United States Court of Appeals for the Federal Circuit

JEFFREY MEMMER, GILBERT EFFINGER, LARRY GOEBEL, SUSAN GOEBEL, OWEN HALPENY, MATTHEW HOSTETTLER, JOSEPH JENKINS, MICHAEL MARTIN, RITA MARTIN, MCDONALD FAMILY FARMS OF EVANSVILLE, INC., REIBEL FARMS, INC., JAMES SCHMIDT, ROBIN SCHMIDT,

Plaintiffs-Appellants,

– v. –

UNITED STATES,

Defendant-Cross-Appellant.

On Appeal from the United States Court of Federal Claims in Case No. 1:14-cv-00135-MMS, Honorable Margaret M. Sweeney, Senior Judge

BRIEF FOR NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS, CATO INSTITUTE, OWNERS' COUNSEL OF AMERICA, SOUTHEASTERN LEGAL FOUNDATION, REASON FOUNDATION, AND PROFESSOR JAMES W. ELY, JR., AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS URGING REVERSAL

MARK F. (THOR) HEARNE, II
STEPHEN S DAVID
TRUE NORTH LAW, LLC
112 South Hanley
Suite 200
St. Louis, MO 63105
(314) 296-4000

Counsel for Amici Curiae

SEPTEMBER 24, 2021

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2021-2133, -2220

Short Case Caption Memmer, et al. v. United States

Filing Party/Entity Amici Curiae

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 9/24/21

Signature: /s/ Mark F. (Thor) Hearne, II

Name: Mark F. (Thor) Hearne, II

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
National Association of Reversionary Property		
Cato Institute		
Owners' Counsel of America		
Southeastern Legal Foundation		
Reason Foundation		
Professor James W. Ely, Jr.		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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Alexander, et al. v. United States, No. 1:18CV4371	U.S. Court of Federal Claims	Counsel for Amici Curiae are counsel for Plaintiffs
Brott, et al. v. United States, No. 1:14CV567	U.S. Court of Federal Claims	Counsel for Amici Curiae are counsel for Plaintiffs
Butler, et al. v. United States, No. 1:17CV667	U.S. Court of Federal Claims	Counsel for Appellants are counsel for Plaintiffs

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Reversionary Property Owners is a non-profit foundation dedicated to defending the Fifth Amendment right to compensation when the government takes an owner's property under the federal Trails Act.[2] See, *e.g.*, *National Ass'n of Reversionary Property Owners* v. *Surface Transp. Bd.*, 158 F.3d 135 (D.C. Cir. 1998) (*NARPO*), and *amicus curiae* in *Preseault* v. *I.C.C.*, 494 U.S. 1 (1990) (*Preseault I*), and in *Brandt Rev. Trust* v. *United States*, 572 U.S. 93 (2014).

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and

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[1] This brief is not authored, in whole or part, by any party's counsel. No party, party's counsel, or person other than *amici curiae*, their members or counsel contributed money intended to fund the preparation or submission of this brief. Ilya Shapiro, Director of Cato Institute's Robert A. Levy Center for Constitutional Studies, Leslie Fields, Executive Director of Owners' Counsel of America, Kimberly S. Hermann, General Counsel for the Southeastern Legal Foundation, and Manuel S. Klausner, legal counsel for Reason Foundation, have authorized the filing of this brief on behalf of their respective organizations. Professor James W. Ely, Jr., has authorized the filing of this brief on behalf of himself. All parties have consented to the filing of this brief.

[2] The National Trails System Act of 1968, as amended in 1983, 16 U.S.C. 1241, *et seq.*

produces the annual *Cato Supreme Court Review*.

Owners' Counsel of America (OCA) is a national not-for-profit organization of lawyers dedicated to the principle that the right to own and use property is "the guardian of every other right" and the basis of a free society. James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3rd ed. 2008). OCA was specifically founded to level the playing field in situations where private landowners find themselves pitted against powerful governmental entities with eminent domain powers and unlimited resources. To that end, OCA works for property owners across the nation to protect and advance the rights of private property.

Southeastern Legal Foundation is a national nonprofit, public-interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. For over forty years, Southeastern Legal Foundation has advocated for the protection of private property interests from unconstitutional takings.

Reason Foundation is a nonpartisan public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing and promoting libertarian principles and policies, including free markets, individual liberty, and the rule of law. To further Reason's commitment to "Free Minds and Free Markets," Reason files amicus briefs on significant constitutional issues.

Professor James W. Ely, Jr., is the Milton R. Underwood Professor of Law Emeritus at Vanderbilt University Law School. Professor Ely is the co-author of the leading treatise on the law of easements, *The Law of Easements and Licenses in Land* (revised ed. 2018), and is the author of *The Guardian of Every Other Right*. The Supreme Court recently relied upon Professor Ely's scholarship in *Brandt*, 572 U.S. at 96.

ARGUMENT

I. The federal government takes private property when it invokes the Trails Act to encumber an owner's land with a rail-trail corridor easement.

