IN THE UNITED STATES COURT OF FEDERAL CLAIMS

4023 SAWYER ROAD I, LLC, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 19-757
	)	
UNITED STATES OF AMERICA,	)	Judge Edward H. Meyers
	)	
Defendant.	)	

LANDOWNERS' RESPONSE TO GOVERNMENT'S MOTION TO EXCLUDE DECLARATION OF PROFESSOR JAMES W. ELY, JR.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

The Government's motion to strike asks this Court to decide whether Professor Ely's declaration and opinion is "helpful" to this Court in the interpretation of the 1905 and 1910 conveyances from the Florida Land and Mortgage Company and the Burton family to the Seaboard Air Line Railway and Seaboard's affiliate, Florida West Shore Railway. Rightly considered, the Government's motion goes to the *weight*, not the *admissibility*, of Professor Ely's opinion. The Court (as trier of fact) may accord Professor Ely's opinion whatever weight the Court deems appropriate. But it would be wrong for the Court to grant the Government's motion to entirely exclude Professor Ely's opinion and order the landowners to refile their pleadings exorcising any reference to Professor Ely's declaration.

Professor Ely is one of the nation's foremost experts on property law – particularly property law involving easements and licenses in land. Especially relevant is Professor Ely's scholarship on American railroad law and Professor Ely's scholarship concerning the law at the time the Burton and Florida Mortgage conveyances were drafted in the early 20th Century.

Confronted with the task of interpreting these historic conveyances, why would any court disregard or exclude the opinion of the nation's leading expert in this field of property and railroad law? Accord Professor Ely's opinion what weight this Court may deem proper, but why should the Court – or the Government – not even consider his opinion? The Government fails to provide a credible or cogent answer to this question. The Government is basically attempting to put its hands over the Court's ears, saying, "I don't want you to hear that." The Court is wiser to consider Professor Ely's declaration and, in the Court's judgment, determine what weight to accord the declaration in the context of the Government's motion. For the reasons we explain below, this Court should deny the Government's ill-advised motion to exclude Professor Ely's declaration.

PROFESSOR ELY'S OPINION

Professor Ely provides an independent opinion analyzing the Burton and Florida Mortgage deeds. See Professor Ely's declaration, attached as Exhibit A. The Government deposed Professor Ely on May 16. See Exhibit B (dep. transcript). Professor Ely also provided an opinion in the *Behrens v. United States*, No. 15-421, Trails Act case. See Exhibit C (*Behrens* report). And the Government also deposed Professor Ely in *Behrens* over three years ago. See Exhibit D (*Behrens* dep. transcript).

Professor Ely's opinion and analysis of the Burton and Florida Mortgage deeds provides this Court with an independent opinion of an esteemed legal historian. Professor Ely has a longstanding academic interest in property law and the legal history of railroads and American law related to the development of railroads. As Professor Ely explained,

> RAILROAD AND AMERICAN LAW came from my reading of so many cases and realizing how the railroads had involved in so many areas of law, yet, there was no volume – there's many histories of railroads – but there was no volume that really systematically examines how railroads influence law and how law sought to deal with railroads, Railroads and American Law. Then, lastly, a couple of years ago I published my book on the constitutional history of the [C]ontract [C]lause.[1]
>
> Exhibit B (dep. transcript), p. 20 (lines 10-20).

Professor Ely explained how railroad companies in the early 20th Century assembled rights-of-way for railroad corridors,

> I know the general practice of railroad companies was to send right-of-way agents out along the lines they were either proposing to build or had already built and obtained, hopefully, deeds from various people to complete their lines and give them legal authority for their lines, so the railroads took the initiative in contacting people with deeds that they, the railroad attorneys, had prepared. I must say I think that's very logical. I know that's a fact that went on. Now what went on in this particular case, I naturally don't know, I have not investigated. But it would be difficult to recall in this vantage point. But it was very common practice. It seems to me fanciful to assume that people all along the railroad line were just coming up

[1] See James W. Ely, Jr., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY (2016).

> with their own deeds for the railroads. I think the railroads would have had definitely a plan in mind and present people with a deed, maybe with some cash as well of course, in order to get them to sign.

Exhibit B (dep. transcript), pp. 80-81.

Professor Ely explained that he prepared his report and opinion because,

> I envision my report might be an assist to the Court in finding ultimately what the legal interests are at stake here. It's for the Court to determine, not for any witness. I tried to bring my expert opinion to bear, only in the thought that it might be some assistance to the court in dealing with what is a somewhat noddy question.

Exhibit B (dep. transcript), pp. 84-85.

Professor Ely further explained that his opinion was offered to assist the Court and not the direct the Court to a particular outcome.

> I believe, as I said before, my report brings to bear the opinion of somebody who's worked rather extensively on easement law for some years, trying to summarize what I believe is the most appropriate interpretations of these ambiguous deeds – they're not really models of clarity – and that this might be of assistance to the Court. It is in no way, nor should any expert opinion be trying to somehow replace the role of a judge. That's not the function of an expert.

Exhibit B (dep. transcript), pp. 85-86.

Professor Ely does not testify in cases unless he has a professional interest in the issue presented. Professor Ely has only testified in four other cases. One lawsuit concerned a Canadian dispute about the taxation of railroads that required Professor Ely to opine concerning the nature and terms of charters granted American railroads in the late 1800s. Another lawsuit concerned a fiber-optic corridor and whether easements were allowed in the corridor. Professor Ely was retained to testify by the fiber-optic company. See Exhibit B (dep. transcript), pp. 22-25.

Professor Ely described how he analyzed the Burton and Florida Mortgage deeds based upon his knowledge of the historical context in which these deeds were drafted.

> Q. Can you tell us how you brought your historical research throughout you career to apply to interpreting the deeds in this case?

A. I look at the deeds in this case and you look at their deeds are all over 100 years old. I think it's helpful to keep a little bit in mind the historical context in which they were drafted. I don't think that necessarily the history alone dictates clearly in any deed if the meaning is clear on the four corners, as they say, that's what prevails. I think that everybody agrees with that. Trouble is, it isn't as always as clear as you might like, and so I think it is very useful to have an understanding, a background understanding of railroad and railroad laws and how they expanded in the late 19th century, early 20th century. Florida was a bit late, so they're getting new expansion right now, 1905, 1910. I think it's very helpful to make an informed decision as to how the instrument should be read.

Q. And can you describe how you applied your knowledge of railroads and railroad behavior in this case?

A. Well, let's consider – to me, it was very instructive that the deeds were almost certainly prepared by the railroad attorneys, because that's how most of those deeds were prepared throughout the 19th and early 20th century. Railroads, as I mentioned before, typically – railroads would send out right-of-way agents, and they would have deeds and they would negotiate, if you will, with the persons who through the land was to run, and they would exchange a deed for some degree of compensation. That was a very common way. Historians, and I've been maybe guilty of this to some extent, have been quite fascinated with the use of eminent domain to acquire railroads right-of-way, and that railroads, to be sure did use eminent domain, but we shouldn't lose sight of fact that a lot of these were in fact voluntary transactions. Parties exchanged deeds for compensation. And in many cases, as already been alluded to, the fact they were very enthusiastic to have railroads coming to their town anyhow, so they would be quite open to railroad activity.

