IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2015-5034

ROMANOFF EQUITIES, INC.,

Plaintiff-Appellant,

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

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the U.S. Court of Federal Claims, No. 1:11CV374
(Hon. Nancy B. Firestone)

BRIEF OF *AMICI CURIAE* CATO INSTITUTE AND CENTER OF THE AMERICAN EXPERIMENT IN SUPPORT OF PETITION FOR REHEARING BY PANEL AND EN BANC

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CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4(a), counsel for *amici curiae* Cato Institute and Center of the American Experiment certifies the following:

1. The full name of every party or *amicus* represented by one or more of the undersigned counsel is: Cato Institute and Center of the American Experiment.
2. The name of the real party in interest (if the party in the caption is not the real party in interest) represented by one or more of the undersigned counsel is: Not applicable.
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus* represented by one or more of the undersigned counsel are: None.
4. The names of all law firms and the partners or associates that appeared for the party or *amicus* now represented by one or more of the undersigned counsel in the trial court or agency or are expected to appear in this court are: Ilya Shapiro of the Cato Institute.

Dated: May 5, 2016

s/ Ilya Shapiro
Ilya Shapiro
Counsel for Amici Curiae

QUESTION PRESENTED

When this Court's decision is premised upon a novel view of state law—or even a guess about how a State's highest court would rule—should this Court certify that question of state law to the State's highest court?

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

Center of the American Experiment is a nonpartisan, nonprofit, educational organization based in Minnesota and dedicated to the principles of free enterprise, limited government, individual freedom, and time-tested American virtues.

This case concerns *amici* because it implicates state common law property rights, and the safeguards that federalism provides individual liberty.

SUMMARY OF ARGUMENT

Federalism is "more than an exercise in setting the boundary between different institutions of government for their own integrity." *Bond v. United States*, 564 U.S. 211, 222 (2011). It protects individual freedom and constitutional rights under our republican system of government. "It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping

[1] Fed. R. App. P. 29 and Circuit Rule 29 Statement: No party's counsel authored this brief in whole or in part. No person other than *amici* contributed money to fund its preparation or submission. All parties consented to its filing.

the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Id*.

When it comes to the judicial branch, federalism and other constitutional considerations require federal courts to certify novel and unsettled questions of state law to the state's highest court. In the absence of a controlling state precedent, the Court of Federal Claims—and subsequently this Court's panel—construed a New York common-law easement as a "general easement" that could be used "for any purpose for which the grantee wishes." *Romanoff Equities, Inc. v. United States*, 815 F.3d 809, __; 2016 U.S. App. LEXIS 4436, * 12 (Fed. Cir. Mar. 10, 2016). In so doing, this Court's panel essentially created new common law and thus violated principles of federalism.

Rehearing is especially important given that the Federal Circuit is a court of national jurisdiction for takings claims against the federal government. Like the common-law New York easement at issue here, takings claims will necessarily depend on independent sources of state law from jurisdictions throughout the United States. There are vast differences in how the individual states and territories treat property rights, and federal judges in Washington—with (understandably) little familiarity with the jurisprudence of the various states—should not be fashioning those states' laws with no basis in state court precedent. This case should be certified to the New York Court of Appeals.

ARGUMENT

I. JUDICIAL FEDERALISM REQUIRES CERTIFICATION OF NOVEL STATE PROPERTY LAW ISSUES

Our constitutional republic is premised on the idea that there are two separate sovereigns with power to protect our rights. Indeed, this "dual sovereignty" was seen by the Founders as one of the most important bulwarks against tyranny provided by the Constitution. *See* The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) ("a double security arises to the rights of the people" because "in the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments"); *see also Bond*, 564 U.S. at 222 ("[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.").

The protective ideal of federalism and state sovereignty—as it pertains to the judicial power—was conveyed by Justice Brandeis:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.

Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

Of course, as the present case exemplifies, it is not always possible to identify a state law rule of decision that should be applied when one has not been previously considered by the state's legislature or high court. Before the process of certification was widely available, judges, in many cases, would have to make an "*Erie* guess" as to how the state's highest court would rule on a determinative legal issue. *See Salve Regina College v. Russell*, 499 U.S. 225, 241 (1991) (Rehnquist, C.J., dissenting) ("[W]here the state law is unsettled . . . the [federal] courts' task is to try to predict how the highest court of that State would decide the question."); *see also*, Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. Pa. L. Rev. 1459, 1548 (1997) (noting unsettled questions of state law are those for which "existing sources of state law do not supply determinative answers.").

The "*Erie* guess," however, creates serious constitutional concerns and flies in the face of the Supreme Court's concern for judicial federalism pronounced in *Erie*. *See Id.* at 1471-72. As the Court indicated in *Erie*, there is no federal common law, and "no clause in the Constitution purports to confer . . . power upon the federal courts" to "declare substantive rules of common law applicable in a state." *Erie*, 304 U.S. at 78. That does not mean that federal courts cannot ascertain or identify state law precedent—when the legal issue is specific to the issue before the court—but they cannot implement policy preferences by creating new common

law that is properly the domain of state courts. *See Clark*, *supra*, at 1472. Thus, when federal courts "declare" substantive rules of decision that are not ascertainable through state legislative rules or judicial precedent, they are "invade[ing] rights which . . . are reserved by the Constitution to the several States." *Erie*, 304 U.S. at 78.

