No. 12-1173

In the
Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST, et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

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

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION AND CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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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 exist across the United States. In *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942), this Court held that 1875 Act rights-of-way are easements and not limited fees with a 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 federal government conveyed the underlying lands into private ownership. In this case, the Tenth Circuit reached the opposite conclusion and acknowledged that its decision would constitute a circuit split. The question presented is:

Did the United States retain an "implied reversionary interest" in a right-of-way created by the 1875 Act rights-of-way after the federal government conveyed the underlying lands into private ownership?

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INTEREST OF AMICI CURIAE[1]

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation and Center for Constitutional Jurisprudence submit this brief amicus curiae in support of Petitioners Marvin M. Brandt Revocable Trust and Marvin M. Brandt (the Brandts). The parties have consented to the filing of this amicus brief.

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 right to obtain just compensation when that right is infringed. *See, e.g., Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013); *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*

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counselor party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

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*, 483 U.S. 825 (1987). PLF attorneys have also participated as lead counsel in *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367 (2012), *Rapanos v. United States*, 547 U.S. 715 (2006). 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 *Presault 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.

The Center for Constitutional Jurisprudence (Center) is the public interest law arm of the Claremont Institute. The mission of the Claremont Institute and Center are to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the mandate expressed in the Fifth Amendment that private property can only be taken upon payment of just compensation. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases, including *Sackett*, 132 S. Ct. 1367; *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592 (2010); *Rapanos*, 547 U.S. 715; and *Kelo v. City of New London, Connecticut*, 545 U.S. 469 (2005).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises important questions regarding the common law system of property ownership and the certainty of titles in property. The Brandts own an 80-acre parcel of property in fee simple. Pet. at 10. An abandoned railroad right-of-way easement, established under the General Railroad Right-of-Way Act of 1875 (1875 Act),[2] traverses their land. *Id*. at 10-11. The Brandts' title is traceable to a 1976 federal land patent that conveyed full ownership of the tract "subject to those rights for railroad purposes that have been granted to [the railroad company] under the [1875 Act]." *Id*. at 11. According to the common law, the Brandts took title to the property in fee simple subject to the burden of a railroad easement. *Great Northern Railway Company v. United States*, 315 U.S. 262, 271 (1942) ("The Act of March 3, 1875 . . . clearly grants only an easement, and not a fee."). That burden, however, was extinguished upon abandonment, and the Brandts now own their land unencumbered by the right-of-way. *Preseault v. United States*, 100 F.3d 1525, 1545 (Fed. Cir. 1996) (*Preseault II*); *Carney v. Board of County Commissioners of Sublette County*, 757 P.2d 556, 562-63 (Wyo. 1988).

In the decision below, however, the Tenth Circuit repudiated the common law rules of property ownership in favor of a per se rule, holding that the United States—the original grantor of the railroad easement and the Brandts' fee estate—will retain an "implied reversionary interest" in an 1875 Act right-of-way, even after the government patents the

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[2] 43 U.S.C. § 934 (1875) (repealed by 90 Stat. 2793 (1976)).

underlying land and conveys it to a private party without any express reservation of reversionary rights. Pet. Cert. App. at 3-6, 18-21, 26. The reason why the lower court refused to follow the traditional rules of real property law is made clear by the decisions it relied upon: the Tenth Circuit had previously concluded that Congress silently intended to "pre-empt or override common-law rules regarding easements, reversions, or other traditional real property interests" when it adopted the 1875 Act to create an "implied reversionary interest" in all railroad right-of-way grants. Pet. Cert. App. at 5; *Marshall v. Chicago & Nw. Transp. Co.*, 31 F.3d 1028, 1030-32 (10th Cir. 1994) (quoting *Idaho v. Oregon Short Line Railroad*, 617 F. Supp. 207, 212 (D. Idaho, 1985)). The decision below extended the Tenth Circuit's rule, holding that all private landowners whose titles are traceable to a federal land patent will be subject to the government's unexpressed reservation of a reversionary interest in a railroad right-of-way, regardless of the rights and expectations established by their titles. Pet. Cert. App. at 5-6.

