2019-1158

United States Court of Appeals for the Federal Circuit

REINALDO CASTILLO, GONZALO PADRON MARINO, MAYDA ROTELLA, JULIA GARCIA, SHOPS ON FLAGER INC., JOSE F. DUMENIGO, DORA A. DUMENIGO, HUMBERTO J. DIAZ, JOSEFA MARCIA DIAZ, LUIS CRESPO, JOSE LUIS NAPOLE, GRACE BARSELLO NAPOLE, BERNARDO D. MANDULEY, NORMA A. MANDULEY, DANILO A. RODRIGUEZ, DORA RODRIGUEZ, AVIMAEL AREVALO, ODALYS AREVALO, DALIA ESPINOSA, DANIEL ESPINOSA, SOFIRA GONZALEZ, LOURDEZ RODRIGUEZ, ALBERTO PEREZ, MAYRA LOPEZ, NIRALDO HERNANDEZ PADRON, MERCEDES ALINA FALERO, LUISA PALENCIA, XIOMARA RODRIGUEZ, HUGO E. DIAZ, and, CONCEPCION V. DIAZ, as Co-Trustees of the Diaz Family Revocable Trust, SOUTH AMERICAN TILE, LLC, GLADYS HERNANDEZ, NELSON MENENDEZ, JOSE MARTIN MARTINEZ, NORMA DEL SOCORRO GOMEZ, OSVALDO BORRAS, JR., LUIS R. SCHMIDT,

Plaintiffs-Appellants,

– v. –

UNITED STATES,

Defendant-Appellee.

On Appeal from the United States Court of Federal Claims in Case Nos. 1:16-cv-01624 and 1:17-cv-01931, Honorable Marian Blank Horn

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FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Reinaldo Castillo and Nelson Menendez and Osvaldo Borras, Jr., (cont.) **v.** United States

Case No. 19-1158

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ■ (appellant) ☐ (respondent) ☐ (appellee) ☐ (amicus) ☐ (name of party)

Petitioner/Appellants

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Avimael and Odalys Arevalo	None	None
Luis Crespo	None	None
Hugo E. and Concepcion V. Diaz as Co-Trustees of the Diaz Family Revocable Trust	None	None
Humberto and Josefa Marcia Diaz	None	None
Jose F. and Dora A. Dumenigo	None	None
Dalia Espinosa, Daniel Espinosa and Sofia Gonzalez	None	None
Gladys Hernandez	None	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:
Arent Fox, LLP, Mark F. (Thor) Hearne, II, Lindsay S.C. Brinton, Meghan S. Largent, Stephen S. Davis, and Abram J. Pafford.

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

Not applicable

11/16/2018
Date

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

Please Note: All questions must be answered

Mark F. (Thor) Hearne, II
Printed name of counsel

cc: Davene Walker - USDOJ-ENRD

Reset Fields

Continuation of Names – Case Caption:
Avimael and Odalys Arevalo
Luis Crespo
Hugo E. Concepcion V. Diaz as Co-Trustees of the Diaz Family Revocable Trust
Humberto and Josefa Marcia Diaz
Jose F. and Dora A. Dumenigo
Dalia Espinosa, Daniel Espinosa and Sofia Gonzalez
Gladys Hernandez
Niraldo Hernandez Padron and Mercedes Alina Falero
Mayra Lopez
Bernardo D. and Norma A. Manduley
Jose Luis and Grace Barsallo Napole
Gonzalo Padron Marino and Julia Garcia, and Mayda Rotella
Luisa Palencia and Xiomara Rodriguez
Alberto Perez
Danilo A. and Dora Rodriguez
Lourdez Rodriguez
Shops on Flagler, Inc.
South American Title, LLC
Jose Martin Martinez and Norma Del Socorro Gomez
Luis R. Schmidt

1. Full Name of party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Niraldo Hernandez Padron and Mercedes Alina Falero	None	None
Mayra Lopez	None	None
Bernardo D. and Norma A. Manduley	None	None
Jose Luis and Grace Barsallo Napole	None	None
Gonzalo Padron Marino and Julia Garcia, and Mayda Rotella	None	None
Luisa Palencia and Xiomara Rodriguez	None	None
Alberto Perez	None	None
Danilo A. and Dora Rodriguez	None	None
Lourdez Rodriguez	None	None
Shops on Flagler, Inc.	None	None
South American Title, LLC	None	None

1. Full Name of party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Jose Martin Martinez and Norma Del Sorcorro Gomez	None	None
Luis R. Schmidt	None	None

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STATEMENT OF RELATED CASES

The two cases involved in this appeal were filed in the U.S. Court of Federal Claims (CFC) in 2016 and 2017 as *Castillo, et al. v. United States*, No. 1:16CV1624-MBH, and *Menendez, et al. v. United States*, No. 1:17CV1931-MBH. These cases were consolidated by the CFC in January 2018. There are no other cases related to this appeal.

INTRODUCTION

Most law students (and many lawyers) do not really enjoy property law. The subject matter is often dry, with case outcomes turning on terms of art in antiquated title documents that must be read in the light of specialized interpretive principles. Of course, there are occasional exceptions – property cases sometimes involve challenging constitutional doctrines, cutting-edge environmental issues, and novel political questions with moral implications for the fair distribution of limited resources in a just society.

This is not one of those cases. But even so, there are at least two attractive features of this case, which does indeed involve construing terms of art in antiquated Florida title documents in the light of specialized interpretive principles used by Florida courts.

The first attractive feature is that the relevant interpretive principles, reflected in Florida law and in the property law of most other states, travel under a colorful name – "the strips-and-gores doctrine." In a nutshell, this intriguing doctrinal label describes a basic rule developed by courts to deal with the somewhat less intriguing subject matter of easements and rights-of-way that are abandoned or no longer used for their original purpose, often many decades after their initial creation. When this happens, courts are often asked the question the CFC was tasked with answering below – Who owns the fee interest in the land underlying the abandoned easement

or right-of-way? It is not the beneficiary of the easement, because they had only an easement. And courts strongly disfavor the notion that the land should revert back to the original grantors (or their heirs several decades removed), as this would create separate ownership of long, narrow, and irregular "strips and gores" of land that would cut through normal parcels on either side owned by others, and as such would not be of much practical use to anyone.

The solution to this dilemma? The centerline presumption – a.k.a. the primary interpretive tool through which courts (in Florida and elsewhere) implement the strips-and-gores doctrine. Under this presumption, owners of parcels that abut an easement or right-of-way are presumed to own the underlying land to the centerline of the easement. This allows the land beneath the abandoned easement to be absorbed into the parcels on either side, thus converting potentially unproductive "strips and gores" into something productive and useful. This centerline presumption can be rebutted, but only by clear and convincing evidence that the original grantor that sold the land of which the easement was a part specifically and affirmatively reserved to itself the right of fee ownership in the land underlying the easement, should the easement ever be abandoned or fall into non-use.

