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

BRIEF FOR CATO INSTITUTE, AMERICAN FARM BUREAU FEDERATION, AMERICAN LAND TITLE ASSOCIATION, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, PUBLIC LANDS COUNCIL AND PROFESSORS OF PROPERTY LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
ishapiro@cato.org
(202) 842-0200
Counsel for Cato Institute

DANIELLE QUIST
AMERICAN FARM BUREAU FEDERATION
600 Maryland Avenue, SW, Suite 1000W
Washington, DC 20024
danielleq@fb.org
(202) 406-3618
Counsel for American Farm Bureau Federation

MARK F. (THOR) HEARNE, II
Counsel of Record
STEPHEN S. DAVIS
LINDSAY S.C. BRINTON
MEGHAN S. LARGENT
ARENT FOX, LLP
1717 K Street, NW
Washington, DC 20036
thor@arentfox.com
(202) 857-6000
Counsel for Amici Curiae

STEVE GOTTHEIM
AMERICAN LAND TITLE ASSOCIATION
1828 L Street, NW, Suite 705
Washington, DC 20036
steve@alta.org
(202) 261-2943
Counsel for American Land Title Assoc.

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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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 principles of individual liberty, free markets, and limited government. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*.

The American Farm Bureau Federation was formed in 1919 to protect, promote and represent the business, economic, social and educational interests of more than 6.1 million member families in all fifty states and Puerto Rico.

The American Land Title Association, founded in 1907, is a national trade association and voice of the real estate settlement services, abstract and title insurance industry – businesses that search, review, and insure land titles to protect homebuyers, real estate investors, and mortgage lenders who invest in real estate. ALTA represents about 4,800 member companies operating in every county in every state of the nation.

The National Cattlemen's Beef Association is the national trade association representing the entire cattle industry. The Association represents nearly

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[1] *Amici curiae* affirm under Rule 37.6 that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, all parties have consented to the filing of this brief.

139,000 cattle producers and 45 affiliated state associations throughout the United States and works to advance the economic, political and social interests of the American cattle business.

The Public Lands Council represents ranchers who use public lands and preserve the natural resources and unique heritage of the West. The Council's members are state and national cattle, sheep, and grasslands associations throughout the western United States.

Professors James W. Ely, Jr., Richard A. Epstein, Donald Kochan and Dale A. Whitman are professors of property law. These professors are noted scholars and have authored several leading texts, treatises, and articles on real property, some of which are referenced in this brief.

BACKGROUND

In 1908, the federal government granted Laramie Hahn's Peak & Pacific Railroad Company a right-of-way easement across a strip of land then owned by the United States. This easement was granted under the General Railroad Right-of-Way Act of 1875 ("1875 Act").[2] Later, in 1976, the government issued a land patent conveying a tract of land to the Brandt Family. The patent included land encumbered by the right-of-way easement originally granted the railroad. The patent contains no provision by which the United States retained any interest in the land encumbered by the railroad right-of-way.

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[2] Codified at 43 U.S.C. §§ 934, *et seq*.

The railroad obtained only an easement to use a strip of land for operation of a railway. *See Great Northern*, 315 U.S. at 277 (holding a railroad "has only an easement in its rights of way acquired under the Act of 1875").

On appeal, the Tenth Circuit held that, even though the United States patented the land without expressly retaining any interest in that land encumbered by the railroad right-of-way, the United States nonetheless retained an "implied reversionary interest" in the right-of-way land. *United States v. Brandt*, 496 Fed. App'x 822, 824 (10th Cir. 2012). The Tenth Circuit further concluded, "interests in abandoned railroad rights-of-way generally revert to the United States rather than the adjacent landowners." *Id.* at 825 (citation omitted). The panel said this holding was dictated by its prior decision in *Marshall v. Chicago & Nw. Transp. Co.*, 31 F.3d 1028 (10th Cir. 1994).

The Tenth Circuit acknowledged this holding was directly contrary to holdings of the Federal and Seventh Circuits. *See Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005) (Newman, J.), and *Samuel C. Johnson 1988 Trust v. Bayfield Cnty.*, 649 F.3d 799 (7th Cir. 2011) (Posner, J.). Rehearing was sought and denied. This Court granted *certiorari* to consider whether the United States retained an "implied reversionary interest" in 1875 Act rights-of-way after the underlying lands were patented into private ownership.

The *Amici* join this brief because the Tenth Circuit's holding is contrary to well-established principles of property law, is contrary to this Court's decisions, and

(if accepted) would unsettle title to millions of acres of land throughout the nation.

SUMMARY OF ARGUMENT

The United States does not retain an "implied reversionary interest" in land patented to private owners. Nor does the United States retain an "implied reversionary interest" in a railroad right-of-way easement established under the Act of 1875. The Tenth Circuit erred when it concluded the United States retained such an interest. The Tenth Circuit's holding, and the analysis by which the Tenth Circuit reached this holding, is contrary to this Court's jurisprudence, including its decisions in *Great Northern Ry. v. United States*, 315 U.S. 262 (1942) (Murphy, J.), and *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979) (Rehnquist, J.).

The Tenth Circuit further erred by failing to resolve a dispute over land title according to established rules of real property and settled common law doctrines. The Tenth Circuit particularly failed to distinguish between an *easement* to use land and ownership of the *fee estate* in the land.

The Tenth Circuit's decision violates the "special need for certainty and predictability where land titles are concerned" and should be reversed.

ARGUMENT

I. The Tenth Circuit's decision violates the "special need for certainty and predictability where land titles are concerned."

A. Owners' right to be secure in their property is one of the primary objectives for which the national government was formed.

The Framers drafted our Constitution embracing the Lockean view that "preservation of property [is] the end of government, and that for which men enter into society…." JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT, Ch. XI § 138.[3] Locke continued:

> [F]or a man's property is not at all secure, tho' there be good and equitable laws to set the bounds of it between him and his fellow subjects, if he who commands those subjects have power to take from any private man, what part he pleases of his property, and use and dispose of it as he thinks good.

Id.[4]

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[3] *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (3d ed. 2008) (noting John Adams' proclamation "property must be secured or liberty cannot exist"), and RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (especially Part I., pp. 3-31).

