under article III. *Id.* at 1195. Under these circumstances, the Ninth Circuit believed that it was "compelled to seek … an authoritative statement of California law" through certification. *Id.* at 1196.

These other circuits' analysis of when *Arizonans* requires a federal court to certify a question of state law to the state's highest court contrast sharply with the Federal Circuit's refusal to certify the unsettled question of New York law. At a minimum, the Federal Circuit should explain why it did not certify its admittedly novel view of New York law to the New York Court of Appeals for determination. This case provides this Court opportunity to guide the lower federal courts as to when *Pullman* and *Arizonans* require a federal court to certify questions of state law to the state's highest court.

CONCLUSION

The Federal Circuit ruled contrary to this Court's jurisprudence and the Federal Circuit's decision is contrary to New York law as declared by New York's highest court. This Court should grant certiorari because federalism compels unsettled questions of state law to be certified to the respective state's highest court, and this Court should reconcile the Federal Circuit's reluctance to certify state law questions with the other circuits' practice of referring such issues to the state's highest court for determination. The Federal Circuit should have followed this Court's direction and given "more respectful consideration" to New York's authority to declare New York state law.

Respectfully submitted,

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APPENDIX

APPENDIX A — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, FILED JULY 18, 2016

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2015-5034

ROMANOFF EQUITIES, INC.,

Plaintiff-Appellant,

437-51 WEST 13TH STREET LLC,
LIRON REALTY, INC.,

Plaintiffs,

v.

UNITED STATES,

Defendant-Appellee.

Appeals from the United States Court of Federal Claims in No. 1:11-cv-00374-NBF, Senior Judge Nancy B. Firestone.

ON PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges.*

Appendix A

PER CURIAM.

ORDER

Appellant Romanoff Equities, Inc. filed a combined petition for panel rehearing and rehearing *en banc*. A response to the petition was invited by the court and filed by appellee United States. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing *en banc* was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing *en banc* is denied.

The mandate of the court will issue on July 25, 2016.

FOR THE COURT

July 18, 2016
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX B — 1934 EASEMENT TO NEW YORK CENTRAL RAILROAD COMPANY

OFFICE SERIAL NO. C 5548 FEES PAID $29.50

THIS INDENTURE made this 5th day of June, 1932 between the NEW YORK STATE REALTY AND TERMINAL COMPANY, a corporation organized and existing under the laws of the State of New York, having its residence (principal office) at 230 Park Avenue in the Borough of Manhattan, City, County and State of New York, hereinafter called the Realty Company, part of the first part, and THE NEW YORK CENTRAL RAILROAD COMPANY, a corporation organized and existing pursuant to the laws of the State of New York and other states, having its residence (principal office) at Number 575 Broadway in the City and County of Albany and State of New York, hereinafter called the Railroad Company, party of the second part; WHEREAS, the Realty Company is the owner of the parcels of land herein described and the Railroad Company is desirous of constructing and maintaining an elevated structure upon and over said parcels supporting the tracks, structures, appliances and facilities to be constructed, maintained and operated by the Railroad Company, its successors and assigns thereon, and the Realty Company is desirous of constructing and maintaining a building or buildings above and/or below the spaces to be used for the purposes of said tracks, structures, appliances and facilities of the Railroad Company as aforesaid; and WHEREAS, the parties hereto have agreed that joint columns and foundations shall be constructed and maintained for the support of the structures of the Railroad Company and of the buildings to be constructed by the Realty Company,

and have likewise agreed upon the easements to be granted to the Railroad Company and the reservations to be made by the Realty Company in respect of said parcels of land; NOW, THEREFORE, THIS INDENTURE WITNESSETH: That the Realty Company in consideration of One hundred dollars ($100.00) and other valuable consideration in dollars, lawful money of the United States, paid by the Railroad Company at or before the ensealing and deliver of these presents, the receipt whereof is hereby acknowledged, does hereby grant and convey unto the Railroad Company, its successors and assigns forever, the permanent and perpetual rights and easements to construct, maintain and operate, without interference or right of interference, its railroad and appurtenances within those portions of the parcels of land herein described included between an upper plane and a lower plane drawn at the respective elevations herein provided for as to each such parcel, together with the exclusive use of the portions of the parcels of land herein described included between said planes for railroad purposes and for such other purposes as the Railroad Company, its successors and assigns, may from time to time or at any time or times desire to make use of the same, subject only to the permanent rights and easements herein specifically reserved to the Realty Company, its successors and assigns, in the portions of said parcels of land included between the said respective planes. THE parcels of land in respect of which said permanent and perpetual rights and easements are granted and reserved as aforesaid, are situate in the Borough of Manhattan, City of New York and are herein described as Parcels No. 1 and No. 2 and the portion of each of said parcels of which

the Railroad Company is to have the exclusive use, subject to the reservations herein contained, is the portion thereof included between the planes, herein called Limiting Planes, drawn at the respective elevations herein provided as to each such parcel and intersecting the vertical planes forming the bounds of each such parcel; the portion of each of said parcels between the Limiting Planes herein established in respect of each such parcel is herein called the Easement Area; the said parcels and the Limiting Planes in respect of each thereof are shown on the plot plans dated April 25, 1932 numbered A and B and identified by the signature of the Chief Engineer of the Railroad Company, which plot plans are hereto attached and hereby made a part of this Indenture; the elevations of the Limiting Planes as to each of said parcels are measured at the railroad center line and have reference to the datus plane of the Railroad Company which takes for its elevation 0'0" mean high water mark of the East River at the foot of East 26th Street, New York City; the parcels of land above referred to and the Limiting Planes in respect of each thereof are respectively as follows: PARCEL NO. 1. THE portion lying below an upper horizontal plane drawn from the northerly line of Little West 12th Street to the southerly line of West 13th Street at elevation 53.0 and above a lower horizontal plane drawn from the northerly line of Little West 12th Street to the southerly line of West 13th Street at elevation 24.50, said elevations being measured at the center line of the railroad, and which horizontal planes intersect the vertical planes determined by the following boundaries, viz: BEGINNING at the corner formed by the intersection of the westerly line of Washington Street with the northerly

line of Little West 12th Street; and running thence westerly along the northerly line of Little West 12th Street fifty-six (56) feet; Thence northerly two hundred eighteen and sixty-eight one hundredths (218.68) feet to a point in the southerly line of West 13th Street that is distant westerly one hundred twenty-seven and ninety-nine one hundredths (127.99) feet from the corner formed by the intersection of the westerly line of Washington Street with the southerly line of West 13th Street; Thence easterly along the southerly line of West 13th Street fifty-six and seventy-three one hundredths (56.73) feet, more or less, to a point distant easterly fifty-three and fifty-six one hundredths (53.56) feet at right angles from the second hereinabove described course; Thence southerly parallel with the second hereinabove described course, two hundred sixteen and forty-nine one hundredths (216.49) feet to the westerly line of Washington Street; and Thence southerly along the westerly line of Washington Street two and seven one hundredths (2.07) feet to the place of beginning. THE parcel of land above described and the Limiting Planes in respect thereof are shown on the plot plan hereto attached and numbered A. SUBJECT to the restrictive comments, if any, of record affecting the parcel of land above described. SUBJECT to two mortgages aggregating $144,000.00 which were consolidated into a single lien by agreement dated December 25, 1928 and recorded in the office of the Register of New York County in Liber 3946 of Mortgages at page 46, which said mortgages cover the parcel of land above described and other premises, and the Realty Company does hereby covenant and agree to indemnify and save harmless the Railroad Company, its successors and assigns, from and

against any claim by reason of the said mortgages. PARCEL NO. 2. THE portion lying below an upper horizontal plane drawn from the northerly line of West 13th Street to the southerly line of West 14th Street at elevation 53.0 and above a lower horizontal plane drawn from the northerly line of West 13th Street to the southerly line of West 14th Street at elevation 24.50 said elevations being measured at the center line of the railroad, and which horizontal plane intersect the vertical planes determined by the following boundaries, viz: BEGINNING at a point in the northerly line of West 13th Street and is distant one hundred fifty-one and thirteen one hundredths (151.13) feet from the corner formed by the intersection of the easterly line of 10th Avenue with the northerly line of West 13th Street; and running thence northerly two hundred eighteen and sixty-nine one hundredths (218.69) feet to a point in the southerly line of West 14th Street that is distant easterly seventy-nine and thirteen one hundredths (79.13) feet from the corner formed by the intersection of the easterly line of 10th Avenue with the southerly line of West 14th Street; Thence easterly along the southerly line of West 14th Street fifty-six and seventy-two one hundredths (56.72) feet, more or less, to a point distant easterly fifty-three and fifty-six one hundredths (53.56) feet at right angles from the first hereinabove described course; Thence southerly parallel with the first hereinabove described course, two hundred eighteen and sixty-nine one hundredths (218.69) feet to the northerly line of West 13th Street; and Thence westerly along the northerly line of West 13th Street fifty-six and seventy-three one hundredths (56.73) feet, more or less, to the place of beginning. THE parcel of land above described