The second paragraph of this introduction promised two attractive features in this case, of which a colorfully-named property law doctrine is only one. The second is that this case should be relatively easy to decide. There is no dispute that all of

the landowner-plaintiffs own parcels of land directly adjacent to portions of an abandoned Miami railroad right-of-way. And the parties have already stipulated that the railroad held only an easement in the relevant segments of the right-of-way, meaning that when it was abandoned, the ownership of the underlying land reverted to someone else. Per established Florida case law applying the centerline presumption, the plaintiffs argued that their undisputed ownership of parcels directly adjacent to the abandoned railroad right-of-way conveyed ownership to the centerline of the land underlying the right of way. Ergo, when the federal government took that land to turn it into a recreational trail, it constituted a Fifth Amendment taking, for which the plaintiffs should receive "just compensation."

The CFC refused to apply the centerline presumption, holding that supposed "exclusionary language" in the relevant subdivision plats and related deeds meant that the subdivision owners (who sold the various platted subdivision lots on which the plaintiffs now reside) "did not intend to pass title to the railroad corridor to the grantees [*i.e.*, the buyers] of the subdivision parcels adjacent to the railroad corridor." Appx5-7. The problem with this holding, as explained in more detail in the summary of argument below, is that the supposed "exclusionary language" cited by the CFC is not even close to qualifying as the type of clear, affirmative reservation by a grantor that is required under Florida law if a grantor/seller wishes to retain a reversionary interest in the land underlying an easement or right-of-way. Indeed,

every source of authority that matters – Florida cases, cases from other states, property law treatises and leading law review articles, and even the language of the plats and deeds in this case – conflicts with the CFC's analysis and contradicts its holding. This is why the CFC did not cite a single case in support of its conclusion that the specific plat and deed "exclusionary language" present in this case qualifies as the type of "clear reservation" required under Florida law in order to rebut the centerline presumption.

The bottom line is that *contra* the CFC, there was no "clear reservation" by the original grantors in this case. Thus, the centerline presumption applies, and the plaintiffs who own the parcels adjacent to the abandoned railroad right-of-way also own to the centerline of the property underlying the right-of-way. Accordingly, the CFC erred in entering summary judgment in favor of the government. The decision below should be reversed, and the case remanded so that these Florida landowners can pursue their claims for the just compensation to which they are entitled under the Fifth Amendment.

JURISDICTIONAL STATEMENT

The government took these owners' property in 2016. The Fifth Amendment requires the Unites States to justly compensate owners when it takes their property. The Tucker Act, 28 U.S.C. §1491(a)(1), grants the CFC jurisdiction to hear claims founded upon the Constitution. These owners filed timely claims for compensation in 2016 and 2017, and the CFC entered final judgment denying their claims in 2018. Appx46.

On October 31, 2018, these landowners filed a timely notice of appeal. Appx1006-1007. Title 28 U.S.C. §1295(a)(3) grants this Court exclusive jurisdiction over an appeal "from a final decision of the United States Court of Federal Claims."

STATEMENT OF THE ISSUES

Whether the government (as the party opposing the centerline presumption) demonstrated that the Moss and Merwitzer families "clearly reserved title" to the fee estate in the land beneath a railroad right-of-way when the adjacent land was platted in the 1940s?

Whether, under Florida property law, the burden of proving an alleged retention by a grantor of a fee interest in the land underlying an easement or right-of-way properly rests with the party claiming such a retention exists?

Whether the CFC committed reversible error by analyzing the centerline presumption in a manner contrary to Florida law, using an approach that would effectively nullify the presumption in the exact cases where it has traditionally applied?

STATEMENT OF THE CASE

I. The federal Trails Act effected a taking of these Florida landowners' property.

This is a Trails Act taking case. The Trails Act "destroys" and "effectively eliminates" a landowner's state-law right to unencumbered title and exclusive use and possession of their land. The Trails Act provides, "use [of otherwise abandoned railroad rights-of-way as public recreational trails] shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. §1247(d). Under Florida law, prior to the STB's invocation of section 8(d), these landowners enjoyed (or would have enjoyed) unencumbered title and the right to exclusive use and possession of their land. See Appx415-418. See also *Rogers v. United States*, 90 Fed. Cl. 418, 428 (2009) ("The Trails Act prevents a common law abandonment from being effected by the conversion of the railroad right-of-way to an interim trail use, thus precluding state law reversionary interests from vesting.") (applying Florida law) (citing *Preseault v. United States*, 100 F.3d 1525, 1533 (Fed. Cir. 1996)) (*Preseault II*).

The STB's invocation of section 8(d) is a compensable per se Fifth Amendment taking. Public recreation and so-called "railbanking" is not a "railroad purpose" and exceeds the scope of the original railroad easement. *Toews v. United States*, 376 F.3d 1371, 1376-77 (Fed. Cir. 2004) ("It appears beyond cavil that use

of these easements for a recreational trail – for walking, hiking, biking, picnicking, Frisbee playing…. – is not the same use made by a railroad.").

In *Preseault v. Interstate Commerce Comm'n*, 414 U.S. 1, 8 (1990) (*Preseault I*), the Supreme Court held the Trails Act gives rise to a taking for which the Fifth Amendment requires the United States to justly compensate the landowner because, as here, "many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests…[and] frequently the easements provide that the property reverts to the abutting landowner upon abandonment of rail operations." See also *Brandt v. United States*, 572 U.S. 93, 105 (2014) ("if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land"). The Supreme Court rejected the notion that the federal government can redefine existing property interests without violating the Fifth Amendment's obligation to justly compensate the owner. In *Brandt*, the Supreme Court considered the nature of railroad easements and explained that "[u]nlike most possessory estates, easements...may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude. In other words, if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land." *Id.* (quoting *Restatement (Third) of Property: Servitudes* §1.2(1) (1998)) (internal citations and quotations omitted).

The Supreme Court reiterated this principle, noting it is "a taking if [the government] recharacterize[s] as public property what was previously private property." *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envt'l Protection*, 560 U.S. 702, 713 (2010) (citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-65 (1980)). See also *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1012 (1984). When the federal Surface Transportation Board (STB) invoked section 8(d) of the Trails Act it prevented the 1924 easements from terminating as they would under Florida state law. Indeed, that is the very purpose of section 8(d).

II. These Florida landowners' claims.

In the 1920s the Florida East Coast Railway obtained a 1.2-mile-long right-of-way easement across these Florida landowners' property through a series of condemnation actions in Dade County Circuit Court. These plaintiff-landowners own the fee estate underlying and abutting portions of this abandoned former railroad right-of-way corridor that is now subject to the STB's November 2016 order invoking section 8(d) of the Trails Act. These owners held title to the fee estate in their respective tracts of land on November 21, 2016, when the STB issued its order effecting the taking under the Trails Act. See Appx415-418.

The now-abandoned railway was built in 1932 by the Florida East Coast Railway. See Appx236-238. By 2016 the right-of-way was no longer needed or used for operation of a railway. *Id.* In January 2016, the Florida East Coast Railway

petitioned the STB for authority to abandon this 1.2-mile-long right-of-way. See Appx213-217. In October 2016, Florida East Coast Industries, LLC, requested the STB invoke section 8(d) of the Trails Act. See Appx268-270. Less than a month later, the STB invoked section 8(d) and issued a "Notice of Interim Trail Use or Abandonment" (NITU), authorizing the railroad to negotiate with a trail-use sponsor, and to transfer the right-of-way to a trail-user for public recreation and railbanking. *Id.*

The landowners and the government agree that the interest the Florida East Coast Railway and its successor railroads obtained was an easement, and all agree the railroad did not obtain title to the fee estate in the land. "The parties in both *Castillo* and *Menendez* also stipulate that the rights-of-way the Florida East Coast Railway obtained through the four final judgments in condemnation proceedings were each an '[e]asement.'" Appx12 (citing the parties' Joint Stipulations Regarding Title). Thus, it is undisputed that the railroad did not own the fee estate in the land across which the railroad subsequently built its railway line. As the CFC also noted, "Nowhere in its response and opposition to plaintiffs' cross-motion for partial summary judgment does defendant allege that 'some other party owned the land under the abandoned railroad right-of-way.'" Appx30, n.10.