Exhibit B (dep. transcript), pp. 89-90.

Professor Ely was asked to provide his independent opinion and analysis of the deeds and was not directed to provide an specific conclusion by the attorneys representing the landowners.

A. Well, I was told to investigate certain deed, yes, of course, that was the nature of the whole arrangement, but I wasn't given any instructions as to what I should decide, no….

I was instructed to prepare a report giving my assessment of these two deeds, what interest was in fact conveyed by these two deeds….

Well, there could have been a number of interests, I suppose, was it going to be a fee simple? Was it going to be an easement? Was it going to be something else

altogether? Maybe merely a license permissing use. There were a variety of opportunities. I was just told to ascertain what interest would be conveyed….

Q. Were you directed to make any assumptions?

A. No.

Q. Were you told to assume that any facts were true?

A. No.

Exhibit B (dep. transcript), pp. 38-39, 40-41.

Q. When you – stepping back to when you first started your work on this case, obviously you were provided written instruction as to what your role was, to look at these two deeds and to opine on what interest they provided, but carrying that out, were you provided with documents other than those two, or those three deeds?

A. No.

Q. So the only documents that you were provided by counsel were the three deeds?

A. Correct.

Q. And the translation also?[2]

A. Yeah, the translations. Yes.

Q. I just want to confirm, were you provided with anything else other than the three deeds and the translations?

A. Partway through the process, counsel did provide a draft of the memorandum that there were going to submit.

Q. The draft memorandum, are you talking about like a court brief?

A. Yes, a court brief. Yes.[3]

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[2] The "translation" refers to the typewritten transcription of the original handwritten deeds. The court reporter likely mistook "translation" for "transcription."

[3] The "memorandum" refers to the memorandum of law in support of summary judgment.

Q. Okay. Did you ask the counsel – and by counsel, I mean obviously Mr. Hearne and Mr. Davis – did you ask them for any additional documents besides the three deeds and the translations?

A. No.

Exhibit B (dep. transcript), pp. 42-43.

A. [S]o I began looking at the four corners, reading the deeds fairly clearly a couple of times and then I engaged in some research in connection with my reading of these deeds. I did no investigations as to the parties.

Id. at 44 (lines 7-12).

When asked if landowners' counsel directed Professor Ely to make any changes to his report and opinion, professor Ely said,

A. There were only two minor changes that were suggested. One relates to the very first paragraph where I was extolling my alleged virtues. It was suggested that I should include my book THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS [ ], and I was happy to include that as well, along with the other works of mine that are cited there. The other change was to format. Counsel formatted it in a way that was more suitable for a court document than I could do at my home computer.

Q. Okay.

A. I want to emphasize there were no substantive changes.

Q. Okay. And those were the only – the changes you just discussed, those are the only changes that you're aware of between the draft and final reports?

A. That's correct.

Exhibit B (dep. transcript), pp. 56-57.

Professor Ely noted the Burton and Florida Mortgage deeds were ambiguously drafted. "I think by perhaps by saying neither this [the Florida Mortgage deeds] or the Burton deed is ever going to get the award for skillful drafting, so we have to start with that fact." Exhibit B (dep. transcript), p. 58 (lines 5-8).

Professor Ely analyzed the Florida Mortgage and concluded that under the historical legal principles applicable to conveyances to Florida railroads at the time the Burton and Florida Mortgage deed were drafted, the interest conveyed the railroad was a railroad right-of-way easement not title to the fee estate. As to the Florida Mortgage deed, Professor Ely testified,

> [A] very salient point was that this is a description of a part of right-of-way that we obtained from Colonel Gillespie, who incidentally was assigned attorney of fact on behalf of the Florida Mortgage company…and in Florida authority as well that a right-of-way conveys and easement…that's a very salient fact cutting in favor of this being an easement. I would add that the description of the property, the way it snakes through the land and so forth, makes any other use of it as a transportation corridor highly unlikely, which also suggested to me that it cuts in favor of being an easement and not a fee simple. So I thought those were points that were very telling in my opinion.

Exhibit B (dep. transcript), pp. 58-59.

> …but the overwhelming weight of authority is consistent with the statement that I made here, and there's also a Florida case, appellate case, which incidentally, if I recall correctly, cites our book [*The law of Easements and Licenses in Land*] that makes the same point. It is possible, as I said earlier, you can have a right-of-way in a fee simple, but here's invariably some special circumstances or some other wording in the instrument which suggests that a fee simple was intended….

Id. at 60-61.

> I start with the assumption that we'll follow the general rule, unless there is something in the instrument itself or in the circumstances which might vary, which would indicate other wording, for example, perhaps in the deed, which would indicate that a fee simple was intended…construe this consistent with the general rule.

Id. at 61 (lines 10-18).

Professor Ely explained that,

> [t]he word "right-of-way" is often used in a whole variety of context, no doubt about that, and I'm sure the users do not always have the same understanding in mind, nonetheless, the term right-of-way, I think in most places triggers the notion that this is an easement. This is a right of passage across somebody else's property. Now, I've already indicated that a railroad could get a right-of-way in fee simple, but this seems to suggest that the rule is that it would inevitably be a fee simple. That I think is simply inaccurate. I have not consulted – this is a Florida Am. Jur. Kind of thing, specialized volume – I have not consulted this volume [a Florida

legal digest] at all, but I am very skeptical. Also, it seems to me it's directly contrary to the decision in the Fifth Circuit, Fifth District Court of Appeals in Florida, which says just the opposite. So at the very least, I am surprised there's not some more qualification than we have here….

Exhibit B (dep. transcript), pp. 64-65.

If you have a narrow strip of land which zigzags across the property, it looks to me on the face of it as if it was intended as a transportation corridor. It's difficult to conceive what other use it would be put to. I might add, a number of courts have in fact noted that narrow strips of land that zigzag and move in various ways seem pretty clearly to be for transportation purposes, and that brings us back to the fact that in most instances, all a railroad really deeds for its transportation purposes is an easement….

Id. at 66 (lines 8-19).

Because it makes little sense to grant someone a fee simple for such a – what will I say – meandering corridor, which could not be put to any other identifiable use. That just doesn't seem the way people would act logically. If what the railroad needs is transportation, what they wanted is a transportation corridor. An easement makes more sense than a fee simple; otherwise, you're going to wind up with strips of fee simples that seem to have little immediate use meandering through the land, whereas an easement, if the railroad eventually takes up the track will be abandoned and the land will then rejoin, free of the easement, the other parcel for which is was temporarily severed.

Id. at 67 (lines 5-21).

…I'm inclined to think that the fee simple is the rarer of these arrangements rather than easement law. I think thought that it would make little sense for state law to encourage or go to treat any kind of ambiguity as a fee simple when the railroads needs are satisfied with an easement and you have less disruption to land titles and you don't wind up with odd little bits of corridor of land here and there perceived to have little other use except as a railroad right-of-way.