and the Limiting Planes in respect thereof are shown as the plot plan hereto attached and numbered B. SUBJECT to the restrictive covenants, if any, of record affecting the parcel of lane above described. SUBJECT to two mortgages aggregating $35,000 which were consolidated into a single lien by agreement dated January 25, 1929 and recorded in the office of the Register of New York County in Liber 3949 of Mortgages at page [illegible], which said mortgages are a lien upon the parcel of land above described and other premises, and the Realty Company does hereby covenant and agree to indemnify and save harmless the Railroad Company, its successors and assigns, from and against any claim by reason of the said mortgages. TOGETHER also with the perpetual right to the Railroad Company, its successors and assigns, to construct, renew and maintain within the Easement Area in respect of each of the parcels of land above described (and in and over the adjacent streets and avenues to the extent that the Realty Company may lawfully grant such right), all such tracks, bridges, wires, conduits, cables, rails, signals, columns, bracings, drainage and other pipes, and also all such other structures, instrumentalities, appliances and facilities as the Railroad Company, its successors or assigns, may from time to time or at any time or times find it necessary or convenient to construct, renew or maintain for its use therein and thereover. TOGETHER also with the perpetual rights and easements to the Railroad Company, its successors and assigns, as to each of the parcels of land above described to construct, renew and maintain below the elevation of the lower plane of the Easement Area as to each such parcel, the columns, column brackets,

footings, foundations, supports and drainage pipes herein called "Supporting Structures," necessary or convenient for the support of the tracks, structures, appliances and facilities to be constructed and maintained by the Railroad Company, its successors or assigns, within the Easement Area as to each such parcel. TOGETHER further with the perpetual right to the Railroad Company, its successors and assigns, as to each of the parcels of land above described, to construct, maintain, and renew through each such parcel and below the elevation of the surface of the adjacent streets as to each such parcel, not to exceed 12 ducts of not more than 4 inches in diameter as to each duct, at such location therein approved by the Chief Engineer of the Railroad Company as will conform generally to the location of the conduits of the Railroad Company in the adjacent streets or avenues and as will not unnecessarily interfere with the buildings or other structures of the Realty Company, its successors or assigns, constructed or at any time constructed thereon. TOGETHER further with the perpetual right to the Railroad Company, its successors and assigns, as to each of the parcels of land above described, to attach, renew and maintain pipes, conduits, overhead contact rails and other appliances and facilities and their supports, to the underside of the building girders, floor beams and other structural members of any building, buildings or other structures that may at any time be constructed above the upper plane of the Easement Area in respect of each such parcel, restricted, however, to an aggregate weight or load, which, together with the other loads thereon, shall not be in [illegible] of a [illegible] loading having regard to the factor used in computing the stresses of [illegible]

girders, floor beams, and other structural members. RESERVING, however, to the Realty Company, its successors and assigns, as to each of the parcels of land above described, the perpetual rights and easements to construct, renew and maintain in and through the Easement Area as to each such parcel, at such locations therein as may be approved by the Chief Engineer of the Railroad Company, the columns, bracings and supports of any building or buildings or other structures (including any building or structure constructed in substitution for or replacement of any building or structure) that may at any time hereafter be constructed by the Realty Company, its successors or assigns, above the upper plane of the Easement Area as to each such parcel; said columns, bracings and supports shall, however, be constructed and at all times maintained by and at the expense of the Realty Company, its successors and assigns, being the owner of the particular parcel or parcels in respect of which said columns, bracings and supports are to be constructed, in accordance with the building requirements for the time being of the City of New York, and in such manner and condition and at such locations as will afford standard clearances and will avoid damage and injury to the railroad tracks, structures, facilities and appliances at any time constructed by the Railroad Company, its successors or assigns, within the Easement Area in respect of such parcel or parcels or to the Supporting Structures and as will not interfere with the traffic and operations of the Railroad Company, its successors or assigns, within the said Easement Area. THE Realty Company for itself, its successors and assigns, does covenant and agree, however, that any buildings or

structures constructed by the Realty Company, its successors or assigns, adjoining or above or below the respective Easement Areas shall be of fire-proof construction and properly waterproofed so as to prevent any substance or material from escaping or percolating from said buildings or structures into the said Easement Areas and that the plans and specifications of any building or other structures to be constructed adjoining or above or below the respective Easement Areas insofar as that may affect the operation and maintenance of the railroad within the said Easement Areas, or the Supporting Structures, the columns, bracings, supports and foundations of any such buildings or structures, the loads and stresses of the structural members of any such buildings or structures, shall all be subject to the reasonable approval of the Chief Engineer of the Railroad Company with a view to proper safeguards and protection to the property and traffic of the Railroad Company, its successors and assigns, within the respective Easement Areas, and the Supporting Structures; and the Realty Company, its successors and assigns, in constructing the columns, bracings, supports and foundations of any such building or other structure, and in the repair, renewal and maintenance thereof, shall, at its own cost and expense, take such precautions and comply with such reasonable rules and regulations as the Chief Engineer of the Railroad Company, its successors and assigns, may require or impose for the purpose of the safeguarding and protection of the railroad tracks, structures, facilities and traffic of the Railroad Company within the Easement Area and the Supporting Structures, and shall also pay for such work as may be done by the Railroad Company, its

successors or assigns, in connection with the construction or the repair, renewal or maintenance of said columns, bracings, supports and foundations as aforesaid. IN respect of any columns, bracings and supports and their foundations, herein called Joint Supports, designed to be used jointly for the support of the railroad structures within the Easement Area as to either of the parcels of land above described and for the support of the building or buildings to be erected above and/or below the Easement Area as to such parcel or parcels, the cost of the construction of said columns, bracings and supports and their foundations, and of the repair, renewal and maintenance thereof after construction, shall be borne by the parties hereto upon the basis of the loads (live and dead) said Joint Supports were designed (in accordance with the building code of the City of New York at the time of said design) to carry for the respective structures of the Railroad Company and of the Realty Company as aforesaid. Upon the completion of the construction of said Joint Supports or of the work of the repair, maintenance or renewal thereof, as the case may be, each party agrees to pay promptly the proportion of the cost thereof payable by it upon the basis aforesaid. THE Realty Company, its successors and assigns, and the Railroad Company, its successors and assigns, shall further each bear and pay its proportion of the cost of the construction, repair, renewal and maintenance (including damages and costs and claims for [illegible] growing out of loss of life or damage or injury to person or property in the performance of such construction, repair, renewal and maintenance work) of any vents, ventilating devices, [illegible], openings, pipes and conduits, herein called Joint Facilities,

designed for the joint use of the railroad structures within the Easement Area as to either of said parcels and of the building or buildings above and/or below the said Easement Area, upon the basis of the use that such construction was designed, as between the parties, to serve in respect of any of said devices, stacks, openings, pipes or ducts designed for the [illegible] use of either of the parties, the party for where exclusive use such construction was designed shall bear and pay the entire cost of the construction, repair, renewal and maintenance thereof, and shall assume, as between the parties, all liabilities in connection with or growing out of such construction, repair, renewal, maintenance or use. THE work of constructing the Joint Supports and Joint Facilities and the repair, renewal and maintenance thereof shall be borne by such one of the parties interested in such construction or maintenance as may from time to time be agreed upon by the parties, and in the absence of such agreement, by the party within whose space the particular construction or maintenance is or is to be done; the cost of the construction and of the repair, renewal and maintenance of the Joint Supports and Joint Facilities, by whichever party the said work shall be performed, shall be borne and paid by the parties upon the bases above provided. IT is further covenanted and agreed: that in case the Railroad Company shall at any time desire to make any changes in the railroad structures constructed within the respective Easement Areas or in the Supporting Structures, which changes shall necessitate the Railroad Company entering upon and/or using the portions of any of the parcels of land above described above or below the Easement Area in respect of such particular parcel or

parcels, the Railroad Company shall in such cases have the right, at its own cost and expense, to make such changes in the railroad structures within the said Easement Area or in the Supporting Structures necessary to accommodate the changes so desired by the Railroad Company; but in such case the Railroad Company shall submit to the Realty Company, its successors or assigns, being the owner of the particular parcel or parcels affected by said work, reasonably in advance of the starting of said work, its plans showing the changes desired and the location and portion of the particular parcel or parcels affected thereby; that during the work or making said changes the Railroad Company shall have the right, upon reasonable notice, to enter at reasonable hours in and upon the building, buildings or other structures above or below the Easement Area as to the particular parcel or parcels affected by said changes and to place therein such temporary sharing and blocking as may be reasonably required in making said changes and also to remove all live loads from the particular supports of the building or other structure affected by said changes; that said work shall be done in accordance with the building requirements for the time being of the City of New York, and upon the completion of said work, the parcel or parcels affected by said changes shall be restored by and at the expense of the Railroad Company as near as may be to the condition existing prior to the making of said changes; that the Railroad Company shall reimburse the Realty Company, its successors and assigns, being the owner of the parcel or parcels affected by said changes, for all actual loss to itself or to its tenants (including loss of rentals or tenants) in the portion of the building,