The parties also agreed the condemnation orders limited the railroad's interest to an easement for railway purposes. Appx12. Thus, when the railroad no longer

operated, the easement terminated, and the owners of the underlying fee estate regained the unencumbered right to use and possess the land. Appx26-27 (citing *Preseault II*, 100 F.3d at 1533; *Ellamae Phillips Co. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009); *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010), *reh'g and reh'g en banc denied*, 646 F.3d 910 (Fed. Cir. 2011); *Caldwell v. United States*, 391 F.3d 1226, 1229 (Fed. Cir. 2004); *Toews*, 376 F.3d at 1376; and *Brandt*, 572 U.S. at 104-05).

The railroad acquired its easements relevant to these landowners' claims by condemnation. See Appx630-631 (table showing each owner with cross-references to stipulations regarding title). After the railroad acquired its right-of-way easement in the 1920s and after the railroad built its railway line across the land in the 1930s, the owners of the land then-encumbered by the railroad right-of-way easement recorded two subdivision plats -- Zena Gardens and Princess Park Manor. See Appx7-9. Louis and Rebecca Merwitzer recorded the Zena Gardens subdivision plat in September 1947, and Erving and Harriett Moss recorded the Princess Park Manor plat in November 1949. The present-day owners bringing this action acquired their title by conveyances referencing the property by lot number, as noted in the recorded Zena Gardens and Princess Park Manor plats. All agree the specific lots conveyed to each owner show the platted lot as adjoining the then-existing railroad right-of-way. In other words, there is no intervening property owned by a third party. See

Appx759 (Zena Gardens plat); Appx757 (Princess Park Manor plat). See also Appx633, Appx758, Appx798 (aerial maps of properties).

Each plat depicts a subdivision consisting of individual lots to be sold to private purchasers, along with streets, roads, and avenues running throughout the subdivision. The Princess Park Manor plat references "streets, avenues, roads, terraces, courts, and alleys." Appx757. The Zena Gardens plat references "[t]he Streets, Avenues and Terrace" depicted in the subdivision layout. Appx759. After referencing these thoroughfares and common areas, each plat included language stating that the right of reversion with respect to these thoroughfares was reserved to the subdivision developers "whenever discontinued by law. Appx757, Appx759. Notably, along with depicting the various common areas and thoroughfares, each plat depicted the railroad right-of-way bordering the planned subdivisions, and each plat described the boundary of the respective subdivision property in relation to the corresponding railroad right-of-way bordering the subdivision. See *id.* But the railroad right-of-way is distinct from the "Streets, Avenues, roads, terraces, carts, and alleys," specified on the plats, and the plats contained no reservation language of any kind in relation to the railroad right-of-way.

The landowners argued below that they own the land underlying the abandoned railway to the center of the corridor under Florida's centerline presumption because their property lots adjoin and abut the railway corridor. The

landowners asserted that Florida's centerline presumption holds that they are presumed to own to the centerline of the corridor, absent specific evidence that must be presented by a party seeking to rebut the presumption. The government argued that because the present-day owner's deeds described the land by reference to a plat instead of a metes-and-bounds survey that specifically incorporates a reference to the center of the adjoining railroad corridor, the owner did not acquire title to the land underlying the abandoned railroad right-of-way. The government argued the dedication provisions of the plats rendered the landowners' ownership of the fee estate in that land underlying the adjoining right-of-way ambiguous. The government asserted that the "reversion" language in the plats "is sufficient [for the developers] to retain ownership to platted roads and streets." Appx755.

The government admits the railroad does not own the fee estate in the land underlying the railroad corridor, and the government has not and cannot identify any present-day owner of this strip of land other than the landowners bringing this action. See Appx14-17, Appx30 n.10. Rather the government takes the agnostic position that it doesn't know, or care, who owns the fee estate. The government argues the present-day owners cannot affirmatively disprove that the Moss and Merwitzer families reserved title to the fee estate in the land beneath the abandoned railroad right-of-way, and therefore, the present-day owners failed to prove they own the fee estate. See Appx804-805. The landowners replied that the entire point of the

centerline presumption is to presume the grantor who conveyed property adjoining a railroad corridor – absent the grantor's clear intent to retain the strip – did not intend to retain title to the narrow strip of land under the adjoining road and, in this case, there is no clearly-stated intention to do so by the Moss or Merwitzer families. Appx790-793.

III. The Court of Federal Claims' decision.

The CFC offered two reasons for its conclusion that the centerline presumption and strips-and-gore doctrine did not apply. First, the Zena Gardens plat included the phrase, "excepting therefrom a strip of land off the westerly side which is the right of way of [the railroad]" and (in the case of the Princess Park Manor plat) the phrase "less the Florida East Coast Right-of-Way...." Appx41, Appx43. This language was drawn from portions of the deeds that conveyed the platted lots, and the CFC relied on this language in concluding that the plaintiffs had not proven that the sellers of the platted lots intended to convey title to the land underlying the railroad right-of-way.

Second, the CFC assumed the centerline presumption has been overcome (or rebutted) when a recorded plat depicts the lots as adjoining the right-of-way easement, but does not explicitly depict the boundary as extending to the center of the adjoining right-of-way. Both of these reasons are incorrect as a matter of Florida law.

SUMMARY OF THE ARGUMENT

Under Florida law, the centerline presumption is a well-established interpretive mechanism used by Florida courts to implement the strips-and-gores doctrine. The approach used by the Florida courts is mirrored by most other states. The strips-and-gores doctrine and the centerline presumption avoid the extensive practical and legal problems that would arise if abandoned easements and rights-of-way were routinely to revert back to the original grantors who owned the underlying land when the easement or right-of-way was first created. Separate fee ownership of long, narrow, irregular "strips and gores," cutting at odd angles through the midst of ordinary parcels used for traditional residential, business, and recreational purposes, is disfavored for obvious reasons. Proper application of the centerline presumption avoids this result, benefiting property owners by ensuring that what might otherwise be unproductive (and perhaps unsellable) land is instead put to productive use.

The CFC's decision below granted summary judgment to the government, and extinguished the Fifth Amendment claims of these Florida property owners, based upon a flawed analytical approach that failed to properly apply Florida law on the strips-and-gores doctrine and the centerline presumption. The CFC's general approach seemed to misapprehend the entire purpose of the doctrine and the presumption, which exist precisely to strengthen the claims to ownership of property

owners whose parcels are adjacent to an abandoned easement or right-of-way, but whose title or deed documents do not explicitly describe the land underlying the easement or right-of-way as being encompassed within the adjacent parcel. The flaws in this general approach were compounded by the CFC's improper reading of language in the pertinent deeds and plats, because the CFC interpreted language such as "except [the right of way]" or "less [the right of way]" as somehow precluding application of the centerline presumption.