Id. at 68 (lines 13-23).

Professor Ely further explained,

Well, as I've already mentioned, I put a lot of stock on the fact this is described as a right-of-way at the beginning, and as I see it, both in Florida and generally in the United States, conveyances of a right-of-way are viewed as easements, unless there's some other countervailing argument. So that was my main point of emphasis.

> Secondly, we have a situation in which this is a strip of land through the property, seems to me overwhelmingly, it was intended as a transportation corridor. Makes little sense – I see little need for there to have been a fee simple. There's no indication the parties intended a fee simple. They could have easily said fee simple if they'd wanted. So I felt everything could have indicated that, to me, the ambiguities here or the uncertainties here to be reviewed in favor of an easement; in other words, that the grantor parted with the least amount of his or her property consistent with the railroad's needs.
>
> Exhibit B (dep. transcript), pp. 69-70.

Professor Ely continued,

> I think that many jurisdictions have rules of law, try to avoid the creation of unusable strips of land, because it doesn't seem very consistent with keeping land productive and useful. So I think that there is a background norm that could come into play here. And I think, generally speaking, I will assume that most people are actually using this logically and they would have no intention of creating a fee simple zigzagging through their property when an easement would work for the railroad's purpose; and therefore, they should be understood to have conveyed the lesser interest, the easement rather than the fee simple estate.
>
> *Id.* at 71-72.

When asked about the Burton deed, Professor Ely explained, in answer to the Government's question, "Q. [by the Government's attorney] My understanding, and correct me if I'm wrong, your opinion is that the Burton deed conveyed an easement limited to railroad purposes to the railroad; is that correct? A. Correct." Exhibit B (dep. transcript), p. 72 (lines 15-19).

Professor Ely explained how the strip and gore doctrine influenced his opinion. See ECF No. 87 (memorandum in support), pp. 29-32 (describing strip and gore doctrine). Professor Ely testified,

> Well, a strip of land on its own, that's a tricky question, and many jurisdictions, I might add, as a matter of law or statute, strips of land to railroads are automatically treated as easements. I don't believe that is the case in Florida, so I didn't make that argument, but there is certainly a body of opinion that a strip of land prima facie, let us say, would be seen as an easement... But I think that if we have the title to a strip of land, it could certainly, arguably, very persuasively argue I think that what they intended is an easement.
>
> Exhibit B (dep. transcript), p. 75 (lines 9-25).

Professor Ely also explained that the Burton deed stated the railroad had already entered the Burton's property and built the railway line pursuant to the railroad's power of eminent domain before the Burton's executed the deed.

> I think it's important to bear in mind that it would appear on the face of this deed that the railroad is already operating on the land because it refers to the existing line. Now, that's not such an uncommon thing as might strike one. Laws in many states, including Florida, as I cite here, permitted railroad companies to enter land, survey it before any kind of proceeding was undertaken to acquire title to the land. So it was not entirely impossible that this could have happened without it being, necessarily raising a lot of eyebrows.
>
> As I recall too, the Burtons were indicated as living in Minnesota, so they might or might not have been on top of things as much as they'd like. Now, my point was that we already have a railroad there. Now they're getting a grant 50 feet each side of their existing line, so where does that put the Burtons as landowners in terms of negotiating. This is a *fait accompli*, the railroad is there, and it seems to me under these circumstances a finder of fact ought to be prepared to construe the instrument in a way most protective of the Burtons' interests.
>
> And that's what I was suggesting there. This of course is coupled with the fact as was true in the previous case, that these deeds were almost certainly prepared by the railroad company. It just begs the information to think that individual owners, especially people in Minnesota, are going to suddenly just fashion deeds of this character. It's inconceivable.
>
> So if you grant my point, it's most likely the attorneys for the railroad prepared these deeds, certainly this deed, it should be construed strictly against them, against the party whose attorney prepared the deeds. That's a Hornbook rule, and you could see in a lot of other places here, and in easement law certainly. So if there's any ambiguity, party that should be construed against the prepared the instrument.

Exhibit B (dep. transcript), pp. 76-78.

Professor Ely explained that, at the time the Burton deed was drafted and the railway line was built across the Burton's land, the railroad only sought an easement,

> A. Possible. There's quite a bit of authority indicating that grants across or over the land of another suggest that you're only conveying a surface right, not a fee simple right, and so I think that that tends to reenforce my first point about the nature of the corridor. This is a grant across the land of another. It doesn't just say a strip, that you might argue is outright, this is

a strip across the land, which looks to me like, pretty clearly, the grantor is not parting with the surface rights, the subsurface rights, excuse me.

Q. Right. So you're talking specifically about across the land, so I think I understand what you're saying. You're saying that that's indicative of the railroad is just wanting the ability to run the railroad tracks, it's not needing the other sticks in the bundle so to speak?

A. That's correct.

Exhibit B (dep. transcript), pp. 73-74.

The Government's counsel asked,

Q. Let's say that the across the land language was not in the deed but it still described the land as a strip of land, would just the mere use of the phrase a strip of land standing on its own be indicative of an easement.

A. It wouldn't be conclusive, no, certainly not. It could yield to some extent to the analysis I've already discussed in connection with the mortgage company deeds, but if it simply said a strip of land, I think it would be a little more arguable in my opinion, but this is buttressed for the fact that it says across. And phrases, like I said before, across and over are often seized as evidence that an easement was intended.

Id. at 74-75.

In sum, Professor Ely opined that under the principles of property law and history of right-of-way conveyances to railroads, the Burton and Florida Mortgage deeds granted the Seaboard Air Line Railway, and its affiliated Florida West Shore Railway, a right-of-way easement to build and operate a railway line across the Burton and Florida Mortgage Company's land. In the case of the Burton's land, the railroad had already entered the land and built its railway line before the deed was drafted and sent to the Burton's for execution. Oscar and Alice Burton were in Minnesota at the time the deed was executed. Additionally, the deeds to Florida Mortgage were typewritten, leaving a space for a handwritten insert designating Florida Mortgage as the grantor. This suggests the deed was a form deed prepared by the railroad company's lawyers. This fact supports Professor Ely's reference to the rule that any ambiguity in a document is construed against the party drafting the document. See Exhibit B (dep. transcript), p. 77 (line 20) ("It's most likely the attorney for the

railroad prepared these deeds, certainly this deed, it should be construed strictly against them, against the party whose attorney prepared the deeds. That's a Hornbook rule.").

ARGUMENT

I. Professor Ely's opinion "will help [this Court] to understand the evidence."

A. The historical legal context in which the Florida Mortgage and Burton conveyances were drafted is important to a faithful interpretation of these instruments consistent with the grantor's intent.

In 1979, then-Justice Rehnquist authored the Court's decision in *Leo Sheep Co. v. United States,* 440 U.S. 668 (1979). The decision concluded with the holding, "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." *Id.* at 687-88.