buildings or other structures affected by said work during the progress thereof, as well as for all other damage to the buildings or property therein caused by or resulting from said work, including compensation for any additional land which may be taken by the Railroad Company owing to changes in the location and construction of the Supporting Structures below the Easement Area as to the particular parcel or parcels in question. THE Railroad Company does for itself and its successors and assigns, covenant and agree that it will properly waterproof its structures constructed within the respective Easement Area [illegible] at all [illegible] water or any substance or material escaping or percolating from the respective Easement Areas into the buildings or structures of the Realty Company, its successors or assigns, adjoining or below the respective Easement Areas. THE Railroad Company does for itself and its successors and assigns, further covenant and agree to and with the Realty Company* Company, its successors and assigns, that it will at all times maintain in proper condition and repair the railroad structures and facilities at any time constructed within the respective Easement Areas and the Supporting Structures (Except the Joint Supports which are to be constructed and maintained as above provided), and will not do or suffer or permit anything to be done that will cause any physical damage or injury to the buildings or other structures at any time constructed adjoining or above or below the respective Easement Areas or any part thereof or to person or property in or about such buildings. THE Realty Company for itself and its successors and assigns, being the owner or owners of the particular parcel or parcels upon which a building,

buildings or other structures may at the time be constructed, does further covenant and agree to and with the Railroad Company , its successors and assigns, that it or they will at all times maintain in proper condition and repair the buildings and structures at any time constructed adjoining or above or below the Easement Area in respect of each such parcel and the columns, bracings, supports and foundations of any such building or structure (other than the Joint Supports which are to be constructed and maintained as above provided), and that in the construction, maintenance, operation and use of any such building or structure and the columns, bracings, supports and foundations thereof, it or they will not do or suffer or permit anything to be done that will cause any physical damage or injury to the railroad structures and facilities within the Easement Area in respect of each such parcel or to the Supporting Structures or that will interfere in any way with the operations of the Railroad Company within the Easement Area in respect of such parcel. THE parties do further covenant and agree to and with each other that they will cooperate in securing a separation by the taxing officials of the assessments for taxes upon the parcels of land above described as between the respective Easement Areas and the railroad and appurtenant structures therein and the Supporting Structures (other than the Joint Supports the taxes upon which are to be apportioned on the basis of the cost thereof borne by each party) on the one part, and the remaining portion of said parcels of land and the improvements thereon, on the other part, and in case of the separation by the taxing authorities of the assessments for taxes as aforesaid, the Realty Company, its successors and assigns,

being the owner of the particular parcel or parcels of land above described subject to the easements herein granted affected by such taxes and the Railroad Company, its successors or assigns, shall each promptly pay and save the other party harmless in respect of the taxes levied or imposed upon the respective interests in the said parcel or parcels of land owned by said parties respectively. IN case, however, the taxing authorities shall fail to assess separately the interests in the parcels of land above described owned by the parties respectively, then the parties hereto, for themselves, their successors and assigns, do further covenant and agree to and with each other as follows: (1) that the Realty Company, its successors and assigns, being the owner of the particular parcel or parcels of land above described subject to the easements herein granted affected by such taxes, shall pay seventy-five (75) per centum of all taxes that may be taxes, charged, imposed or assessed upon each parcel or parcels on account of the value of such parcel or parcels considered as unimproved and the entire amount of all taxes at any time taxes, charged, imposed or assessed upon such parcel or parcels on account of the value of such parcel or parcels on account of the value of the buildings and other improvements constructed thereon (including the building columns within the Easement Area in respect of such parcel or parcels), but including the value of the railroad structures and improvements within the Easement Area as to such parcel or parcels and the value of the Supporting Structures (other than the Joint Supports, the taxes upon which are to be apportioned on the basis of the cost thereof borne by each party); and (2) that the Railroad Company, its sucessors and assigns,

shall pay twenty-five (25) per centum of all taxes that may be taxes, charged, imposed or assessed upon the parcels of land above described-on account of the value of said parcels considered as unimproved and the entire amount of all taxes at any time taxed, charged, imposed and assessed upon said parcels on account of the value of the railroad structures and improvements within the respective Easement Areas as to said parcels and the value of the Supporting Structures (other than the Joint Supports, the taxes upon which are to be apportioned on the basis of the cost thereof borne by each party); and (3) that in case the assessments for taxes imposed upon the respective parcels of land above described on account of the value of the improvements shall include without separation the value of the buildings and other structures constructed adjoining or above or below the respective Easement Areas (including the building supports within the Easement Area) and the value of the railroad structures and improvements within the respective Easement Areas and the value of the Supporting Structures, then the Realty Company, the successors or assigns, being the owner of the particular parcel or parcels subject to the easements herein granted, affected by such assessments for taxes, and the Railroad Company, the successors and assigns, shall each in such case pay such equitable and just proportion of the taxes levied or imposed upon such parcel or parcels on account of the value of the improvements thereon as shall, in the case of the Realty Company, its successors or assigns, being the owner of said parcel or parcels as aforesaid, be equal to the proportion of the total tax assessment that is property allocable to the value of the buildings and other

improvements constructed thereon (including the building supports within the Easement Area as to such parcel or parcels) but excluding the value of the railroad structures and improvements within the Easement Area as to such parcel or parcels and excluding also the value of the Supporting Structures (other than the Joint Supports, the taxes upon which are to be apportioned on the basis of the cost thereof borne by each party), and as shall, in the case of the Railroad Company, be equal to the proportion of the total tax assessment that is properly allocable to the value of the railroad structures and improvements within the respective Easement Area as to such parcel or parcels and the value of the Supporting Structures (other than the Joint Supports, the taxes upon which are to be apportioned on the basis of the cost thereof borne by each party), such respective proportions to be agreed upon by the parties, or in case of disagreement, determined by arbitration as hereinafter provided; and (4) that each of the parties shall preemptly pay all taxes payable by such party hereunder and in case of the failure of either party so to do, the other party may pay the taxes payable by the party so in default, and the party so in default shall, in such case, pay to the party making such payment the sum so paid promptly upon the rendition of bills therefor with accrued interest at the rate of six (6) per centum per annum from the date of such payment, and the party making such payment shall have and maintain a lien upon the property of the other party until such repayment shall have been made. IN case of the imposition of any taxes in respect of improvements upon the parcels of land above described without separation as to the amount thereof properly allocable to the Railroad Company, its successors

or assigns, on the one part, and the Realty Company, its successors or assigns, being the owner of the particular parcel or parcels of land above described affected by such taxes on the other part, and the parties shall be unable to agree upon the respective proportions of said taxes on account of the value of improvements payable by each of the parties as aforesaid, then the proper allocation thereof shall be determined by three arbitrators, one appointed by the Realty Company, its successors or assigns, being the owner of the parcel or parcels affected by such taxes, one by the Railroad Company, and the third by the arbitrators so chosen. In case either of the parties to the arbitration shall fail to appoint an arbitrator as aforesaid for the period of twenty days after written notice from the other party to make such appointment, the party giving such notice may, upon ten days previous notice to the party in default, apply to the Presiding Justice of the Appellate Division of the Supreme Court of the State of New York for the First Department, or in case [illegible] Appellee Division shall cease to be, to the person who is the Senior Justice in point of service of the body exercising the functions now exercised by said Appellate Division, to appoint an arbitrator for the party in default, and such Justice may name and appoint such sound arbitrator, and the arbitrator so named and appointed shall have like power and authority as if he had been chosen by the party in default. In case the two arbitrators chosen as above in this paragraph provided shall fail to select a third arbitrator within twenty days after the selection of the second arbitrator, such third arbitrator may be appointed (after ten days previous notice by either party to the other of intention to make application therefor) by the Presiding

