No. 12-1173

In The Supreme Court Of The United States

MARVIN M. BRANDT REVOCABLE TRUST AND MARVIN M. BRANDT, TRUSTEE,

PETITIONERS,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE STATES OF NEW MEXICO, OREGON, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the United States retains an interest in rights-of-way granted from public lands to railroads under the General Railroad Right-of-Way Act of 1875, 43 U.S.C. §§ 934-939, such that the disposition of such rights-of-way is governed by 43 U.S.C. § 912 and 16 U.S.C. § 1248(c).

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INTERESTS OF THE AMICI STATES

The amici States contain railroad rights-of-way granted by the United States under the General Railroad Right-of-Way Act of 1875, 43 U.S.C. §§ 934-939 (1875 Act). The States have an interest in this Court's accurate determination of the property interests in these rights-of-way. The federal government has enacted a policy of making former federally granted railroad rights-of-way available for alternative transportation purposes, including highways and trails. The amici States contain federally granted railroad rights-of-way that have been converted to such purposes, and most of these highways and trails are administered by the States or their political subdivisions. In the State of Washington, for example, a former railroad right-of-way, comprised in part of lands granted under the 1875 Act, has been converted into the popular Iron Horse State Park and John Wayne Pioneer Trail. Many other federally granted rights-of-way exist within Washington and the other amici States, which may become available for conversion to highways or trails.

The Court's determination that the United States retained an interest in 1875 Act rights-of-way sufficient to authorize their conversion to highways and trails will support enacted federal policy and the amici States' interest in promoting highway and non-motorized transportation for the benefit of their citizens.

SUMMARY OF ARGUMENT

The Tenth Circuit should be affirmed. The United States retains two distinct types of interest in the railroad rights-of-way granted under the 1875 Act: a reserved right to "alter, amend, or repeal" the use of the rights-of-way; and a fee simple interest in the underlying land. The government retained, and intended to retain, both interests because the purpose of Congress's grants was to create transportation corridors for the benefit of the American public as a whole. Based on the text of the 1875 Act and its predecessor statutes, and their legislative history, the best understanding of these federally granted rights-of-way is that they consist of robust railroad "easements" defined by federal law and subject to federal control, with the fee interest in the underlying property remaining in federal ownership. The United States may "alter or amend" the use of an 1875 Act right-of-way in favor of a different transportation purpose, such as a highway or trail. In addition, if the right-of-way is legally abandoned, the United States controls the disposition of the property.

Petitioners' argument to the contrary is premised upon *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942). *Great Northern* held that in 1871, Congress changed from granting "limited fee" railroad rights-of-way, with an implied reversion in the United States, to granting "easement" rights-of-way. Congress, it stated, wished to stop "granting lands" or mineral rights to railroads and instead wanted to preserve the public lands for homesteaders. But, while *Great Northern* was likely correct that Congress did not wish to

grant mineral rights to railroads in 1875 Act rights-of-way, *Great Northern* did not reach the issue of what interest the United States government retained in an 1875 Act right-of-way. In fact, there is no evidence that Congress intended to make any change to the federal government's interests in railroad right-of-way grants. The *Great Northern* Court's analysis did not address the significant differences between "checkerboard" subsidy land grants to railroads, which Congress ceased to pass after 1871, and the government's interests in its federally granted railroad rights-of-way, which Congress continued to grant, following its prior practice without significant change. Responding to language in *Great Northern*, lower courts have erroneously concluded the United States intentionally surrendered any government interest in rights-of-way granted after 1871. Again, there is no evidence Congress intended any such change. The Court should clarify that, based on both statutory text and legislative history, the United States retained an interest in federally granted railroad rights-of-way from both before and after 1871.

There are multiple reasons for this Court to hold in favor of the United States. First, the text of the 1875 Act explicitly reserves to the United States the right to "alter, amend, or repeal" that Act. Exercising that reserved authority, Congress altered and amended the 1875 Act through legislation in 1922 and 1988. That legislation provided that if railroad rights-of-way granted under the 1875 Act (and other similar statutes) were no longer needed for railroads, the rights-of-way could be used for other transportation purposes that would benefit the

public, including highways and trails. Accordingly, when the United States issued a patent to Petitioners' predecessors-in-interest in 1976, it transferred the land subject to the right-of-way granted under the 1875 Act, and Congress's specific retained authority to change the right-of-way's use. Here, the use was permissibly changed to a trail. On this basis alone, the Tenth Circuit's decision in favor of the government should be affirmed.

Second, the right-of-way granting language in the 1875 Act is virtually the same as all of Congress's right-of-way grants from the 1830s through the 1860s, each of which granted a robust federally-defined right-of-way, sufficient for exclusive railroad purposes, while retaining federal ownership of the land under the right-of-way. Congress gave no clear signal that it intended the 1875 Act to change its longstanding practice, meaning the 1875 Act should be interpreted to convey the same real property interest as previous grants. In addition, the text of the 1875 Act directly linked it to the 1864 Pacific Railroad Act, through its incorporation by reference of the 1864 Act's right-of-way condemnation authority. This linkage also strongly suggests that both right-of-way grants involved the same type of government interest.

Third, even if this Court found the text of the 1875 Act ambiguous as to the interest of the United States, the Act's legislative history explicitly states that Congress expected the United States to retain the fee ownership of the land underlying 1875 Act railroad rights-of-way, even if it parted with ownership of the other public lands in the vicinity. An 1875 Act right-of-way was described in debate as

having the same legal status as the rights-of-way granted under the railroad "land grant" acts of the 1860s, such as the Union Pacific Railroad. Congress retained this ownership to preserve the right-of-way corridor for public purposes, including transportation, mail delivery, or troop movements in the newly developing territory, if the grantee railroad corporation happened to fail.