In December 1985 Justice Rehnquist was asked what opinion he was most fond of. Justice Rehnquist said,

> "[A] case I enjoyed writing as much as any" was *Leo Sheep Company v. United States*, "just because it enabled me to get away from strictly case law and into a little bit of history."
>
> The legal issue in the obscure 1979 decision was "mundane," as Justice Rehnquist put it in ruling that the Government did not have an "implied easement" to build a road across some land Congress granted the Union Pacific Railroad in the 1860s.
>
> But in searching out the intent of Congress in using land grants to finance the race to span America with rails, the Court's most dedicated history buff plunged with relish into the epic of the American West: the California Gold Rush, Civil War battles, range wars, payoff scandals, the driving of the gold spike in Utah in 1869.
>
> Stuart Taylor, Jr., *New York Times* (December 3, 1985), p. 8.

In March 2014, John Roberts, Chief Justice Rehnquist's former clerk, who is now, himself, Chief Justice, authored the Court's decision in *Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93 (2014). Chief Justice Roberts noted, "[t]his case turns on what kind of interest Congress granted to railroads in their rights of way in 1875. Cf. *Leo Sheep Co*., 440 U.S. at 681

("The pertinent inquiry in this case is the intent of Congress when it granted land to the Union Pacific in 1862.")." *Id.* at 109.

When the Court issued its decision in *Brandt Trust*, commentators remarked upon the decision's continuity with *Leo Sheep* and the Court's interest in the history and context in which the original railroad easements were established. Chief Justices Rehnquist and Roberts both premised the Court's decision upon the history and context at the time the right-of-way easements were granted. As Professor Richard Pildes (who clerked for Justice Thurgood Marshall in 1984) commented,

> The *Brandt* opinion is a subtle gesture of respect and affection for his former boss and predecessor, the late Chief Justice William Rehnquist. In 1979, when Chief Justice Rehnquist was an Associate Justice, he wrote a classically Rehnquist opinion in a case called *Leo Sheep Co v. United States*. Rehnquist was fascinated with American history, and that opinion begins with an elegiac, powerful, and unusually extended historical saga of the role of the railroad in the development of the West (along with the legal issues involving public grants of easements that were central in both cases). The Rehnquist opinion is so compelling that it is a principal case in one of the leading casebooks on statutory interpretation, the Eskridge, Frickey, Garrett Legislation book.
>
> Chief Justice Roberts became Justice Rehnquist's law clerk in 1980 and would no doubt have intimate familiarity from nearly thirty-five years ago with the decision his boss had written shortly before Roberts arrived to clerk. And Roberts gives *Leo Sheep* a starring role in yesterday's opinion – it is both the first and the last case cited in yesterday's opinion; it is cited four times overall; and it forms one of the two central precedents on which the Roberts opinion relies. Beyond that, the opening several pages of the Roberts opinion is modeled on the opening pages of the Rehnquist opinion; like the latter, the Chief Justice's opinion starts with the same aura of historical saga ("In the early to mid-19th century, America looked west.").[4]

This Court's task is to interpret the Florida Mortgage and Burton deeds and determine what interest these landowners (Florida Mortgage and Burton) intended to convey given the text of the

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[4] Available at: https://www.scotusblog.com/2014/03/commentary-john-robertss-quiet-homage-to-william-rehnquist/

instruments, the context in which the conveyances were drafted and the law at the time the conveyances were executed.

It would be improper to reinterpret the Florida Mortgage and Burton conveyances (and in so doing redefine established property interests) to accomplish some present-day government objective of establishing a national network of recreational trails and "railbanking" the strips of land for future possible railroad lines without paying the landowner. To redefine existing state law property interests is a taking of the owners' property interests. See Leo Sheep, 440 U.S. at 687; *Preseault v. I.C.C.*, 494 U.S. 1, 22-23 (1990) (*Preseault I*) ("[A] sovereign, 'by *ipse dixit*, may not transform private property into public property without compensation.... This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.'") (O'Connor, J., concurring); *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 713, 715 (2010) ("States effect a taking if they recharacterize as public property what was previously private property."); *Knick v. Scott Township*, 139 S.Ct. 2162, 2172 (2019) ("We explained that government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.' …A property owner acquires an irrevocable right to just compensation immediately upon the taking.") (citing *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987)). See also Bryan Garner, *et al.*, THE LAW OF JUDICIAL PRECEDENT (2020) §51, pp. 421-22 (explaining the Doctrine of Heightened Stare Decisis for Rules of Property).

Thus, the immediate issue before this Court is whether, in 1905 and 1910, Florida Mortgage and the Burton family intended to grant Seaboard Air Line Railway (and its subsidiary, the Florida West Shore Railway) title to the fee estate in the strip of land across which the railroad built and operated its railway line or to grant the railroad a right-of-way easement to use this strip for the specific purpose of operating a railway line. As the Supreme Court did in *Leo Sheep* and *Brandt*

Trust, it is important to interpret these deeds considering the context and the governing law at the time these documents were drafted. As we noted in our memorandum in support of summary judgment, a railroad right-of-way is like a turtle on a fence post – it didn't get there by itself – and was created for a specific purpose. See ECF No. 87, p. 13. As Chief Justices Rehnquist and Roberts noted, understanding the history at the time these rights-of-way were created it is essential to determine the interest the land owner intended to convey to the railroad.

Professor Ely provides his opinion to help this Court resolve this question. Professor Ely is one of the nation's leading authorities in property land, railroad law and the related legal history. Professor Ely's opinion provides this Court with helpful historical and legal context the Court may consider when determining the interest these landowners intended to grant the railroad.

B. Professor Ely is one of the nation's leading authorities on the law of property, easements, and railroads.

Professor Ely is currently the Milton R. Underwood Professor Emeritus and Professor of History Emeritus at Vanderbilt University. Professor Ely graduated from Princeton with a Bachelor of Arts in American political history, from Harvard Law School with an L.L.M., and from the University of Virginia with a Ph.D. in history. Professor Ely taught at Vanderbilt University Law School as well as William and Mary Law School and the University of Tulsa Law School, and he was a visiting Professor of Law at University of Leeds.

In his more than thirty-year career, Professor Ely has published more than twenty books, many on the legal history of property rights and railroad law. See **Exhibit E** (Curriculum Vitae attached as exhibit to Professor Ely's Expert Report filed in *Behrens v. United States*, 15-421). Of particular note is Professor Ely's work as co-editor of the leading national treatise THE LAW OF EASEMENTS AND LICENSES IN LAND, with co-editor, Jon W. Bruce, and Professor Ely's text, RAILROADS AND AMERICAN LAW. Professor Ely's scholarship in the field of legal history, property

law, and railroad law is sweeping and impressive. In addition to his published books and treatises, Professor Ely has written more than fifty articles and book chapters. In 2006 Professor Ely was awarded the Brigham-Kanner Property Rights Prize by the William and Mary Property Rights Project for his career of scholarship in the field of property law and legal history.