As explained in the Brandts' brief on the merits, the Tenth Circuit's decision is based on a flawed construction of the 1875 Act. Amici write separately to emphasize how the Tenth Circuit's rule departs from ordinary understandings of property ownership, and will adversely affect landowners across the nation.

Typically, when Congress uses a term of art taken from the common law—as it did in the 1875 Act by granting a "right of way through the public lands of the United States" (1875 Act § 1)—it is presumed that Congress intended for the term to have its ordinary, common law meaning:

> Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Evans v. United States, 504 U.S. 255, 259-60 (1992) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)); *see also Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles."). Thus, while Congress has the authority to override a common law principle when enacting new laws, to do so, it must "speak directly" to the question addressed by the common law. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978); *see also Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 79 n.2 (1996) (It would be error for a court to conclude that Congress intended to abolish well-settled common-law rights in property by mere implication). Congress did not do so when adopting the 1875 Act.

If not reversed, the Tenth Circuit's rule will unsettle the rights and expectations of tens of thousands of landowners across the nation. *See, e.g., Brown v. Washington*, 924 P.2d 908, 916 (1996) (relying on federal precedent to determine ownership of abandoned railroad easements). Between 1781 and

2010, the United States conveyed approximately 816 million acres of public lands into private ownership (individuals, railroads, etc.).[3] The federal government transferred another 328 million acres to the states generally, and an additional 142 million acres to Alaska.[4] Simply put, "[g]enerations of land patents have issued without any express reservation of the right now claimed by the Government." *Leo Sheep Co. v. United States*, 440 U.S. 668, 687-88 (1979). Amici urge this Court to reverse the Tenth Circuit's opinion in this case and to reaffirm the fundamental common law principle that ownership of land will be determined by title, not implication.

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[3] U.S. Dept. of the Interior, Bureau of Land Management, Public Land Statistics, 2010, Table 1-2, http://www.blm.gov/public_land_statistics/pls10/pls10.pdf (last visited Nov. 4, 2013). Most transfers to private ownership (97 percent) occurred before 1940; homestead entries, for example, peaked in 1910 at 18.3 million acres but dropped below 200,000 acres annually after 1935, until being fully eliminated in 1986. U.S. Dept. of Commerce, Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970 (Washington, DC: GPO, 1976), H.Doc. 93-78 (93rd Congress, 1st Session), pp. 428-29. The homesteading laws were repealed in 1976, although homesteading was allowed to continue in Alaska for 10 years.

[4] *Id.*

ARGUMENT

I

THE COMMON LAW OF PROPERTY IS AN ESSENTIAL PREDICATE WHEN CONSTRUING FEDERAL RAILROAD RIGHT-OF-WAY GRANTS

A. Disputes over Ownership of Railroad Rights-of-Way Have Historically Been Determined by Reliance on Common Law Principles

The Tenth Circuit's repudiation of the common law is fundamentally at odds with decisions of this Court and other courts that 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). In that case, the federal government sought an injunction to stop a railroad company from drilling for or removing gas, oil, and other materials from lands underlying an 1875 Act right-of-way. *Id.* at 270. The railroad argued that the 1875 Act conveyed a fee interest, giving it the right to extract oil from its land. *Id.* The government, relying on the common law definitions of easements and fee estates, argued that 1875 Act grants were "strictly limited" in scope and conveyed "a mere right of passage across the public domain." *See* Brief for the United States, *Great Northern Ry. Co. v. U.S.*, 1942 WL 54245 at 5 (U.S., 2006). Significantly, the United States contended that, because the railroad had taken only an easement, the fee itself—including all minerals and subsurface rights—remained federal property. *Id.* at 5, 11. The

government's argument focused on Section 4 of the 1875 Act, which provided that "all such lands over which such right-of-way shall pass shall be disposed of subject to such right-of-way." *Id.* at 11. The United States argued, "[t]o construe the right of way grant as a fee in the land would be to rob this provision of all meaning. It surely would have been novel, as well as wholly unnecessary, for Congress, after it granted a fee, to declare that the adjacent lands are to be conveyed 'subject to' the prior grant in fee." *Id.* The *Great Northern* Court agreed that "[t]his reserved right to dispose of the lands subject to the right of way is wholly inconsistent with the grant of a fee." *Great Northern*, 315 U.S. at 271. Thus, following traditional principles of property law, the Court concluded that the Act "grants only an easement, and not a fee." *Id.* (" '[a]pter words to indicate the intent to convey an easement would be difficult to find.' ") (quoting *MacDonald v. United States*, 119 F.2d 821, 825 (9th Cir. 1941)).

