No. 12-1173

In the
Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST, et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BRIAN T HODGES
Counsel of Record
Pacific Legal Foundation
10940 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
E-mail: bth@pacificlegal.org

PAUL J. BEARD, II
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: pjb@pacificlegal.org

Counsel for Amicus Curiae
Pacific Legal Foundation

QUESTION PRESENTED

This case involves the General Railroad Right-of Way Act of 1875 (1875 Act), under which thousands of miles of rights-of way were established across the United States. In *Great Northern Ry Co. v. United States*, 315 U.S. 262 (1942), this Court held that the 1875 Act rights-of-way are easements and not limited fees with an implied reversionary interest. Based upon the 1875 Act and this Court's decisions, the Federal and Seventh Circuits have concluded that the United States did not retain an implied reversionary interest in 1875 Act rights-of-way after the underlying lands were patented into private ownership. In this case, the Tenth Circuit reached the opposite conclusion and acknowledged that its decision would continue a circuit split. The question presented is:

Did the United States retain an implied reversionary interest in 1875 Act rights-of-way after the underlying lands were patented into private ownership?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Administrative Decisions

Federal Statutes

TABLE OF AUTHORITIES—Continued

Page

Rule of Court

Miscellaneous

TABLE OF AUTHORITIES—Continued

Page

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation submits this brief amicus curiae in support of Petitioners Marvin M. Brandt Revocable Trust and Marvin M. Brandt (Brandt).[1]

Pacific Legal Foundation (PLF) was founded 40 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF attorneys have participated as lead counsel or amicus curiae in several cases before this Court in defense of the right of individuals to make reasonable use of their property, and the corollary right to obtain just compensation when that right is infringed. *See, e.g*, *Koontz v. St. Johns River Water Management District* (U.S. Supreme Court No. 11-1447); *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*,

---

[1] All parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

No counsel for any party authored this brief in whole or in part and no person or entity made a monetary contribution specifically for the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

483 U.S. 825 (1987). PLF attorneys are familiar with the issues surrounding the government's policy of converting abandoned railroad tracks to recreational trails, having participated as amicus curiae in *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990). Because of its history and experience with regard to issues affecting private property, PLF believes that its perspective will aid this Court in considering Brandt's petition.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE WRIT

This case raises important questions regarding the common law of property ownership and the certainty of titles in property. Brandt owns a parcel of property in fee simple. Pet. at 11-12. An abandoned railroad right-of-way easement, established under the General Railroad Right-of-Way Act of 1875 (1875 Act), traverses his land. *Id.* According to the common law, the railroad easement was extinguished upon its abandonment and Brandt owns his land unencumbered by the right-of-way. *Preseault v. United States*, 100 F.3d 1525, 1545 (Fed. Cir 1996); *Carney v. Board of County Commissioners of Sublette County*, 757 P.2d 556, 562-63 (Wyo. 1988). The Tenth Circuit, however, adopted a new rule of federal property law, holding that the United States—the original grantor of the railroad easement and Brandt's fee estate—held an implied reversionary interest in the easement, even though the government had patented the underlying property and sold the land without a reservation of reversionary rights. Pet. Cert. App. at 3-6, 18-21, 26.

As fully set out in the Petition, the Tenth Circuit's rule directly conflicts with decisions of this Court as well as decisions from the Federal Circuit, the Court of

Federal Claims, and the Seventh Circuit. Pet. at 17-34. The split of authority regarding ownership of abandoned railroad rights-of-way has been growing for years, and is well-documented. *See, e.g.*, Pet. Cert. App. at 5-6, 22-24 (discussing split of authority); *Hash v. United States*, 403 F.3d 1308, 1318 (Fed. Cir. 2005) (same), 11 *Powell on Real Property* § 78A (referring to the existing split of authority as a "mess [that] is not entirely fixed" and in need of "thorough analysis"), Roger Cunningham, et al., *The Law of Property* § 8.9, p. 460 (2d ed. 1993) (decisions concerning railroad rights-of-way "are in considerable disarray").