This reading of these terms is flatly contradicted by extensive precedent from the Florida courts and the courts of other states. This body of precedent recognizes that such terms may put buyers on notice of the existence and precise location of an easement or right-of-way, but do not in any way constitute a "clear reservation" of title in the land underlying the easement or right-of-way to the grantor in the event that the easement or right-of-way is later abandoned or ceases to be used. Indeed, the CFC did not cite a single case in which similar language in deeds or plats was interpreted as being a clear reservation that rebutted the centerline presumption.

In a similar vein, the CFC erred by invoking language on the pertinent plats or deeds that described the location of the platted parcels in relation to the location of the adjacent railroad right-of-way. Appx43. This language, while acknowledging the existence and location of what at the time was an active railroad right-of-way with trains running on it, as distinct from the platted land that would be of practical

use to residential owners within the platted subdivision, did not in any way reserve ownership of the land underlying the right-of-way to the grantors who platted the subdivision and sold the platted parcels to purchasers who included the plaintiffs (or their predecessors-in-title). Again, the CFC cited no case law to support this portion of its holding, and the type of right-of-way references at issue are in fact quintessential examples of language that courts routinely identify as *triggering* the centerline presumption, *not* rebutting it or defeating its application.

The CFC, for all of its effort in finely parsing the language of the pertinent deeds and plats, also ignored language that clearly undermined the rationale underlying its grant of summary judgment in favor of the government. Specifically, the "less" or "except" language in relation to the railroad right-of-way consistently moved from one deed to the next after first appearing in the chains of title, which proves that this language cannot possibly be read to have reserved fee ownership to the grantors who first utilized it. In addition, the Zena Gardens and Princess Park subdivision plats contain very clear language reserving to the original grantors and their heirs the reversionary ownership of the land underlying the subdivisions streets and roadways that were dedicated in the plats as easements for public use, should the easements ever be abandoned. This shows that the drafters of the subdivision plats knew perfectly well how to reserve reversionary ownership interests to the grantors when they wished to do so. The complete *absence* of any such language in

relation to the railroad right-of-way confirms that the grantors who platted and sold the Zena Gardens and Princess Park subdivision parcels did not affirmatively reserve ownership in the land underlying the right-of-way should that right-of-way ever be abandoned by the railroad.

ARGUMENT

I. The standard of review for this appeal is de novo.

The CFC resolved attorney fees on cross-motions for summary judgment. Summary judgment is appropriate only where evidence demonstrates "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 247 (1986). The moving party – the government in the case of its cross-motion for summary judgment – bears the burden of establishing the absence of any material facts. Any doubt over factual issues will be resolved in favor of the non-moving party. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987).

An order granting summary judgment is reviewed *de novo* "in all respects." *Cienega Gardens v. United States*, 331 F.3d 1319, 1328 (Fed. Cir. 2003). This Court owes no deference to the CFC's legal conclusions. *Barclay v. United States*, 443 F.3d 1368, 1372-73 (Fed. Cir. 2006), *cert denied*, 549 U.S. 1209 (2007).

II. The CFC erred in failing to apply the centerline presumption and in rejecting the landowners' claims of ownership to the land underlying the abandoned railroad right-of-way.

It is undisputed that the plaintiffs owned parcels directly adjacent to the abandoned railroad right-of-way. It was stipulated with respect to the claims at issue in this appeal that the railroad held only an easement in the right-of-way. There is no dispute that the railroad years ago abandoned the right-of-way and ceased to run trains over the tracks. The CFC acknowledged that the Notice of Interim Trail Use (NITU) issued by the STB operated as a Fifth Amendment taking of the state-law property rights these landowners may have had in the land underlying the abandoned railroad right-of-way and directly adjacent to and abutting their subdivision parcels. And the CFC agreed that the centerline presumption and the strips-and-gores doctrine were indeed components of Florida property law, and that the centerline presumption could be rebutted only by "evidence that the grantor did not own the land underlying the easement at issue, or, if there was ownership of such land, evidence that the grantor clearly reserved title to the land, such that the adjoining landowner would have no interest in the easement." Appx40.

Against this backdrop, the CFC should have entered summary judgment on liability in favor of the landowners. Instead, the CFC entered summary judgment in favor of the government. That decision was based upon flawed analysis, leading to a flawed conclusion utterly lacking in legal support, and indeed contradicted by

applicable Florida law as well as by multiple cases from other states. The CFC's decision should be reversed.

A. Many states, including Florida, apply the strips-and-gores doctrine and the centerline presumption exactly because of situations like this.

Before he was President and before he was Chief Justice, then-Judge William Howard Taft explained the strips-and-gore doctrine. In *Paine v. Consumers' Forwarding & Storage, Co.*, 71 F. 626, 629-30, 632 (6th Cir. 1895), Judge 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.

More recently, 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. 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).

In *Leo Sheep Co. v. United States*, 440 U.S. 668, 687-88 (1979), the Supreme Court noted, 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." The centerline presumption is a foundational tenant of property law dating back before Blackstone. "It is a familiar principle of law, that a grant of land bordering on a road or river, carries the title to the center of the river or road, unless the terms or circumstances of the grant indicate a limitation of its extent by the exterior lines." *Banks v. Ogden*, 69 U.S. 57, 69 (1864); see also Robert Kratovil, *Easement Draftsmanship and Conveyancing*, 38 Cal. L.Rev. 426, 432 (1950) ("The general rule is that a conveyance of land which is bounded by a private way carries title to the center of the way, unless there is a clear expression to the contrary.").

The entire point of the strips-and-gores doctrine and the related centerline presumption, as Taft explained in *Paine*, is to address the situation where a property boundary is described as being the edge of an existing right-of-way or other physical feature such as a stream. The doctrine holds that the conveyance of title describing the property boundary as being the edge of the referenced right-of-way or monument actually conveys title to the land extending to the center of the reference right-of-way, even when the description only references one edge of the right-of-way. See William B. Stoebuck & Dale A. Whitman, *The Law of Property* (3rd ed.) §11.2. As Professors Stoebuck and Whitman explain, "public streets and highways are usually easements in favor of some public agency, with the so-called 'underlying fee' remaining in private ownership." *Id.*

Professors Stoebuck and Whitman explain that the centerline presumption applies even where the deed or plat describes the property as ending at a street or railroad corridor. "Where [the corridor is an easement], the usual rule of construction is that a conveyance describing land with a call 'to Main Street' will actually convey title to the center of the street, subject to the street easement." *Law of Property* §11.2 (citing *Haggart v. United States*, 108 Fed. Cl. 70, 83 (2012)[1] ("This presumption applies even when 'the deed refers to the grantor's right of way as a boundary without clearly indicating that the side of the right of way is the boundary.'"); 2 R. Patton & C. Patton, *Land Titles* §143 (1957); 49 A.L.R.2d 982 (1956)). "The policy ground for the rule is obvious," Stoebuck and Whitman continue, because "if the street easement is someday vacated, it makes little sense to hold that some former owner or developer can take possession of a strip of land 20 or 30 feet wide." *Law of Property* §11.2.