More than two hundred times, courts (including three opinions by the United States Supreme Court) have looked to Professor Ely's work as an authority on property law and railroad law. See, for example, *Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93, 96 (2014), *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S.Ct. 1837, 1844 (2020), and *Sveen v. Melin*, 138 S.Ct. 1815, 1828 (2018) (Gorsuch, J., dissenting). Courts in forty-one states and territories have also cited Professor's Ely's work, including twenty-nine state supreme courts. See Exhibit F (inexhaustive list of over 150 cases citing Professor Ely's scholarship). In addition to the U.S. Supreme Court, twenty-one federal courts have relied upon Professor Ely's scholarship, including the United States Courts of Appeals for the Second, Fourth, Sixth, Ninth, Tenth, Eleventh, and Federal Circuits. See *id.*

C. This Court is asked to determine what interest two landowners (the Florida Mortgage and Investment Company and the Burton Family) intended to grant Seaboard Air Line Railway in 1905 and 1910.

This Court is asked to determine whether conveyances to the Seaboard Air Line Railway (and Seaboard's affiliated railroads) at the turn of the 20th Century granted the railroad a *right-of-way easement* to operate a railway line across a strip of the owner's land or whether they conveyed *title to the fee estate* to the narrow strip of land across which the railroads built and operated a railway line.

In light of Professor Ely's knowledge of legal history – and especially property law and railroad law at the turn of the 20th Century – Professor Ely was asked to provide his opinion concerning two essentially identical conveyances the Florida Mortgage and Investment Company

granted Seaboard's affiliated railroad, the Florida West Shore Railway, in 1905. See Exhibits G and H (the Florida Land and Mortgage Company deeds). Professor Ely was also asked to provide his opinion concerning a 1910 conveyance from Oscar and Alice Burton to the Seaboard Air Line Railway. See Exhibit I (Burton Deed). See also Landowners' motion for partial summary judgment and memorandum of law in support. ECF No. 87, pp. 32-40.

Professor Ely opined that, considering the text of these instruments and the law related to railroads and property at the time these documents were drafted, the parties to these conveyances most likely understood them to be the grant of an easement for a railroad right-of-way. See discussion above.

D. Professor Ely's opinion provides this Court helpful insight into the historical and legal context in which the Florida Mortgage and Burton deeds were drafted.

In *Preseault I,* 494 U.S. at 8, Justice Brennan wrote for the Court that the Court' s holding was consistent with long-settled law. The RESTATEMENT OF THE LAW (THIRD): SERVITUDES provides at §2.2 that,

> Conveyances of land described as a road or right of way, or stated to be for a depot, station, or other purpose related to transportation, often give rise to disputes. If the instrument fails to specify, exactly, the nature and extent of the rights conveyed to the grantee, and the rights retained by the grantor it may be ambiguous. The fact that the consideration paid was less than the value of a fee-simple estate in the land weighs strongly in favor of finding that an easement was intended. ... If the ambiguity cannot be resolved by reading the instrument as a whole, courts must resort to the circumstances surrounding the transaction and public-policy preferences in constructing the instrument.

The RESTATEMENT continues:

> These disputes tend to arise after the use has been abandoned, when the original parties ae no longer involved or available, and successors on both sides claim ownership of the disputed parcel. The value and character of the land involved has often changed substantially since the time of the conveyance, so that what was once a relatively valueless strip of rural land has become a valuable piece of urban real estate. If the court finds that an easement was conveyed the successor to the grantor's land (which often includes and adjacent parcel) retains ownership of the

> abandoned right of way, road or station. If the court finds that a fee was conveyed, the grantee's successor owns the land, although it may still be subject to a servitude restricting use to the purpose stated under the principles discussed in Comment *d*.
>
> Determining the parties' intent at the time of the conveyance is often difficult. The grantee's contemplated uses will normally exclude any use by the grantor, which suggests that the parties intended that the instrument convey an estate to the grantee. However, the consideration paid, the narrowness of the parcel, and its location in relation to the remaining land of the grantor, may suggest that the parties intended conveyance of an easement. Viewed from the standpoint of the parties at the time of the transaction, it may appear likely that the parties regarded ownership of the now-disputed land, after abandonment of the contemplated use, as more valuable to the grantor than to the grantee because of its shape and location in relation to the land of the grantor….
>
> *The fact that the grantee is a railroad may also tend to indicate that the instrument should be construed to convey an easement only.* The narrowness of the parcel, the consideration paid, and the frequency with which railroad uses have been abandoned often lead to the conclusion that the grantor, as a reasonable person dealing with a railroad, intended to grant no more than an easement for the right of way, retaining ownership of the land. The fact that an amount approaching full value of the fee has been paid, however, does not necessarily lead to the conclusion that a fee was intended because an easement will also deprive the grantor of any ability to use the land for an indefinite period of time. If less than full market value has been paid for conveyance of land for a railroad station or depot, that fact together with the fact that proximity to a functioning railroad was a significant part of the consideration to the grantor, tends to indicate that the instrument was intended to convey and easement rather than an estate.

Id. §2.2, pp. 69-70 (emphasis added).

The intent of the original parties to these deeds is informed by the text of the document, the context in which these instruments were drafted and the relevant principles of law, especially property law and the law governing railroads at the time these instruments were drafted. Justice O'Connor, joined by Justices Scalia and Kennedy, concurred in *Preseault I* to emphasize the "basic axiom that '[p]roperty 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.'" 494 U.S. at 20 (quoting *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1001 (1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)).

When interpretating century-old documents (whether a real estate conveyance or even the Constitution) courts consider the legal history at the time the document was drafted. As Judge Richard A. Posner observed,

> Law is the most historically oriented, or if you like the most backward-looking, the most "past-dependent," of the professions. It venerates tradition, precedent, pedigree, ritual, custom, ancient practices, ancient texts, archaic terminology, maturity, wisdom, seniority, gerontocracy, and interpretation conceived of as a method of recovering history. The common law doctrine of stare decisis, the obligation to apply settled precedents to new facts, involves courts in a distinctly historical task. Courts act even more like historians when they elucidate the legal or social circumstances that generated a particular precedent or statute. Because the legal system derives its authority from the past and because every case has its own factual history, it is unsurprising that history and law converge both in spirit and in practice.
>
> Richard A. Posner, *Past-Dependency Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573 (2000).

Florida provides rules of construction to guide this Court in its task. Under Florida law, a court should "consider the language of the entire instrument in order to discover the intent of the grantor, both as to the character of estate and the property attempted to be conveyed, and to so construe the instrument as, if possible, to effectuate such intent." *Rogers v. United States*, 90 Fed. Cl. 418, 429 (2009) (quoting *Reid v. Barry*, 112 So. 846, 852 (Fla. 1927), and citing *Thrasher v. Arida*, 858 So.2d 1173, 1175 (Fla. Ct. App. 2003)). "There is a strong presumption in favor of the correctness of deeds and other official documents, but courts cannot lose sight of the fact that it is the intention of the parties which governs the interpretation of a document." *United States v. Schultz*, 2007 WL 9711672, at *4 (M.D. Fla. April 5, 2007), *aff'd* 321 F. App'x 915 (11th Cir. 2009) (quoting *Thrasher*, 858 So.2d at 1175, and *Barr v. Schlarb*, 314 So.2d 609, 610 (Fla. Ct. App. 1975)).