Amicus PLF urges the Court to grant the Petition to resolve this conflict, especially because the Tenth Circuit's rule departs from ordinary understandings of property ownership. Specifically, the Tenth Circuit altered the common law definitions of easements and freehold estates by holding that the common law of property categorically does not apply to disputes over ownership of railroad easements. Pet. Cert. App. at 5 (citing *Idaho v. Oregon Short Line Railroad Co.*, 617 F Supp. 207, 212 (D. Idaho, 1985)). *See Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012) (disapproving of categorical rules that reduce property rights). The Tenth Circuit's rule deprives property owners of their right to exclusive ownership of their land. If left unreviewed, the decision below will unsettle the rights and expectations of thousands of property owners within the Circuit and nationwide. *See, e.g.*, *Brown v. Washington*, 924 P.2d 908, 916 (Wash. 1996) (relying on federal precedent to determine ownership of abandoned railroad easements). PLF, therefore, urges this Court to grant the Petition to reaffirm the common law principle that ownership of land is determined by title.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I

THE TENTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE COMMON LAW OF PROPERTY OWNERSHIP

The property interest at issue in this case is a fee holder's right to reclaim exclusive ownership of lands underlying an abandoned easement that traverses his land. That right is well-recognized by the common law of property *Preseault*, 100 F.3d at 1542-46; *Carney*, 757 P.2d at 562-63. The Tenth Circuit, however, adopted a *per se* rule that grants the federal government ownership of a fee holder's reversionary interest in an abandoned railroad easement, and consequently refused to consider Brandt's common law property rights to determine ownership of the abandoned easement. Pet. Cert. App. at 5-6.

A. Property Rights Created by Federal Land Grants Are Determined in Accordance with the Common Law

The Tenth Circuit's repudiation of the common law is fundamentally at odds with decisions of this Court and other courts that have relied on the common law to define property interests in railroad right-of-way cases. Indeed, the common law guided this Court in construing the 1875 Act. In *Great Northern Railway Company v. United States*, 315 U.S. 262 (1942), this Court considered whether the 1875 Act conveyed railroad rights-of way as easements or as limited fees. This Court determined that Congress' use of the phrase "right of way" in the statute was intended only to create an easement because that phrase was

consistent with the common law understanding of easements and was wholly inconsistent with the rights associated with fee estates. *Id.* at 271 ("The Act of March 3, 1875 . clearly grants only an easement, and not a fee.")

This Court also relied on the common law to determine the property rights acquired in patented lands that are burdened by a right-of-way easement. *Smith v. Townsend*, 148 U.S. 490, 499 (1893) ("Doubtless whoever obtained title from the government to any quarter section of land through which ran this right of way would acquire a fee to the whole tract, subject to the easement of the company; and if ever the use of that right of way was abandoned by the railroad company, the easement would cease, and the full title to that right of way would vest in the patentee of the land.")

In fact, early administrative land decisions viewed railroad rights-of way as common law easements, and relied on common law principles to define the nature and scope of federal land grants when the property is traversed by a railroad right-of-way For example, an 1888 decision instructed that patentees must pay for the full area purchased with no deduction for the right-of way easement because the patentee was taking title to the entire tract, including the land underlying the easement:

> The act of March 3, 1875, is not in the nature of a grant of lands; it does not convey an estate in fee . . . All persons settling on public lands to which a railroad right of way has attached, take the same subject to such right of way and must pay for the full area of

> subdivision entered, there being no authority to make deductions in such cases.

Great Northern, 315 U.S. at 275 n.13 (quoting 12 L.D 423, 428 (Jan. 13, 1888)). Many other decisions from that period apply common law principles to resolve disputes concerning railroad rights-of-way.[2] *See, e.g.*, *John W Wehn*, 32 Pub. Land Dec. 33, 34 (1903) (noting that the rights-of-way granted under the 1875 and 1891 Acts were mere easements and that the applicant who purchased land over which they passed would therefore be required to pay for the entire tract); *Brucker v. Buschmann*, 21 Pub. Land Dec. 114, 115 (1895) (finding railroad right-of-way does not diminish the acreage held in fee by the homesteader); *Mary G. Arnett*, 20 Pub. Land Dec. 131, 132 (1895) (A grant under the 1875 Act conveyed "an easement and not the land."); *Pensacola & Louisville R.R. Co.*, 19 Pub. Land Dec. 386, 388 (1894) (holding that "lands across which a right-of way is claimed by a railroad company [under federal land grants] may be disposed of by patent" and that the "patentees will take the servient tenement, subject to whatever servitude may exist, and they will find ample protection in the courts, should any attempt be made to deprive them of the use or occupancy of their land"); *Fremont, Elkhorn and Missouri Valley Ry. Co.*, 19 Pub. Lands Dec. 588, 599 (1894) ("That the right of way granted by the [1875] act in question is a mere easement can not be questioned, for the fourth section provides that 'thereafter all such lands, over which such right of way shall pass, shall be disposed of subject to the right of way.' "); *Eugene McCarthy*, 14