Notably, when arguing *Great Northern*, the United States anticipated that a similar dispute could arise between railroad companies and patentees of the fees underlying 1875 Act rights-of-way. The federal government argued that the same common law principles applied in *Great Northern* should be applied in future cases involving patentees, such as the Brandts:

> Many legal subdivisions crossed by railroad rights of way have since been patented to homesteaders, stock-raisers, and miners. This fact suggests an additional question whether these subsequent patentees have not thereby succeeded to the mineral rights

> of the Government in the lands thus patented But inasmuch as the United States still owns thousands of acres of unpatented land along the Great Northern and other railroad rights of way, it is in a position to litigate the scope of the 1875 Act without raising at this time the legal effect of particular patents in specific cases. **It may be said in passing that the solution to the question whether the Government's mineral rights in particular parcels have passed to individual patentees will depend on the language of the statute under which the patent was issued, on the classification of the land at the time the patent was issued, and on the nature of the interest which this Court ultimately decides was granted to the railroads under the 1875 Act**.

Brief for the United States, 1942 WL 54245 at 10 n.4 (emphasis added).

Contemporaneous administrative land decisions also viewed railroad rights-of-way as common law easements, and relied on traditional principles of property law 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 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. *See, e.g.*, *John W. Wehn*, 32 Pub. Land Dec. 33 (1903) (noting that the rights-of-way granted under 1875 and 1891 acts were mere easements and that the applicant to purchase land over which they passed would therefore be required to pay for the entire tract); *Brucker v. Buschmann,* 21 Pub. Land Dec. 114 (1896) (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 the1875 Act conveyed "an easement and not the land"); *Pensacola & Louisville R.R. Co.*, 19 Pub. Land Dec. 386 (1894) ("[L]ands across which a right-of-way is claimed by a railroad company [under federal land grants] may be disposed of by patent . . . 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 . . ."); *Fremonth, Elkhorn and Missouri Valley Ry. Co.*, 19 Pub. Land Dec. 588 (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 Pub. Land Dec. 105 (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).

Indeed, the United States continued to rely on the common law when defending its rails-to-trails policy against a takings challenge in *Preseault v. Interstate Commerce Comm'n* (*Preseault I*), 494 U.S. 1 (1990). In that case, the property owners alleged that the rails-to-trails statute[5] was unconstitutional on its face because it effected a taking of landowners' ownership interests in abandoned railroad rights-of-way without payment of just compensation. *Id.* at 9. The federal government argued, in part, that its rails-to-trails policy should not be subject to facial invalidation because the nature of each landowner's property interests will change based on the terms of the deeds and the applicable common law rules:

> In this case, the nature of petitioners' property interest, if any, has not yet been determined. Petitioners and the State of Vermont dispute whether the interest acquired in 1899 by the State's predecessor in interest, the Rutland-Canadian Railway, was an easement or an estate in fee simple. **If the interest was acquired in fee simple, then petitioners have no right in the property whatsoever and,**

[5] National Trails System Act Amendments of 1983 (Amendments), Pub. L. 98-11, 97 Stat. 48, to the National Trails System Act (Trails Act), Pub. L. 90-543, 82 Stat. 919 (codified, as amended, 16 U.S.C. § 1241 *et seq.*).

> **consequently, no basis for a takings claim. Moreover, even if the railroad acquired only an easement, the question whether petitioners have a colorable claim of a taking would depend upon the terms of that easement.** The document creating an easement may specify the events on which a reversionary interest will vest in possession, may speak in ambiguous terms, or may be completely silent on the issue. **And in all cases, state law will guide the inquiry into the intent of the parties and whether that intent will be respected.** Thus in some cases, interim trail use may cause an easement to revert; in other cases, it may not.