This centerline "rule," Professors Stoebuck and Whitman continue, "is sometimes applied, although not as consistently, even if the instrument describes the boundary as running along one side or edge of the street." *Law of Property* §11.2. "A *very clear* expression of intention is necessary for the grantor to exclude the street from the document's coverage. A similar rule making the center line the boundary is applied to railroad and other rights of way...." *Id.* (emphasis added). Thus, even

[1] *Haggart* is cited in the forthcoming 4th edition to *The Law of Property*.

when a deed or plat describes the property as extending "to Main Street," or as here, "to the railroad corridor," without specifically identifying the land underlying the corridor, the underlying fee owner will be presumed to own to the centerline of the street or corridor, unless a "very clear expression" of intending otherwise is stated.[2]

The CFC recognized that Florida follows the centerline presumption. Appx36 ("In *Smith v. Horn*, the Supreme Court of Florida presumed that an owner of a parcel of land that was adjacent to a street within a subdivision owned to the center of a street because there was no 'contrary showing' that the original subdivision owner or his grantees clearly reserved title to the street."). Florida precedent recognizing the strips-and-gores doctrine, and implementing this doctrine through application of the centerline presumption, was also discussed and summarized at some length in the Florida Supreme Court's decision (on a certified question from this Circuit) in *Rogers v. United States*, 184 So.3d 1087, 1097-98 (Fla. 2015); see Appx36-38 (discussing and quoting *Rogers*' survey of Florida law concerning strips-and-gores doctrine and centerline presumption).

[2] Professors Stoebuck and Whitman note, "The same principle is applied when the property is described by reference to a recorded map or plat showing the street...." *Law of Property* §11.2.

B. A review of the CFC's opinions below confirms the absence of legal support for the CFC's holding.

The CFC issued its initial forty-five-page summary judgment opinion on June 29, 2018. Appx1-45. It issued an additional twenty-page opinion on October 30, 2018, denying the plaintiffs' motion for reconsideration. Appx47-66. These lengthy opinions contain copious citations to a wide range of cases addressing various background principles, ranging from the summary judgment standard to the legal framework that governs Fifth Amendment taking claims in Rails-to-Trails cases. But the CFC's core analysis and corresponding holdings occupy only a few pages, and it is striking that the CFC cites no case law (from Florida or anywhere else) offering direct support for the key conclusions reached by the CFC. The CFC presented separate but similar analysis relating to each of the two platted subdivisions implicated by the plaintiffs' claims – Zena Gardens and Princess Park Manor.

1. Zena Gardens

For Zena Gardens, the holding in the CFC's initial opinion turned on a small number of points found at pages 40-42 of the opinion. After quoting language from the Zena Gardens plat, Appx41, the CFC asserts:

> The plat makes a specific point to "except[]" the railroad corridor from the description of land platted in the Zena Gardens subdivision, which is the same platted subdivision that includes the nine parcels which were each transferred to the nine Castillo plaintiffs. Thus, based on the language of the plat, the railroad corridor is not included in the Zena

> Gardens subdivision. Furthermore, as depicted on the Zena Gardens plat, none of the parcels belonging to the nine Castillo plaintiffs extended onto the railroad corridor but, instead, end at the edge of the railroad corridor. Additionally, there is another paragraph in the plat in which the Merwitzers dedicate various areas of their subdivision [Streets, Avenues and a Terrace] to public use. Notably, this paragraph does not reference the railroad corridor.

After citing these various features of the Zena Gardens plat, the CFC concludes, with little further analysis and no citation to cases in Florida or elsewhere, that the original Zena Gardens subdivision owners "did not intend to pass title to the railroad corridor to the grantees of the subdivision parcels adjacent to the railroad corridor." Appx42.

The CFC's subsequent reconsideration opinion echoes this conclusion, citing the same reasons. Appx58-59. The reconsideration opinion also quoted language from the deed through which Louis Merwitzer, the original grantor who platted Zena Gardens and sold the platted lots, acquired the land that eventually became Zena Gardens. Appx59. The quoted language was similar to the "excepting therefrom" language incorporated into the Zena Gardens plat, in that it described the property being acquired, while stating that it was "Less" the strip devoted to what at the time was an active railroad right-of-way. *Id.* The CFC cited this deed language for the proposition that "because Mr. Merwitzer did not receive title to the land underlying the railroad corridor, the nine Castillo plaintiffs, as successors-in-interest to Mr. Merwitzer, could not have received title to the land underlying the railroad corridor." Appx60.

As in its initial opinion, the CFC cited no cases, from Florida or anywhere else, to support its assertion that a deed's description of an active railroad right-of-way preceded by the word "Less" was sufficient to defeat the centerline presumption when the presumption was invoked by a future owner of a parcel directly abutting the right-of-way years after it had been abandoned by the railroad. As explained in Section C below, existing Florida law, as well as compelling supporting authority from other states and leading property law treatises, contradicts the CFC's flawed analysis and unsupported conclusion.

2. Princess Park Manor

The CFC's analysis and holding in relation to those plaintiffs who own parcels in the Princess Park Manor subdivision was substantially similar to its Zena Gardens analysis and holding described above. The CFC cited the Princess Park Manor plat's description of the then-active railroad right-of-way preceded by the term "less," asserting that use of this term was somehow evidence that the original grantors who created the Princess Park Manor plat had intended to reserve to themselves the reverting fee ownership of the land underlying the railroad right-of-way in the event that the railroad ever abandoned or stopped using its easement. Appx43. The CFC also noted that the Princess Park Manor plat described the platted land in two places as being "East of the Florida East Coast Right-of-Way." *Id.* In addition, the CFC observed that the section of the Princess Park Manor plat in which the original

grantors had dedicated various platted streets and alleys to public use "does not mention the railroad corridor" (which even the CFC acknowledges was "in use by the Florida East Coast Railway at the time the plat was created."). Appx43-44.

The CFC cited these various phrases from the plat as evidence that "any potential presumption that the [plaintiffs] own to the center of the railroad corridor is rebutted." Appx44. In its reconsideration opinion, the CFC reiterated this same holding, while also citing language in the original deed to Princess Park Manor developer William Moss that contained "less" and "east of" phrasing similar to that incorporated into the Princess Park plat. Appx60.

As with Zena Gardens, the CFC did not cite a single case, from Florida or anywhere else, to support its assertion that the use of the word "less" to set off a description of a then-existing, active railroad right-of-way, or the mere reference to a platted parcel as being "east of" a directly adjacent active railroad right-of-way, could somehow defeat the centerline presumption decades later when the presumption was invoked by owners of the adjacent parcels years after the railroad had abandoned its former right-of-way easement. Nor did the CFC ever acknowledge or grapple with the most basic flaw in its analysis – *the strips-and-gores doctrine and the centerline presumption by definition are only relevant when the land underlying an abandoned right-of-way or easement is not explicitly incorporated into the deeds or plats of the adjacent or abutting properties.* If the

pertinent parcels had deeds or plat documents that on their face plainly encompassed the land underlying an adjacent or abutting easement to the center of the easement, there would be no need to discuss the centerline presumption in the first place. The fact that this rarely occurs is precisely why there is a presumption, and precisely why that presumption can only be rebutted with clear evidence that the original grantor of an adjacent parcel either did not own the land underlying the easement, or clearly and affirmatively reserved the right of reverting ownership in the underlying land should the easement or right-of-way be abandoned or terminated at a future date.