---

[2] Public Land Decisions are administrative orders issued between 1881 and 1929 by the U.S. Department of Interior and General Lands Office in cases relating to public lands.

Pub. Land Dec. 105, 110 (1892) (title to mineral claim would become unrestricted upon abandonment of federal land grant right-of-way); *Right of Way*, 12 Pub. Land Dec. 423, 428 (1891) (under the 1875 Act, settlers take the full tract of land that is subject to the right-of-way).

Simply put, the common law understandings of easements and freehold estates defined the character of property interests conveyed in federal land grants and patents.

B. Disputes over Ownership of Abandoned Railroad Rights-of-Way Are Determined by Reliance on Common Law Principles

The Tenth Circuit's rule also conflicts with the Federal Circuit's reliance on the common law to determine whether a landowner has a protected property interest in an abandoned right-of way. *See, e.g., Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009); *Hash*, 403 F.3d at 1314, *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir 2004); *Preseault*, 100 F.3d at 1533. Determining the character of a right-of-way is a necessary step before deciding ownership of the land because not all railroad rights-of-way involve the same property interest. *See* Cecilia Fex, *The Elements of Liability in a Trails Act Taking: A Guide to the Analysis*, 38 Ecology L.Q. 673, 686-89 (2011) At certain times in history, the federal government granted the railroad companies rights-of-way as limited fee estates. *See, e.g., Great Northern*, 315 U.S. at 273-74, *Northern Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903). At other times, the government granted the railroad companies rights-of-way as easements. *Great Northern*, 315 U.S.

at 271 The type of right-of-way owned by a railroad depends upon the specific terms and conditions of the original conveyance, which, in turn, relies on common law understandings of easements and fee estates. *Id.*

At common law, there is a stark difference between a limited fee and an easement. A grant of a limited fee estate (also known as a fee simple determinable, base fee, or qualified fee) creates a fee simple subject to a special limitation, such as a requirement that the property be used only for railroad purposes. *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 485 (10th Cir 1998) (citing Chester H. Smith & Ralph E. Boyer, *Survey of the Law of Property* 8 (2d ed. 1971)); *see also State of Wyoming*, 27 IBLA 137, 164 (1976) (Chief Administrative Judge Frishberg, dissenting) (citing L. M. Simes, *Law of Future Interests* 28-29 (2d ed. 1966)). Upon the occurrence of the special limitation, the fee estate automatically terminates and the property reverts to the grantor or his successors in interest. *Mount Olivet Cemetery,* 164 F.3d at 485; *State of Wyoming*, 27 IBLA at 164 (citing Simes, *supra*; 1 Tiffany, *Real Property* § 220 (3d ed. 1939)).[3] But, until the condition for reverter is triggered, the owner of the limited fee is considered the "absolute owner of the land." *Choctaw O. & G. R.R. Co. v. Mackey*, 256 U.S. 531, 538-39 (1921)

A conveyance of an easement transfers no ownership in the underlying land to the holder of the right-of-way *Preseault*, 100 F.3d at 1542; *see also Louis W. Epstein Family Partnership v. Kmart Corp.*,

---

[3] The Interior Board of Land Appeals reviews decisions of departmental administrative judges concerning public lands.

13 F.3d 762, 766 (3d Cir. 1994) ("[T]he owner of land, who grants a right of way over it, conveys nothing but the right of passage and reserves all incidents of ownership not granted."); *Board of County Sup'rs of Prince William County, Va. v. United States*, 48 F.3d 520, 527 (Fed. Cir. 1995) ("[A] fee simple estate is not an easement, or vice versa."). Instead, an easement creates a servitude on the land that grants the holder "a right to make use of the land over which the easement lies for the purposes for which it was granted." *Preseault*, 100 F.3d at 1545 (citing 7 Thompson on Real Property § 60.02(c), (d)). And when the easement is abandoned, the easement is extinguished and the underlying fee becomes unburdened. *Preseault*, 100 F.3d at 1545; *Carney*, 757 P.2d at 562-63.