"If there is no ambiguity in the language employed then the intention of the grantor must be ascertained from that language." *Rogers v. United States*, 93 Fed. Cl. 607, 618 (2010), *aff'd*

814 F.3d 1299 (Fed. Cir. 2015) (quoting *Saltzman v. Ahern*, 306 So.2d 537, 539 (Fla. Ct. App. 1975), and citing *Thompson v. Ruff*, 78 So. 489 (1918)). See also *Rogers v. United States*, 184 So. 3d 1087, 1095 (Fla. 2015) ("The effect of a deed, both as to the property conveyed and the character of the estate conveyed, is determined by the intent of the grantor.") (citing *Reid*, 112 So. at 852). "The court must interpret the contract in such a manner as to reconcile the conflicting provisions." *Thrasher*, 858 So.2d at 1175 (citing *Kaplan v. Bayer*, 782 So. 2d 417, 419 (Fla. Ct. App. 2001)). "The most basic rule in a court's interpretation of a deed is for the court to 'consider the language of the entire instrument in order to determine the intent of the grantor, both as to the character of the estate and the property conveyed and to so construe the instrument as if legally possible to effectuate such intent.'" *Thrasher*, 858 So.2d at 1175 (quoting *Reid*, 112 So. at 851).

Whenever a party "presents an arguable claim that a document contains a latent ambiguity, the court is obliged to consider the extrinsic evidence, at least to the extent necessary to determine whether the claimed latent ambiguity exists." *City of Clearwater v. BayEsplanade.com, LLC*, 251 So.3d 249, 254 (Fla. Ct. App. 2018) (quoting *Thrasher*, 858 So.2d at 1175, and *Board of Trustees v. Lost Tree Village Corp.*, 805 So.2d 22, 26 (Fla. Ct. App. 2001)). "This is so because a latent ambiguity is shown where the writing is otherwise clear and unambiguous on its face, but some collateral fact creates a necessity for interpretation." *Id.* at 254 (quoting *Lost Tree Village*, 805 So.2d at 26). "A latent ambiguity in a deed description is said to exist when the deed, clear on its face, is shown by some extraneous fact to present an equivocation by being susceptible to two or more possible meanings." *Id.* (quoting *Lost Tree Village*, 805 So.2d at 25, and citing Thrasher, 858 So.2d at 1175). "A latent ambiguity arises when the words of a conveyance 'apply to and fit without ambiguity' to more than one subject. *Id.* (quoting *Deni Assocs. of Fla., Inc. v. State Farm Fire & Cas. Ins. Co.*, 711 So.2d 1135, 1139 (Fla. 1998), and *Perkins v. O'Donald*, 82 So. 401, 404

(Fla. 1919)). In "such cases [parol] evidence will be received to prove *which* of the subjects' was intended to be conveyed." *Id.* (emphasis in original) (quoting *Perkins*, 82 So. at 404).

The legal norms and practice when the document was drafted as well as the history of how the parties acted in reliance upon the instrument provide an indication of the parties understanding of the interests created. Here, Florida Mortgage and the Burton family granted the railroad this right-of-way used the strip of land exclusively for operation of a railway line. The land was never used for public recreation. Indeed, it was illegal for the public to enter the land used for the railroad right-of-way. Fla. Stat. Ann. §§810.09, 810.12. See also *Battiste v. Lamberti*, 571 F. Supp.2d 1286, 1293 (S.D. Fla. 2008) (plaintiffs arrested for trespassing on railroad tracks). For more than one-hundred years after the parties signed the deeds, the Seaboard and its successor railroads never used the land for anything other the operation of a railway line. This is a strong indication that the parties to the original 1905 and 1910 deeds did not intend to grant anything more than an easement. The Government presents no evidence to suggest that for more than a century Seaboard or its successor-railroads asserted any greater interest than a right-of-way easement across the land, and the Government provides no evidence that the land subject to the Florida Mortgage and Burton conveyances was ever used for any purpose other than the active operation of a railroad line.

This is the undisputed evidentiary record upon which Professor Ely provides his opinion. The "facts and data" upon which Professor Ely bases his declaration are the Burton and Florida Mortgage deeds and Professor Ely's scholarship in property and railroad law. These documents and Professor Ely's more than thirty-year career interpreting and studying property law, railroad law, and conveyances to railroads are the basis of his opinion.

II. Professor Ely's opinion is admissible under the Federal Rules of Evidence.

Rule 702 of the Federal Rules of Evidence provides, "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion

or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Rule 704(a) further provides that "[a]n opinion is not objectionable just because it embraces an ultimate issue."

Much of the jurisprudence surrounding Rule 702 concerns the trial court's "gatekeeping" function to assure the reliability of expert testimony presented to a jury. See *Kumho Tire Co Ltd., v. Carmichael*, 526 U.S. 137 (1999), and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). See also Paul Rothstein, *Federal Rules of Evidence* (3rd ed.), pp. 615-616 (explaining the *Daubert* and *Kumho* factors are a direction to the trial judge acting as a "gatekeeper" for the jury to evaluate the reliability of expert testimony are lessened when the expert's testimony is presented to the Court in a bench trial in support of a motion for summary judgment).

The central question concerning the admissibility of Professor Ely's opinion is the helpfulness to the Court of Professor Ely's opinion. If Professor Ely's opinion is helpful, this Court should consider Professor Ely's opinion. Considering Professor Ely's opinion does not mean Professor Ely's opinion is dispositive or that this Court is bound to adopt Professor Ely's opinion.

Professor Ely (as we explain below) is not offering a legal conclusion that is binding upon this Court. Rather, Professor Ely provides this Court his opinion of the Florida Mortgage and Burton deeds given his knowledge of property law, legal history, the law surrounding the creation of railroads in the early 20th Century, and the text and context in which the Florida Mortgage and Burton conveyance were drafted. The landowners do not suggest this Court *must* adopt Professor Ely's opinion. Rather, we suggest that the opinion of one of the nation's foremost experts in property law, easements, and railroad law may be *helpful* to this Court.

Furthermore, the opinion Professor Ely provides is not testimony being presented to a jury. This action is brought under the Tucker Act, 28 U.S.C. §1491, which allows only a bench trial – there is no jury here. Furthermore, Professor Ely's opinion is offered in support of a motion for summary judgement. The Government's motion asking this Court to exclude Professor Ely's opinion and order a judicial exorcism of all reference to Professor Ely's opinion from the landowners' pleadings must be evaluated in the context in which it is offered – a summary judgment motion in a bench-tried case. Understandably, the Government does not like Professor Ely's opinion and, hence, seeks to exclude Professor Ely's opinion from the record. Indeed, the Government is positively allergic to Professor Ely's analysis. The Government went so far as to not only ask this Court to exclude Professor Ely's declaration but to order the landowners to rewrite and refile the motion for summary judgement exorcising any reference to Professor Ely.