C. The CFC's analysis and holding are contradicted by Florida law, the law of other states, and the language of the pertinent deed and plat documents in this case.

As explained above, the CFC's holding essentially turned on two features of the plat and deed documents at issue in this case. The first is that in describing the existence and location of the then-active railroad right-of-way, the documents sometimes used words such as "excepting" or "less" when referencing the railroad right-of-way in relation to the rest of the adjoining property. The second is that in some instances, the deed and plat documents also depicted the then-active railroad right-of-way as a boundary in relation to the platted lots, or described directly adjacent or abutting parcels as being "east of" the then-active railroad right-of-way.

As explained below, Florida precedent on the strips-and-gores doctrine and the centerline presumption squarely contradicts the CFC's reliance on these two

features of the deed and plat documents as support for refusing to apply the centerline presumption. This Florida precedent is echoed by compelling analysis from courts in other states. In addition, when the pertinent plat and deed documents in this case are considered in their entirety, they actually provide strong support to the landowners' claim that, pursuant to the centerline presumption, they are entitled to summary judgment with respect to their ownership of the land underlying the abandoned railroad right-of-way directly adjacent to their Zena Gardens and Princess Park Manor subdivision properties.

1. Florida precedent proves the CFC must be reversed.

The CFC correctly recognized that Florida law holds that the owner of land described as a platted lot abutting a right-of-way is presumed to hold title to the fee estate in the land, extending to the centerline of the right-of-way. Appx36. Florida has long-recognized this "strip-and-gore" doctrine, and has long held that it applies to land owned within a platted subdivision. In *Smith v. Horn*, 70 So. 435, 436 (Fla. 1915), the Florida Supreme Court held that where the owner of land platted the same and sold subdivisions in accordance with such plat, the title of the grantees of the platted lots presumably extended to the center of the street subject to the easement.

Florida codified this presumption as to land described in recorded subdivision plats and with regard to a county's abandonment of a road. See *Servando Building Company v Zimmerman*, 91 So.2d 289, 293 (Fla. 1956); Fla. Stat. §§177.085,

336.12. In *Seaboard Air Line Ry. v. Southern Inv. Co.*, 44 So. 351, 353 (Fla. 1907)(citing and quoting *Rawls v. Tallahassee Hotel Co.*, 31 So. 237 (Fla. 1901), and *Jacksonville, T. & K.W. Ry. Co. v. Lockwood*, 15 So. 327 (Fla. 1894)), the Florida Supreme Court noted the longstanding principle of Florida property law that "the proprietor of lots abutting on a public street is presumed, in the absence of evidence to the contrary, to own soil to the center of the street."

In *Servando*, the Florida Supreme Court, interpreting its prior decisions in both *Horn* and *Florida Southern*, held that the owner of the lot abutting road easements took title to the land under the easement to the centerline. 91 So.2d at 293. In *Servanado*, the Florida Supreme Court held,

> "[T]he title of the grantees of [lots] abutting on such streets, in the absence of a contrary showing, extends to the center of such highway, subject to the public easement." In *Florida Southern Ry. Co. v. Brown*, 1 So. 512, 513 [(Fla. 1887)], decided nearly seventy years ago, this court observed that the rule "seems to be based on the supposed intention of the parties, and the improbability of the grantor desiring or intending to reserve his interest in the street when he had parted with his title to adjoining land." And it was further said in that case that such intention will never be presumed.[3]

The court reasoned that a ten-foot-wide alley on a subdivision plat would serve no "practical use or service," and that an "isolated piece of land of such proportion could be of no use to anyone except owners of property it touched and persons dealing

[3] See also *Seaboard*, 44 So. at 353, and *Rawles*, 31 So. at 239 (in the absence of evidence to the contrary, abutting owner is presumed to own the soil to the center of the street).

with them." *Id.* And in *United States v. 16.33 Acres of Land in Dade County*, 342 So.2d 476, 480 (Fla. 1977), the Florida Supreme Court reaffirmed this doctrine. The owner who had originally subdivided the property claimed he still owned the strips of land under the roads. The Florida Supreme Court, following *Horn*, *Florida Southern*, and *Servando*, held that the owners of the lots abutting the easements took title to the centerline of the easements.

These cases establish that the Florida courts have a long history of implementing and applying the strips-and-gores doctrine and the centerline presumption. Yet amongst this body of law, no court decision has ever analyzed the centerline presumption in a manner that resembles or supports what the CFC did below. The law in Florida, as elsewhere, is that the presumption can only be rebutted by putting on evidence that the grantor's intent was not to convey the property to the centerline. *Bischoff v. Walker*, 107 So. 3d 1165, 1170 (Fla. Ct. App. 2013) ("To rebut the presumption, Walker would have had to present evidence of the grantor's intent not to convey to the centerline of the canal."). Notably, the onus is on the party rebutting the presumption to come forward with evidence of the grantor's intent that would override the strong presumption. And, the fact that the owners' deeds do not explicitly state the boundary is the "center" of the right-of-way will not suffice. *Id.* (rejecting the argument "that the deed does not explicitly state that the boundary is at the 'center' of the canal."). The Florida appellate court in *Bischoff*

also invoked the multiple cases where a conveyance of land using a reference point such as a creek, and then describing the property as "lying south of," "south of," "along the southerly bounds," and "north of" the reference point, nonetheless conveys title to the centerline of the reference point. *Id*. (collecting cases).

The CFC, however, concluded the grantors of the Princess Park Manor and Zena Gardens plats reserved title to the fee estate in the narrow strip of land under the former railroad right-of-way, simply because the plats referenced the railroad right-of-way with the words "excepting" and "less." The CFC's conclusion is incorrect as a matter of Florida law, which may be why the CFC cited no case law in support of its holding on this specific issue.

The Florida appellate courts directly confronted the issue of "less" and "except" language in reference to an easement in *Dean v. MOD Properties, Ltd.*, 528 So.2d 432, 434 (Fla. Ct. App. 1988). In *Dean*, the Florida court found that a conveyance that stated "'less and except the following described easement' *did not* serve to reserve to [grantor] any right of reversion as to the fee simple title but served simply to exclude the recorded easement in favor of the [third party] from the title interest being conveyed and to prevent the recorded easement from constituting a breach of the covenants of warranty in each deed."[4] The Florida court also looked

[4] Emphasis added. Citing *16.33 Acres of Land in County of Dade*, 342 So.2d at 478; *Horn*, 70 So. at 435; *Florida Southern Railway Company v. Brown*, 1 So. 512

to the treatise *Thompson on Real Property* §381, p. 513 (1980), which states, "A transfer of the land subject to or even excepting the right-of-way passes title to the underlying fee to the grantee." *Dean*, 528 So.2d at 434.