Appendix B

Justice of the Appellate Division of the Supreme Court of the State of New York for the First Department, or in case said Appellate Division shall cease to be, by the person who is then the Senior Justice in point of service of the body exercising the functions now exercised by such Appellate Division. In case the person who shall be the Presiding Justice or Senior Justice shall decline to appoint said second arbitrator or said third arbitrator, as the case may be, then the arbitrator so to be appointed shall be appointed by such one of the other Justices of said Appellate Division (or body then performing the functions of said Appellate Division) as shall consent to make such appointment, application being made to said Justice as aforesaid in the order of seniority of service as a Justice of such court. The arbitrators upon their selection, after having been duly sworn to perform their duties with impartiality and fidelity, shall proceed with all reasonable dispatch to [illegible] the values of the improvements of the respective parties to said arbitration upon the particular parcel or parcels of land in respect of which the arbitration shall be had as aforesaid, and the values fixed by said arbitrators or a majority of them shall be final and conclusive upon the parties to said arbitration as to the true value of the said improvements for the purpose of determining the apportionment to be made between the respective parties to said arbitration of the taxes which are subject matter of such arbitration and each of the parties shall promptly pay the proportion of the taxes in question which are payable by such party in accordance with the determination of said arbitration. Each of the parties to the arbitration shall pay the expense of the arbitrator appointed by or for such party and of its counsel

and witnesses, and the expense of the third arbitrator and the other necessary expenses of the arbitration shall be borne equally by the parties hereto. ALL of the covenants and agreements contained in this Indenture shall run with the land and shall enure to the benefit of and be binding upon the respective parties hereto, their successors and assigns, being the successors in title to the respective interest in the parcels of land above described owned by the parties hereto respectively, and whenever the term Realty Company shall be used herein, the same shall be construed to mean the Realty Company, its successors and assigns, being the successor in title of the Realty Company to the respective parcels of land above described subject to the respective rights and easements herein granted to the Railroad Company, and whenever the term Railroad Company shall be used herein, the same shall be constructed to mean the Railroad Company, its successors and assigns, being the successor in title to the Railroad Company to the rights and easements herein granted to the Railroad Company in the respective parcels of land above described. TO HAVE AND TO HOLD the perpetual rights and easements herein granted by the Realty Company in the parcels of land above described unto the Railroad Company, its successors and assigns forever. AND the Realty Company does covenant and agree that it has not done or suffered anything to be done whereby the said parcels of land above described have been encumbered in any way whatsoever, except as herein provided, and that upon complying with the provisions herein contained, the Railroad Company shall not be disturbed in the possession or use of the perpetual rights and easements herein granted. IN WITNESS WHEREOF,

the respective parties hereto have hereunto caused their respective corporate seal to be hereunto affixed and these presents to be signed by their respective duly authorized officers the day and year first above written. New York State Realty and Terminal Company, by R. I. Dougherty, Vice President (Seal-New York State Realty and Terminal Company, Incorporated 1904). Attest: E.F. Stephenson, Secretary. The New York Central Railroad Company, by F.E. Williamson, President (Seal – The New York Central Railroad Company, Consolidated Dec. 27, 1914 New York & c). Attest: E. F. Stephenson, Secretary. State of New York, County of New York, ss: On this 8 day of June, 1932, before me personally [illegible] R. I. Dougherty, to me known and known to be to be Vice President of the New York State Realty and Terminal Company, who, being by me duly sworn, depose and says; that he resides in White Plains, N.Y. that he is Vice President of the New York State Realty and Terminal Company, one of the corporations described in and [illegible] the foregoing instrument and knows the corporate seal thereof that the seal affixed to the foregoing instrument is the corporate seal of the New York State Realty and Terminal Company and was affixed thereto by authority of the Board of Directors of said corporation, and that he signed his name thereto as Vice President by like authority. B. H. Shaffer, Notary Public, Westchester County, N.Y. Certificate filed in New York County Clerk's No. 343 Register's No. 38250. My commission expires March 30, 1933 (LS) (Certificate filed Register's Office New York County HM) State of New York, County of New York, set on this 8 day of June, 1932, before me personally came R. I. Williamson, to me known and known to me to be President of the New York

Central Railroad Company, who, being by me duly sworn, deposes and says; that he resides at New York, N.Y.; that he is President of the New York Central Railroad Company, one of the corporations described in and which executed the foregoing instrument, and knows the corporate seal thereof; that the seal affixed to the foregoing instrument is the corporate seal of the New York Central Railroad Company and was affixed thereto by authority of the Board of Directors of said corporation, and that he signed his name thereto as President by like authority. B. H. Shaffer, Notary Public, Westchester County, N.Y. Certificate filed in New York County Clerk's No. 343, Register's No. 38250. My commission expires March 30, 1933 (LS) (Certificate filed Register's Office New York County GM) (Not subject to Recording Tax Jun. 10, 1932 LJD) INDORSED to be indexed against Block Nos. 645 and 646 on Land Map of County of New York. RECORDED preceding at request of J. P. McQuade, Land & Tax Agent, N.Y.C.R.R.Co. Room 1115, 466 Lexington Ave. NYC Jun. 10, 1932 at 11 o'clock 45 mins. A.M.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, FILED MARCH 10, 2016

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2015-5034

ROMANOFF EQUITIES, INC.,

Plaintiff-Appellant,

437-51 WEST 13TH STREET LLC,
LIRON REALTY, INC.,

Plaintiffs,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in No. 1:11-cv-00374-NBF, Senior Judge Nancy B. Firestone.

Decided: March 10, 2016

Before NEWMAN, LOURIE, and BRYSON, Circuit Judges.

BRYSON, *Circuit Judge.*

Appendix C

The High Line is an elevated "linear park" in New York City that runs along the west side of Manhattan from Gansevoort Street to 34th Street. The park, which is used for walking, jogging, and other recreational purposes, occupies the elevated viaduct of a former railway line. In 2005, the elevated viaduct was converted to a public recreational trail under the authority of the National Trails System Act, 16 U.S.C. §§ 1241-49. In this takings action, the appellant, Romanoff Equities, Inc., contends that the conversion of the railway property to a trail entailed a taking of its property without just compensation. The Court of Federal Claims held, on summary judgment, that the conversion did not result in a taking of Romanoff›s property. We agree with the analysis of the trial court and therefore affirm.

I

In 1932 the New York State Realty and Terminal Company granted an easement to the New York Central Railroad Company ("the New York Central"), an affiliated entity, to allow for the construction and maintenance of an elevated railroad corridor on the west side of Manhattan adjacent to Tenth Avenue. The purpose of the elevated railroad was to replace the ground-level railroad then in use, in order to eliminate dangerous grade-level road crossings. The easement covered a roadway that ran above the street level and was wide enough for a rail line and associated stations.

The elevated railroad was constructed and operated for approximately 50 years. It ceased operations in the

mid-1970s. By 1982 Conrail, then the successor to the New York Central, had removed the stations and tracks along the roadway. Various other uses for the property were considered, such as a highway or a waste disposal service, but were not implemented. In 1989, the owners of property along the viaduct initiated an adverse abandonment proceeding before the Interstate Commerce Commission (the predecessor to the United States Surface Transportation Board), seeking to have the easement declared abandoned. In 1992, the Commission ruled that an abandonment of the easement would be declared if the property owners filed a bond to cover demolition costs, but no such bond was filed.

In 1999, Romanoff acquired certain property that was traversed by the viaduct and was subject to the easement. At that time, no determination had been made as to whether the viaduct would be removed or used for some other purpose. Subsequently, a non-profit entity began urging that the viaduct be converted to use as a public space, subject to possible reactivation as a rail line. Following negotiations with the City and the railroad company›s successors, including Conrail and CSX, the Surface Transportation Board in 2005 issued a Certificate of Interim Trail Use for the elevated right of way. Based on that authority, the viaduct was converted into the High Line Park.

In 2011, Romanoff filed suit in the Court of Federal Claims. Romanoff principally contended that the easement originally granted to the railroad did not authorize the use of the rail corridor for park purposes. For that

reason, Romanoff argued that the conversion of the railroad viaduct into a park constituted an appropriation of Romanoff›s property by the United States for which Romanoff was constitutionally entitled to be compensated.

The Court of Federal Claims rejected Romanoff›s claim. The court relied on the broad language of the original easement granted to the New York Central. The language in question grants the railroad and "its succes-sors and assigns forever, the permanent and perpetual rights and easements" within the described area, "together with the exclusive use of the portion of the parcels of land herein described . . . for railroad purposes *and for such other purposes as the Railroad Company, its successors and assigns, may from time to time or at any time or times desire to make use of the same*." (emphasis added).

The court held that the broad grant of the easement "for such other purposes" as the railroad company and its successors desired to make of it, was broad enough to encompass the use of the property for a park. As a result, the court held, the easement did not terminate when the railroad company and its successors no longer used the property for railroad purposes. The court therefore concluded that Romanoff had no property rights that were terminated or impaired by the construction and maintenance of the High Line Park on the site where the railroad had previously operated. The court also rejected Romanoff's argument that the easement had been abandoned when the railroad company ceased using it for railroad purposes, and that all rights in the property had

reverted to Romanoff before the Surface Transportation Board authorized its conversion into and use as a park.

II

Romanoff's principal argument on appeal is that the 1932 easement granted to the New York Central was limited to railroad use and did not authorize the successors of the New York Central to use the property for other purposes, such as a park. That argument fails in light of the sweeping breadth of the easement grant. The easement was specifically not limited to the use of the property for railroad purposes, but stated that the property could be used "for railroad purposes and for such other purposes as the Railroad Company, its successors and assigns, may from time to time or at any time or times desire to make use of the same." As the Court of Federal Claims held, it is not possible to read that language as limiting the easement to railroad purposes when it says, explicitly, that the easement applies *not only* if the property is used "for railroad purposes," *but also* if it is used "for such other purposes" as the railroad company and its successors and assigns may desire.

A

Romanoff makes several arguments in support of its effort to escape the broad language of the easement grant, but none is persuasive.