III. Professor Ely's opinion is not an inadmissible "legal conclusion."

A. The Government's argument to exclude and exorcise Professor Ely's opinion is without merit.

The Government's says this Court should exclude Professor Ely's declaration and make the landowners refile their motion for summary judgement exercising any reference to Professor Ely's opinion because, the Government claims, Professor Ely's declaration is a "legal conclusion." ECF No. 92, p. 6 ("Prof. Ely's opinions are unhelpful and improper here because they consist entirely of legal opinions that invade the province of the Court. Indeed, his "report" amounts to nothing more than additional summary judgment argument that happens to be under his signature instead of Plaintiffs' counsel's."). The Government argues, "Prof. Ely's legal opinions fail to satisfy Fed. R. Evid. 702(b) because those opinions rely on legal authorities and not on 'facts or data.'" *Id.* at 8.

The Government is wrong. Professor Ely's declaration is not a "*legal conclusion*," it is the *opinion* of one of the nation's leading experts based upon the stipulated facts – the deeds from (Florida Mortgage and Burton), the context in which these conveyances were granted, and the historical context and property law at the time these documents were drafted and executed. Professor Ely provides this Court his opinion as the leading scholar in property law and the history of the law related to railroad companies and railroad right-of-way easements at the time these instruments were drafted and executed. The fact that Professor Ely's declaration "embraces" the "ultimate issue" of whether these instruments conveyed an easement for a railroad right-of-way or title to the fee estate in the strip of land does not mean this Court should exclude Professor Ely's opinion. See Rule 704(a).

Rightly considered, the Government's motion to exclude Professor Ely's declaration goes to the *weight* not the *admissibility* of Professor Ely's declaration. This Court, in its role as fact finder, may accord Professor Ely's declaration whatever weight this Court deems appropriate. In *United States v. Coffman*, 574 F. App'x 541, 553 (6th Cir. 2014), the Government introduced the testimony of a securities lawyer and law professor stating that the standard definition for what is material is not an impermissible legal conclusion in a jury-tried securities case. The Government's expert explained that information is "material" if there is a "substantial likelihood that the information is information that an investor would find important in making his or her investment decision." *Id.* The Sixth Circuit affirmed the district court's decision to allow this testimony.

The Government complains that Professor Ely's opinion "rel[ies] on *legal authorities* and not on 'facts or data.'" Government brief, p. 8 (emphasis in original). First, the Government's statement is not true. Professor Ely's opinion relies upon the stipulated factual record including the Florida Mortgage and Burton deeds. See ECF No. 70 (Joint Title Stipulations). In *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 333 (2015), the Supreme Court explained,

> In some instances, a factual finding will play only a small role in a judge's ultimate legal conclusion about the meaning of the patent term. But in some instances, a factual finding may be close to dispositive of the ultimate legal question of the proper meaning of the term in the context of the patent. Nonetheless, the ultimate question of construction will remain a legal question. Simply because a factual finding may be nearly dispositive does not render the subsidiary question a legal one. "[A]n issue does not lose its factual character merely because its resolution is dispositive of the ultimate" legal question. *Miller v. Fenton*, 474 U.S. 104, 113 (1985). It is analogous to a judge (sitting without a jury) deciding whether a defendant gave a confession voluntarily. The answer to the legal question about the voluntariness of the confession may turn upon the answer to a subsidiary factual question, say, "whether in fact the police engaged in the intimidation tactics alleged by the defendant."

The First Circuit explained, in *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 100001 (1st Cir. 1997), that how Rule 704(a)

> removes the common-law bar on 'otherwise admissible' testimony that 'embraces an ultimate issue to be decided by the trier of fact,' does not vitiate the rule against expert opinion on questions of law. The common law did not allow an expert witness to inform the jury of his or her factual conclusion concerning the "ultimate issue" in the case, because this was thought to invade the province of the jury. The abolition in Rule 704(a) of this "ultimate issue" rule allows the expert witness to offer his or her factual conclusion in order to aid the jury, which properly can choose to accept or reject it. …[W]e acknowledge that it is often difficult to draw the line between what are questions of law, what are questions of fact, and what are mixed questions.

Litigation concerning the interpretation of the Second Amendment has necessarily required the Court to consider the meaning of the text of the Second Amendment given the history at the time the Second Amendment was drafted and adopted. To interpret the text of the Second Amendment the Supreme Court considered the legal history at the time the text was written. See *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008), and *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, No. 20-843, 2022 WL 2251305, at *11 (U.S. S.Ct. June 23, 2022). In *New York State Rifle*, the Court noted,

> to be sure, "[h]istorical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it." *McDonald* [*v. City of Chicago*], 561 U.S. [742,] 803-04 (Scalia, J., concurring). But reliance on history to inform the meaning of

> constitutional text—especially text meant to codify a pre-existing right—is, in our view, more legitimate, and more administrable, than asking judges to "make difficult empirical judgments" about "the costs and benefits of firearms restrictions," especially given their "lack [of] expertise" in the field. Id., at 790–791 (plurality opinion).

2022 WL 2251305, at *11.

The Court amplified this point in footnote six writing:

> The job of judges is not to resolve historical questions in the abstract; it is to resolve legal questions presented in particular cases or controversies. That "legal inquiry is a refined subset" of a broader "historical inquiry," and it relies on "various evidentiary principles and default rules" to resolve uncertainties. W. Baude & S. Sachs, *Originalism and the Law of the Past*, 37 L. & Hist. Rev. 809, 810-11 (2019). For example, "[i]n our adversarial system of adjudication, we follow the principle of party presentation." *United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1579 (2020). Courts are thus entitled to decide a case based on the historical record compiled by the parties.

Id. at n.6.

This case involves these owners' constitutionally protected right to be justly compensated for private property the government took from them. This is not a case concerning the Second Amendment right to keep and bear arms. But the Court's recent decisions in the *Heller* and *New York State Riffle* demonstrate the Court's reliance upon the historical context and the law at the time inform courts interpretation and construction of ancient documents.