[4] Blackstone wrote, "The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisition, without any control

Madison declared, "Government is instituted to protect property of every sort….This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his own…."[5]

Last term in *United States v. Jones*, 132 S.Ct. 945, 949 (2012) (Scalia, J.), this Court recalled Lord Camden's holding in *Entick v. Carrington*, 95 Eng. Rep. 807, 817 (C.P. 1765):

> [O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.

Id.

This Court described Lord Camden's pronouncement as a "'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted." *Id.* at 949

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or diminution, save only by the laws of the land. The origin of private property is probably founded in nature." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, Book I, § 191-92.

Kent similarly observed the constitutional protection of property is a "principle in American constitutional jurisprudence, [that] is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law." JAMES KENT, COMMENTARIES ON AMERICAN LAW, Lecture XXXIV.

[5] THE COMPLETE MADISON at 267-68 (Saul K. Padover ed., 1953) published in NATIONAL GAZETTE (March 29, 1792).

(citing *Brower v. Cnty. of Inyo,* 489 U.S. 593, 596 (1989) (Scalia, J.), and *Boyd v. United States*, 116 U.S. 616, 627 (1886) (Bradley, J.)).

Adam Smith similarly noted,

> The first and chief design of every system of government is to maintain justice: to prevent the members of society from incroaching on one another's property, or seizing what is not their own. The design here is to give each one the secure and peaceable possession of his own property.

ADAM SMITH, LECTURES ON JURISPRUDENCE (1978).[6]

In *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (Stewart, J.), this Court rightly observed, "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights…. That rights in property are basic civil rights has long been recognized." (citations omitted).

More recently the Court observed, "an essential principle: Individual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993) (Kennedy, J.).

We doubt there is serious dispute that protecting individuals' right to their property is a foundational purpose for which our national and state governments were established. But we begin from this point because

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[6] *See* STEVEN J. EAGLE, REGULATORY TAKINGS, Ch. 1 (5th ed. 2012) (discussing the historical source for property rights). *See also* DAVID A. THOMAS, THOMPSON ON REAL PROPERTY (2d ed.) Vol. 1.

the right landowners have to be secure in their property is undermined – or forfeited entirely – when title to property is not determined by established rules of property and principles of common law. Simply stated, faithful and consistent application of settled principles of property law is essential to secure an owner's fundamental right to their property.

B. This Court affirmed the need for "certainty and predictability" when determining title to land.

This Court unanimously held,

> [there is a] special need for certainty and predictability where land titles are concerned, [and this Court is] unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation.

Leo Sheep, 440 U.S. at 687-88.

The States likewise recognize this principle. For example, Michigan's Supreme Court held:

> [I]f there is any realm within which the values served by *stare decisis* – stability, predictability, and continuity – must be most certainly maintained, it must be within the realm of property law. For this reason, "[t]his Court has previously declared that *stare decisis* is to be strictly observed where past decisions establish 'rules of property' that induce extensive reliance"….The justification for this rule is not to be found in rigid fidelity to precedent, but conscience….Judicial "rules of property" create

> value, and the passage of time induces a belief in their stability that generates commitments of human energy and capital.

2000 Baum Family Trust v Babel, 793 N.W.2d 633, 655 (Mich. 2010) (Markman, J.) (internal citations omitted).[7]

In like vein, this Court recognized government cannot take landowners' property by redefining property interests without justly compensating the landowner as guaranteed by the Fifth Amendment.

In *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 8 (1990) (Brennan, J.) this Court held section 1247(d) of the National Trails System Act "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." The taking occurs when the federal Trails Act is invoked to redefined existing railroad easements to now allow uses of land not originally granted and to perpetuate an easement that otherwise terminated.

Justice O'Connor (joined by Justices Kennedy and Scalia) concurred to emphasize the point:

> [A] sovereign, "by *ipse dixit,* may not transform private property into public property without compensation . . . . This is the very kind of thing

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[7] Citing *Bott v. Natural Res. Comm*., 327 N.W.2d 838, 849 (Mich. 1982); *see also Michigan DNR v. Carmody-Lahti Real Estate, Inc*., 699 N.W.2d 272 (2005) (Young, J.).

> that the Taking Clause of the Fifth Amendment was meant to prevent."

Id. at 23 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 (1984) (Blackmun, J.)), which, in turn, quoted *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 164 (1980) (Blackmun, J.)).[8]

In *Webb's*, the Florida Supreme Court declared interest on funds deposited in the court registry was "public money." This Court said that was a taking in violation of the Fifth Amendment because:

> The usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal….Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money"….

Webb's, 449 U.S. at 162, 164.

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[8] *Preseault* illustrates the unsettling effect of *ex post facto* redefinition of property rights. It took decades of costly litigation to finally resolve the nature of the Trails Act's easement across the Preseaults' land. Throughout this time, the Preseaults' title was clouded, and their ability to sell or mortgage their land was impaired. Uncertainty over title to land causes a significant decline in the value of property. *See* Lee J. Alston, Gary D. Libecap, Robert Schneider, *The Detriments and Impact of Property Rights, Land Titles and the Brazilian Land Frontier*, 12 J. L. ECON. & ORG. 25 (1996). (The Preseaults' property was taken in January 1986, and they were not paid until the summer of 2002. *See Preseault v. United States,* 52 Fed. Cl. 667 (2002).)

Webb's held the government's "redefinition" of property from private to public is a taking for which our Constitution compels that the owner be justly compensated. *See id.*

Similarly, in *Stop the Beach Renourishment, Inc. v. Fla. Dept. of Envtl. Prot.*, 130 S.Ct. 2592, 2601 (2010) (Scalia, J.), this Court reaffirmed the government "effect[s] a taking if they recharacterize as public property what was previously private property."

Joseph Story wrote:

> Indeed, in a free government, almost all other rights would become utterly worthless, if the government possessed and uncontrollable power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature, and the rulers.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, VOL. III, § 1784 (1833).

Landowners' right to be secure in their property is only as secure as the government's – primarily the judiciary's – fealty to what this Court in *Leo Sheep* described as "settled expectations" of land title. 440 U.S. at 687-88. Property ownership is defined by established rules of property and common law doctrines. Arbitrarily changing these rules (or failing to follow these rules) unsettles established property interests.