The necessity of making an "*Erie* guess" was greatly reduced, however, when many states began to pass statutes allowing federal courts to certify unsettled questions of state law to the state's highest court. *See Clark*, *supra*, at 1545. And the Supreme Court has repeatedly recognized the appeal of certification. *See e.g.*, *Clay v. Sun Ins. Office*, 363 U.S. 207, 212 (1960) (citing *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959) ("[W]e have frequently deemed it appropriate, where a federal constitutional question might be mooted thereby, to secure an authoritative state court's determination of an unresolved question of its local law."); *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974) ("[R]esort to [certification] would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law . . . we have referred to ourselves on this Court in matters of state law, as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction.").

In *Arizonians for Official English v. Arizona*, 520 U.S. 43 (1997), the Supreme Court reiterated the rationale for certification and essentially created a

presumption in favor of certifying novel or unsettled state law legal issues. As Justice Ginsburg explained: "[F]ederal courts lack competence to rule definitively on the meaning of state legislation . . . [and] . . . certification procedures . . . allow a federal court faced with a novel state-law question to put the question directly to the State's highest court." *Id*. at 76-77. Further, the certification procedure reduces delay, cut costs, and increases the assurance of gaining an authoritative response.

Yet, when New York law did not provide a determinative rule of decision here—and certification was available to the New York Court of Appeals—the panel ignored all of the rationales mandating certification and took it upon themselves to make an "*Erie* guess" as to how New York courts would construe the easement at issue—essentially making state common law. *See* Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va. L. Rev. 1671 (1992) ("The federal judge's prediction of state law in the absence of a dispositive holding of the state supreme court often verges on the lawmaking function of that state court. . . . The law that is the resulting product is not found, but made.") (internal quotation marks and citations omitted).

New York courts have never definitively recognized the existence of a "general easement" essentially granting a fee simple property interest. The panel—while conceding there was no case on point—attempted to base its rationale on a case from 1931, which "signal[ed]" or "suggest[ed]" that New York courts would

recognize an easement for "any purpose for which the grantee wishes." *See Romanoff Equities v. United States*, 815 F.3d 809, __, 2016 U.S. App. LEXIS 4436, *12 (Mar. 10, 2016).

That wording denotes vast uncertainty in the precedent. The panel should have sought a definitive determination of state law from New York's highest court.

II. THE NEED FOR CERTIFICATION IS GREATER WHERE NOVEL ISSUES OF STATE LAW DETERMINE CONSTITUTIONAL TAKINGS CLAIMS IN A COURT OF NATIONAL JURISDICTION

Congress granted the Federal Circuit exclusive nationwide jurisdiction over every appeal against the federal government of a landowner's Fifth Amendment right to just compensation. 28 U.S.C. § 1491(a)(1). This exclusive jurisdiction, because it calls for judges sitting in a court in Washington to determine rights of individuals in various states, heightens the need for a robust judicial federalism and therefore certification. *See Lehman Bros*., 416 U.S. at 386. Indeed, the Court in *Lehman Bros*., a case in which a New York court had interpreted the state law of Florida, acknowledged that:

> [R]esort to [certification] would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant State. When federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as "outsiders" lacking the common exposure to local law which comes from sitting in the jurisdiction.

Id. at 390-391.

The nature of a Fifth Amendment takings claim also warrants this Court's reconsideration of the panel decision. In such cases, state law property interests are determinative of whether a taking has occurred. *See e.g.*, *Preseault v. United States*, 494 U.S. 1, 20 (1990) (O'Connor, J., concurring) ("In determining whether a taking has occurred, we are mindful of the basic axiom that 'property interests … are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'") (citations omitted).

Those property interests will be different in each individual state, which requires the expertise of judges familiar with particular state law. Indeed, the Federal Circuit has recognized the divergence of property law and the advantage of certification in a recent case involving easements and takings claims. *Rogers v. United States*, 814 F.3d 1299, 1304-05 (Fed. Cir. 2015) (certifying unsettled question of Florida property law to the Florida Supreme Court).

There are vast differences in how the individual states and territories treat property rights. Federal judges in Washington—with (understandably) little familiarity with the jurisprudence of the various states—should not be fashioning those states' laws with no basis in state court precedent. Here, a panel of federal judges in Washington guessed how the courts of New York would rule on an important issue of state property law—the interpretation and construction of a

common law easement—with very little basis in the current law of the state. By allowing the panel's decision to stand, this Court will set a precedent of federal judges' making substantive decisions regarding state law all over the country.

CONCLUSION

This novel question of New York law should be certified to the New York Court of Appeals. *Amici* respectfully request that this Court vacate the panel decision and rehear the appeal, whether as a panel or *en banc*.

Respectfully submitted,

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May 5, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Federal R. App. P. 29(c)(7), I certify the following:

This brief complies with the type and volume limitations set out in Fed. R. App. P. 32 and Circuit Rule 35(g) because it is less than 10 pages—excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b)—and has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: May 5, 2016

s/ Ilya Shapiro
Ilya Shapiro
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2016, I electronically filed the original of the foregoing document with the Clerk of this Court by using the CM/ECF system, which will send notice of such filing to the principal counsel for each party.

Dated: May 5, 2016

s/ Ilya Shapiro
Ilya Shapiro
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