Fourth, Petitioners' arguments that an 1875 Act right-of-way is the equivalent of a common-law easement are premised in part on a historical error, one that unfortunately finds superficial support in some of the reasoning from *Great Northern*. Based on certain legislative history, *Great Northern* concluded that when Congress ceased granting checkerboard land subsidies to railroads in 1871, it also intended that its right-of-way grants would not convey any mineral rights to the railroads. Petitioners, citing *Great Northern* and certain lower court decisions, make the further claim—not decided by *Great Northern*—that after 1871, Congress also intended to surrender all future federal interest in federally granted railroad rights-of-way to homestead patentees.

That claim is simply wrong, and unsupported by the legislative history and statutory text. Federal right-of-way grants to railroads originated before checkerboard land subsidy grants, continued alongside the subsidy grants, and persisted after the subsidy grants ended. Throughout, Congress intended to retain ultimate ownership and control of such property. When checkerboard land grants ended around 1871, there is no indication Congress intended to make any parallel change in right-of-way

grants. Congressional comments about ending "grants of lands," cited in *Great Northern*, were focused on ending checkerboard land subsidies to railroads, not changing the real property status of federally granted railroad rights-of-way. Relative to the colossal and unpopular checkerboard subsidy grants, the acreage covered by the rights-of-way was vanishingly small. There is no legislative history whatsoever indicating that anyone in Congress intended that, after 1871, Congress should change forty years of established right-of-way granting practice to give homesteaders fee title to lands that would lie *under* railroads' tracks for the foreseeable future.

ARGUMENT

I. The Text Of The 1875 Act And Subsequent Legislation Authorized The United States To Convert The Wyoming Right-Of-Way To A Trail

Congress retained the right to alter or amend the 1875 Act to promote the statute's purposes. That reserved right, along with subsequent legislation, allows Congress to alter the active use of an 1875 Act right-of-way for an alternative transportation purpose, regardless of who is deemed to own the land underneath it. In addition, the text of the 1875 Act is virtually identical to earlier right-of-way grants, to which the United States has been deemed to hold fee title, indicating that Congress also intended to hold the fee title to the land underlying 1875 Act rights-of-way.

A. The Text Of The 1875 Act Reserves To Congress The Power To "Alter, Amend, Or Repeal" The Act, Including The Power To Control The Use Of Rights-Of-Way Granted Under The Act

The text of the 1875 Act reserves to Congress broad powers to "alter, amend, or repeal" the statute. Congress altered the 1875 Act through subsequent legislation directing that 1875 Act rights-of-way no longer needed by railroads should be made available for alternate transportation uses, such as highways and trails. The government's transformation of the Wyoming right-of-way into a trail is consistent with this legislation, and well within the scope of the government's reserved powers. On this basis alone, the Court should affirm the judgment of the Tenth Circuit.

In "any case of statutory construction," the Court's analysis "begins with the language of the statute." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (internal quotation marks omitted). "[W]here the statutory language provides a clear answer, [the analysis] ends there as well." *Id.* (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)).

Section VI of the 1875 Act reserves to Congress the right to "alter, amend, or repeal" the Act, "or any part thereof." 43 U.S.C. § 939. In *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986), the Court held that the meaning of an "alter, amend, or repeal" clause "has been settled since the *Sinking-Fund Cases*" in

the late 1870s. *Bowen*, 477 U.S. at 53 (citing *Union Pac. R.R. Co. v. United States*, 99 U.S. 700, 719-20 (1879)). Under such a clause, "Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments as come within the just scope of legislative power." *Id.* at 53. In the *Sinking-Fund Cases*, the Court held that while the reserved power would not include depriving "persons or corporations of property without due process of law," Congress could "provide for what shall be done in the future," including action to "carry into effect the original purposes of the grant." *Union Pac. R.R. Co.*, 99 U.S. at 719-21. This might include providing for "the proper disposition of [the corporation's] assets." *Id.* at 720.

The reserved right to "alter, amend, or repeal" a statute carries further specific meaning in the context of Congress's grants to railroads between 1862 and 1875. The 1862 Pacific Railroad Act, the first transcontinental railroad grant, gave the Union and Central Pacific Railroads "the right of way through the public lands," substantial "checkerboard" land subsidies, and other aid to support construction. *See, e.g.*, *Leo Sheep Co. v. United States*, 440 U.S. 668, 672-77 (1979). In Section 18 of the Act, Congress described in detail its "object" in making these grants:

> "[T]o promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same

> for postal, military and other purposes, Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act." 12 Stat. 489, § 18.

This reserved power was described in the debates on the 1862 Act as being among the reasons "[t]he interests of Government are carefully protected in the bill."[1] A virtually identical description of legislative purpose was included in the 1864 Northern Pacific Railroad Act.[2]

In several other railroad grants from this period, beginning with its 1864 legislation amending and expanding the 1862 Pacific Railroad Act, Congress retained the right to "alter, amend, or repeal" the grant, while dropping the lengthier language in the 1862 Act explaining the purpose of the reserved right.[3] Nevertheless, this Court held that both the expansive 1862 "alter, amend, or repeal" clause and its abbreviated 1864 sibling reflected the same legislative purpose: to promote the public interest and welfare, and to secure to the government (and thus the public at large) the transportation benefits from the construction of the railroad. *Union Pac. R.R. Co.*, 99 U.S. at 719-21. Congress regularly reserved the right to "alter,

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[1] Cong. Globe., 37th Cong., 2d Sess., 1580 (Apr. 8, 1862).

[2] Northern Pacific Railroad Act of July 2, 1864, 13 Stat. 365, § 20.