The Surface Transportation Board (the Board) issued an order invoking the Trails Act and imposed a rail-trail corridor easement upon Indiana owners' land. This is a taking of private property for which the Fifth Amendment compels the government to pay the landowners just compensation. *Preseault I*, 494 U.S. at 8, 19; *Preseault* v. *United States*, 100 F.3d 1525, 1550 (Fed. Cir. 1996) (*en banc*) (*Preseault II*); *Brandt*, 572 U.S. at 105; *Toews* v. *United States*, 376 F.3d 1371, 1376, 1381 (Fed. Cir. 2004); *Trevarton* v. *South Dakota*, 817 F.3d 1081, 1087 (8th Cir. 2016)).

The Fifth Amendment provides that "no person shall be***deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." In *Cedar Point Nursery* v. *Hassid*, the

Supreme Court reaffirmed this principle and declared that "the government likewise effects a physical taking when it occupies property," and that these "sorts of physical appropriations constitute the 'clearest sort of taking,' and we assess them using a simple, *per se* rule: The government must pay for what it takes." 141 S.Ct. 2063, 2071 (2021) (citation omitted).

The government's "categorical" obligation to pay a landowner compensation arises the moment the government takes private property. *Knick* v. *Township of Scott*, 139 S.Ct. 2162, 2172 (2019) ("because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time"); *Tahoe-Sierra Preservation Council* v. *Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002) ("When the government physically takes possession of an interest in property for some public purpose, it has a *categorical* duty to compensate the former owner***.") (emphasis added); *Horne* v. *Dep't of Agriculture*, 576 U.S. 350, 358 (2015) ("The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.").

A. The Trails Act "destroys" and "effectively eliminates" a landowner's private property.

Congress wanted to preserve otherwise-abandoned railroad corridors by delaying the railroad's authority to abandon the corridor for six months to allow a non-railroad (such as a local government or a private organization) to acquire the otherwise-abandoned right-of-way for public recreation. See *National Wildlife Federation* v. *I.C.C.*, 850 F.2d 694, 697 (D.C. Cir. 1988).[3] But this scheme did not work because, under state law, the railroad had nothing to sell. As the Supreme Court noted, whatever interest the railroad held in the right-of-way terminated when the railroad no longer operated a railway across the land. See *Preseault I*, 494 U.S. at 7-8; *Brandt*, 572 U.S. at 105; *Leo Sheep* v. *United States*, 440 U.S. 668, 687-88 (1979). The landowners' state-law reversionary right to unencumbered use of the land was a "problem."[4] *Preseault I*, 494 U.S. at 7-8 ("many railroads do not own their rights-of-way outright but rather hold them under easements [and]***the property reverts to the abutting landowner upon abandonment of rail operations").

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[3] See also *Citizens Against Rails-to-Trails* v. *Surface Transp. Bd.*, 267 F.3d 1144, 1149 (D.C. Cir. 2001); *NARPO*, 158 F.3d at 139.

[4] "Reversionary" is a shorthand term for the fee owner's interest. "Instead of calling the property owner's retained interest a fee simple burdened by the easement, this alternative labels the property owner's retained interest***a 'reversion' in fee." *Preseault II*, 100 F.3d at 1533. See also *Brandt*, 572 U.S. at 105 n.4.

So, in 1983, Congress amended the Trails Act adding section 8(d).[5] Section 8(d) provides, "interim [trail] use [or railbanking] shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. §1247(d). Congress adopted section 8(d) for the express purpose of "destroying" and "effectively eliminating" landowners' state-law reversionary property interests and allowing the Board to impose a new easement for railbanking and public recreation.[6]

Once the Board invokes section 8(d),

> [t]he [Board] retains jurisdiction over [the land once used for] a rail line throughout the CITU/NITU negotiating period, any period of rail banking/interim trail use, and any period during which rail service is restored. It is only upon a railroad's lawful consummation of abandonment authority that the Board's jurisdiction ends. At that point, the right-of-way may revert to reversionary landowner interest, if any, pursuant to state law.
>
> *National Trails System Act and Railroad Rights-of-Way*, 2012 WL 1498609, *5 (STB Decision April 25, 2012).

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[5] See Mark F. (Thor) Hearne, *The Trails Act: Railroading Property Owners and Taxpayers for More Than a Quarter Century*, 45 *ABA Real Property, Trust & Estate L.J.* 115, 173 (Spring 2010).

[6] See *Preseault I*, 494 U.S. at 8. "It is settled law that a Fifth Amendment taking occurs in Rails-to-Trails cases when government action *destroys* state-defined property rights by converting a railway easement to a recreational trail, if trail use is outside the scope of the original railway easement." *Ladd v. United States*, 630 F.3d (Fed. Cir. 2010) (*Ladd I*) (emphasis added). See also *Caldwell v. United States*, 391 F.3d 1226, 1228 (Fed. Cir. 2004) ("a Fifth Amendment taking occurs when, pursuant to the Trails Act, state law reversionary interests are *effectively eliminated* in connection with a conversion of a railroad right-of-way to trail use") (emphasis added).

State law is preempted beginning with the Board's original invocation of section 8(d) and state law is continually and perpetually preempted thereafter.