Dean is on point. The portion of the *Dean* holding quoted in the preceding paragraph suffers from the somewhat cumbersome style that seems strangely popular amongst courts and academics when discussing property law. But in plainer terms, what the *Dean* court said is this: A seller owns a parcel of land burdened by an easement or right-of-way. The easement or right-of-way is being actively used by a beneficiary who has a legal right to use it for specified purposes. The seller wants to sell the parcel, but the seller naturally does not want to get dragged into court, especially in a case involving property law. So, the seller uses language such as "less than" or "except" when describing the relationship of the strip of land burdened by the easement to the adjacent land that makes up the rest of the parcel. The seller does this to make sure the buyer knows that whatever ownership rights in the land he or she is getting, those rights must co-exist with the pre-existing easement. This language also puts both the buyer and the beneficiary of the easement on notice that the seller has done its part, and has made all parties involved aware of the various legal rights and obligations that attach to the land being sold.

(1887); *Servando*, 91 So.2d at 291; and *Emerald Equities, Inc. v. Hutton*, 357 So.2d 1071 (Fla. Ct. App. 1978).

But the seller **is not suggesting**, and the buyer **is not expecting**, that if years or decades later, the easement is abandoned or terminated, the seller or the seller's heirs will materialize, and say to the buyer or the buyer's heirs, "Hey! We are so excited to reclaim our ten-foot strip of land that runs along the edge of your backyard!"

In other words, just as Florida law holds that "less" and "except" are effective to transfer the entire fee estate from a grantor to a grantee subject to the easement, Florida law also would not interpret "less" and "except" to "clearly reserve" to the grantors the reversionary interest in the fee estate underlying the right-of-way. In both the Zena Gardens and Princess Park Manor plats, the respective use of the words "except" or "less" explicitly references the then-existing "Florida East Coast [railroad] Right-of-Way," and (as discussed in Section C.3 below) these references are completely separate and apart from the express reservation of the reversionary interest in the "streets, avenues, terrace(s), alleys, and courts" that follow.

Compare the language of the Princess Park Manor and Zena Garden plats, reserving the reversionary interest in the streets, avenues, terraces, alleys, and courts (discussed and quoted in Section C.3 below) with the language of the plat in *Peninsular Point, Inc. v. South Georgia Co-Op*, 251 So.2d 690, 691 (Fla. Ct. App. 1971). It is nearly identical. In *Peninsular Point* the Florida Court of Appeals held, "The recorded plat of the subdivision dedicating the street in question bore on its face a dedication which stated the following material language: '...and does hereby

dedicate to the perpetual use of the public, as public highways, the streets as shown hereon, reserving unto itself, its heirs, successors, assigns, or legal representatives, the reversion or reversions of the same, whenever abandoned by the public or discontinued by law.'" *Id.*

Peninsular Point is an example of the explicit and unambiguous language a grantor must use to reserve a reversionary interest necessary to overcome the centerline presumption. The Zena Park and Princess Park Manor plats contain the same specific and clear reservation of expressly identified reversionary right *in the streets, avenues, terraces, alleys, and courts*, but importantly the reservation makes no mention of the railroad right-of-way. Conversely, the "less" and "except" language used in specific reference to the railroad right-of-way is just like the similar language used in *Dean*. And as in *Dean*, that language does not serve to unsettle or destabilize the title in the land underlying the railroad right-of-way, especially where the right-of-way is now abandoned, and the adjacent landowners correctly claim ownership of the underlying land to the centerline, pursuant to the centerline presumption. The CFC failed to acknowledge this on-point Florida authority, or grapple with its clear implications, which is one reason why its flawed *sua sponte* decision granting summary judgment to the government must be reversed.

2. Precedent from other states suggests the CFC should be reversed.

The CFC's conclusion that the centerline presumption is rebutted or overcome unless the plat specifically depicts the property boundary as extending to the centerline of the referenced right-of-way would render the presumption a nullity. The courts of other states, when confronting this issue under strikingly similar circumstances, align with Florida courts in their interpretation of the centerline presumption, consistently holding that clear evidence of a grantor's intent to retain the reversionary ownership interest is necessary to overcome the presumption.

For example, Missouri courts have consistently applied the presumption in this way to railroad easements. In *Boyles v. Missouri Friends of Wabash Trace Nature Trail*, the Missouri Court of Appeals held, "[w]hen a grantor conveys title to land abutting a railroad right-of-way, it is presumed, *absent clear and convincing evidence to the contrary*, that the grantor intended to convey to the middle line of the railroad right-of-way." 981 S.W.2d 644, 650 (Mo. Ct. App. 1998) (emphasis added) (citing *Brown v. Weare*, 152 S.W.2d 649, 656 (Mo. 1941)). Furthermore, the Texas Court of Appeals held that the word, "less," in a deed does not overcome the centerline presumption. In *Pebsworth v. Behringer*, the court held that "[a] deed to land abutting on a railroad right-of-way conveys title to the center of the right-of-way unless the contrary intention is expressed in the instrument." 551 S.W.2d 501, 504 (Tex. Ct. App. 1977) (citing *State v. Fuller*, 407 S.W.2d 215, and *Angelo v. Biscamp*, 441 S.W.2d 524). The court explained that the phrase "100 acres *less* 8

acres sold to…railroad" in the deed does not express an intention by the grantor to reserve title in the right-of-way. *Id.* (emphasis added).

Likewise, the Massachusetts Supreme Judicial Court held in *Hamlin v. Pairpoint Mfg. Co.*, 6 N.E. 531 (1886), that the centerline presumption applies, even to the point of conveying title underlying the entire right-of-way in certain circumstances, in order to promote the presumption's goal of avoiding the creation of valueless strips of land. In *Hamlin*, the court held, "[a] deed describing the granted land as lying 'southwardly of a highway,' and '*excepting the road* laid out over said land,' must be construed as conveying the land to the center of the highway, subject to the public right of way." *Id.* at 534 (1886) (citing *Wellman v. Dickey*, 2 A. 133 (Me. 1885)) (emphasis added). In addition, the Alabama Supreme Court held the centerline presumption applied in the context of platted lots where "the deeds either used the railroad right-of-way boundary as a property line, or conveyed a platted lot which abutted the railroad right-of-way…." *Ex parte Jones*, 669 So.2d 161, 165 (Ala. 1995). The court examined the decisions of several states and held Alabama "hereby adopt[s] the majority rule, that unless the original grantor of the abandoned right-of-way has, when making a later conveyance, expressly reserved legal title to the land subject to the right-of-way, the grantor is presumed to have intended to pass title to the abutting landowners to the center line of the right-of-way." *Id.*

Consistent with these decisions and Florida's centerline presumption, Oregon courts also recognize a presumption in favor of abutting landowners taking title to the centerline upon extinguishment of an easement. In *Oregon Dep't of Transp. v. Tolke*, 586 P.2d 791, 796-97 (1978), the Oregon appellate court construed a deed with similar language to that used in the Princess Park Manor and Zena Gardens plats as passing the fee of underlying the easement to the grantee. In *Tolke*, the deed from the grantor to the grantee described the land as "excepting therefrom" the portion of the property encumbered by a railroad easement. The deed specifically stated: "[A]ll the following bounded and described property, situated in the County of Washington, State of Oregon, (description of entire farm, omitted) containing 79 acres, more or less, *excepting* therefrom that certain tract of land described in Deed Book 118, page 29, records of deeds of Washington County, Oregon." *Tolke*, 586 P.2d at 796 (emphasis added). In *Tolke*, the Court determined that the "except" language passed the fee estate underlying the railroad's easement to the grantee, because there was no evidence the grantor owned any other abutting land to the strip, there was no express reservation, and "the probable intent of the grantor was not to retain any interest in the narrow strip. The most logical construction of the language is that it was intended to exclude from the conveyance, and thus from the grantors' warranty, the rights of the Railroad under the earlier deed." *Id.* See also *Petersen v. Crook Cty*, 17 P.3d 563, 567 (Or. 2001).