[3] Act of July 2, 1864, 13 Stat. 356. The amendatory act doubled the checkerboard land grant subsidy to the two railroads and added authority for the railroads to condemn right-of-way across any privately held land.

amend, or repeal" subsequent railroad grants, including the 1875 Act.

In the twentieth century, Congress chose to exercise its power to "alter, amend, or repeal" the 1875 Act grants through subsequent legislation. In 1922, Congress passed 43 U.S.C. § 912. The statute provided that whenever the United States had granted public lands for railroad purposes (including in grants other than the 1875 Act), and that land had been declared abandoned or forfeited by decree of a court of competent jurisdiction or by an Act of Congress, the United States would pass its interest in that land to the patentee (or successor) of each legal subdivision traversed by the right-of-way.[4]

Section 912 also contained three exceptions, under which the land would not pass to an adjoining patentee: (1) when any of the former railroad lands were embraced in a public highway legally established within one year after the abandonment or forfeiture; (2) when the lands lay within the limits

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[4] Petitioners suggest that Section 912 was, in essence, error by Congress that was invited by the decision in *Rio Grande Western Railway Co. v. Stringham*, 239 U.S. 44 (1915). Pet'rs' Br. at 42-45. *Stringham* held that post-1871 rights-of-way, like pre-1871 rights-of-way, were "limited fees." Petitioners argue that this Court should ignore Section 912 because *Great Northern* disagreed with *Stringham*, holding that post-1871 rights-of-way were "easements." Pet'rs' Br. at 45. But *Great Northern* addressed only whether railroads received mineral rights in their 1875 Act rights-of-way. It did not consider whether Congress intended or enacted any significant shift in the government's interest in such rights-of-way around 1871. As described below, the statutory text and legislative history indicate that Congress intended to retain the same government interests as it had in earlier right-of-way grants.

of a municipality, in which case the statute transferred title to that municipality; and (3) the mineral rights, which were reserved for the United States under all circumstances. Effectively, then, the United States retained control of the rights-of-way to the extent they remained useful for transportation or mineral purposes, and voluntarily relinquished them if they were not.

In 1988, Congress enacted 16 U.S.C. § 1248 as part of the National Trails System Improvements Act, supplementing 43 U.S.C. § 912 and further altering the disposition of abandoned federally granted rights-of-way. Section 1248 amended 43 U.S.C. § 912 to provide that, rather than pass an otherwise unused right-of-way to a patentee of the underlying lands, the United States retained any rights it might have in such a right-of-way, to re-use them for purposes including recreational trails.[5]

Taken together, 43 U.S.C. § 939, 43 U.S.C. § 912, and 16 U.S.C. § 1248 authorize the actions taken by the United States in this case. Section 939 reserves to the United States the right to "alter, amend, or repeal" its rights-of-way granted to railroads under the 1875 Act. Under that section, any individual who subsequently acquired an interest in public lands traversed by an 1875 Act right-of-way took that interest "subject to" the right-

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[5] As Petitioners correctly note (Pet'rs' Br. at 49), because there was uncertainty as to the precise scope of the property interest the United States had retained in such rights-of-way, Congress stated that it intended to retain whatever interest it had. *See* Pub. L. No. 100-470, § 2, 102 Stat. 2281 (1988).

of-way grant, including the United States' right—reserved since the statute's 1875 enactment—to "alter, amend, or repeal" the grant. Under this Court's precedents, Congress's reserved right in Section 939 constitutes "special notice," to individuals taking subsequent interests, of the government's intent to retain such power. *See Bowen*, 477 U.S. at 53. In addition, the nature of the statute makes clear that even if it were construed as an "easement," it would be a robust easement defined by federal law, not common law, and subject to the continuing exercise of reserved federal rights.

Petitioners do not contest that they acquired their interest in their land "subject to" an existing 1875 Act right-of-way. They therefore also took their interest "subject to" Congress's reserved right to modify the railroad grant. At a minimum, this reserved right persists as long as Congress identifies a legitimate transportation purpose for the right-of-way, regardless of who is deemed to own the land underneath the right-of-way.

Both 43 U.S.C. § 912 and 16 U.S.C. § 1248 were permissible amendments by Congress governing the use and disposition of 1875 Act rights-of-way. The conversion of the Wyoming right-of-way to a trail in this case fell within this authority and properly exercised a right the government had reserved. Based on the text of the governing statutes, the Tenth Circuit's decision in favor of the United States should be affirmed.

B. Because The 1875 Act And Pre-1871 Right-Of-Way Grants Use Similar Or Identical Language, The 1875 Act Also Should Be Construed To Retain Government Ownership In Fee Of The Land Underlying A Right-Of-Way Grant

1. The 1875 Act Uses Substantially The Same Granting Language As Pre-1871 Right-Of-Way Grants

"[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read 'as if they were one law.'" *Wachovia Bank v. Schmidt*, 546 U.S. 303, 315-16 (2006); *accord Graham Cnty. Soil & Water Conserv. Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010). If a legislature intends to depart from a longstanding practice, courts will generally require it to clearly signal its intent in the language of the statute. *See, e.g.*, *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 683 (2006) (requiring a "clear signal from Congress" before treating claims "ordinarily resolved in state courts" as "arising under" federal jurisdiction).

The text of the 1875 Act is functionally identical to all significant right-of-way grants from before 1871. Nothing in the text of the 1875 Act clearly indicates any intent by Congress to depart from its previous practice. In the right-of-way granting section of the 1875 Act, Congress used the following language:

> "The right of way through the public lands of the United States is granted to any railroad company duly organized under the laws of any State or Territory . . . to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road." 43 U.S.C. § 934.