> Congress made it clear that there can be no abandonment if there is interim trail use on the line. ***[I]f the parties are still negotiating a trail agreement at the end of the Trails Act negotiating period (or are continuing to negotiate the implementation of any other of our conditions that preclude consummation), the line will not be considered to be fully abandoned until a consummation notice is filed as required under our rules.
>
> *Abandonment and Discontinuance of Rail Lines and Rail Transportation*, 2 S.T.B. 311, n.6 (1997).

The Board's invocation of section 8(d) "pre-empt[s] the operation and effect of certain state laws that 'conflict with or interfere with federal authority over the same activity.'" *Preseault I*, 494 U.S. at 21 (O'Connor, J., concurring). State courts "cannot enforce or give effect to asserted reversionary interests***." *Id.* at 22. The federal government's jurisdiction over the strip of land is plenary and exclusive. *Chicago & N.W. Transp.* v. *Kalo Brick & Tile*, 450 U.S. 311, 321 (1981) ("The exclusive and plenary nature of the [ICC]'s authority to rule on carriers' decisions to abandon lines is critical to the congressional scheme, which contemplates comprehensive administrative regulation of interstate commerce.").[7]

[7] See also *Grantwood Village* v. *Missouri Pac. RR.*, 95 F.3d 654, 657 (8th Cir. 1996) ("the ICC has exclusive and plenary authority to determine whether a rail line has been abandoned"); *Barclay* v. *United States*, 443 F.3d 1368, 1374 (Fed. Cir. 2006) ("While state law generally creates the property interest in a railroad right-of-way, 'the disposition of reversionary interests [is] subject***to the [Board's] "exclusive

The trail-use agreement between the railroad and trail-user is a private agreement not submitted to, reviewed by, or approved by the Board. Indeed, the owners whose land is subject to the new rail-trail corridor are never even told of the agreement between the railroad and trail-user.[8] See *Birt* v. *Surface Transp. Bd.*, 90 F.3d 580, 589 (D.C. Cir. 1996); *Rail Abandonments – Supplemental Trails Act Procedures*, 4 I.C.C.2d 152 (1987). The Board also freely issue "replacement NITUs," substituting new and different trail-users even after the trail-use negotiating period has expired. See *Barclay*, 443 F.3d at 1376 (despite expiration of the original NITU, replacement NITU precluded consummation of abandonment and reversion of landowners' interest). The Board may grant *any* railroad (not just the railroad that had abandoned the right-of-way) authority to build a new railway line across the owner's land in the indefinite future. The Board can indefinitely extend the period for the railroad to reach a trail-use agreement. *Caldwell*, 391 F.3d at 1234 ("If no trail use agreement is reached within 180 days, but the railroad wishes to continue negotiations with the trail operator rather than consummate abandonment, the regulations also allow the NITU to be extended.") (citing 49 C.F.R. §1152.29(e)(1)).

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and plenary" jurisdiction to regulate abandonments' of railroad rights of way.") (citation omitted; quoting *Preseault I*, 494 U.S. at 8, 16).

[8] See *Twenty-Five Years of Railbanking: A Review and Look Ahead, Hearing before the Surface Transportation Board*, Ex Parte No. 690 (July 8, 2009). See also Hearne, *The Trails Act*, *supra*, note 5, at 133-35.

B. The Board's invocation of the Trails Act is a *per se* taking for which the government has a "categorical" obligation to pay the landowner.

The Board's invocation of the Trails Act is a "direct appropriation of [the owner's reversionary] property, or the functional equivalent of a practical ouster of the owner's possession." *Lucas* v. *South Carolina Coastal Council,* 505 U.S. 1003, 1014 (1992). The Trails Act imposes "a new easement for the new use, constituting a physical taking of the right of exclusive possession that belonged to the [landowners]." *Preseault II*, 100 F.3d at 1550. See also *Trevarton*, 817 F.3d at 1087 ("as a matter of federal law it granted 'a new easement for a new use'"***the 'new easement' [the trail-user] acquired under the Trails Act, [is] an interest which authorized [the trail-user] to use the Trail for Trails Act purposes.") (quoting *Preseault II*, 100 F.3d at 1550).

When the government "depriv[es] the owner of the right to possess, use and dispose of the property," the government has a "categorical" duty to compensate the owner. *Horne*, 576 U.S. at 358. Government action confiscating an owner's property or "practically oust[ing]" an owner from possession of his property is "perhaps the most serious form of invasion of an owner's property interest, depriving the owner of the right to possess, use and dispose of the property." *Id.* at 360 (internal quotation omitted). The Fifth Amendment requires the government to compensate the owner for what the owner lost, not what the government gained.

Boston Chamber of Commerce v. *City of Boston*, 217 U.S. 189, 195 (1910) ("the question is, What has the owner lost? not, What has the taker gained?") (Holmes, J.). The Fifth Amendment is self-executing. *San Diego Gas & Elec. Co.* v. *City of San Diego*, 450 U.S. 621, 654 (1981).[9] The Supreme Court reaffirmed this point in *Tahoe-Sierra*, stating, "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a *categorical* duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." 535 U.S. at 322 (emphasis added; citation omitted; citing *United States* v. *Pewee Coal Co.*, 341 U.S. 114, 115 (1951)). See also *Arkansas Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 31 (2012).