According to those common law principles, ownership of an abandoned right-of way depends on the character of the right-of-way Where the railroad acquired a fee interest in the right-of-way, title no longer remained in the United States. *Northern Pacific*, 190 U.S. at 270. The federal government held a possibility of a reverter (by operation of the special limitation in the grant), but the land itself belonged to the railroad company *Id.* at 271 Therefore, a subsequent grant of the surrounding property could not transfer title to the land underlying the right-of way *Id.* at 270. And the owner of the surrounding lands did not acquire a reversionary interest in the railroad right-of-way

However, where the railroad acquired a right-of-way easement, title to the underlying property remained in the United States. *Hash*, 403 F.3d at 1314. Thus, a subsequent patent of the property

conveyed the entire tract, including the easement and the reversionary interest therein, to the patentee. *Railroad Co. v. Baldwin*, 103 U.S. 426, 430 (1880); *Energy Transp. System Inc. v. Union Pac. R.R. Co.*, 619 F.2d 696, 698-99 (8th Cir. 1980) (ruling servient estate to railway grant passed when state acquired federal lands); *see also Boesche v. Udall*, 373 U.S. 472, 477 (1963) (a land patent "divests the government of title"). The government grantor cannot retain an implied reversionary interest in an abandoned easement located on private property without effecting an uncompensated taking of the fee holder's property rights. *See, e.g* , *Leo Sheep Co. v. United States*, 440 U.S. 668, 678-79 (1979); *Hash*, 403 F.3d at 1318 ("[P]roperty rights that are not explicitly reserved by the grantor cannot be inferred to have been retained."). Thus, it is essential to determine the common law character of the right-of-way before a court can decide who owns the reversionary rights in the land.

C. The Tenth Circuit's Rule Repudiates the Common Law

The Tenth Circuit's decision creates so many conflicts with other decisions because it adopts a categorical rule that (1) changes the definition of an easement and (2) holds that the common law of property does not apply to disputes over ownership of abandoned railroad easements. Pet. Cert. App. at 5-6. As shown above, the Tenth Circuit's rule finds no support in this Court's case law Instead, the Tenth Circuit created its rule by elevating a poorly reasoned trial court opinion to the status of binding Circuit precedent. Pet. Cert. App. at 5 (citing *Oregon Short Line Railroad*, 617 F. Supp. at 212, *see also Marshall v. Chicago & Northwestern Transp. Co.*, 31 F.3d 1028,

1030-32 (10th Cir 1994) (adopting the "result and rationale" of *Oregon Short Line*)).

Oregon Short Line is a summary judgment opinion resolving a dispute over ownership of an abandoned right-of-way easement. 617 F Supp. at 208-09. Key to the dispute was whether the federal government held an implied reversionary interest in the easement. *Id.* at 209, 211-12. Although an implied reversionary interest is not recognized by the common law, the Idaho federal district court ruled that the federal government could create a new property interest. *Id.* at 211 12. The trial court explained that the government, in authorizing grants for right-of-way easements, had the authority to "pre-empt or override common law rules regarding easements, reversions, or other traditional real property interests" in order to create an "implied condition of reverter" on all such conveyances. *Id.* at 212. Because of that, the court refused to consider the common law rules regarding easements, holding instead that the "precise nature of [the] retained interest need not be shoe-horned into any specific category cognizable under the rules of real property law " *Id.* Thus, the trial court concluded that the federal government, in enacting the 1875 Act, had *implicitly* suspended the common law and had *impliedly* reserved a reversionary interest in all railroad right-of-way easements. *Id.*

The Tenth Circuit's decision to adopt the reasoning of *Oregon Short Line* as a *per se* rule of federal property law threatens our common law system of property ownership. Indeed, legal scholars recognize that the conflict between the Tenth Circuit and the Federal Circuit engenders a "fundamental contradiction" in the law of property 11 *Powell on*