The *Great Northern* Court construed this language as evincing a "clear" congressional intent to grant an "easement" right-of-way that granted no mineral rights to railroads. It cited Congress's use of the terms "the" right-of-way "through" the public lands as signs of this intent. *Great Northern*, 315 U.S. at 271. However, virtually identical terms are used in the 1862 Pacific Railroad Act:

> "[T]he right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power, and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over

> the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations." 12 Stat. 489, § 2.

This language was construed by the Court to grant a "limited fee" with an "implied right of reverter" to the United States. *Northern Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903) (construing the 1864 Northern Pacific Railroad Act as such); *Great Northern*, 315 U.S. at 273 n.6 (identifying the 1864 Northern Pacific Act, the 1862 and 1864 Pacific Railroad Acts, and the 1850 Illinois Central Railroad Act as "limited fee" grants).

The Illinois Central Railroad Act,[6] which inaugurated the 1850-to-1871-era policy of granting certain railroads both a checkerboard land grant subsidy and a federally granted right of way, used similar language:

> "[T]he right of way through the public lands be, and the same is hereby, granted to the State of Illinois for the construction of a railroad . . . with the right also to take necessary materials of earth, stones, timber, etc., for the construction thereof: *Provided*, That the right of way shall not exceed one hundred feet on each side of the length thereof . . . ." 9 Stat. 466, § 1.

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[6] Illinois Central Railroad Act of Sept. 20, 1850, 9 Stat. 466.

This language, however, also was used in many pre-1871 right-of-way grants that did *not* grant checkerboard subsidy lands to the railroads.[7] In 1852, for example, Congress passed its first "general railroad right of way act," a direct predecessor of the 1875 Act:

> "[T]he right of way shall be, and is hereby granted to all rail and plank road, or Macadamized turnpike companies . . . over and through any of the public lands of the United States . . . and the said company or companies are hereby authorized to survey and mark through the said public lands, to be held by them for the track of said road, one hundred feet in width . . . . *And be it further enacted*, That the said company or companies shall have the right to take from the public lands, in the vicinity of said road or roads, all such materials of earth, stone, or wood, as may be necessary or convenient, from time to time, for the first construction of said road or roads, or any part thereof, through said land." Act of Aug. 4, 1852, 10 Stat. 28, §§ 1, 2.

This right-of-way-only, pre-1871 statute further indicates the consistency and unity of congressional practice with respect to right-of-way grants. The 1852 Act was cited as precedent for the

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[7] Petitioners fail to acknowledge that Congress gave many right-of-way-only grants prior to 1871. *See* Pet'rs' Br. at 2-3, 20-21 (describing Congress's grants as comprising rights-of-way and "alternating sections" from 1850 to 1871, and right-of-way grants thereafter).

1862 Pacific Railroad Act.[8] In turn, both the 1852 Act and the 1850 Illinois Central Railroad Act derived from various right-of-way granting statutes in the 1830s, the dawn of railroading in North America. These grants were for rights-of-way only and did not include checkerboard land subsidies. The text of a grant to the New Orleans and Nashville Railroad in 1836 looked very similar to that used for the rest of the century:

> "[T]here be, and is hereby granted . . . the right of way through such portion of the public lands as remain unsold, *Provided*, That the portion of the public lands occupied therefor, shall not exceed eighty feet in breadth . . . . *And be it further enacted*, That for such depots, watering places and work-shops as may be essential to the convenient use of the said road; there shall also be granted to the said company, such portions of the public land [of five acres, for every fifteen miles] . . . . *And be it further enacted*, That so long as the public lands in the vicinity of the said road shall remain unsold, the said company shall have power to take therefrom, such materials of earth, stone, or wood, as may be necessary for

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[8] *See* Cong. Globe, 37th Cong., 2d Sess., 2676 (June 12, 1862) (citing the 1852 Act, but with a typographical error stating the "law approved 4th of August, 1854," rather than 1852); *see also* debates on the Pacific Railroad Act at Cong. Globe, 1579-80 (Apr. 8, 1862); 2675-77 (June 12, 1862); 2778-80 (June 18, 1862).

the construction of the said road[.]" Act of July 2, 1836, 5 Stat. 65, §§ 1, 2, 3.[9]

There is no obvious textual basis to conclude that these very similar statutes granted different property interests before and after 1871. The presumption should be that they granted the same type of right-of-way, one that preserved an ownership and control interest in the United States. *See, e.g., Townsend*, 190 U.S. 267 (construing the 1864 Northern Pacific right-of-way grant to retain an "implied right of reverter" in the United States); *see also United States v. Union Pac. R.R. Co.*, 353 U.S. 112 (1957) (construing the 1862 Union Pacific right-of-way grant as a "limited fee" in the surface that did not convey mineral rights to the railroads). As described below, this is consistent with the legislative history of these statutes.

2. The 1875 Act Incorporates By Reference The 1864 Act's Right-Of-Way Condemnation Authority, Suggesting That Both Acts Were Intended To Grant Similar Property Interests

Section 3 of the 1875 Act, 43 U.S.C. § 936, authorized a railroad to condemn private property for its right-of-way, but did not set forth the procedures for exercising eminent domain or the type

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[9] *See also* Darwin P. Roberts, *The Legal History Of Federally Granted Railroad Rights-Of-Way And The Myth Of Congress's "1871 Shift,"* 82 U. Colo. L. Rev. 85, 106-13 (Winter 2011) (discussing 1830s right-of-way grants).

of property interest the railroad would acquire. It simply incorporated by reference the condemnation power from the amendatory Pacific Railroad Act of 1864, which had granted condemnation powers to the Union Pacific and Central Pacific Railroads. If Congress intended a "sharp change" in policy in the 1875 Act, it would make little sense to incorporate verbatim the condemnation authority from the right-of-way grant provision in the 1864 Act. As discussed below, the more sensible conclusion is that Congress did not intend to change the government's interests in rights-of-way granted after 1871.