First, Romanoff argues that under New York law, an easement is limited to the uses contemplated by the

parties when the easement was granted.[1] Romanoff contends that the parties contemplated only that the property would be used for railroad purposes and that the easement cannot be construed to permit the use of the property for non-railroad purposes such as a park.

The problem with Romanoff's argument is that in determining the purpose for which an easement is granted, New York law requires that the intent of the parties be determined based on the language of the grant. *See Dowd v. Ahr*, 78 N.Y.2d 469, 583 N.E.2d 911, 913, 577 N.Y.S.2d 198 (N.Y. 1991) ("Easements by express grant are construed to give effect to the parties' intent, as manifested by the language of the grant."); *Edge Mgt. Consulting, Inc. v. Blank*, 25 A.D.3d 364, 807 N.Y.S.2d 353, 368-69 (App. Div. 2006) (the terms of an agreement are the best evidence of the parties' intent). In this case, the language of the grant is not limited to railroad purposes, but expressly includes other purposes for which the grantee or its successors may desire to use the property. Limiting the scope of the easement to the purposes revealed by the granting instrument is therefore of no help to Romanoff.[2]

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1. "Property interests rely on the law of the state where the property is located," *Mildenberger v. United States*, 643 F.3d 938, 948 (Fed. Cir. 2011), so in this case we look to New York law to interpret the scope of the grant.

2. In its briefs, Romanoff quotes (nine times) the statement by the trial judge that "the parties at the time the easement was granted could not foresee use of the corridor for a public trail and park" as support for its contention that the parties to the easement did not intend the easement to be used for non-railroad purposes. In fact,

Romanoff cites a number of cases for the proposition that the scope of an easement is limited to the purposes contemplated by the parties at the time of the agreement that created the easement. In each of those cases, however, the easement was limited to a specific purpose. None of the granting instruments contained language such as the language found in the easement at issue in this case, which not only does not limit the purpose for which the easement is granted, but explicitly states that the purposes extend to any purpose for which the grantee and its successors wish to use the property.

Romanoff's next argument is that the trial court's ruling as to the scope of the easement is at odds with the purpose of the easement, as determined from the entire 10-page granting document. Romanoff points out that much of the document relates to the details of the proposed railroad use of the property, and the reference to other uses is found in only a single sentence. Romanoff states that upon reading the entire document, "it is impossible to honestly conclude Realty Company and New York Central Railroad intended the 1932 Easement to grant New York City the right to use the property for anything it 'desired.'" The problem with that argument is that New York City

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however, the court's comment was directed to the quite different point that in light of the breadth of the grant, it did not matter that the specific purpose of use for a public trail and park was not in the parties' contemplation, as is clear from the full text of the court's statement ("Moreover, having agreed to allow the Railroad, its successors and assigns to use the corridor for any lawful purpose, it is irrelevant that the parties at the time the easement was granted could not foresee use of the corridor for a public trail and park.").

is clearly a "successor" to the New York Central,[3] and the document plainly authorizes such a successor to use the property "for such other purposes [as it may] desire to make use of the same." Thus, the text of the granting document is exactly contrary to Romanoff's argument that such a reading is "impossible."

Next, Romanoff argues that the use of the term "such" in the granting document limits the uses of the easement to railroad uses. The argument is that the term "such" is a limiting term that constrains the "other purposes" for which the easement can be used to railroad purposes. As an example of the limiting nature of the word "such," Romanoff offers the sentence "My sister doesn't particularly enjoy talking with such people," where the word "such" is limited to a group of people already identified.

While the term "such" can have a limiting effect in some settings, it does not have that effect in the context of the 1932 easement. There, context makes it quite clear

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3. Romanoff briefly contends that New York City is not a "successor" to the New York Central, even though the property rights of the railroad were conveyed through several successors and ultimately to the City. Romanoff's contention is that when a right-of-way easement is granted to a railroad and the railroad's successors and assigns, the class of successors and assigns is limited to successor railroads. The case on which Romanoff relies for that proposition, however, was one in which the easement was specifically limited to railroad purposes. Where, as here, the easement is not limited to railroad purposes, there is no logical reason to construe the term "successor" to be limited to a railroad corporation with a franchise to operate the railway line, as Romanoff contends.

that the word "such" is used to mean "any" or "whatever," and is not limiting. The phrase "for such other purposes as the Railroad Company . . . may . . . desire" means "for any purposes" or "for whatever purposes" the Railroad Company may desire, as in the sentence "You may invite your classmates, your roommates, and such other friends as you choose." In that setting the reference to "such other friends" is clearly not limited to classmates and roommates. Moreover, as the government aptly notes, this reading would result in the pertinent clause permitting the use of the property "for railroad purposes and such other railroad purposes," an interpretation that would be nonsensical.[4]

B

Stepping back from analysis of the language of the easement, Romanoff makes the broader argument that New York law does not recognize a "general easement" that would permit the property in question to be used for any purpose. Romanoff does not point to any authority that stands for that proposition. Instead, Romanoff cites New York cases that simply stand for the proposition that the scope of an easement is limited to the specific use

4. The term "such" is clearly used, elsewhere within the 1932 easement deed, to mean "any" or "whatever." For example, the deed gives the New York Central "the right, upon reasonable notice, to enter at reasonable hours in and upon the building, buildings or other structures above or below the Easement Area as to the particular parcel or parcels affected by said changes and to place therein *such* temporary shoring and blocking as may be reasonably required in making said changes." (emphasis added).

for which it is granted. Those cases do not stand for the proposition that an easement granted for any purpose for which the grantee wishes to use it would be unenforceable in New York.

In fact, the closest New York case suggests the opposite. That case, *Missionary Society of the Salesian Congregation v. Evrotas*, 256 N.Y. 86, 175 N.E. 523 (N.Y. 1931), involved what the court called an "unusually broad" easement over the plaintiff's property. The easement granted not only rights of ingress and egress, but also permitted "a free and unobstructed use of the described land for passage of horses and vehicles of every kind and 'for all other lawful purposes.'" *Id.* at 524. The court held that the easement, "being in general terms, . . . must be construed to include any reasonable use to which the land may be devoted. . . . The only limitation is that all the uses must be lawful." *Id.* The court added that "[w]hen the terms of a grant are doubtful, the grantee may take the language most strongly in its favor." *Id.*

That decision of the New York Court of Appeals clearly signals that the New York courts will enforce easements by their terms and that a very broad easement, although "unusual," is not void simply because it extends not only to the specific purposes named in the easement, but to "all other lawful purposes." *See also Phillips v. Jacobsen*, 117 A.D.2d 785, 499 N.Y.S.2d 428, 429 (App. Div. 1986) ("easement granted in general terms must be construed to include any reasonable use to which it may be devoted, provided the use is lawful and one contemplated by the grant"); *Morgan v. Bolsan Realty Corp.*, 48 A.D.2d 331,

369 N.Y.S.2d 544, 546 (App. Div. 1975) ("A grantor of an easement may convey or retain that which he desires. In other words, he may create an extensive or a limited easement.").

In a context similar to this case, the New York Appellate Division recognized that when the conveyance of an easement is between related parties, it is not surprising for the grantor to give extensive rights to the grantee. *Morgan*, 369 N.Y.S.2d at 546. The fact that the grantor and grantee in this case were affiliated parties thus provides an additional reason for upholding the easement in accordance with the broad terms of the deed.

Romanoff next contends that even if the broad language of the easement were enforceable when the easement was granted, it became more limited by virtue of the parties' conduct in the more than 50 years that followed the execution of the grant. According to Romanoff, because the New York Central and its successors used the viaduct exclusively for railroad purposes during that period, the actual use of the property must be regarded as having defined the scope of the easement.

The cases on which Romanoff relies in support of this argument involve easements of ambiguous scope. In *Onthank v. The Lake Shore & Michigan Southern Railroad Co.*, 71 N.Y. 194 (1877), cited by Romanoff, the easement was "for the purpose of laying down and keeping in repair an iron pipe or conductor." The defendant installed a two-inch pipe; ten years later the defendant removed that pipe and replaced it with a four-inch pipe.

Although the original grant did not specify where the grantee could lay the pipe or how large it could be, the court held that once the grantee "selected the place where it would exercise its easement thus granted in general terms, what was before indefinite and general became fixed and certain, and the easement could not be exercised in any other place." The scope of the grant thus became fixed through the actions of the parties, and the grantee was not allowed to replace the original pipe with a larger one, even though the original grant did not specify a width. The same is true of the later decision in *Dowd v. Ahr*, 78 N.Y.2d 469, 583 N.E.2d 911, 577 N.Y.S.2d 198 (N.Y. 1991).

In those cases, the courts applied the familiar principle that the parties' course of conduct under an ambiguous agreement is evidence of the parties' understanding of the scope of that agreement. That principle has no application here, as there is no ambiguity in the scope of the easement. The fact that the property was used for railroad purposes for some period of time after the grant does not suggest that the parties understood that the express right to use the property for other purposes would be forfeited by its longstanding use for railroad purposes.