Brief for the United States, *Preseault v. Interstate Commerce Comm'n*, 1989 WL 1127500 at 23-24 (U.S., 1989) (citations omitted; emphasis added); *see also Preseault I*, 494 U.S. at 24 ("Even the federal respondents acknowledge that the existence of a taking will rest upon the nature of the state-created property interest that petitioners would have enjoyed absent the federal action and upon the extent that the federal action burdened that interest.").

Again, the Court agreed with the United States' arguments, holding that it was necessary for a court to determine the parties' common law property interests before deciding who owns the land over which the right-of-way runs:

> [The rails-to-trails statute] gives rise to a takings question in the typical rails-to-trails case because **many railroads do not own**

> **their rights-of-way outright but rather hold them under easements or similar property interests. While the terms of these easements and applicable state law vary, frequently the easements provide that the property reverts to the abutting landowner upon abandonment of rail operations. State law generally governs the disposition of reversionary interests,** subject of course to the ICC's "exclusive and plenary" jurisdiction to regulate abandonments.

494 U.S. at 8 (emphasis added); *see also id*. at 24 ("Well-established principles will govern analysis of whether the burden the ICC's actions impose upon state-defined real property interests amounts to a compensable taking."). Following *Preseault I*, both the Federal and Seventh Circuits held that determining the character of the right-of-way is a necessary first step before deciding ownership of the land because not all railroad rights-of-way involve the same property interest. *See, e.g., Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009); *Hash v. United States*, 403 F.3d 1308, 1314 (Fed. Cir. 2005); *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004); *Presault II*, 100 F.3d at 1533; *see also Samuel C. Johnson 1988 Trust v. Bayfield County*, 649 F.3d 799, 803 (7th Cir. 2011) (concluding that the Federal Circuit's approach to rails-to-trails disputes as "make[s] better sense" than the Tenth Circuit's conclusion that the government holds an implied reversionary interest in all railroad rights-of-way).

The common law understandings of easements and freehold estates have always guided the courts and

federal government when defining the character of property interests conveyed in cases concerning railroad rights-of-way. There is simply no historical or legal basis for the Tenth Circuit's decision to depart from traditional principles of property law when construing the 1875 Act.

B. The Tenth Circuit Provides No Justifiable Explanation for its Repudiation of the Common Law

The Tenth Circuit's decision to repudiate the common law is not based on the language of the 1875 Act—there is nothing in the statute indicating an intent to alter or abrogate the common law of property. Instead, the decision is based on the Circuit's earlier decision, *Marshall*, 31 F.3d 1028. In that case, the Tenth Circuit rejected the reasoning of *Great Northern* in favor of an Idaho district court decision, concluding that the federal government held an "implied condition of reverter" in all 1875 Act rights-of-way. Pet. Cert. App. at 5 (citing *Marshall*, 31 F.3d at 1031-32 (quoting *Oregon Short Line*, 617 F. Supp. 207)).

Oregon Short Line involved a dispute over ownership of an abandoned right-of-way easement. 617 F. Supp. at 208-09. Key to the dispute was whether this Court was correct when it held, in *Great Northern*, 315 U.S. at 271, that the 1875 Act conveyed an easement, not a possessory interest in the land. *Oregon Short Line*, 617 F. Supp. at 211. The trial court began its analysis by asserting that, although this Court "denominat[ed] the railroad's interest as an 'easement,' " it did not expressly hold that it was incorporating all of the common law definitions and rules relating to easements. *Id.* Based on that, the

trial court determined that *Great Northern* was an incomplete decision, and substituted its own analysis of the Legislative history for this Court's interpretation of the 1875 Act.[6] *Id*. at 211-12; *but see Great Northern*, 315 U.S. at 277 ("That [the railroad company] has only an easement in its rights of way acquired under the Act of 1875 is therefore clear from the language of the Act, its legislative history, its early administrative interpretation and the construction placed upon it by Congress in subsequent enactments."). Then, based entirely on its consideration of later-enacted statutes, the Idaho federal district court concluded that Congress "felt that it had some retained interest in railroad rights-of-way," and imputed an intent to create an "implied condition of reverter" on all railroad right-of-way grants. *Oregon Short Line*, 617 F. Supp. at 212.