3. Section 4 Of The 1875 Act Does Not Establish That Congress Intended To Divest The United States Of Any Interest In An 1875 Act Right-Of-Way

Petitioners rely on Section 4 of the 1875 Act, 43 U.S.C. § 937, along with *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005), and *Great Northern* for the proposition that Congress intended not only to change the nature of an 1875 Act right-of-way from prior enactments, but to alienate any United States interest in the land underlying such a right-of-way to a homesteader or other future patentee. Pet'rs' Br. at 38, 45. Section 4 provides that after the right-of-way has been officially located and noted on the land office plats, "thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way."

The text of Section 4 does not establish that Congress intended to dispose of any federal interest

in an 1875 Act right-of-way and the land underneath it. Indeed, *Great Northern* found Section 4 to be ambiguous because it looked to "legislative history" to establish its purported meaning. *Great Northern*, 315 U.S. at 271 n.3. However, *Great Northern* cited not the legislative history of the 1875 Act, but a few lines of debate over an 1872 predecessor statute. *Id.* The Federal Circuit's decision in *Hash*, relying on *Great Northern*'s discussion of this small extract of legislative history, seems to have misinterpreted the context of that debate and drawn historically inaccurate conclusions from it. *See* Roberts, 82 U. Colo. L. Rev. at 118-20, 150-62 (examining in detail the legislative history of Section 4's predecessor statutes; concluding that the statutory language was written by a land grant proponent, and was intended to protect *railroads* from settlers obstructing their rights-of-way without employing the unpopular procedure of administratively withdrawing public lands in the vicinity of the railroad from homesteading and settlement). Section 4 did not address the disposal of any federal interest in the railroad right-of-way, but of other public lands in the vicinity of the right-of-way. It provides no basis for altering the conclusion that the United States retained a fee interest in 1875 Act rights-of-way.

II. The Legislative History Of The 1875 Act Indicates Congress Intended To Reserve Control Over The Rights-Of-Way And Ownership Of The Land Underneath

If this Court determines the text of the 1875 Act is ambiguous as to whether Congress reserved an interest in the rights-of-way, the legislative history plainly reveals that Congress intended to retain

control over the use of 1875 Act rights-of-way, and to retain title to the land underlying such property.

A. During Debates On The 1875 Act, Legislators Stated That The United States Would Own The Land Underlying An 1875 Act Right-Of-Way Even If It Later Disposed Of "All The Other" Public Lands "In The Vicinity Of The Road"

The "authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill[.]" *Eldred v. Ashcroft*, 537 U.S. 186, 209 n.16 (2003) (citing *Garcia v. United States*, 469 U.S. 70, 76 (1984)). But there appears to have been no committee report by either the House or Senate on the bill that became the 1875 Act. In the absence of such authority, floor debates on the legislation are relevant. *Cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 580 n.10 (2006) (citing floor debate statements in construing the Detainee Treatment Act of 2005); *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 19-20 (2006) (citing floor debate statements in construing the Hobbs Act of 1946).

The remarks of legislators in floor debates on the 1875 Act make Congress's intentions clear. As explained below, in one of the final House debates before passing the Act, the bill's floor manager explicitly analogized the right-of-way property interests granted by the 1875 Act to those granted by the Pacific Railroad Acts. Under 1875 Act grants, it was stated, the land underlying the rights-of-way would remain in federal ownership, even if the United States alienated the other public lands in the

vicinity of the road—just as with the Pacific Railroad Acts. This is not surprising, because in passing the 1875 Act, Congress was simply continuing the right-of-way granting policy it had been following since the 1830s.

On January 12, 1875, the "territorial railroad" bill was reported back from the House Committee on Public Lands by the committee's chair, Representative Washington Townsend of Pennsylvania, who managed the bill on the House floor.[10] The debate on the bill quickly focused on the respective state and federal powers to regulate railroads receiving federally granted rights-of-way, which led to a discussion of the retained federal interest in a federally granted right-of-way of this type:

> "Mr. G.F. HOAR [of Massachusetts]. I ask my friend from Pennsylvania [Representative Townsend] to hear me a moment in explanation of my point. Suppose after a railroad company has built a railroad under this bill in a Territory a State is formed there, through whose territory the road passes. Now, what would be the condition of the road-bed? *It is a tract of land owned by the United States, over which a railroad under the authority of the United States passes.* Now, if the State undertakes to meddle with that location, it is

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[10] In *Great Northern*, this Court cited other remarks by Representative Townsend from the same debate as evidence of Congress's "intent" to grant an easement. *Great Northern*, 315 U.S. at 274 n.8 (citing Cong. Rec., 43d Cong., 2d Sess., Vol. 3, pt. 1, 404-05 (1875)).

meddling with lands within its limits [which are] the property of the United States, and with a right of way within its limits granted by the United States. *The United States may in the course of years or generations have parted with all its public lands in the State or in the vicinity of the road,* and still, whenever the State undertakes to exercise [its] ordinary local authority . . . the railroad will meet the State with the constitutional objection that *this land you are dealing with is the property of the United States;* the eminent domain did not come from your State to us as in ordinary cases, and the right of way with which we are clothed was given by the United States. In that case the people of the State would either have to come to Congress for a remedy or be without it.