Real Property § 78A. Even scholars who support the modern rails-to-trails policy acknowledge that *Oregon Short Line* created a property interest that is neither recognized nor bound by common law principles. Danaya C. Wright, *The Shifting Sands of Property Rights, Federal Railroad Grants, and Economic History: Hash v. United States and the Threat to Rail Trail Conversions*, 38 Envtl. L. 711, 731-32 (2008) (*Oregon Short Line* corrected Congress' "unfortunate use of the term 'easement'" by overriding the common law rules.); Gregg H. Hirakawa, *Preserving Transportation Corridors for the Future: Another Look at Railroad Deeds in Washington State*, 25 Seattle U L. Rev. 481, 504 (2001) ("Since federal 'easements' on public land are granted by Congress, the easements are subject to Congressional desires rather than common law."); 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, 101 (2011) (Since railroad easements are not bound by the common law in the Tenth Circuit, courts can alter the language of a federal land grant to advance modern government interests such as the rails-to-trails policy.).

Landowners deserve to have their property rights determined by the title they hold in their land, not by a court-created *per se* rule. The Tenth Circuit's decision to the contrary raises important questions of property law and warrants review by this Court.

II

THE TENTH CIRCUIT'S *PER SE* RULE THREATENS THE CERTAINTY AND STABILITY OF TITLE

The consequences of the Tenth Circuit's decision are far-reaching. Landowners rely on their titles to establish ownership of property But if courts are unwilling to give effect to titles, the owners' interests and expectations in their property become potentially worthless. Accordingly, this Court has a long-standing policy of avoiding rules or constructions that unsettle titles. *Leo Sheep*, 440 U.S. at 687 ("This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned[.]") (citing *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.*, 118 U.S. 196, 206-07 (1886); *Lessee of Irwin H. Doolittle's Lessee v. Bryan*, 55 U.S. 563, 567 (1852)); *see also Beres v. United States*, 64 Fed. Cl. 403, 427 (2005) ("A fundamental precept of our property ownership system and system of laws includes certainty of ownership upon purchase, whether by receipt of a land patent from the federal government or a deed from a private party.")

This case provides a good example of the rights threatened by the Tenth Circuit's decision. Brandt's parents acquired title in fee simple to property traversed by an abandoned railroad easement. Pet. at 10-11 It is well-recognized that a federal land patent passes "a perfect and consummate title" to the owner. *Wilcox v. Jackson*, 38 U.S. 498, 516 (1839); *Hash*, 403 F.3d at 1314-15 (A patent "'conveys the fee simple title in the land over which the right-of-way is granted to the person to whom patent issues . such patentee takes the fee subject only to the railroad company's

right of use and possession'.") (quoting 43 C.F.R. 243.2 (1909) (repealed by the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701, *et seq.*)). Once a parcel is patented and sold as private property, the federal government "is absolutely without authority" to alter the property interests transferred. *Moore v. Robbins*, 96 U.S. 530, 533 (1877). Because the federal government did not reserve any reversionary rights in the railroad easement when it sold its property, Brandt has a common law right to exclusive ownership of the land underlying the abandoned right-of-way.

The Tenth Circuit's decision, however, repudiates those common law principles and authorizes the government to take some of the property back decades after the land was sold. Under the lower court's rule, "titles derived from the United States, instead of being the safe and assured evidences of ownership which they are generally supposed to be, [are] subject to the fluctuating, and in many cases unreliable, action of the [government]." *Moore*, 96 U.S. at 533. The Tenth Circuit's decision is contrary to policies underlying our property system and warrants review *Beres*, 64 Fed. Cl. at 427 ("The average citizen, the reasonable man, expects that a contract to transfer land, whether from a public or private owner, is effective and will not be retroactively changed many years after the land transfer ").

CONCLUSION

The Tenth Circuit's repudiation of the common law rights inherent in fee simple title creates a conflict that, by itself, warrants certiorari. But the need for this Court's review is heightened by the fact that the lower court adopted a harmful rule that has the capacity to unsettle the expectations of property owners across the Nation. This Court should grant Brandt's petition.

DATED: April, 2013.

Respectfully submitted,

BRIAN T HODGES
Counsel of Record
Pacific Legal Foundation
10940 33rd Place, Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
E-mail: bth@pacificlegal.org

PAUL J BEARD, II
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail. pjb@pacificlegal.org

Counsel for Amicus Curiae
Pacific Legal Foundation