C

Finally, Romanoff argues that the trial court's holding as to the scope of the easement is "contrary to the understanding of every party," including the railroad, the landowners, and New York City. Romanoff points in particular to the fact that before converting the viaduct into a park, New York City sought easements from the

landowners to allow the viaduct to be used as a park. Such steps would not have been necessary, according to Romanoff, if the City had believed that the original easement gave it the right to convert the viaduct into a park. The simple answer to that argument is that New York City likely sought such express easements in the hope of avoiding litigation such as this case, and that it reasonably expected that the easements would be granted because of the value the High Line Park would add to the properties that abutted it.

III

Romanoff's final argument is that the 1932 easement had terminated before the viaduct was converted into a park, and that the easement had reverted to the original owners and their successors, including Romanoff. Because the property ceased being used for rail purposes in the early 1980s, Romanoff contends that there was no easement for Conrail to convey to its successors, including the City of New York.

This argument, like others made by Romanoff, depends on Romanoff's flawed assumption that the easement was limited to rail use in the first place. Because the easement was not so limited, Conrail's cessation of rail operations on the viaduct did not terminate its rights under the easement. While Conrail, or any successor, could have terminated the easement by abandoning any interest in the property altogether, Conrail never did so. Instead, Conrail expressed its interest in maintaining its rights in the property, which it ultimately passed on to the City as its successor. There being no indication of abandonment by

Conrail or its successor, the easement did not terminate at any time as a matter of law.

Moreover, under New York law "abandonment does not result from nonuse alone, no matter how long"; it requires proof that the owner of the easement intended to abandon it and committed some overt act or failure to act indicating that the owner does not claim or retain any interest in the easement. *Janoff v. Disick*, 66 A.D.3d 963, 966, 888 N.Y.S.2d 113 (App. Div. 2009); *see also Gerbig v. Zumpano*, 7 N.Y.2d 327, 165 N.E.2d 178, 180-81, 197 N.Y.S.2d 161 (N.Y. 1960); *DeJong v. Abphill Assocs.*, 121 A.D.2d 678, 504 N.Y.S.2d 445, 447 (App. Div. 1986). As the trial court pointed out, Romanoff offered no evidence of such intent or acts of abandonment. Romanoff points to statements by several courts that the rail use was abandoned, but not that the easement was abandoned. Romanoff's claim of abandonment is therefore unsupported.

In sum, the easement granted to the New York Central in 1932 was broad enough to encompass the use of the viaduct for a trail and park. Nothing was done to terminate that easement. Accordingly the trial court properly held that Romanoff did not at any time acquire a property interest in the viaduct easement that was taken by the United States and for which Romanoff is entitled to compensation.

AFFIRMED

APPENDIX D — OPINION OF THE UNITED STATES COURT OF FEDERAL CLAIMS, DATED NOVEMBER 20, 2014

UNITED STATES COURT OF FEDERAL CLAIMS

No. 11-374L*

ROMANOFF EQUITIES, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

November 20, 2014, Filed
OPINION ORIGINALLY FILED UNDER SEAL
ON OCTOBER 20, 2014

Summary Judgment; Rails to Trails;
Scope of Easement; Abandonment; New York Law

OPINION

FIRESTONE, *Judge*

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* The case caption has been changed to reflect the remaining plaintiff in this case. Further filings in this case shall be made under the remaining case number, No. 11-374. Previous filings were made in the lead case, No. 11-333.

Appendix D

This "Rails-to-Trails" case deals with the creation of the "Highline" recreational trail in the City of New York ("New York City" or "the City"). Plaintiff Romanoff Equities, Inc. ("Romanoff Equities") claims that the United States ("the government") took its property interest in the elevated railroad right-of-way that is now part of the Highline when the Surface Transportation Board ("STB"), a federal agency, authorized the City to turn the right-of-way into an elevated park. This court previously dismissed the claims of five other plaintiffs on the grounds that they had waived any right to compensation from the United States when they entered into Covenant Not to Sue Agreements with the City of New York in exchange for certain development rights alongside the Highline. *West Chelsea Buildings, LLC v. United States*, 109 Fed. Cl. 5, 28 (2013), *aff'd*, 554 F. App'x 942 (Fed. Cir. 2014), *reh'g denied, petition for cert. filed.* The court also dismissed a sixth plaintiff, 437-51 West 13th Street, LLC ("West 13th Street, LLC"), for lack of standing when the facts established the subject property was owned by Romanoff Equities, a related company, at the time the alleged taking occurred.[1] *Id.* As the owner of the property encumbered by the easement at the time of the alleged taking, Romanoff Equities is now the only remaining plaintiff in the case.

1. The alleged taking occurred on June 13, 2005. Romanoff Equities transferred the property encumbered by the easement to West 13th Street, LLC on August 25, 2005. At the time of the transfer, Michael Romanoff was the President of Romanoff Equities and Romanoff Equities became the sole owner of West 13th Street, LLC. Michael Romanoff was and remains the manager of West 13th Street, LLC.

Appendix D

Pending before the court are plaintiff's motion for partial summary judgment, ECF No. 94, and the government's cross-motion for summary judgment, ECF No. 99, filed pursuant to Rule 56 of the Rules of the United States Court of Federal Claims ("RCFC"). In its motion, the government argues that it did not take plaintiff's property because the easement provided by plaintiff's predecessor, the New York State Realty and Terminal Company, to the New York Central Railroad Company for an elevated right-of-way for rail traffic encompasses use of the property interest for a public trail and park. Further, the government argues that the easement was not abandoned by the railroad prior to the creation of the Highline. In the alternative, the government argues that, even if there were a taking, plaintiff is bound by the Covenant Not to Sue Agreement signed by Michael Romanoff, the owner of Romanoff Equities, as well as the manager of West 13th Street, LLC, plaintiff's successor in interest.

Plaintiff argues in its motion that the easement at issue does not extend to use of the property for an elevated trail and park and, as a result, the government committed a taking of plaintiff's property interest. Additionally, plaintiff argues that the easement had been abandoned before the creation of the Highline, at the time that railroad use of the corridor ended. Plaintiff further argues that there are genuine issues of material fact that preclude summary judgment on the issue of whether Romanoff Equities is bound by the Covenant Not To Sue Agreement entered into by its successor, West 13th Street, LLC.

Appendix D

For the reasons discussed below, the court finds that the easement granted by plaintiff's predecessor to the railroad encompasses any lawful use, including use of the easement for an elevated park such as the Highline. Further, the court finds that the easement had not been abandoned by the railroad. As a result, the government cannot be liable for a taking, and the court must deny plaintiff's motion and grant the government's cross-motion.

I. STATEMENT OF FACTS

The following facts are not disputed unless otherwise noted. In June of 1932, New York State Realty and Terminal Company granted an easement to the New York Central Railroad Company in consideration of one hundred dollars to allow for the construction and maintenance of an elevated railroad corridor in the airspace that has now become a part of the Highline. Pl.'s Mot. P. Summ. J., Ex. A, at 1. The Railroad Company acquired the easement "as part of a plan to eliminate dangerous railroad crossings at street level." *New York City Council*, 4 A.D. 3d 85, 87, 770 N.Y.S.2d 346 (N.Y. App. Div. 2004). The Easement states in relevant part:

> [Grantor] does hereby grant and convey unto the Railroad Company, its successors and assigns forever, the permanent and perpetual rights and easements to construct, maintain and operate, without interference or right of interference, its railroad and appurtenances within those portions of the parcels of land

> herein described included between an upper plane and a lower plane drawn at the respective elevations herein provided for as to each such parcel, together with the exclusive use of the portion of the parcels of land herein described included between said plane for railroad purposes and for such other purposes as the Railroad Company, its successors and assigns, may from time to time or at any time or times desire to make use of the same, subject only to the permanent rights and easement herein specifically reserved to the [Grantor], its successors and assigns, in the portions of said parcels of land included between the said respective planes.

Pl.'s Mot. P. Summ. J., Ex. A. Romanoff Equities acquired its interest in the subject property in 1999. Am. Compl., Ex. K. Through a series of conveyances, the easement conveyed to New York Central Railroad Company in 1932 was transferred to CSX Transportation, Inc. ("CSX"), effective August 24, 2004. Am. Compl., Exs. C-D. The railroad ceased operations in the mid-1970s. *Consol. Rail Corp. v. Interstate Commerce Comm'n*, 29 F.3d 706, 709, 308 U.S. App. D.C. 60 (D.C. Cir. 1994). By 1982, Consolidated Rail Group ("Conrail"), then the owner, had removed the stations and tracks on the corridor. Following that, various uses of the corridor were proposed, including a highway and a waste disposal service. *Id.* Neither of the projects were ultimately carried out. *Id.* In 1989, a group of property owners submitted a third-party application seeking permission for the railroad to abandon the

easement, which Conrail opposed. *West Chelsea*, 109 Fed. Cl. at 10; *see also Chelsea Property Owners*, 7 I.C.C.2d 991, 992 (1991), *rev'd, Chelsea Property Owners*, 8 I.C.C.2d 773, 794 (1992). Those proceedings were completed in 1994 with a finding that abandonment was permitted if the property owners posted a surety bond, *see Consol. Rail*, 29 F.3d at 706, but no such bond was ever posted, *West Chelsea*, 109 Fed. Cl. at 10.