Imposing an easement upon a landowner's property is a *per se* taking even when the government does not take or itself occupy the land.[10] *Cedar Point Nursery*, 141 S.Ct. at 2072 ("The access regulation appropriates a right to invade [Cedar Point Nursery's] property and therefore constitutes a *per se* physical taking."). The Court

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[9] Dissenting opinion of Justice Brennan, which was later adopted by the Court in *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 318 (1987).

[10] See, *e.g.*, *Cedar Point Nursery*, 141 S.Ct. at 2073 ("appropriation of an easement constitutes a physical taking") (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979), and citing *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 423 (1982), *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 841-42 (1987) (easement for a public walkway along owner's land), and *Dolan v. City of Tigard*, 512 U.S. 374, 384, 396 (1994) (imposing an easement for bike trails and public greenways).

explained the "the right to exclude is universally held to be a fundamental element of the property right and is one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 2072-73.[11]

Even if the duration of the taking is temporary, it is still a *per se* physical taking for which the government has a "categorical" duty to compensate the owner. *Cedar Point Nursery*, 141 S.Ct. at 2074 ("we have held that a physical appropriation is a taking whether it is permanent or temporary"). The Supreme Court continued, "Our cases establish that 'compensation is mandated when a leasehold is taken and the government occupies property for its own purposes, even though that use is temporary.'" *Id.* (quoting *Tahoe-Sierra*, 535 U.S. at 322, and citing *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945), and *United States* v. *Petty Motor*, 327 U.S. 372 (1946)).[12] The duration of a taking concerns the amount of compensation the owner is due, not the government's liability for a taking. *Id.* ("The duration of an appropriation — just like the size of an appropriation — bears only on the amount

[11] Internal quotations omitted; quoting *Kaiser Aetna*, 444 U.S. at 176, 179-80.

[12] See also *Arkansas Game*, 568 U.S. at 32 ("our decisions confirm that takings temporary in duration can be compensable") (citing and quoting *United States v. Westinghouse Elec. & Mfg. Co.*, 339 U.S. 261, 267 (1950) (involving "[c]ondemnation for indefinite periods of occupancy [took hold as] a practical response to the uncertainties of the Government's needs in wartime"), *Pewee Coal*, 341 U.S. at 114, *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), and *General Motors*, 323 U.S. at 373).

of compensation.") (some citations omitted) (citing *Loretto*, 458 U.S. at 436-37, and *United States* v. *Dow*, 357 U.S. 17, 26 (1958)).

The Supreme Court explained, "[a] temporary takings claim could be maintained as well when government action occurring outside the property gave rise to 'a direct and immediate interference with the enjoyment and use of the land.'" *Arkansas Game*, 568 U.S. at 33 (citing and quoting *United States* v. *Causby*, 328 U.S. 256, 266 (1946)). This Court, in *Hendler* v. *United States*, explained that the government, "when it has taken property by physical invasion, could subsequently decide to return the property to its owner, or otherwise release its interest in the property. Yet no one would argue that would somehow absolve the government of its liability for a taking during the time the property was denied to the property owner." 952 F.2d 1364, 1376 (Fed. Cir. 1991). This Court continued, "[a]ll takings are 'temporary,' in the sense that the government can always change its mind at a later time***." *Id.* And Chief Justice Roberts, writing for the Supreme Court, emphasized this point, stating, "A bank robber might give the loot back, but he still robbed the bank." *Knick*, 139 S.Ct. at 2172.

C. A landowner's right to compensation arises immediately when the Board invokes the Trails Act and does not depend upon the railroad and trail-sponsor reaching a private agreement.

During the early years of Trails Act litigation, the government argued landowners' claims were time-barred if the landowner did not sue the federal government within six years after the Board first issued an order invoking the Trails Act. The government said the six-year limitation period in 28 U.S.C. §2501 begins running when the government first issues an order invoking the Trails Act.[13] This Court accepted the government's argument and announced a "bright-line rule" that a Trails Act taking occurs, and an owner's claim for compensation accrues, when the Board first invokes section 8(d). See *Caldwell*, 391 F.3d at 1229 ("A Fifth Amendment taking occurs if the original easement granted to the railroad under state property law is not broad enough to encompass a recreational trail."); *Barclay*, 443 F.3d at 1378 ("the issuance of the original NITU triggers the accrual of the cause of action" for a taking); *Illig* v. *United States*, 274 Fed. App'x 883 (Fed. Cir. 2008); *Ladd I*, 630 F.3d at 1023-24, *reh'g and reh'g en banc denied*, 646 F.3d at 910 ("[I]t is settled law. A taking occurs when state law reversionary property interests are blocked. *** *The issuance of the NITU is the only event that must occur to entitle*

[13] This Court correctly held that the statute of limitations does not begin until the landowner knows of the government's order invoking the Trails Act. See *Ladd v. United States*, 713 F.3d 648, 653 (Fed. Cir. 2013) (*Ladd II*).

the plaintiff to institute an action.") (emphasis added; internal quotations omitted); *Ladd II*, 713 F.3d at 652 ("In the context of Trails Act cases, the cause of action accrues when the government issues the first NITU that concerns the landowner's property."). In *Barclay*, this Court reaffirmed this bright-line rule and explained,

> But even if under [state] law the reversion would not occur until after federal authorization of abandonment, that state law reversion was still delayed by the issuance of the NITU, and the claim still accrued with the issuance of the NITU. *It similarly makes no difference that railroad use may have continued after the NITU issued.* The termination of railroad use was still delayed by the NITU.
>
> *Barclay*, 443 F.3d at 1374 (emphasis added).