"Mr. TOWNSEND. *Is not that the condition in which the Union Pacific Railroad stands in Kansas and has stood, and in California too?*

"Mr. G.F. HOAR. Undoubtedly; [which] I regard as a most lamentable fact . . . ." Cong. Rec., 43d Cong., 2d Sess., 406 (Jan. 12, 1875) (emphases added).[11]

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[11] *See also Union Pac. R.R. Co. v. Peniston*, 85 U.S. 5, 50 (1873) (in railroad taxation case, holding that, in addition to the exemption from state taxation for operations on the Union Pacific's 1862 right-of-way, "[t]he estate in the soil [under the right-of-way] cannot be taxed, for that remains in the United States").

These statements confirm that the legislators who passed the 1875 Act believed the United States would retain ownership of the land underlying these federally granted railroad rights-of-way, as it had with the earlier Pacific Railroad Acts. Moreover, the legislators had this understanding even though the bill also was described, in the same debate, to be granting the railroads only "the right to lay their tracks and run their trains over the public lands[.]"[12] *Great Northern* did not cite or analyze this highly relevant legislative history, and neither do Petitioners.

Applying the legislative history of the 1875 Act and this Court's precedent with respect to pre-1871 federally granted railroad rights-of-way, the United States retained ownership of the land underlying the right-of-way in Wyoming. For this reason as well, the judgment of the Tenth Circuit should be affirmed.

B. The Legislative History Of The 1875 Act Emphasized That The Purpose Of Railroad Right-Of-Way Grants Was To Benefit The Public As A Whole

The Court's construction of the 1875 Act also should be informed by Congress's purpose in passing that Act. In *Leo Sheep Co.*, the Court reviewed several rules of construction regarding statutory grants to railroads. The Court recognized "the familiar canon of construction that, when grants to

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[12] Cong. Rec., 43d Cong., 2d Sess., 407 (Jan. 12, 1875) (comment of Mr. Hawley of Illinois).

federal lands are at issue, any doubts 'are resolved for the Government not against it.'" *Leo Sheep Co. v. United States*, 440 U.S. 668, 682 (1979) (citing *Andrus v. Charlestone Stone Prods. Co.*, 436 U.S. 604, 617 (1978)). Nonetheless, the Court also noted that it "long ago declined to apply this canon in its full vigor to grants under the railroad Acts." *Id.* Instead:

> "The solution of [ownership] questions [involving the railroad grants] depends, of course, upon the construction given to the acts making the grants; and they are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together." *Id.* at 682 (bracketed material theirs) (quoting *Winona & St. Peter R.R. Co. v. Barney*, 113 U.S. 618, 625 (1885)).

Petitioners suggest that "*Leo Sheep* is dispositive of the question presented." Pet'rs' Br. at 38. Essentially, they argue that the checkerboard subsidy lands at issue in *Leo Sheep Co.* should be treated in exactly the same way as a federally granted right-of-way. Pet'rs' Br. at 39-40. But there was a great difference in congressional intent regarding the checkerboard subsidy lands at issue in *Leo Sheep Co.*, and the federally granted rights-of-way at issue in cases like *Townsend*, *Great Northern*, and the instant case. The checkerboard land grants,

though vast in their scope and influence on the history of the American West, were merely a means to subsidize the construction of railroads (including, in several cases, across the entire continent). In contrast, Congress repeatedly emphasized that its intent and purpose in making railroad right-of-way grants was to expand transportation to benefit the public. As noted above (*supra* at 8), in the Union Pacific Railroad Act of 1862 at issue in *Leo Sheep Co.*, Congress stated that its purpose was "to promote the public interest and welfare by the construction of said railroad," to "keep[] the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes[.]"[13] This provision was cited as one of the reasons the "interests of Government" were "carefully protected" by the law.[14]

For that reason, the more important holding of *Leo Sheep Co.* for the instant case is that railroad grants should be construed to "carry out the intent of Congress . . . look[ing] to the condition of the country when the acts were passed, as well as to the purpose declared on their face[.]" *Leo Sheep Co.*, 440 U.S. at 682. The public purpose of promoting transportation from one end of the right-of-way to the other, and to points along it, would in no sense depend on whether the public retained future access to the even-numbered sections of public land not granted to the Union Pacific, or the Union Pacific's disposition of the odd-numbered sections that were granted to

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[13] Pacific Railroad Act of July 1, 1862, 12 Stat. 489, § 18.

[14] Cong. Globe, 37th Cong., 2d Sess., 1580 (1862).

subsidize the railroad, often many miles from the actual track. But the public's interest and control over the use of the *right-of-way* would be critically important. For that reason, *Leo Sheep Co.*'s holding that no rights were impliedly reserved to cross the checkerboard lands should not control the outcome of this case.[15]

The legislative history of the 1875 Act confirms that, as with the Pacific Railroad rights-of-way, Congress's purpose was to benefit the public by promoting transportation. In an 1874 debate on the legislation that would become the 1875 Act, a senator stated: "We are not creating railroads for the benefit of railroad companies; we are creating railroads for the benefit of the public."[16] The legislative history of the 1875 Act also shows that Congress further intended to protect the public interest by explicitly retaining the right to "alter, amend, or repeal" the legislation in order to "reserve[] the right of Congress to alter or amend [the grant] in any manner it may choose."[17] Consistent with these statements, the Court recognized the fundamental public purpose

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[15] Indeed, during a century in which the constitutionality of any government funding for "internal improvements" was a subject of serious debate (*see Leo Sheep Co.*, 440 U.S. at 671-72), the direct transfer of vast amounts of public land to a railroad corporation could not possibly have been seen as legally justified unless the essential purpose of the project was to benefit the public, not the corporation.

[16] Cong. Rec., 43d Cong., 1st Sess., 3030 (Apr. 13, 1874) (remarks of Sen. Thomas Bayard of Delaware).