C. The Tenth Circuit's decision undermines the "certainty and predictability" of land title.

Brandt does exactly what this Court admonished lower courts to avoid in *Leo Sheep*. The Tenth Circuit failed to apply settled principles of property law when called upon to determine title to land. The Tenth Circuit further erred when it defined (redefined is a more accurate description) an easement granted in 1875 through the lens of 1920s legislation and erred again when it embraced the notion of an "implied reversionary interest" supposedly retained by the United States. *Brandt*, 496 Fed. App'x at 824.

Millions of acres of privately-owned land are encumbered by railroad rights-of-way established under the 1875 Act.[9] If the United States holds an "implied reversionary interest" and if "abandoned railroad rights-of-way generally revert to the United States," then owners of hundreds of thousands, if not millions, of acres will lose title to their land.

(1) The United States does not retain "an implied reversionary interest" in land patented to private owners.

The Federal Circuit correctly observed this "Court's precedent has consistently held that absent an explicit reservation of an interest in land, such would not be implied." *Hash*, 403 F.3d at 1316 (citing *Swendig v. Washington Water Power Co.,* 265 U.S. 322, 329 (1924),

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[9] *See* Brief of *Amici Curiae* Cato Institute, *et al.*, in support of granting *certiorari*, pp. 17-18.

Witherspoon v. Duncan, 71 U.S. 210, 219 (1866), and *United States v. Schurz*, 102 U.S. 378, 397 (1880)).

When the United States patents land to private owners, the private owner obtains the *entirety* of the fee simple estate. The private owners' interest is limited only by (a) the United States' prior grant of an interest in the land to a different owner; or, (b) an interest the United States itself expressly reserved in the land patent. *See, e.g.*, *Boesche v. Udall*, 373 U.S. 472, 477 (1963) (a land patent "divests the [g]overnment of title"); *Watt v. W. Nuclear, Inc.*, 462 U.S. 36, 49 n.9 (1983) (holding once the land patent issued, the government had no recourse, even when the patent was erroneously issued); and *Swendig*, 265 U.S. at 331 ("it is true as a general rule, that when…entry is made and certificate given, the land covered ceased to be a part of the public lands…[and] all title and control of the land passes from the United States"); *see also Witherspoon*, 71 U.S. at 219, and *Schurz*, 102 U.S. at 397. This Court has *never* recognized a notion the United States retains an "implied" interest in land patented to private ownership.

The Tenth Circuit, however, held the United States "impliedly" reserved an interest in the land under the railroad right-of-way. Land patents (like a deed) are interpreted according to the plain meaning of the words used in the document. This is how all legal instruments are interpreted. *See* ANTONIN SCALIA AND BRIAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012), p. 93. "Nor should the judge elaborate unprovided-for exceptions to a text." *Id.* (citing Justice Blackmun, "[I]f the Congress [had] intended to provide additional exceptions, it would

have done so in clear language." *Petteys v. Butler,* 367 F.2d 528, 538 (8th Cir. 1966) (Blackmun, J., dissenting)).

If the United States wanted to retain any interest in that strip of land encumbered by the railroad right-of-way, it could have stated this intention in the land patent. The United States did not do so. And the Tenth Circuit was wrong to suppose the United States did by "implication" what the United States elected not to do by express provision.

(2) Applying established rules of property law to resolve disputes over title to land secures ownership of property.

In *Marshall*, the Tenth Circuit said, "The precise nature of that retained interest need not be shoe-horned into any specific category cognizable under the rules of real property." 31 F.3d at 1032.[10]

This is the Tenth Circuit's fundamental error. Competing claims to land cannot be resolved without considering the "specific category [of ownership interest] under the rules of real property." Ignoring rules of real property (here the distinction between "easements" and a "fee estate") results in an arbitrary decision that unsettles established land title and can result in a *de facto* taking of property.

When the rules of property law and the common law doctrines governing land title are disregarded, an

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[10] *Brandt* said *Marshall* compelled the *Brandt* panel to reach its conclusion. *Brandt*, 496 Fed. App'x at 824.

owner's title to land becomes nothing more than the unmoored whim of a particular court on a particular day.

The Tenth Circuit determining the Brandt's title to their land without regard to the rules of property and without distinguishing between an easement and a fee estate is like trying to play baseball when the strike zone is different with each pitch.

We explain below how the Tenth Circuit's holding and analysis is contrary to the rules of real property and common law doctrines. For now, we simply make the point that a court *must* apply established rules of real property when determining title to land.

Securing private ownership of property is a fundamental requirement for economic prosperity.[11]

Thomas Sowell observed,

> For fostering economic activities and the prosperity resulting from them, laws must be reliable, above all. If the law varies with the whims of kings or dictators, with changes in democratically elected governments, or with the caprices or corruption of appointed officials, then the risks surrounding investment rise, and consequently the amount of investing is likely to be less than . . . under a reliable framework of laws.

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[11] "Clarity of legal title has been the foundation of all modern economic growth." Mark Ellis, *Legal Profession Must Shape Our Post-Crisis Future,* INT'L B. NEWS (Oct. 2010), p. 7.

> One of the important advantages that enabled nineteenth-century Britain to become the first industrialized nation was the dependability of its laws.

THOMAS SOWELL, BASIC ECONOMICS (2000), p. 239.

Nations prosper when private property rights are well-defined and enforced. *See*, for example, the acclaimed work of economist Hernando de Soto in THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000). De Soto found one of the most substantial factors underlying America's prosperity to be our legal system providing established and consistent rules governing ownership of property.[12]

Donald Kochan notes, in *Certainty of Title: Perspectives After the Mortgage Foreclosure Crisis on the Essential Role of Effective Recording Systems*:

> Certainty of ownership is necessary to facilitate private market-based transactions….The first role of the government in promoting certainty is to minimize its capacity to disrupt market transactions. With constitutional limits or self-restraint, the government can add certainty into the market place for property….The second way…is to provide a neutral system for the resolution of private disputes and the

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[12] *See also* Acemoglu, Daron, and Simon Johnson, *Unbundling Institutions*, JOURNAL OF POLITICAL ECONOMY (October 2005), pp. 949-95 (finding well-defined and enforced rules protecting property ownership is one of the most important factors determining a nation's long-run economic growth and prosperity).

> enforcement of agreements according to the *original* terms of the transacting parties and consistent with their rights….When it comes to the courts….[t]here must be objectivity and neutrality in the resolution of disputes such that the judgments of the adjudicating parties are sufficiently predictable *ex ante*.