The Idaho trial court had no idea, however, what type of property interest was granted to the railroad, retained by the government, or conveyed to the patentee—let alone, whether any of those interests was recognized by the common law. *Id*. Instead, the court simply concluded that Congress must have silently exercised its authority to "pre-empt or override common-law rules regarding easements, reversions, or other traditional real property interests" in order to create a reversionary interest in all railroad right-of-way grants. *Id*. at 212.

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[6] Although Amici do not address the competing legislative histories offered by the parties to this case, this Court should note that the history adopted by *Oregon Short Line* is contrary to the analysis argued by the United States in its 1942 Merits Brief filed with this Court in *Great Northern*. *See* Brief for the United States, *Great Northern Ry. Co. v. U.S.*, 1942 WL 54245 at 15-35.

Marshall adopted the "result and rationale" of *Oregon Short Line* in order to give effect to the federal government's current policy toward abandoned railroad rights-of-way. *Marshall*, 31 F.3d at 1032. And, like the Idaho trial court, the Tenth Circuit paid the common law no heed, stating that "[t]he precise nature of that retained interest need not be shoe-horned into any specific category cognizable under the rules of real property law." *Id*. at 1032 (quoting *Oregon Short Line*, 617 F. Supp. at 212). As a result, in *Brandt*, the court awarded ownership of the land underlying the abandoned railway right-of-way to the federal government without ever identifying the property interests held by the railroad or patentee. Pet. Cert. App. at 5-6.

II

THE COMMON LAW OF PROPERTY DOES NOT RECOGNIZE AN "IMPLIED REVERSIONARY INTEREST" IN EASEMENTS

The question presented asks whether the United States retained an "implied reversionary interest" in a 1875 Act railroad right-of-way after the government patented and sold the underlying lands into private ownership. To consider that question, it is essential to understand precisely what the common law says in regard to railroad rights-of-way and reversionary interests. *Preseault I*, 494 U.S. at 8.

Not all railroad grants involve the same property interest. At certain times in history, the federal government granted the railroad companies

rights-of-way as limited fee estates.[7] *See, e.g., Great Northern*, 315 U.S. at 273-74; *Northern Pac. Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903); *see also* 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 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

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[7] Between 1850 and 1871, Congress subsidized railroad construction through individual, large grants of public land. *Great Northern*, 315 U.S. at 273. These grants eventually met with much public disapproval. *Id.* Responding to that criticism, in 1871, Congress changed its policy toward land grants for railroad companies. Still wishing to "encourage development of the Western vastnesses," yet unwilling to provide direct grants of land to railroad companies, Congress initiated a policy by which it passed special acts for designated railroad companies, granting only individual "rights-of way" over public land. *Id.* at 274. Granting railroads only a "right-of-way" for railroad purposes through and over federal lands, instead of granting whole land parcels, represented "a great shift in congressional policy." *See United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 119 (1957). This policy change was crystallized in a House Resolution passed in March, 1872, which stated: "Resolved, that in the judgment of this House the policy of granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers, and for educational purposes, as may be provided by law." Cong. Globe, 42d Cong., 2d Sess., at 1585 (1872). Thus, after 1871, outright grants of public lands were discontinued, and Congress began a policy of making individual, specialized right-of-way grants to specific railroad companies. Eventually, however, enacting special legislation for individual railroad companies became burdensome, and led to the passage of the General Railroad Right of Way Act of 1875. *Great Northern*, 315 U.S. at 275.

turn, relies on common law understandings of easements and fee estates. *Id*.

The common law does not recognize a "reversionary interest" in an easement. A reversion is a future possessory interest created when the owner of a fee estate conveys a lesser estate to a transferee (*e.g.*, a life estate or a term of years). *Preseault II*, 100 F.3d at 1533. The grant of an easement, by contrast, transfers no ownership interest in the underlying land to the holder of the right-of-way. *Preseault II*, 100 F.3d at 1542; *see also Louis W. Epstein Family Partnership v. Kmart Corp.*, 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—an incorporeal hereditament—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 II*, 100 F.3d at 1545 (citing 7 Thompson on Real Property § 60.02(c), (d)). Thus, the interest that the fee holder has in an easement is properly characterized as "a present estate in fee simple, subject to the burden of the easement." *Id*.