When the landowners in *Illig* sought a writ of certiorari on the issue of whether their claims were time-barred, then-Solicitor General Elena Kagan wrote,

> The issuance of the NITU "thus marks the 'finite start' to either temporary or permanent takings claims." When the NITU is issued, all the events have occurred that entitle the claimant to institute an action based on federal-law interference with reversionary interests, and any takings claim premised on such interference therefore accrues on that date.
>
> Brief for the United States in Opposition to Petition for Writ of Certiorari, 2009 WL 1526939, *12-13 (quoting *Caldwell*, 391 F.3d at 1235).

In *Illig*, Solicitor General Kagan further wrote,

> It is true that, under *Caldwell*, landowners may seek compensation for an alleged taking immediately upon issuance of the NITU, *even though*

> *no trail use agreement has been reached, and any taking that may later be found would only have been temporary*.
>
> *Id.* at *15 (emphasis added).[14]

This Court reaffirmed this principle and "bright-line rule" in *Caquelin* v. *United States*, explaining,

> The NITU***was a government action that compelled continuation of an easement for a time; it did so intentionally and with specific identification of the land at issue; and it did so solely for the purpose of seeking to arrange, without the landowner's consent, to continue the easement for still longer, indeed indefinitely, by an actual trail conversion.
>
> 959 F.3d 1360, 1367 (Fed. Cir. 2020)
> (citing *Brandt*, 572 U.S. at 104-05).

In *Caquelin*, this Court held, "[w]e conclude that *Ladd I* remains governing precedent and has not been undermined by *Arkansas Game* in favor of a non-categorical [taking] approach." 959 F.3d at 1370. And in *Knick*, the Supreme Court

[14] The Supreme Court denied the landowners' petition for certiorari in *Illig*. 557 U.S. 935 (2009). This point of law is critically important because the time between the government originally invoking the Trails Act and the railroad and a trail-user reaching an agreement frequently endure a decade or longer – far longer than the six-year statute of limitations. See, *e.g.*, *Wisconsin Cent. Ltd.*, No. AB-303 (Sub-No. 18X) (Surface Trans. Bd. July 28, 2009) (NITU issued March 1998 and extended until January 2010). Thus, if a landowner must await the railroad and some trail-user reaching some private agreement (about which the owner is never told) before seeking compensation, the statute of limitations will have expired. The Justice Department has exploited this trap in past Trails Act cases by using the statute of limitations to deny hundreds of landowners the compensation they are due. See *Caldwell*, 391 F.3d at 1233-34, *Barclay*, 443 F.3d at 1373, and *Illig*, 274 Fed. App'x at 884.

reaffirmed the principle that "because a taking without compensation violates the self-executing Fifth Amendment *at the time of the taking*, the property owner can bring a federal suit at that time." 139 S.Ct. at 2170, 2172 (emphasis added). When the government issues an order taking private property without paying the owner, the government violates the owner's constitutional right and this is an ongoing constitutional violation that is not remedied until the government pays the owner for what the government has taken. See *id.* at 2170-72 (citing *First English*, 482 U.S. at 321).

II. Encumbering an owner's land with an easement for public recreation and a future railroad is a *per se* taking for which the government has a categorical obligation to pay the owner, not a "regulatory" taking subject to the *ad hoc* multi-factor *Penn Central* analysis.

The government claims a *per se* taking of a landowner's property does not occur until the railroad and trail-sponsor execute a private trail-use agreement, and that until that happens, the government's taking of the landowner's property is only a "temporary regulatory" taking. The government's argument is contrary to the Supreme Court's Takings Clause jurisprudence, contrary to this Court's holdings, and contrary to all authority. In *Caquelin*, this Court held, "[w]e conclude that *Ladd I* remains governing precedent and has not been undermined by *Arkansas Game* in favor of a non-categorical approach." 959 F.3d at 1370. See also *Ladd I*, 630 F.3d at 1023-24 ("The issuance of the NITU is the only event that must occur to 'entitle

the plaintiff to institute an action.' Accrual is not delayed until a trail use agreement is executed or the trail operator takes physical possession of the right-of-way.") (quoting *Caldwell*, 391 F.3d at 1235, and *Barclay*, 443 F.3d at 1373); *Knick*, 139 S.Ct. at 2170-72.

The government has repeatedly made and lost this "Trails-Act-takes-nothing-because-it-changes-nothing" argument.[15] In fact, the Supreme Court mocked this argument in *Preseault I*, and this Court, while deliberating *Ladd*, recalled that this argument was ridiculed by the Supreme Court. In *Preseault I*, the government argued the Board's invocation of section 8(d) did not take the owner's state-law interest in their property because there was a railroad easement across the owners' land before the federal government imposed two new easements upon the owners' land. During oral argument in *Ladd I*, Judge Moore reminded the government this argument does not work.