66 ARK. L. REV. 267, 301, 304-05 (2013) (emphasis added). *See also* Todd J. Zywicki, *The Rule of Law, Freedom and Prosperity,* 10 SUP. CT. ECON. REV. 1, 22 (2003) ("Individuals are more willing to invest…where property rights are stable, contracts are secure, and arbitrary governmental action is restrained.").

Richard Pipes, in his work, PROPERTY AND FREEDOM (1999), similarly observed:

> Property is an indispensable ingredient of both prosperity and freedom. The close relationship between property and prosperity is demonstrated by the course of history, which shows that one of the main reasons for the rise of the West to the position of global economic preeminence lies in the institution of property.

Id. at 286.

(3) The Tenth Circuit wrongly redefined property interests established by the 1875 Act on the basis of 1920s legislation.

The Tenth Circuit wrongly accepted the government's premise which the Federal and Seventh Circuits rightly rejected; namely, property interests established by the 1875 Act and land patents under the

Homestead Act of 1862 can be defined (or redefined) by subsequent government enactments and policies. This concept is wholly contrary to this Court's holding in *Boesche*, 373 U.S. at 477, that a land patent "divests the government of title."

The notion the United States can convey land to a private owner and then, decades later, enact some policy that has the effect of retroactively redefining the nature of the property originally conveyed is repugnant to the principle of certainty and predictability.

In *Samuel C. Johnson*, the Seventh Circuit held the 1875 Act did not provide even a "hint" by which a landowner "would suspect a lurking governmental right so unsettling to the security of private property rights." 649 F.3d at 803.

The Tenth Circuit's supposition that subsequent government enactments somehow define (or redefine) earlier land-grants is also contrary to this Court's jurisprudence. *See Hastings v. Whitney*, 132 U.S. 357, 360 (1889) (Lamar, J.), stating:

> [T]he doctrine first announced in *Wilcox v. Jackson*, 13 Pet. 498, that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace it, or to operate upon it, although no exception be made of it, has been reaffirmed and applied by this court in such a great number and variety of cases that it may now be regarded as one of the fundamental principles underlying the land system of this country.

The Tenth Circuit, contrary to this doctrine, concluded the United States retained an "implied" interest in land encumbered with a 1875 Act right-of-way and patented to private ownership, under the Homestead Act of 1865, on the basis of a 1920 statute, 43 U.S.C. § 913.

But, even if we do consider this subsequent statute, it still does not support the Tenth Circuit's conclusion. The Federal Circuit rightly noted, "an authorization to railroads to share their 200-foot wide right-of-way with local highway needs does not mandate the conclusion that the United States retained the fee to the land underlying the right-of-way after land patents including that land were granted to private persons." *Hash*, 403 F.3d at 1317.

II. The Tenth Circuit further erred by failing to follow common law rules of property recognizing important differences between "easements" and the "fee estate."

A. An "easement" is not an interest in the "fee estate."

In *Great Northern*, 315 U.S. at 271, this Court held "The Act of March 3, 1875, from which [the railroad's] rights stem, *clearly grants only an easement, and not a fee*" (emphasis added). This Court continued, "the right is one of passage." *Id.*

According to this Court's holdings, ownership of the fee estate in land subject to an 1875 Act right-of-way easement was retained by the United States until it was patented to private ownership. And, when the United States patents land to private ownership (here the Brandt family), it conveys *the entirety* of the fee

estate, unless the land patent expressly retains a defined interest in the land. *See Boesche, Watt* and *Swendig, supra.*

The United States did not expressly retain *any* interest in that land encumbered by the 1875 Act easement. When railroad operations ceased and the easement terminated, the Brandt family's fee estate (the servient interest) became unencumbered by the former railroad easement.

The forgoing is how the title dispute between the Brandt family and the United States resolves under established rules of real property. These rules require us to distinguish between an "easement" and "fee estate."

But in *Marshall,* the Tenth Circuit said it construed title "regardless of the precise nature of the [property] interest" and that it need not consider the "rules of real property." 31 F.3d at 1032. And this is exactly the problem with the Tenth Circuit's analysis. Disregarding traditional "rules of real property" lead the Tenth Circuit to make the nonsensical statement "interests in abandoned railroad rights-of-way generally revert to the United States rather than the adjacent owners." *Brandt*, 496 Fed. App'x at 825.

An easement is a nonpossessory interest in the land of another. *See* JON W. BRUCE AND JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND (2013) § 1:1. An easement is "an interest in land, but it is not

an estate." *Id.* § 1.21 (citing, among other authorities, 4 POWELL ON REAL PROPERTY § 34.02[1]).[13]

The fundamental, and critical, difference between an easement and fee estate is a foundational concept of property law.

For example, the Montana Supreme Court noted, "[t]he important distinction between an easement and a fee simple is that the former describes the right to a use of land which is specific or restrictive in nature, while the latter is the grant of title to the land itself." *Park Cnty. Rod & Gun Club v. Dept. of Highways*, 517 P.2d 352, 355 (Mont. 1973). The Florida Court of Appeals similarly held, "An easement, or right to use land not owned, is more in the nature of a claim or encumbrance against the title to the land than it is in the nature of title to, or an estate in, the land itself." *Dean v. MOD Props., Ltd.*, 528 S.2d 432, 433 (Fla. Ct. App. 1988).

Bruce and Ely observe, "This difference is significant because fee owners receive substantive and procedural rights unavailable to easement holders." THE LAW OF EASEMENTS § 1:21 (citing 2 AMERICAN LAW OF PROPERTY § 8.21 and CUNNINGHAM, STOEBUCK AND WHITMAN, THE LAW OF PROPERTY § 8.1 (2d ed.)).[14]

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[13] *See also* THOMPSON ON REAL PROPERTY § 60.02(a) (citing the RESTATEMENT OF PROPERTY) ("an easement is 'an interest in the land in the possession of another' that entitles the easement owner to 'limited use or enjoyment' of that land").

[14] The word "fee" is occasionally used by courts and drafters to describe the *duration* of an easement as perpetual. This engenders confusion. "Cases occasionally contain the assertion that

B. This Court respects the distinction between an "easement" and the "fee estate" when construing ownership of railroad rights-of-way.

This Court held Congressional land-grants to railroads made before 1871 generally granted the railroad a "limited fee." Whereas, those made after 1871 granted the railroad only an easement.