That description provides an important distinction. According to traditional property law, the termination of an easement "would not cause anything to 'revert' to the landowner. Rather, the burden of the easement would simply be extinguished, and the landowner's property would be held free and clear of any such burden." *Toews*, 376 F.3d at 1376. Because

the fee holder has a present ownership interest in the entire property, a transfer of the property in fee simple will convey the entire tract, including the land under the easement, to the new owner. *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); *see also Boesche v. Udall*, 373 U.S. 472, 477 (1963) (a land patent "divests the government of title"). Thus, if a fee holder wants to retain a possessory interest in the land underlying an easement, he or she must do so by express reservation when conveying the fee simple. *See Leo Sheep Co. v. United States,* 440 U.S. at 678-79; *Hash*, 403 F.3d at 1318 ("[P]roperty rights that are not explicitly reserved by the grantor cannot be inferred to have been retained.").

The preceding point is best illustrated by contrasting an easement with a limited fee estate. A grant of a limited fee estate (also known as a fee simple determinable, base fee, or qualified fee) conveys 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 will automatically terminate and the property will revert to the grantor or his successors in interest. *Mount Olivet Cemetery*, 164 F.3d at 485; *Wyoming*, 27 IBLA at 164 (citing Simes; 1 Tiffany, Herbert T., *Real Property* §

220 (3d ed. 1939)). But, until the condition for reverter is triggered, the owner of the limited fee is considered the "absolute owner of the land."[8] *Choctaw O. & G. R.R. Co. v. Mackey*, 256 U.S. 531, 538-39 (1921). Thus, if the federal government granted a railroad right-of-way as a limited fee, the government would hold no present property interest in the land so long as it continued to be used for railroad purposes. *Northern Pacific*, 190 U.S. at 270. If, in that circumstance, the government were to convey the surrounding land to a private party, the conveyance would not transfer title to the land underlying the right-of-way. *Id*. at 270. And the owner of the surrounding lands would not acquire the government's possibility of reverter in the railroad right-of-way, unless that future interest was expressly conveyed.

The Tenth Circuit's recognition of an "implied reversionary interest" in an easement does not comport with the traditional rules of property. Indeed, even commentators who support the modern rails-to-trails policy, acknowledge that *Oregon Short Line* created a property interest that was neither recognized nor bound by common law principles. *See, e.g.*, Darwin P. Roberts, *The Legal History of Federally Granted*

[8] A possibility of reverter does not vest rights in the holder until the conditions necessary to trigger the reversionary interest transpire. *Commonwealth Transp. Comm'r v. Windsor Indus., Inc.*, 630 S.E.2d 514, 520, 523 (Va. 2006) (a possibility of reverter does not accrue as an enforceable right to reconveyance until the contingencies for the forfeiture of the fee occur; possibility of reverter is not a vested right); *Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1201, 1233 (D. Utah 2004) (possibility of reverter is a limited interest, immaterial with respect to the current right of possession; it does not establish ownership of the property; it is, at best, a future estate and not a present interest; and it is not considered property in the constitutional sense).

Railroad Rights-of-Way and the Myth of Congress's "1871 Shift", 82 U. Colo. L. Rev. 85, 101 (2011); 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); 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). The only reason for the Tenth Circuit's rule is to alter property law in a manner that gives effect to the government's later-adopted policies:

> [T]he policy interests of the United States sometimes shift. Whereas the 1875 Act legislative history suggests that the railroads should be given only a right-of-way through the public lands so the public land can be reserved for homesteading by settlers and for educational purposes, the government currently urges use of the same land for the Rails to Trails program. Moreover, the United States Supreme Court in Great Northern used the presumption in favor of the government to establish the railroad right-of-way as an easement, whereas the government now is attempting to use the presumption in its favor to define the right-of-way as in the nature of a fee, with a reversionary right. The 1875 Act, however, is not ambiguous, rather, the 1875 Act is silent regarding a reversionary right in the government's favor and uses the clear phrase "right of way through the public lands of the United States . . . ."

Beres v. United States, 64 Fed. Cl. 403, 423 (2005) (citing the Act of 1875, § 1, and criticizing *Marshall* and *Oregon Short Line*). Such a drastic change in the law of property, however, should only be made if it is the express and clear intent of Congress, not out of expedience.