When confronted with the interpretation of historical documents, courts frequently consider the testimony of legal historians.[5] Rule 704(a) provides that opinions and inferences "otherwise admissible" are "not objectionable" because they embrace "an ultimate issue to be

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[5] See, *e.g.*, Samuel Bray, *National Injunctions: Historians Enter the Lists, The Volokh Conspiracy* (Nov. 17, 2018) (explaining that leading opponent of universal injunctions disagreed with their conclusions but nevertheless acknowledged the gravitas of the authors of that amicus brief, characterizing the authors as "an all-star cast of legal historians and historians of the early Republic" and recognizing that "[t]hese historians have written some of the leading scholarship on American equity"), available at: https://reason.com/2018/11/17/national-injunctions-historians-enter-th/

decided by the trier of fact." Fed. R. Evid. 704(a). See also *United States v. Goodman,* 633 F.3d 963, 968 (10th Cir. 2011). Rule 704(a) specifically allows testimony in the form of an opinion that "'embraces an ultimate issue to be decided by the trier of fact.'" *United States v. Awadallah*, 401 F. Supp.2d 308, 313 (S.D.N.Y. 2005) ("The Government correctly argues that the fact that a lay witness's opinion testimony might go to an ultimate issue in this case does not, by itself, mean that it must be precluded."); Weinstein's ¶ 704.02, pp. 704-05 (2001) ("Rule 704 permits testimony in the form of an opinion or inference about an ultimate issue, and abolishes the common-law ultimate fact rule barring such evidence.").[6] According to Jonathan Martin,

> Historians are increasingly being called to testify as expert witnesses. They appear in cases adjudicating a vast array of matters, including Native American rights, gay rights, voting rights, water rights, border disputes, trademark disputes, gender discrimination, employment discrimination, establishment clause violations, toxic tort and product liability, tobacco litigation, and the deportation of alleged Holocaust participants, among others. Depending on their needs, lawyers can turn to popular historians like Ambrose, to the ranks of academia, or to for-profit firms devoted entirely to historical research and litigation support.
>
> Jonathan D. Martin, *Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts*, 78 N.Y.U. L. REV. 1518, 1519-20 (2003).[7]

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[6] See also M.D. Goodman, *Slipping through the Gate: Trusting Daubert and Trial Procedures to Reveal the 'Pseudo–Historian' Expert Witness and to Enable the Reliable Historian Expert Witness—Troubling Lessons from Holocaust–Related Trials*, 60 BAYLOR L. REV. 824, 861, 868-69, n.243 (2008); A. Hasani, *Putting History on the Stand: A Closer Look at the Legitimacy of Criticisms Levied Against Historians Who Testify as Expert Witnesses*, 34 WHITTIER L. REV. 343, 354-55 (2013) (quoting M. Howell & W. Prevenier, *From Reliable Sources: An Introduction To Historical Methods* 2 (2001)).

[7] Martin advocated that "historians should be appointed by the court rather than called by the parties when cases require expert historical testimony. District court judges – the gatekeepers of expert testimony – have the power to appoint experts under Rule 706 of the Federal Rules of Evidence." *Id.*

B. Professor Ely is not an advocate.

The Government asks this Court to exclude the testimony of Professor Ely because, the Government claims, Professor Ely's opinion is "just another brief from a paid advocate." Gov. Br., p.1. The Government claims "Prof. Ely's opinions are unhelpful and improper here because they consist entirely of legal opinions that invade the province of the Court." *Id.* at 6. "Prof. Ely offers no insight into the thoughts or intentions of the parties to these three deeds." *Id*. And the Government says, "[a]t a more fundamental level, Prof. Ely's report is simply unhelpful." *Id*.

First, the Government levels the allegation that Professor Ely is "just…another paid advocate." Gov. Br., p. 1. Professor Ely is one of the nation's most distinguished scholars in property law and legal history. Professor Ely earned a doctorate in history from the University of Virginia and a law degree from Harvard and has a storied more than thirty-year career as a professor of law at Vanderbilt and other law schools. The Government suggests Professor Ely would say whatever was necessary to advance the position of the owners whose counsel paid Professor Ely a total fee of $11,000. Does the Government seriously suggest Professor Ely is selling a distinguished life-long reputation for $11,000? The Government's suggestion is offensive. Furthermore, the Government provides absolutely nothing to support its scandalous assertion. Indeed, the Government's deposition of Professor Ely disproves this the Government's assertion. As the deposition of Professor Ely in both this case and in *Behrens* demonstrate, Professor Ely was provided the relevant deeds and title documents and asked to provide his independent opinion as to the construction of these documents given the relevant property law at the time these documents were drafted. The attorneys representing the landowners did not instruct, draft, or direct the report Professor Ely prepared. Professor Ely provided an entirely independent report expressing his opinion as to the interest the relevant conveyances granted the railroad.

Second, the Government complains that Professor Ely's opinion is "unhelpful." Of course, Professor Ely's opinion is unhelpful *to the Government*. Professor Ely's independent analysis of the Burton and Florida Mortgage deeds finds them to be a grant of an easement for a railroad right-of-way and not a conveyance of title to the fee estate in the land across which the railroad built and operated its railway line. The Government, understandably, doesn't like this. So, the Government attacks Professor Ely's opinion as "unhelpful." Professor Ely's opinion is "unhelpful" to the Government, but Professor Ely's opinion is not unhelpful to this Court, which is asked to decide this question. Professor Ely's opinion is not dispositive, but it does provide this Court an extremely helpful opinion of a distinguished legal scholar.

C. *Behrens* provides the government no succor.

The Government relies heavily upon Judge Campbell-Smith's refusal to consider Professor Ely's declaration and amicus brief in *Behrens v. United States*, No. 15-421 L. See Gov. Br., pp. 3, 7-8. In response to the Government's reliance upon Judge Campbell-Smith's refusal to consider Professor Ely's declaration and amicus brief in *Behrens* we note three points. *First*, Judge Campbell-Smith denied the amicus parties opportunity to file an amicus brief by Professor Ely, but tellingly, when Judge Campbell-Smith's decision in *Behrens* was appealed, the Federal Circuit accepted the amicus brief Professor Ely filed in the Federal Circuit in support of the landowners. *Second*, Judge Campbell-Smiths decision in *Behrens* are not controlling on this Court. This is especially relevant because Judge Campbell-Smith's decision is currently on appeal before the Federal Circuit. *Third*, as the LAW OF JUDICIAL PRECEDENT explains,

> one reason why lower-court decisions are often unsuited to establish precedent is the nature of the decisional process itself. Generally lower-court decisions are shorter than published opinions of higher courts and contain less reasoning because those courts' primary job is to rule on cases then pending, not to shape the law. … Because lower-court cases are usually decided expeditiously by one judge, a

> decision might not receive the same consideration and scrutiny as one issued by a high court.

Id. at 256-57.

CONCLUSION

The Government doesn't like Professor Ely's opinion. We get it. Professor Ely's opinion is contrary to the Government's narrative. The Government's narrative in this (and other Trails Act cases) is that the federal government can redefine established state law property interests without paying the owner. This has been the Government's narrative since before *Preseault I*. See, *e.g.*, *National Wildlife Federation v. I.C.C.*, 850 F.2d 694 (D.C. Cir 1988). This narrative was rejected by the Supreme Court in *Preseault I*. In short, the Government's objective is to redefine state law to allow the Government to take private property without complying with the Constitutional mandate to pay the owner. The Government's objective is to (as Judge Plager put it) transmogrify by judicial *leger de main* a decades-old grant of a railroad right of way easement into a conveyance of title to the fee estate in the land.

This Court should deny the Government's motion to exclude Professor Ely's declaration and opinion and should deny the Government's motion asking this Court to order the exorcism of Professor Ely's opinion from the landowners' pleadings. This Court is, of course, free to give Professor Ely's opinion that weight this Court deems appropriate, but it would be wrong to exclude Professor Ely's opinion. There is no basis in this Court's rules or the Federal Rules of Evidence for this Court to do so.

Respectfully submitted,

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