For example, in *Northern Pacific Ry. Co. v. Townsend*, 190 U.S. 267, 271 (1903), considering an 1864 Act land-grant, this Court held, "In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted."

Congressional largess to railroads (granting railroads the fee estate in public lands) ended in 1871. This Court found a railroad obtained a "limited," "base," or "qualified" fee interest in "land-grant[s] before the shift in Congressional policy occurred in 1871." *Great Northern*, 315 U.S. at 278. This Court clarified this point when it corrected the erroneous description of the railroad's interest the Court made in *Rio Grande W. R. Co. v. Stringham*, 239 U.S. 44, 47 (1915) (Van Devanter, J.).

Stringham described the interest a railroad acquired under the 1875 Act as "neither a mere

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easements may be held in fee or as a defeasible fee." THE LAW OF EASEMENTS §§ 1:21, 10.1. "Such statements are unnecessarily confusing. One need not refer to the hierarchy of estates in land to identify the longevity of an easement." *Id.*

easement, nor a fee simple absolute, but a limited fee, made on an implied condition of reverter" (essentially following *Townsend*). *Id.*

In *Great Northern*, however, this Court corrected itself and said *Stringham* was incorrect and "based on cases arising under the land-grant acts passed prior to 1871." 315 U.S. at 279. This Court explained, "it does not appear that Congress' change of policy after 1871 was brought to the Court's attention" and "no brief was filed by the defendant or the United States." *Id*. at 279, n.20.

This Court then held the statement in *Stringham* (that the railroad obtained a "limited fee" under the 1875 Act) was "inconsistent with the language of the Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation." *Id*. This Court declared, "We therefore do not regard [*Stringham*] as controlling." *Id*. The Court further declared references to *Stringham* in *Choctaw, O. & G. R. Co. v. Mackey*, 256 U.S. 531 (1921), and *Noble v. Oklahoma City*, 297 U.S. 481 (1936), "[to be] dicta based on the *Stringham* case [which is] entitled to no more weight than the statements in that case." *Id*.[15]

This Court found, "[f]ar more persuasive are two cases involving special acts granting rights of way passed after 1871 and rather similar to the general act of 1875." *Id*. (citing *Denver & R.G. Ry. Co. v. Alling*, 99 U.S. 463 (1878) (Harlan, J.), and *Smith v. Townsend*,

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[15] *Choctaw* and *Noble* both involved other congressional acts and railway lines running through Indian lands.

148 U.S. 490 (1893) (Brewer, J.)). Both these cases found the interest granted the railroad to be "a present beneficial easement" and "simply an easement, not fee."

Two points emerge from *Great Northern*. *First*, congressional land-grants to railroads made before 1871 were a "limited fee with a right of reverter." Congressional grants to railroads made after 1871 (and specifically those made under the 1875 Act) were "simply an easement, not a fee." *Id. Second,* this Court never lost sight of the distinction between an "easement" and an interest in the "fee estate." This Court consistently used "fee" to refer to a possessory estate as distinguished from an easement, which is a limited right to use the land of another for a specific purpose.

The Tenth Circuit, however, failed to appreciate this Court's analysis in *Great Northern*. And it especially failed to note this Court's disavowal of *Stringham*. The Tenth Circuit said, "the Supreme Court had held as late as 1915 that the right of way granted by the Act of 1875 was neither a mere easement, nor a fee simple absolute, but a 'limited fee' made on an implied condition of reverter in case of nonuse." *Marshall,* 31 F.3d at 1031.

The Tenth Circuit then expressly relied on the repudiated language in *Stringham* for its conclusion, "*Stringham* and other decisions, congressional committeemen in the early 1920's spoke of this retained interest in terms of an 'implied condition of reverter.'" *Id.* at 1032.

It is simply impossible to reconcile the Tenth Circuit's decision in *Marshall* with this Court's holding in *Great Northern*.

While the Tenth Circuit in *Brandt* declared it was compelled to follow its own precedent in *Marshall*, it oddly overlooked its own prior inconsistent precedent in *Chicago & Northwestern Ry. v. Continental Oil, Co.*, 253 F.2d 468 (10th Cir. 1958).

Continental Oil noted precisely the points we just mentioned. To wit:

> *Great Northern*…expressly repudiated the *Stringham* case and those which followed it. In the first place, the court pointed out that the limited fee concept in the *Stringham* case rested upon prior decisions involving pre-1871 legislation, and that *Stringham* failed to heed the "sharp change in Congressional policy with respect to railroad grants after 1871"; and "is inconsistent with the language of the Act, its legislative history, its early administrative interpretation and the construction placed on it by Congress in subsequent legislation." The later limited fee cases were dismissed as mere dicta, based on the *Stringham* case.

Id. at 471 (emphasis added).

The Tenth Circuit failed to reconcile its decision in *Brandt* and *Marshall* with its prior contrary holding in *Continental Oil*.

C. Easements do not revert.

Because they are not estates, easements do not "revert." There is nothing to revert. "A reversion is the future estate left in a transferor…when the transfer is of less than the entire estate." WM. STOEBUCK AND DALE WHITMAN, THE LAW OF PROPERTY (3d ed. 2000), p. 83.

An easement is created to serve a particular purpose – here operation of a railroad. The easement terminates when the underlying purpose no longer exists. *See* EASEMENTS AND LICENSES IN LAND § 10.8. "This cessation of purpose doctrine is designed to eliminate meaningless burdens on land and is based on the notion that parties that create an easement for a specific purpose intend the servitude to expire upon cessation of that purpose." *Id.*[16]

The Seventh Circuit noted, "the termination of an easement restores to the owner of the fee simple full rights over the part of his land formerly occupied by the right of way created by the easement." *Samuel C. Johnson*, 649 F.3d at 803 (citing RESTATEMENT (THIRD) OF PROPERTY; Servitudes § 7.4 comments a, c, f (2000)).

The term "reversionary" is sometimes used in a technically incorrect manner as a short-hand label describing the fee owner's right to unencumbered possession of their land when the easement terminates. As the Federal Circuit explained in *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004),

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[16] Citing, *inter alia*, 3 TIFFANY, LAW OF REAL PROPERTY § 817 (3d ed.).

> "[A]s a matter of traditional property law terminology, a termination of the [railroad] easements 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."[17]

D. The Tenth Circuit's holding is nonsensical because it confuses an easement with a fee estate.

An easement granted a railroad under the 1875 Act is a common law easement and there is no "reversionary" right "impliedly" retained by the United States.