III

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

The consequences of the Tenth Circuit's decision are far-reaching. The common law relies on a predicable and well-understood system for characterizing the various types of interests in property. *See, e.g., Preseault II*, 100 F.3d at 1542-46; *Carney*, 757 P.2d at 562-63. The terms used by the common law have precise definitions, and a complex system of rules flows from those definitions. *Id.*

Landowners rely on those definitions and terms 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. *See Hardin v. Jordan*, 140 U.S. 371, 381 (1891) (An attempt to impute an unexpressed reversionary interest into a government land grant "is calculated to render titles uncertain, and to derogate from the value of [the property].").

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." *Leo Sheep*, 440 U.S. at 687 (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*, 64 Fed. Cl. at 427 ("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."). Accordingly, this Court condemned the very idea that the government can hold an implied property interest that is inconsistent with the terms of a property grant. *Leo Sheep*, 440 U.S. at 687; *Hardin*, 140 U.S. at 381.

This case provides a good example of the rights threatened by the Tenth Circuit's rule. The Brandts' parents acquired title in fee simple to property traversed by a railroad easement. Pet. at 10-11. It is well-recognized that a federal land patent passes "a perfect and consummate title" to the owner.[9] *Wilcox v. Jackson*, 38 U.S. 498, 516 (1839); *Swendig v. Washington Water Power Co.*, 265 U.S. 322, 331 (1924) ("[W]hen a patent issues in accordance with governing statutes, all title and control of the land passes from the United States."). A federal land patent "is intended to quiet title to and secure the enjoyment of the land for the patentees and their successors." *Grainger v. United States*, 197 Ct. Cl. 1018, 1024 (1972) (citing *Dominguez De Guyer v. Banning*, 167

[9] "A patent to land, issued by the United States under authority of law, is the highest evidence of title, something upon which its holder can rely for peace and security in his possession. It is conclusive evidence of title against the United States and all the world, until cancelled or modified by an action brought for this purpose." *Nichols v. Rysavy*, 610 F. Supp. 1245, 1254 (D.S.D. 1985) (quoting 2 *The American Law of Mining*, § 1.29, at 357), *aff'd*, 809 F.2d 1317 (8th Cir.), *cert. denied*, 484 U.S. 848 (1987).

U.S. 723, 743-44 (1897)). 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); *see also United States v. Eaton Shale Co.*, 433 F. Supp. 1256, 1267 (D. Colo. 1977) ("The [government] loses its jurisdiction over the land as soon as a valid patent is issued." (quoting 2 *Patton on Land Title*, § 292, at 26-27)). Under the rule repudiated by the Tenth Circuit, resolution of any dispute over ownership of the land would be resolved by the plain terms of the conveyances: a patent of land underlying a railroad right-of-way "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." *Hash*, 403 F.3d at 1314 (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*.)).

The Tenth Circuit's rule, however, states that the United States will always hold a superior "reversionary interest" in the land under an abandoned railway easement, regardless of the plain meaning of the words of the 1875 Act and the plain meaning of the words in a land patent. Under that 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 rule will impact more than the current owners of patented lands. The federal government conveyed millions of acres of land into

private ownership with patents that did not reserve any reversionary rights to the United States. No prospective purchaser of the patented lands could have found a right-of-way reservation from examining either the underlying legislation, the patents, or the public land records over the years following the issuance of the patents. *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."). The decision below, by repudiating the common law rules of property in favor of a rule that grants the federal government an unexpressed reservation in federal land patents, would not only impair the rights of the patentees but would also impact bona fide purchasers succeeding to their titles, long after the time when their rights should have been deemed vested by title.

CONCLUSION

The Tenth Circuit's decision undermines this Court's policy of promoting certainty and predictability in land titles by abolishing the rights and expectations established by traditional rules of real property law. The decision below vests essential property rights in the federal government, despite alienation, allowing the government to wait for years—even a century or more—before exercising its rights against the current owners. There is no justification for a rule that gives the government an unexpressed property interest in lands that it had long-ago conveyed into private ownership. This Court should reverse the Tenth Circuit's opinion in this case and reaffirm the fundamental common law principle that ownership of land will be determined by title.

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