In response to those property owners, a community non-profit formed several years later under the name Friends of the High Line, Inc. and began advocating for the use of the corridor as a public park. *Id.* In 2002, New York City joined with that group to support a public park and entered into negotiations with the property owners, CSX, Conrail, and other parties to achieve that goal. *Id.* In those negotiations, both Conrail and CSX supported the issuance of a Certificate of Interim Trail Use ("CITU") to authorize rail banking and trail use for the elevated right of way for the purpose of creating a public park. Def.'s Reply in Supp. Mot. Summ. J., Ex. 1 at 4, Joint Supplemental Statement ("[CSX and Conrail] have determined that a CITU is an appropriate mechanism to use for the purpose of achieving the parties' objectives with respect to the High Line."). On June 13, 2005, the STB issued a CITU for the elevated right of way which has since become the Highline. Am. Compl., Ex. H. The City and CSX entered into a Trail Use Agreement on November 4, 2005. Am. Compl., Ex. I.

At the time the CITU was issued on June 13, 2005, Romanoff Equities owned the property encumbered by

the easement in fee simple absolute. On that same date, Michael Romanoff, [. . .], formed a new entity named 437-51 West 13th Street, LLC. Def.'s Mot. Summ. J., Exs. 2, 4. Michael Romanoff [. . .]. Def.'s Mot. Summ. J., Ex. 1, Tr. 33:4-18. Thereafter, on August 25, 2005, Romanoff Equities transferred the property encumbered by the railroad easement to West 13th Street, LLC. *Id*. at 25:9-24. The Real Property Transfer Report filed in connection with the transfer identifies the transfer as a "Sale Between Related Companies or Partners in Business" and states that "One of the Buyers is also the Seller." Def.'s Mot. Summ. J., Ex. 2 at 30. The Report identifies the assessed value of the property as $800,100; however, no monetary consideration was paid by West West 13th Street, LLC to Romanoff Equities for the property. *Id*.

[. . .]. In December 2008, West 13th Street, LLC filed applications for zoning variances with the New York City Board of Standards and Appeals. *See* Def.'s Mot. Summ. J., Ex. 3 at 1. Although the property was not within the area rezoned by New York City in connection with creation of the Highline, West 13th Street, LLC eventually secured several zoning variances allowing for additional retail use and greater floor area for the property than would have otherwise been allowed under the existing zoning. *Id*. at 1-2, 6.

On May 15, 2009, Michael Romanoff, in his capacity as manager of West 13th Street, LLC, entered into a Release, Waiver, and Covenant Not to Sue Agreement with New York City, which stated that West 13th Street, LLC will not "sue or join any action seeking compensation from . .

. The United States or any of its departments or agencies with respect to the Highline CITU." Def.'s Mot. Summ. J., Ex. 6. This agreement is identical to the agreements signed by the other property owners along the Highline, which this court in its prior opinion found to bar those plaintiffs from seeking compensation from the United States. *Id.*; *West Chelsea*, 109 Fed. Cl. at 12. West 13th Street, LLC also granted a separate easement to New York City granting it "the right to develop the Highline for Public Space, with reasonable access to the Highline across the property, with such right being a restriction in perpetuity . . . ." Def.'s Mot. Summ. J., Ex. 2, Quitclaim, Consent & Easement.

Sometime after West 13th Street, LLC signed the Agreement and granted the easement to the City, West 13th Street LLC received the above-noted zoning improving the value of the property. *See* Def.'s Mot. Summ. J., Ex. 3 at 1-2, 6. In late 2010 or early 2011, [. . .] the property was sold to 860 Washington Street, LLC. Def.'s Mot. Summ. J., Ex. 1. The deed was signed by Michael Romanoff as the authorized signatory for West 13th Street, LLC. *Id.* The Real Property Transfer Report filed with New York City in connection with the transfer identifies the "Full Sale Price" as $81,000,000. *Id.* The parties dispute the degree to which the Highline affected the value of the property, with plaintiff claiming that it would have been more valuable if it were not encumbered and the government claiming that it would have been much less valuable as it would not have received the same zoning adjustments.

II. DISCUSSION

A. Standard of Review

The standard of review when considering a motion for summary judgment is well-settled. The court's role is "to determine whether there is a general issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). It is not the court's role to "weigh the evidence and determine the truth of the matter." *Id.* RCFC 56 provides that "[s]ummary judgment is appropriate where there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." RCFC 56; *see also Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1371 (Fed. Cir. 2009).

B. The Easement Encompasses Use of the Easement for the Highline

The Federal Circuit has explained that a taking occurs "when government action destroys state-defined property rights by converting a railway easement to a recreational trail, if trail use is outside the scope of the original railway easement." *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010). In *Ellamae Phillips*, the Federal Circuit identified a three-step inquiry to determine whether the federal government is liable to pay just compensation. 564 F.3d at 1373 (citing *Preseault v. United States*, 100 F.3d 1525, 1533 (Fed. Cir. 1996)). First, the court must determine "who owns the strip of land involved, specifically, whether the railroad acquired only an easement or obtained a fee simple estate." *Id.* Second,

the court must determine "if the railroad acquired only an easement, were the terms of the easement limited for railroad purposes, or did they include future use as a public recreational trail (scope of the easement)." *Id.* Third, the court must determine whether, "even if the grant of the railroad's easement was broad enough to encompass a recreational trail, had this easement terminated prior to the alleged taking so that the property owner at the time held a fee simple by the easement (abandonment of the easement)." *Id.* To resolve these issues, the court is required to apply state law. *See Presault v. Interstate Commerce Comm'n*, 494 U.S. 1, 20, 110 S. Ct. 914, 108 L. Ed. 2d 1 (1990) (O'Connor, J., concurring) ("The nature of the property interest and the question of abandonment are routinely determined based upon state law."); *Macy Elevator, Inc. v. United States*, 97 Fed. Cl. 708, 718 (2011) ("Because real property rights arise from state law, the extent of the plaintiffs' property interests in the right-of-way depend on the law of the state in which the property is located."). Here, applying New York state law to the issues presented, the court finds as follows.

The government's liability turns on whether the subject easement is broad enough to encompass use of the easement for the Highline. If the easement is not broad enough to encompass the Highline, the court need not look further to find a taking. If the easement is broad enough to encompass the Highline, the court will also be required to determine whether the easement was abandoned prior to the alleged taking.

Appendix D

We begin our evaluation with the language of the easement. *Dowd v. Ahr*, 583 N.E.2d 911, 577 N.Y.S.2d 198, 200, 78 N.Y.2d 469 (N.Y. 1991) ("Easements by express grant are construed to give effect to the parties' intent, as manifested by the language of the grant." (citing 2 Warren's Weed, *New York Law of Real Property, Easements*, §§ 3.02, 17.03 (4th ed.))). The subject deed states that it is to be used "for railroad purposes and *for such other purposes as the Railroad Company, its successors and assigns, may from time to time or at any time or times desire to make of the same* . . . ." Pl.'s Mot. P. Summ. J., Ex. A (emphasis added). Under New York law, the court's inquiry into a general easement must focus on what uses were contemplated when the easement was granted. *Lewis v. Young*, 705 N.E.2d 649, 651, 92 N.Y.2d 443, 682 N.Y.S.2d 657 (N.Y. 1998) ("express easements are defined by the intent, or object, of the parties" (citing *Dowd*, 583 N.E.2d at 911)); *see also Phillips v. Jacobsen*, 117 A.D.2d 785, 499 N.Y.S.2d 428, 429 (N.Y. App. Div. 1986) ("An easement granted in general terms must be construed to include any reasonable use to which it may be devoted, provided the use is lawful and is one *contemplated by the grant*." (emphasis added) (citing *Missionary Soc'y v. Evrotas*, 256 N.Y. 86, 175 N.E. 523 (N.Y. 1931))). In addition, the easement "owner cannot 'materially increase the burden of the servient estate[] or impose new and additional burdens on the servient estate[] from that which was originally allowed. *Gates v. AT&T*, 100 A.D.3d 1216, 956 N.Y.S.2d 589, 591 (2012) (alteration in original) (citations omitted).