> Government counsel (12:37-12:47): "The [landowners] enjoy a fee interest burdened only by the railroad's right to run a railroad. That was the pre-existing situation before the NITU; that's the same situation today."
>
> Judge Moore (12:47-13:02): "That's the argument you made unsuccessfully in the Supreme Court where Justice Scalia seemed to actually make fun of you? I mean, I don't think that's going to work

[15] This Court held, "The vague notion that the State may at some time in the future return the property to the use for which it was originally granted, does not override its present use of that property inconsistent with the easement." *Preseault II*, 100 F.3d at 1554 (Rader, J., concurring).

> on us at this point. You can't say 'oh yeah, well they didn't lose anything because they didn't have anything the day before.'"[16]

Judge Moore was recalling Chief Justice Rehnquist and Justice Scalia's response to this argument that the Trails Act "takes nothing because it changes nothing." The courtroom broke into laughter when Chief Justice Rehnquist described this argument as, "That is like saying if my aunt were a man she would be my uncle." Justice Scalia then responded describing the argument as:

> The ICC didn't order the railroad to keep running. Saying the railroad could have continued using [the land] for rail purposes so you really haven't lost anything. In fact, they didn't, but they might have. Even though you have a deed that says if we stop using it for rail purposes its yours, you say, well you haven't lost anything because, yeah, they have stopped using it for rail purposes but they might not have. That's not very appealing to me.[17]

The government's argument is further flawed because the government claims the owners must prove the railroad abandoned the easement. This is not true. As this Court's *en banc* decision in *Preseault II* held, "if the railroad acquired only an easement***limited to use for railroad purposes," there is a taking of a new easement for "future use as a public recreational trail." 100 F.3d 1533. By no longer using

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[16] *Ladd v. United States* (Fed. Cir. No. 2010-5010), oral argument held Sept. 7, 2010, available at: http://cafc.uscourts.gov/oral-argument-recordings?title=ladd&field_case_number_value=2010-5010&field_date_value2%5Bvalue%5D%5Bdate%5D=.

[17] Oral argument, *Preseault* v. *I.C.C.*, 494 U.S. 1 (1990) (No. 88-1076), available at: https://www.oyez.org/cases/1989/88-1076.

the original easement for railroad purposes and granting a new easement for public recreation, the government exceeded the terms of the original easement and the original easement had terminated. The question of whether the original easement terminated prior to the date of the Board's order invoking the Trails Act only arises when the original easement granted the railroad "was broad enough to encompass a recreational trail." *Id.* See also *Toews*, 376 F.3d at 1375.

In *Caldwell*, *Barclay*, and *Illig* the government argued a landowner is entitled to compensation when the Board first issues an order invoking section 8(d) and that the six-year statute of limitation begins to run when the Trails Act is first invoked. The government won this argument, and, in winning this argument, avoided the government's constitutional obligation to pay the hundreds of Georgia, California, and Missouri landowners whose property was the subject of the *Caldwell, Barclay,* and *Illig* cases. See, *supra*, note 14. But, then in *Ladd I* and *Ladd II*, the government made a *volte-face* and argued the owner's property was not taken and the owner did not have a claim for compensation until after the railroad and a trail-user reached an agreement. The government is now recycling this argument that, until a private trail-use agreement is reached, the owner's claim is to be treated as a temporary regulatory taking to be evaluated under *Penn Central Transp. Co.* v. *N.Y.C.*, 438 U.S. 104, 124 (1978).

The government now supposes the Board's invocation of section 8(d) gives rise to multiple different takings – both temporary regulatory takings and permanent physical takings – the timing and character of which depend upon non-government actors (the railroad and trail-user) negotiating an agreement that is not public and is not provided to the government or to the landowners. Under the government's argument, the Board's invocation of section 8(d) places landowners in a Trails Act-limbo where the government has denied them use and possession of their land but the owners are not entitled to compensation until the railroad and trail-sponsor reach a private agreement, to which the government and owners are not parties and about which they are not told.

This fallacious facet of the government's argument has also been previously rejected and now recycled. In *Caldwell*, this Court explained that the "two different takings" argument (which the government has repurposed as its "*Caquelin* theory") is contrary to Supreme Court takings jurisprudence. This Court explained that the Supreme Court, in *United States* v. *Dow*, 357 U.S. at 23, "rejected" this theory as "bizarre" and instead "endorsed a rule similar to the one that we adopt here, namely that a taking occurs when the owner is deprived of use of the property, there by physical possession, here by blocking the easement reversion." *Caldwell*, 391 F.3d at 1235. This Court affirmed this holding in *Barclay*, 443 F.3d at 1378 ("This is merely another version of the argument — rejected in *Caldwell* — that the original

NITU should not be viewed as the taking because subsequent events might render the NITU only temporary.").