The Tenth Circuit, however, expressly disregarded "any specific category [of property interest] under the rules of real property" and, in so doing, confused an easement with a fee estate. This confusion, in turn, led the Tenth Circuit to wrongly conclude "railroad rights-of-way revert to the United States rather than the adjoining owner."

Because the Tenth Circuit in *Marshall* and *Brandt* chose to eschew the "rules of real property," it is not clear exactly what "interest" it believes the United States held.

On one hand, the Tenth Circuit's holding can be read as saying (at the time of the patent to the Brandt

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[17] *See also Preseault v. United States*, 100 F.3d 1525, 1533-34 (Fed. Cir. 1996) (*en banc*) (same as *Toews*). This Court similarly used "revert[]" in this shorthand manner. *See Preseault*, 494 U.S. at 8.

family) the United States "impliedly" retained title to the fee estate in land encumbered by the railroad easement, and this fee estate "reverted" to the United States when the railroad easement was subsequently "abandoned." If so, the Tenth Circuit's decision is contrary to this Court's holdings that when a land patent issues, it conveys the *entirety* of the United States interest in the fee estate unless the United States *expressly* retains an interest in the land. *See Boesche, Watt* and *Swendig, supra.*

Alternatively, the Tenth Circuit's holding could be read to say (which is how the decision is written) "railroad rights-of-way revert to the United States." But this reading is contrary to this Court's holding in *Great Northern* that the 1875 Act granted the railroad *only* an easement and is further contrary to the fundamental nature of an easement. To wit: easements do not *revert* to anyone. If the railroad "abandoned" its "interest" (as the Tenth Circuit says), the easement terminated and ceased to exist. There would, thus, be no easement and nothing to "revert" to the United States.

In short, no reading of the Tenth Circuit's decision is consistent with settled principles of property law and this Court's holdings.

III. The Tenth Circuit's decision is also contrary to the common law "strip-and-gore doctrine."

Common law doctrines define rights in land, are the basis of landowners' expectations and understanding of their property interest, and guide courts resolving disputes over land title. The common law was adopted

by the United States and continues to guide determination of land title. *Amoco Prod. Co. v. Southern Ute Indian Tribe*, 526 U.S. 865, 879 (1999) (the common law has proved adequate to the task of resolving the resulting conflicts between estates");[18] *Shaw v. Merchants' Nat'l Bank,* 101 U.S. 557, 565 (1879) ("No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express.").

Congress *could* have pre-empted common law rules regarding easements, reversions, and other traditional real property interests. But, Congress did not do so. Nothing in the 1875 Act or the Homestead Act of 1862 abdicates common law rules defining an easement granted a railroad as anything other than a common law easement for the limited purpose of operating a railway across a strip of land.

The 1875 Act must be read in light of common law property doctrines. *See Evans v. United States*, 504 U.S. 255, 259-260, 269 (1992) (in the face of "silence" from "the body that is empowered to give us a 'contrary direction' if it does not want the common-law doctrines to survive," the common law applies), and *Smith v. Townsend,* 148 U.S. at 494 (construing a materially identical right-of-way grant and explaining courts look to common law principles before the passage of legislation and the context of the times when construing federal grants).

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[18] *See* ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW (1966), p. 107 (explaining the "dominant concern" of the common law was rights in land).

Among those common law doctrines governing property interests is the "strip-and-gore doctrine" – and the related "centerline-presumption" or "appurtenance doctrine." *See* JAMES KENT, COMMENTARIES ON AMERICAN LAW, Vol. III, Lecture LI (1828), in which he notes:

> The law with respect to public highways, and to fresh water rivers, is the same, and the analogy perfect, as concerns the right to the soil. The owners of the land on each side go to the centre of the road, and they have the exclusive right to the soil, subject to the right of passage in the public.

Id. at 348.[19]

The Texas Supreme Court (echoing Kent) explained this common law rule of real property in *Mitchell v. Bass*, 26 Tex. 372, 380 (Tex. 1862):

> The established doctrine of the common law is, that a conveyance of land bounded on a public highway carries with it the fee to the center of the road as part and parcel of the grant. Such is the legal construction of the grant unless the inference that it was so intended is rebutted by the *express* terms of the grant.

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[19] The strip-and-gore and appurtance doctrine has been a foundational principle of property law since the colonial period. *See City of Boston v. Richardson,* 95 Mass. 146, 146 (1866) ("A record…made between 1639 and 1645, of a possession of a house and lot 'bounded with the street,' shows title in the possessor to the centre of the street, even if the possession was granted by the general court or the town after the street had been laid out.").

The strip-and-gore doctrine presumes that when a grantor conveys title to land adjacent to (or divided by) a narrow strip, the title conveyed includes title to the narrow strip of land unless the deed (or, here, a land patent) expressly reserves to the grantor title to the strip by plain and specific language.

In *Penn Central Corp. v. U.S.R.R. Vest. Corp.*, 955 F.2d 1158 (7th Cir. 1992), Judge Posner applied the concepts underlying this doctrine to find a railroad's interest in a strip of land used for a railway is presumed an easement not a fee estate.[20]

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[20] Beyond the common law doctrine, many states by statute or constitution, expressly limit the interest a railroad can acquire in land across which it builds its railway to only an easement. *See, e.g.*, *Abercrombie v. Simmons*, 81 P. 208, 210-11 (Kan. 1905); *Chouteau v. Mo. Pac. Ry. Co.*, 22 S.W. 458, 460 (Mo. 1893); New York Railroad Act of 1850, (L. 1854, ch. 282, § 17).

Professor Ely noted:

> Prominent experts took the position that, absent statutory provisions expressly authorizing the taking of a fee simple, railroads should receive just an easement in land condemned for their use. "It is certain, in this country, upon general principles," Redfield declared, "that a railway company, by virtue of their compulsory powers, in taking lands, could acquire no absolute fee-simple, but only the right to use the land for their purposes." Judicial decisions tended to adopt this line of analysis.

JAMES W. ELY, JR., RAILROAD AND AMERICAN LAW (2001), p. 198 (citing An Act prescribing certain general regulations for the incorporation of rail-road companies, Ch. 118, Laws of Virginia, 1837; SIMEON F. BALDWIN, AMERICAN RAILROAD LAW (1904), p. 77; and quoting REDFIELD, THE LAW OF RAILROADS, Vol. I, p. 255).