[17] Cong. Rec., 43d Cong., 2d Sess., 406 (Jan. 12, 1875).

underlying the 1875 Act in *United States v. Denver & Rio Grande Railway Co.*, 150 U.S. 1 (1893). The Court held the 1875 Act "was not a mere bounty for the benefit of the railroads that might accept its provisions, but was legislation intended to promote the interests of the government in opening to settlement and in enhancing the value of those public lands through or near which such railroads might be constructed." *Id.* at 8. Consistent with *Leo Sheep Co.*, a holding in favor of the government in this case would allow the rights-of-way to continue to be used for transportation for the benefit of the public, as intended when they were created out of the federal public lands.

III. There Is No Support In The Legislative History For Petitioners' Conclusion That Congress Surrendered Any Federal Interest In Rights-Of-Way Granted After 1871

Petitioners rely heavily on *Great Northern*'s analysis of Congress's intentions in the early 1870s. *Great Northern* concluded Congress made a "sharp change" in policy after 1871, because it did not wish to grant to railroads mineral rights in their rights-of-way. But Petitioners' attempt to extend *Great Northern*'s holding to government interests in 1875 Act rights-of-way relies on two problematic interpretations of the legislative history.

First, Petitioners, like *Great Northern*, describe the legal history of federal grants to railroads as consisting of two phases: the first from 1850 to 1871, involving "railroad land grants," and the second "after 1871," when Congress supposedly

"changed its policy in favor of homesteaders" and thereafter granted only rights-of-way to railroads. Pet'rs' Br. at 2-3; *Great Northern*, 315 U.S. at 273-74. But selecting 1850 as the first year of relevant history is inherently misleading if the issue concerns the government's rights in a right-of-way. As the right-of-way statutes cited above indicate, federal right-of-way grants began in the 1830s, well before any railroad received a checkerboard subsidy land grant, and used substantially consistent language through the 1870s and beyond. Meanwhile, between 1850 and 1871, Congress awarded some, but not all, railroads subsidy land grants *in addition* to right-of-way grants. Thus, federal right-of-way law developed before land grants to railroads and existed in parallel to the land grants. Right-of-way law was not merely a subpart or after-effect of the railroad subsidy land grant policy. *See* Roberts, 82 U. Colo. L. Rev. at 105-22 (describing the independent development of the right-of-way granting policy and the subsidy land grant policy).

Second, *Great Northern* suggested that because the last checkerboard subsidy land grants to railroads passed Congress in 1871, Congress thereafter deliberately and collectively shifted to a policy of opposing "land grants" to railroads, including mineral rights in railroads' right-of-way grants. *Great Northern*, 315 U.S. at 273-74 (citing House Resolution of Mar. 11, 1872, and debates about bills "granting no lands"). Petitioners rely on *Great Northern*'s sources to argue that Congress also intended to retain no government interest in post-

1871 rights-of-way. *See* Pet'rs' Br. at 3-4. But Petitioners fail to acknowledge the fact that subsidy land grant legislation remained a subject of active controversy throughout the 1870s, and that the congressional discussions about "granting no lands," cited from the early 1870s, were still focused on subsidy land grants to railroads, *not* a changed government interest in rights of way.

By the late 1860s, the public came to resent not only the vast quantity of lands the railroads actually received, but the government's routine practice of temporarily "withdrawing" even greater swaths of land from eligibility for homesteading, to allow the railroads to select the most attractive tracts without interference from individual farmers. Even so, the railroads still maintained substantial support in Congress, and checkerboard subsidy land grants to railroads became the subject of an intense political struggle from the late 1860s through the early 1870s. *See* Roberts, 82 U. Colo. L. Rev. at 118-20, 126-41 (describing the political struggle).

As late as 1873, bills were still being introduced to grant railroads both rights-of-way and subsidy lands. It became clear only in retrospect that 1871 was the turning point, after which opponents in Congress successfully voted down all bills that included subsidy land grants. Throughout this period, however, Congress continued to pass numerous bills that granted only a railroad right-of-way, in the same form that had been passing since the 1830s. What changed in 1871? After 1871, bills

that would have granted both checkerboard subsidy lands and rights-of-way failed, but right-of-way-only bills continued to pass. There was no congressional shift to a new right-of-way policy somehow favoring homesteaders; Congress merely ceased to pass right-of-way bills if they also included land grants to railroads. *See* Roberts, 82 U. Colo. L. Rev. at 130-41.

Because *Great Northern* characterized this gradual, contested discontinuation of land grants as an affirmative "sharp change" in favor of homesteaders, its portrayal of the 1875 Act's legislative history unfortunately invites misleading conclusions, of the sort advanced here by Petitioners, and by the Federal Circuit in *Hash*. *Great Northern* cited numerous congressional debates from the early 1870s, on right-of-way bills predating the 1875 Act, in which legislators stated that those particular right-of-way bills would "grant no lands," as evidence Congress intended to grant no mineral rights to railroads in their rights-of-way. But those debates were focused on distinguishing bills that granted *only* rights-of-way from bills that would grant *both* subsidy lands and rights-of-way. Contrary to Petitioners' arguments, legislators were not declaring that right-of-way bills would grant a different, diminished *government* property interest from rights-of-way granted in earlier decades by legislation using identical language. *See, eg.*, Pet'rs' Br. at 20-21, 34-38 (citing *Great Northern* and *Hash*); *cf.* Roberts, 82 U. Colo. L. Rev. at 150-62 (reviewing in detail the 1875 Act's legislative history).