The government's change of position in an attempt to take private property without paying the landowner has been repeatedly condemned. In *Leo Sheep* the Supreme Court held, "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." 440 U.S. at 687-88. The Court reaffirmed this principle in *Brandt*, 572 U.S. at 110 ("We decline to endorse [the government's] stark change in position, especially given 'the special need for certainty and predictability where land titles are concerned.'") (quoting *Leo Sheep*, 440 U.S. at 687). Chief Justice Roberts, speaking for the Court, summarized, "[t]he Government loses [its] argument today, in large part because it [previously] won when it argued the opposite before this Court***." *Brandt*, 572 U.S. at 102.

III. Trails Act takings are not subject to some multi-factor "causation analysis."

A. *Arkansas Game* does not require "causation analysis" in Trails Act cases.

In *Caquelin* v. *United States*, 121 Fed. Cl. 658 (2015), 697 Fed. App'x 1016 (Fed. Cir. 2017), the government claimed the court must engage in a detailed multi-factored analysis to determine the "causation" of the Trails Act taking. This is an attempt by the government to revisit and enrich its rejected *Penn Central* regulatory taking argument by claiming *Arkansas Game* now requires some multi-factor analysis in Trails Act cases. This Court described the government's argument as follows:

> [The government] does not argue that, as a matter of law, no taking occurs unless a trail use agreement is reached. Nor does the government dispute that if a temporary taking occurred, it began on***the date of the NITU. Rather, the government argues that the 180-day blocking of reversion was not a categorical taking but instead calls for a multi-factor takings analysis. It invokes the general "regulatory takings" framework set forth to govern land-use restrictions in *Penn Central* [ ] and the temporary-takings analysis set forth to govern the repeated controlled floodings, for water management projects, at issue in *Arkansas Game* [ ] – without indicating whether those standards differ materially.

Caquelin, 697 Fed. App'x at 1019.

This Court remanded *Caquelin*. When Judge Lettow again ruled for the landowner on remand, the government renewed its addlepated appeal clinging to its

Caquelin argument like a limpet. In response to the government's second appeal in *Caquelin*, this Court explained the government's argument as follows:

> The government accepts that the trial court's judgment is supported by *Ladd I*, but it renews its two arguments that this court should no longer adhere to *Ladd I*. First, it contends, the Supreme Court's decision in *Tahoe-Sierra* requires that the general regulatory-takings analysis of *Penn Central* be applied to assess whether a NITU is a taking when no trail-use agreement has been reached before it expires, and that such a NITU should not be treated as a categorical taking. Second, it contends, at a minimum we should replace the categorical approach with the multi-factor approach of *Arkansas Game* — which shares certain features of the *Penn Central* analysis. ***
>
> The only post-*Ladd I* decision of the Supreme Court invoked by the government is *Arkansas Game*. We do not think, however, that *Ladd I* is inconsistent with the decisions on which the government relies, including *Arkansas Game*.

Caquelin, 959 F.3d at 1366.

This Court rejected the government's argument by writing, "[w]e *reject* the contention that *Arkansas Game* calls for displacing the categorical-taking analysis adopted in our precedents for a NITU that blocks termination of an easement, an analysis applicable even when that NITU expires without a trail-use agreement that would indefinitely extend the federal-law blocking of the easement's termination." *Caquelin*, 959 F.3d at 1363 (emphasis added). And the Supreme Court has held that "whenever regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place." *Cedar Point Nursery*, 141 S.Ct. at 2072. The Court explained, "our cases establish that appropriations of a right to

invade [an owner's property] are *per se* physical takings, not use restrictions subject to *Penn Central*." *Id.* at 2077. The point bears repeating: *Penn Central* "has no place" in the analysis of the taking of a servitude, such as a Trails Act taking.

The Supreme Court rejected the government's reading of *Arkansas Game.* In *Arkansas Game* the government didn't want to pay the owner of the land it intermittently flooded, arguing the government-induced flooding was only a non-compensable tort or trespass because the government only flooded the land temporarily. In *Arkansas Game*, the Supreme Court unanimously rejected the government's argument, holding that "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner."[18] 568 U.S. at 32-33. Justice Ginsberg, writing for the unanimous Court, held the government must compensate the owner even when private property is taken temporarily, stating, "our decisions confirm that takings temporary in duration can be compensable." *Id.*

Notwithstanding the clear holding in *Arkansas Game*, the government still argued that *Arkansas Game* established a "multi-factor" formula applicable to Trails Act takings. Since then, in *Cedar Point Nursery*, the Supreme Court rejected the government's reading of *Arkansas Game*. The Court again affirmed, "we have held

[18] Citing and quoting *Tahoe–Sierra*, 535 U.S. at 322, and *Pewee Coal*, 341 U.S. at 115.

that a physical appropriation is a taking whether it is permanent or temporary." *Cedar Point Nursery*, 141 S.Ct. at 2074. The Court repeated this point, stating, "we have recognized that physical invasions constitute takings even if they are intermittent as opposed to continuous." *Id.* at 2075 (citing *Causby*, 328 U.S. at 259). "Our cases establish that 'compensation is mandated when a leasehold is taken and the government occupies property for its own purposes, even though that use is temporary.'" *Id.* at 2074 (citing *Tahoe-Sierra,* 535 U.S. at 322, *General Motors*, 232 U.S. at 373, and *Petty Motor*, 327 U.S. at 372). As Chief Justice Roberts explained, "The duration of an appropriation – just like the size of the appropriation – bears only on the amount of compensation." *Id.* at 2074 (internal citation omitted; citing *Loretto*, 458 U.S. at 436-37, *Dow*, 357 U.S. at 26, and *Causby*, 328 U.S. at 267-68). As the Court previously explained, "'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English*, 482 U.S. at 318.