Judge Posner explained:

> The presumption is that a deed to a railroad or other right of way company (pipeline company, telephone company, etc.) conveys a right of way, that is, an easement, terminable when the acquirer's use terminates, rather than a fee simple. . . . Transaction costs are minimized by undivided ownership of a parcel of land, and such ownership is facilitated by the automatic reuniting of divided land once the reason for the division has ceased. If the railroad holds title in fee simple to a multitude of skinny strips of land now usable only by the owner of the surrounding or adjacent land, then before the strips can be put to their best use there must be expensive and time-consuming negotiation between the railroad and its neighbor – that or the gradual extinction of the railroad's interest through the operation of adverse possession. It is cleaner if the railroad's interest simply terminates upon the abandonment of railroad service. A further consideration is that railroads and other right of way companies have eminent domain powers, and they should not be encouraged to use those powers to take more than they need of another person's property – more, that is, than a right of way.

955 F.2d at 1160 (citations omitted).

The public policy identified by Judge Posner is an extension of the common law doctrine disfavoring creation of "strips" or "gores" of land. In *Paine v. Consumers' Forwarding & Storage, Co.* 71 F. 626, 629-30, 632 (6th Cir. 1895) William Howard Taft wrote,

> The existence of "strips or gores" of land along the margin of non-navigable lakes, to which the title may be held in abeyance for indefinite periods of time, is as great an evil as are "strips and gores" of land along highways or running streams. The litigation that may arise therefrom after long years, or the happening of some unexpected event, is equally probable, and alike vexatious in each of the cases, and that public policy which would seek to prevent this by a construction that would carry the title to the center of a highway, running stream, or non-navigable lake that may be made a boundary of the lands conveyed applies indifferently, and with equal force, to all of them. It would seem, also, that whatever inference might arise from the presumed intention of the parties against the reservation of the land underlying the water would be as strong in one case as in either of the others….
>
> The evils resulting from the retention in remote dedicators of the fee in gores and strips, which for many years are valueless because of the public easement in them, and which then become valuable by reason of an abandonment of the public use, have led courts to strained constructions to include the fee of such gores and strips in deeds of the abutting lots. And modern decisions are even more radical in this regard than the older cases.

The intent of this doctrine, as Taft explained, is to avoid the "evil" of "valueless" "gores and strips" of land. *Id.* at 632. As Judge Posner noted in *Penn Central*, this

doctrine is premised upon the policy disfavoring the creation of economically unusable skinny strips of land. 955 F.2d at 1160.

Brandt is contrary to the strips-and-gore doctrine. Further, *Brandt* ignored the Tenth Circuit's own strips-and-gores precedent in *United States v. Magnolia Petroleum Co.,* 110 F.2d 212, 217 (10th Cir. 1939):

> It is the general rule that the servient estate in a strip of land set apart for a railroad or highway right-of-way, or for a street, or a small area set apart for school, church, or other public purpose, passes with a conveyance of the fee to the abutting legal subdivision or tract out of which the strip or small area was carved even though no express provision to that effect is contained in the instrument of conveyance, and that on the abandonment of the strip or small area of the purpose for which it was set apart and dedicated the dominant estate becomes extinguished and the entire title and estate vests in the owner of such abutting legal subdivision or tract.

While some segments of abandoned railroad line may be suitable for public recreation or a road, most are not. The United States acquiring title to (or an easement across) these skinny strips will result in the land being taken out of productive use as farm or pasture land and removed from state and municipal

tax rolls. And the United States will not be able to put most of this land to any productive use.[21]

IV. The *Brandt* Court failed to comprehend Congress "shifted" its policy defining land-grants to railroads in 1871.

The Tenth Circuit acknowledged its holding was directly contrary to decisions of the Federal and Seventh Circuits, and Court of Federal Claims. *Brandt*, 496 Fed. App'x at 825. The Tenth Circuit rejected the view of these other courts and looked instead to *Marshall* which was premised on a district court opinion and a law review article.[22]

The Tenth Circuit's deference to a district court decision rather than its own prior contrary precedent in *Continental Oil* and *Magnolia Petroleum* – is more than passing strange, as is the Tenth Circuit's denial of rehearing in light of an acknowledged circuit-split.

The Tenth Circuit relied upon a law review article by Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights-of-Way and the Myth of Congress's "1871 Shift*," 82 U. COLO. L. REV. 85, 150-64 (2011). Mr. Roberts is neither historian nor scholar; he

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[21] By definition, this strip of land has no value as a railroad corridor. In order for the STB to grant the railroad's request to abandon the railroad line, the STB must first find the "present or future public convenience and necessity require or permit the abandonment." 49 U.S.C. § 10903(d).

[22] "Relying upon *Idaho v. Oregon Short Line R.R.*, 617 F. Supp. 207 (D. Idaho 1985), we concluded that the United States retained an implied reversionary interest. *Marshall*, 31 F.3d at 1032." *Brandt*, 496 Fed. App'x at 824.

is (or was) a government lawyer. *See* Roberts, *Legal History* at n.1.

More importantly, his article is premised on a demonstrably false historical premise. As the title suggests, the article contends Congress' 1871 shift in policy concerning land-grants to railroads is a "myth." But, if a "myth," it is a "myth" embraced and affirmed by extraordinarily credible authorities – including this Court.

In *Great Northern*, this Court explained the 1875 Act was the result of a "sharp change in Congressional policy with respect to railroad grants after 1871." 315 U.S. at 275.

Before 1871, Congress made generous grants of the fee estate in publically owned lands (and the minerals under the land) to railroads. Congress sought to encourage railroads to build a transcontinental railway line and provided public land for a right-of-way as well as fee title to alternating tracts of public land the railroad could sell to finance construction of the railway. This Court described the railroad's interest in the right-of-way land under these pre-1871 grants as a "limited fee." *See, e.g.*, *Townsend*, 190 U.S. at 271.

Federal largesse to powerful and politically connected railroads resulted in scandal and public outrage. Congress responded by dramatically changing its land grant policy.