Taking into account New York law, the court finds that the easement granted in this case was quite broad, and explicitly granted an easement "for railroad purposes *and for such other purposes* as the Railroad Company, *its successors and assigns*, may from time to time *or at any time desire to make use of the same*." Pl.'s Mot. P. Summ. J., Ex. A (emphasis added). Such terms clearly and unambiguously contemplate that the easement may be used for purposes beyond the railroad purposes for which it was initially used. Further, as the easement authorized the Railroad Company's successors and assigns to use the corridor for "such other purposes as [they] may . . . desire," use of the corridor for a public park would by the plain terms of the easement appear to be clearly within the scope of the easement, absent evidence that the new easement is not lawful or imposes some significant new burden on the servient estate. There is no question here that the Highline is a lawful project.[2] Plaintiff has not made any allegation to support a finding that use of the corridor for the Highline will impose significant new burdens on the servient estate. Moreover, having agreed to allow the Railroad, its successors and assigns to use the corridor for any lawful purpose, it is irrelevant that the parties at

2. In this connection, plaintiff's contention that use of the property for a park would have been illegal while the corridor was used for railroad purposes does not make use of the easement for the Highline now illegal. Regardless of whether third parties walking on rail tracks were potentially liable for criminal trespass under New York's penal code while the railroad was operating, now that the easement owner has converted the corridor to a trail and public recreational use, the penal code does not apply and use of the easement for walking is not illegal.

the time the easement was granted could not foresee use of the corridor for a public trail and park. Regardless of whether the easement included numerous pages devoted to railroad-related issues, the easement grant contemplated by its terms was not limited to railroad purposes and the court cannot read that purpose into the easement. Rather, the easement by its terms recognized that other uses might be "desired" and explicitly permitted such uses so long as the uses fit within the physical specifications of the easement.

Unlike the cases cited by plaintiff to support its argument that the easement is limited to railroad uses, the easement in this case includes no language limiting the purpose of the use that may be made. For example, plaintiff refers the court to *Ledley v. D.J. & N.A. Management, Ltd.*, in which the court found that a "very broad" easement was limited to "a right-of-way and [the ability] to pass and repass over the defendant's property." 228 A.D.2d 482, 643 N.Y.S.2d 675, 676 (N.Y. App. Div. 1996). However, the easement in that case did not include the open-ended grant that is at issue in this case, but rather provided only the "right to pass and repass over the right-of-way across the adjoining lands." *Id.* After reviewing the New York cases cited by the parties, the court finds that *Missionary Society* contains an easement that is most analogous to the one at issue in this case. In that case, the court found that "[t]he phrase 'for all other lawful purposes' compels an extension of defendant's right beyond the limits of ordinary passage by horses and vehicles of all kinds." 256 N.Y. at 90. More directly, the court found that, "[b]eing in general terms, [the easement]

must be construed to include any reasonable use to which the land may be devoted." *Id.* at 89-90 (citing Jones, *Law of Easements* § 374; *Abbott v. Butler*, 59 N.H. 317 (1879)). In addition to finding that pedestrian access was permitted, the court went on to find that the laying of water pipes was permitted as well. *Id.* (citing *Thompson v. Orange & Rockland Elec. Co.*, 254 N.Y. 366, 369, 173 N.E. 224 (1930). Compared to *Missionary Society*, the language of the easement in this case is even broader. As a result, the court finds that use of the easement for a public trail and recreation and for certain other associated activities fits within the broad scope of the subject easement.

In this connection, the court disagrees with plaintiff that allowing use of the easement for the Highline amounts to converting the subject easement into a fee estate, contrary to New York law. The subject easement is limited by its express terms to "those portions of the parcels of land herein described included between an upper plane and a lower plane drawn at the respective elevations herein provided for as to each such parcel," which necessarily limit the scope of what can be done with the easement. Pl.'s Mot. P. Summ. J., Ex. A. Thus, while the terms of the easement are broad in terms of use, they are not limitless and the physical bounds set in the easement ensure that the subject easement is not converted to a fee estate.

Finally, the court disagrees with plaintiff that New York City's decision to obtain a new easement to explicitly incorporate the use of the corridor for the Highline as public space does not mean that the subject easement was not broad enough to encompass the Highline in the

first instance. First, the court is not bound by New York City's actions or its reading of the easement. Second, as the government argues, there are plausible reasons for New York City to acquire a new easement beyond the original easement that do not imply that it believed the easement to only permit railroad use. For example, it may have desired the easement because it believed that property owners were likely to sue irrespective of its interpretation of the original easement and wished to avoid such suits. Finally, New York City's decision to acquire new easements on top of the existing easements is simply irrelevant in considering whether the original easement encompasses use of plaintiff's easement for the Highline. New York City acquired the easement after plaintiff gave away his interest in the easement to West 13th Street, LLC and therefore the New York City easement has no bearing on this case.

In sum, the court finds that it is compelled by the plain language of the easement to agree with the government and finds that the subject easement encompasses use of the property for the Highline.

C. The Corridor Was Not Abandoned Prior to the STB's Actions

Having determined that use of the easement for the Highline fits within the scope of the easement, the court now turns to whether the corridor had been abandoned by the railroad prior to the issuance of the CITU, in which case there may still be a taking. In order to demonstrate abandonment under New York law, a plaintiff must

"establish both an intention to abandon and also some overt act or failure to act which carries the implication that the owner neither claims nor retains any interest in the easement." *Gerbig v. Zumpano*, 7 N.Y.2d 327, 331, 165 N.E.2d 178, 197 N.Y.S.2d 161 (N.Y. App. Div. 1960) (citing *Loening v. Red Spring Land Co.*, 198 Misc. 151, 94 N.Y.S.2d 568 (1949)). It is not enough to demonstrate "mere nonuse." *Spier v. Horowitz*, 16 A.D.3d 400, 791 N.Y.S.2d 156, 158 (N.Y. App. Div. 2005).

While there is no disagreement that the subject corridor was no longer being used for railroad purposes, there is no indication that CSX or Conrail intended to abandon its easement under New York law. As the easement is broad enough to encompass any use desired by the grantee, the cessation of railroad activities is not enough to demonstrate an intent to abandon. Instead, the burden is on the plaintiff to show that the easement holder had intended to relinquish any use of the easement. Here, as discussed above, CSX and Conrail both desired to make use of the easement following the cessation of rail use. Both railroads participated in negotiations regarding the creation of the Highline in support of the project and CSX continues to claim that it holds an interest in the easement. Def.'s Reply in Supp. Mot. Summ. J., Ex. 1 at 2-3, Joint Supplemental Statement (detailing the status of Highline negotiations in 2004, involving the City, CSX, Conrail, the property owners, and other parties). Further, prior to the conception of the Highline, Conrail sought to make use of the easement for a highway and for a waste disposal service and defended the easement against property owners seeking permission for abandonment in

front of the Interstate Commerce Commission ("ICC"), a predecessor to the STB, from 1989 to 1994. *See Consol. Rail*, 29 F.3d at 706; *Chelsea Property Owners*, 7 I.C.C.2d at 992.[3] While none of Conrail's plans for usage of the easement were successful, they nonetheless demonstrate an intent to retain an interest in the easement and to find a potential use, as permitted by the easement.

In support of its argument that the easement was abandoned, plaintiff relies on several cases in which courts found abandonment at the cessation of railroad use, *Preseault*, 100 F.3d at 1554, and *Rogers v. United States*, 101 Fed. Cl. 287, 295 (2011). However, those cases differ from the present case in important ways, as the findings of abandonment in both cases were based on elements that are not present in this case. In *Preseault*, the court found that an easement for railroad purposes was abandoned when the railroad tracks were removed. 100 F.3d at 1554. In this case, as discussed above, the subject easement authorized more than railroad use, making the function of the railroad tracks irrelevant. In *Rogers*, the court applied Florida law to find that the deed itself provided that the easement would be abandoned when it was no longer used for railroad purposes. 101 Fed. Cl. at 291, 295-96. In this case, no such language exists.

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3. In that proceeding, the ICC found that abandonment was permitted subject to the posting of a surety bond by the property owners. *Chelsea Property Owners*, 8 I.C.C.2d 773, 794 (1992), *aff'd*, 29 F.3d 706, 715, 308 U.S. App. D.C. 60; *see also West Chelsea*, 109 Fed. Cl. at 9-10. The ICC did not find that the corridor was abandoned, and the conditions required for abandonment were never met.

As plaintiff has not presented any evidence that the easement's grantee demonstrated an intent to abandon the easement accompanied by an overt act or failure to act, the court must conclude that the easement was not abandoned. Indeed, the record demonstrates the opposite, as both CSX and previous owners have played an active role in plans and proceedings involving the corridor. As a result, in such circumstances under New York law, the easement did not terminate prior to the actions of the STB.

III. CONCLUSION

For the foregoing reasons, plaintiff's motion for partial summary judgment is **DENIED** and the government's motion for summary judgment is **GRANTED** with respect to the issues of the scope of the easement and the abandonment of the easement. The Clerk is directed to enter final judgment for the United States.[4]

IT IS SO ORDERED.

/s/ Nancy B. Firestone
NANCY B. FIRESTONE
Judge

4. Having concluded that there was no taking, the court has no occasion to reach the government's alternative arguments.

APPENDIX E — RELEVANT STATUTORY PROVISION

16 U.S.C. § 1347(d)

(d)INTERIM USE OF RAILROAD RIGHTS-OF-WAY

The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. 801 *et seq.*], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.