Chief Justice Roberts also debunked the government's argument that *Arkansas Game* required a court considering a Trails Act taking to engage in some multi-factor "causation analysis." The Court explained the "multi-factor causation analysis" the government tries to extract from *Arkansas Game only* applies when the

court must distinguish between a "trespass" and a "taking" in the "unique" situation of government-induced flooding:

> The distinction between trespass and takings accounts for our treatment of *temporary government-induced flooding* in *Arkansas Game* [ ]. There we held, "simply and only," that such flooding "gains no automatic exemption from Takings Clause inspection." [568 U.S.] at 338. Because *this type of flooding can present complex questions of causation*, we instructed lower courts *evaluating takings claims based on temporary flooding* to consider a range of factors, including the duration of the invasion, the degree to which it was intended or foreseeable, and the character of the land at issue. ***Our approach in *Arkansas Game* [ ] reflects nothing more than an application of the traditional trespass-versus-takings distinction to *the unique considerations that accompany temporary flooding*.
>
> *Cedar Point Nursery*, 141 S.Ct. at 2078 (emphasis added).

The Court held that government-induced intermittent flooding cases are a "unique" situation that do not apply to takings, such as Trails Act takings, where the servitude imposed upon an owner's property is not due to temporary flooding and it is not necessary to distinguish between a trespass and a taking. If the panel in *Caquelin* had the benefit of *Cedar Point Nursery*, they would not have remanded the case for a "multi-factor causation" analysis because the Supreme Court said this analysis is "unique" to government-induced flooding cases.

This Court included the "causation" discussion in its *Caquelin* opinion because the Justice Department had argued that the government's issuance of the NITU did not effect a taking of the Caquelin family's property because there was insufficient evidence that the railroad would have abandoned its railway in the

absence of the NITU. This Court recounted, the government "suggests that there is insufficient evidence to support a finding that the railroad would not have abandoned the line at issue***even if no NITU had issued." *Caquelin*, 959 F.3d at 1372-73. This Court responded, "*We reject the suggestion*." *Id.* at 1373 (emphasis added). This Court explained, "[t]he government does not point to *any evidence at all* affirmatively indicating that the railroad would have delayed abandonment past [the date the NITU expired], had there been no NITU to interfere with the grant of authority of abandonment that was set to take effect on July 5, 2013," two days after the NITU issued. *Id.* (emphasis added).

B. "Causation analysis" makes no sense in Trails Act takings.

Furthermore, as a practical matter, "causation analysis" makes absolutely no sense in Trails Act takings cases. The federal government takes a landowner's private property when the Board *first issues* an order invoking section 8(d) of the Trails Act. The "cause" of a Trails Act taking is the Surface Transportation Board issuing an order invoking section 8(d) of the federal Trails Act. See *Caldwell*, 391 F.3d at 1233-34 ("The issuance of the NITU is the only *government* action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way.") (emphasis in original); *Barclay*, 443 F.3d at 1373 ("The issuance of the NITU is the only event that must occur to entitle the plaintiff to institute an action. Accrual is

not delayed until a trail use agreement is executed or the trail operator takes physical possession of the right-of-way.") (citation and internal quotation omitted); *Illig*, 274 Fed. App'x at 884; *Ladd I*, 630 F.3d at 1023-24 ("[I]t is settled law. A taking occurs when state law reversionary property interests are blocked. ******The issuance of the NITU is the only event that must occur to entitle the plaintiff to institute an action.*") (emphasis added; internal quotations omitted);[19] *Ladd II*, 713 F.3d at 652 ("In the context of Trails Act cases, the cause of action accrues when the government issues the first NITU that concerns the landowner's property."); *Rogers* v. *United States*, 814 F.3d 1299, 1303 (Fed. Cir. 2015); *Navajo Nation* v. *United States*, 631 F.3d 1268, 1274-75 (Fed. Cir. 2011). The Board's invocation of the Trails Act is the *government action* that gives rise to a taking. No "multi-factor analysis" is necessary.

CONCLUSION

This Court should follow the Supreme Court's mandate in *Cedar Point Nursery* and *Knick*, eliminate *Caquelin's* "causation" analysis, and hold that the government is categorically obligated to pay these landowners full and just compensation for the government's *per se* taking of their property.

[19] *Reh'g and reh'g en banc denied*, 646 F.3d 910 (Fed. Cir. 2011).

Respectfully submitted,

/s/ Mark F. (Thor) Hearne, II
Mark F. (Thor) Hearne, II
Stephen S. Davis
True North Law, LLC
112 S. Hanley Road, Suite 200
St. Louis, MO 63105
(314) 296-4000
Thor@truenorthlawgroup.com

Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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