This Court explained Congress's 1871 "shift" in policy:

> Beginning in 1850 Congress embarked on a policy of subsidizing railroad construction by

> lavish grants from the public domain. This policy incurred great public disfavor which was crystallized in the following resolution adopted by the House of Representatives on March 11, 1872:[23]
>
> After 1871 outright grants of public lands to private railroad companies seem to have been discontinued. But, to encourage development of the Western vastnesses, Congress had to grant rights to lay track across the public domain….

Great Northern, 315 U.S. at 273-74.[24]

In the early 1870s, Congress initially passed separate "special acts" for each grant of a right-of-way to a railroad. *Id.* at 274. But passing special legislation for each railroad right-of-way was burdensome, so Congress passed the 1875 Act which was a "general right of way statute" that applied to all railroad rights-of-way across land then owned by the national government. *Id.* at 275.

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[23] "[T]he 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., 1585 (1872).

[24] *See also* JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW (2001), pp. 51-64 ("As a consequence [of scandals such as Credit Mobilier], Congress began to shift priorities with respect to the transcontinental project.").

This Court held the 1875 Act granted railroads only a "right of passage" across the land:

> Since *it was a product of the sharp change in Congressional policy* with respect to railroad grants after 1871, it is improbable that Congress intended by it to grant more than a right of passage, let alone mineral riches.…[Section 4] strongly indicates that *Congress was carrying into effect its changed policy regarding railroad grants.*

Great Northern, 315 U.S. at 275 (footnotes omitted) (emphasis added).

This Court noted the animating objective underlying Congress's shift in policy was that "public lands should be held for the purpose of securing homesteads to actual settlers." *See supra* note 23.

Thus, in the 1870s, there was a "sharp change in Congressional policy with respect to railroad grants." This new policy intended to convey public lands "for the purpose of securing homesteads to actual settlers," and the 1875 Act was adopted as part of this new congressional policy. The property interests of the railroad, the United States, and the homesteaders who actually settled the land must be determined consistent with this policy.

CONCLUSION

The Tenth Circuit's decision in *Brandt* is contrary to this Court's opinion in *Great Northern* and contrary to this Court's admonition in *Leo Sheep*. The Tenth Circuit failed to follow established rules of real property and common law doctrines when determining

title to the Brandt's land. This Court should overturn the Tenth Circuit's ruling.

Respectfully submitted,

ILYA SHAPIRO
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
ishapiro@cato.org
(202) 842-0200
Counsel for Cato Institute

DANIELLE QUIST
AMERICAN FARM
BUREAU FEDERATION
600 Maryland Avenue, SW
Suite 1000W
Washington, DC 20024
danielleq@fb.org
(202) 406-3618
Counsel for American Farm Bureau Federation

MARK F. (THOR) HEARNE, II
Counsel of Record
STEPHEN S. DAVIS
LINDSAY S.C. BRINTON
MEGHAN S. LARGENT
ARENT FOX, LLP
1717 K Street, NW
Washington, DC 20036
thor@arentfox.com
(202) 857-6000
Counsel or co-counsel for all Amici Curiae

STEVE GOTTHEIM
AMERICAN LAND
TITLE ASSOCIATION
1828 L Street, NW
Suite 705
Washington, DC 20036
steve@alta.org
(202) 261-2943
Counsel for American Land Title Assoc.

CERTIFICATE OF COMPLIANCE

No. 12-1173

MARVIN M. BRANDT
REVOCABLE TRUST, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

As required by Supreme Court Rule 33.1(h), I certify that the Brief for Cato Institute, American Farm Bureau Federation, American Land Title Association, National Cattlemen's Beef Association, Public Lands Council and Professors of Property Law contains 9,000 words, excluding the parts of the Brief that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 22, 2013.

Donna J. Wolf
Becker Gallagher Legal Publishing, Inc.
8790 Governor's Hill Drive, Suite 102
Cincinnati, OH 45249
(800) 890-5001

Sworn to and subscribed before me by said Affiant on the date designated below.

Date: _____

_____
Notary Public

[seal]

CERTIFICATE OF SERVICE

I, Donna J. Wolf, hereby certify that 40 copies of the foregoing Brief for Cato Institute, American Farm Bureau Federation, American Land Title Association, National Cattlemen's Beef Association, Public Lands Council and Professors of Property Law as *Amici Curiae* in Support of Petitioners in No. 12-1173, *Marvin M. Brandt Revocable Trust, et al. v. United States*, were sent via Next Day Service and E-mail to The U.S. Supreme Court, and 3 copies were sent via Next Day Service and E-mail to the following parties listed below, this 22nd day of November, 2013:

STEVEN J. LECHNER
Counsel of Record
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, CO 80227
(303) 292-2021
lechner@mountainstateslegal.com

Counsel for Petitioners Marvin M. Brandt Revocable Trust, et al.

DONALD B. VERRILLI, JR.
Solicitor General of the United States
Room 5614
DEPARTMENT OF JUSTICE
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001
(202) 514-2217
SupremeCtBriefs@USDOJ.gov

Counsel for Respondent

MARK F. (THOR) HEARNE, II
Counsel of Record
STEPHEN S. DAVIS
LINDSAY S.C. BRINTON
MEGHAN S. LARGENT
ARENT FOX, LLP
1717 K Street, NW
Washington, DC 20036
thor@arentfox.com
(202) 857-6000

Counsel or co-counsel for all Amici Curiae

ILYA SHAPIRO
CATO INSTITUTE
1000 Massachusetts Ave, NW
Washington, DC 20001
ishapiro@cato.org
(202) 842-0200

Counsel for Cato Institute

STEVE GOTTHEIM
AMERICAN LAND
TITLE ASSOCIATION
1828 L Street, NW, Suite 705
Washington, DC 20036
steve@alta.org
(202) 261-2943

Counsel for American Land Title Assoc.

DANIELLE QUIST
AMERICAN FARM
BUREAU FEDERATION
600 Maryland Avenue, SW, Suite 1000W
Washington, DC 20024
danielleq@fb.org
(202) 406-3618

Counsel for American Farm
Bureau Federation

All parties required to be served have been served.

I further declare under penalty of perjury that the foregoing is true and correct. This Certificate is executed on November 22, 2013.

_____

Donna J. Wolf
Becker Gallagher Legal Publishing, Inc.
8790 Governor's Hill Drive, Suite 102
Cincinnati, OH 45249
(800) 890-5001

Subscribed and sworn to before me by the said Affiant on the date below designated.

Date: _____

_____
Notary Public

[seal]