Again, the legislative history of the 1875 Act itself also does not support the conclusion that Congress intended to relinquish any interest in the

lands underlying 1875 Act rights-of-way. As described above, the debate over the 1875 Act explicitly stated that Congress intended to retain the fee interest in the land underlying an 1875 Act right-of-way, even if it parted with its other public lands in the area.[18] Petitioners fail to acknowledge or address this legislative history, which was not discussed in either *Great Northern* or *Hash*.

Moreover, homesteaders depended on the railroads. As a practical matter, protecting the railroad rights-of-way from encroachment reflected Congress's concern for the economic welfare of homesteaders. Relative to the colossal (and colossally unpopular) checkerboard land grants, the acreage covered by railroad rights-of-way was vanishingly small. It likely would lie under an active railroad—crucial for transportation—for the foreseeable future. There is no legislative history whatsoever indicating that anyone in Congress sought to give homesteaders the fee title to such property.

In sum, Petitioners' conclusion that Congress intended to surrender all interest in its post-1871 rights-of-way is faulty. It is inaccurately premised on *Great Northern*'s analysis, which only decided the issue of mineral rights, and did not resolve the issue of whether Congress intended to change the government's interests in federally granted railroad rights-of-way. Petitioners' arguments should be rejected.

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[18] *See* Cong. Rec., 43d Cong., 2d Sess., 406 (Jan. 12, 1875).

IV. Congress Intended, Both Before And After 1871, To "Appropriate" Rights-Of-Way From The Public Domain And Classify Them As Robust "Easements" Under Federal Control, With Title And Mineral Rights Remaining In The United States

The true nature of Congress's right-of-way grants to railroads has been obscured by the use and discontinuance of terms like "limited fee" and a mistaken notion of an 1871 shift in right-of-way policy. But reviewing the grants and their legislative history from the 1830s through 1875 paints a reasonable, consistent picture. Federally granted railroad rights-of-way were robust railroad easements under federal law, not common law; they were "appropriated" from the public lands by the grant, removing them from the category of lands available for later settlement; they were granted for the benefit of the public, not the railroad; and Congress intended for the United States to own the underlying lands and the mineral rights therein, with Congress controlling the disposition of the property if abandoned. At least three lines of evidence support this understanding.

First, Congress used "right of way" as its definitional term for the granted property. To the extent it described what it meant by that term, it characterized its right-of-way grants as a type of easement or similar property. *See, e.g.*, Roberts, 82 U. Colo. L. Rev. at 110-11, 116, 122-23 (discussing grants and bills from the 1830s through the 1850s). But there is no indication that Congress intended the rights-of-way to be mere common-law

easements. Instead, Congress's view, expressed in the legislative history of various grants, was that the rights-of-way would be defined by federal law, and that the land underneath the rights-of-way would remain in United States ownership.

Second, this is consistent with the "appropriation doctrine" of public lands, which dates to the 1830s. *See Wilcox v. Jackson*, 38 U.S. 498 (1839) (announcing the principle underlying the "appropriation doctrine"). Under this doctrine, public lands that were legally "appropriated" for some purpose, including a railroad right-of-way, were deemed to have been taken out of the category of public lands available for acquisition under other laws, including the Homestead Act of 1862. *See, e.g.*, *Townsend*, 190 U.S. at 269-71 (holding that a right-of-way grant to the Northern Pacific appropriated the right-of-way land for that purpose, even if a homestead patent later issued that nominally covered the same land). If, as the *Townsend* Court held, federally granted rights-of-way constituted "appropriations" of the public lands, no person could subsequently acquire an interest in such lands.

Third, Congress saw fit to "appropriate" public lands for the rights-of-way because the right-of-way grants were made with the primary intention to benefit the public, not the railroad. Congress did not intend to grant railroads a fee interest in the right-of-way property or the rights to the minerals underlying the rights-of-way.[19] Nevertheless,

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[19] *See* Roberts, 82 U. Colo. L. Rev. at 111, 122 (discussing congressional statements that railroads would not acquire fee interests or mineral rights in rights-of-way).

Congress wanted the ability to ensure that the right-of-way property would remain available for public benefit if needed, even if abandoned by a railroad. For that reason, ultimate control and title were retained by the United States. Congress understood and intended that the lands appropriated for the rights-of-way would revert to full government ownership and control if the railroads ceased to use them. When Congress passed laws in 1906, 1909, and 1921 regulating the disposition of abandoned or never-constructed rights-of-way, it first reasserted its ownership of the property before prescribing what should happen to it.[20]

This view of Congress's enactments unifies this Court's holding in *Townsend*—that the right-of-way grants "appropriated" the public lands for the railroads—with this Court's holdings in *Great Northern* (1942) and *United States v. Union Pacific Railroad Co.* (1957) that neither the Pacific Railroad rights-of-way nor the 1875 Act rights-of-way conveyed mineral rights to the railroads. It only requires the Court to hold that Congress intended the government's rights in a federally granted railroad right-of-way to be consistent both before and after 1871, a conclusion that is supported by both the text of the 1875 Act and its legislative history.

CONCLUSION

This Court should hold that Congress's reserved right to "alter, amend, or repeal" the 1875 Act, combined with its subsequent legislation,

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[20] *See* Roberts, 82 U. Colo. L. Rev. at 146-49 (discussing 43 U.S.C. §§ 940 and 912).

authorizes the use of 1875 Act rights-of-way for alternative transportation purposes regardless of who owns the land underneath. Even if the text of the statute were not clear, this Court should further hold that the 1875 Act's predecessor statutes and legislative history indicates that Congress intended to retain control over 1875 Act rights-of-way and ownership of the land underneath, just as it had with rights-of-way prior to 1871. The Court should affirm the judgment of the Tenth Circuit.

RESPECTFULLY SUBMITTED.

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