In sum, these cases from other states echo Florida's approach to the strips-and-gores doctrine and the centerline presumption. In doing so, they provide additional compelling support for the conclusion that the features of the plat and deed documents relied upon by the CFC below provide no legal support whatsoever for the CFC's flawed analysis and its incorrect holding.

3. The language of the pertinent deeds and plats confirms that the CFC must be reversed.

All of the plaintiffs own land described in their present-day deeds by reference to a lot and block in either the Princess Park Manor plat (between Taimimi Canal and Fourth Street) or the Zena Gardens plat (between Fourth Street and Eighth Street). The CFC invoked isolated snippets of language in the Princess Park Manor plat and the Zena Gardens plat to support its assertion that the centerline presumption had been rebutted. The CFC's holding required a finding that the owners of the land at the time it was platted clearly reserved an interest in the right-of-way land. But that conclusion is conspicuously undermined by reading the description of the land in the plats.

The Princess Park plat states:

> That Erving A. Moss and Harriet E. Moss his wife, owners of the South ½ of the NE ¼ South of canal **and east of the Florida East Coast Right-of-way,** located in Sec. 2 Twp. 54 South, RGE. 40 East . . . being the land East of the Florida East coast Right-of-Way and between Flagler Street and the Tamiami canal and extending east to Ludlum Road, **also** the West ½ of the Northeast ¼ of the southeast ¼ **less the Florida East Coast Right of Way** all in Sec. 2 Township 34 South

> RGE 40 East . . . **Said Florida East Coast Right-of-Way being the right-of-way of the Okeechobee Miami Extension of the Florida East Coast Railway**, have caused to be made the attached plat entitled PRINCESS PARK MANOR,
>
> **The streets, Avenues, Roads, Terraces, Courts and Alleys** as shown together with all existing and future planting, trees and shrubbery thereon **are hereby dedicated to the perpetual use of the public** for proper purposes, **reserving to the said Erving A. Moss and Harriett Moss his wife their heirs, successors or assigns, the reversions or reversion thereof whenever discontinued by law**.

Appx757 (emphasis added).

> The Zena Gardens plat states:
>
> That Louis Merwitzer and Rebecca Merwitzer his wife owners of the S.E. ¼ of the S.E. ¼ of Section 2, Township 54 South, Range 40 East, Miami, Dade County, Florida, **excepting therefrom a strip of land off the westerly side which is the right of way of the Okeechobee-Miami Extension of the Florida East Coast Railway** have caused to be made the attached plat entitled "Zena Gardens."
>
> **The Streets, Avenues and Terrace as shown** together with all existing and future planting, trees and shrubbery there on **are hereby dedicated to the perpetual use of the Public** for proper purposes **reserving to the said Louis Merwitzer and Rebecca Merwitzer, his wife, their heirs, successors or assigns, the reversion or reversions thereof whenever discontinued by law**.

Appx759 (emphasis added).

Both plats contain nearly identical reservations, which clearly "reserve[e]" in the Merwitzers and Mosses the right of reversion should any of the streets, avenues, and terraces, courts, or alleys be "discontinued by law" for public use. The railroad is not referenced in the reservations contained in the second paragraph of the plats,

but the railroad rights-of-way are expressly referred to in the first paragraph. So, it is obvious that the grantors did not intend to include the railroad right-of-way in the reservation of their potential reversionary interest in the land underlying the "streets, avenues, terraces, courts, or alleys." If the grantors had intended to include the railroad right-of-way in this express affirmative reservation, they would have done so. The plain language of the plats proves that if the grantors intended to reserve something, they knew how to do so, and were in fact careful to include the type of clear, affirmative reservation language that is required to rebut the otherwise-applicable centerline presumption.

In the Princess Park Manor plat, the railroad right-of-way is referenced twice in the description of the land owned by the Mosses, which is "being the land East of the Florida East coast Right-of-Way" for the portion of the plat bordered by Tamiami Canal on the north and Flagler Street on the south, and "less the Florida East Coast Right of Way" for the portion of the plat between Flagler Avenue and Fourth Street. While the CFC implies that the use of the term, "less the Florida East Coast Right of Way," operated to reserve the right-of-way in the grantor, that reading is undermined by the fact that the plat simply re-states the legal description of all the lands owned by the Mosses when they acquired it. The prior deed in the chain of title, which conveyed this land to the Mosses, contains the *exact same legal description*.

Erving Moss acquired the property in 1949 from the estate of Lucy Cotton (a.k.a. Lucy Cotton Thomas Magraw, a.k.a. Lucy Eristavi-Tchitcherine).[5] The deed to Moss conveyed:

> The South one-half of the Northeast quarter South of the Canal and East of the Florida East Coast Right-of-way, located in Section 2, Township 54 South, Range 40 East, Dade County, Florida; **being the land East of the Florida East Coast Right-of-way** and between Flagler Street and the Tamiami Canal and extending East to Ludlam Road; also
>
> The West one-half of the Northeast quarter of the Southeast quarter **less the Florida East Coast Right-of-Way** all in Section 2, Township 54 South, Range 40 East, Dade County, Florida.

Appx943-944 (emphasis added).

Therefore, the Mosses could not have been intentionally reserving anything in themselves when they used an identical legal description of all the lands owned by them. Indeed, the deed to the Mosses' predecessor-in-interest (the Cotton estate) used this exact same language as well.[6] The fact the "less the Florida East Coast Right of Way" language was repeated from deed-to-deed belies a finding that the Mosses were intending to reserve anything in themselves when they conveyed the land to be platted for Princess Park Manor.

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[5] Lucy Cotton appears to be the inspiration for "Princess Park Manor," as the deed by which she acquired the property states her name as "Princess Lucy Eristavi-Tchitcherine." Appx941. It too contains the exact same legal description for the property as is stated in the plat. *Id.*

[6] See Appx941.

This is exactly the situation that arose in *Dean*, *supra*, where the Florida court held the use of "less" and "except" is used "simply to exclude the recorded easement in favor of the [third-party] from the title interest being conveyed." *Dean*, 528 So. at 434. The only logical reading of the "less" language when viewed in context of the entire chain of title is that the grantors were excluding the easement, not the underlying fee.

And, in fact, the Mosses did not include any language in the plat for the northern part between Tamimi Canal and Flagler Avenue, which simply states they own everything "east of the Florida East Coast Right of Way." A straightforward application of Florida's centerline presumption, *supra*, dictates that the Mosses would have been held to be the fee owners of the land to the centerline of the right-of-way.

The Zena Gardens plat likewise uses a similar legal description to describe the land platted as is contained in the grantors' deed by which they (the developers of the Zena Gardens subdivision) acquired the land. The deed to Louis Merwitzer from the Central Construction Company, two years prior to the creation of the plat, described the land as "LESS that certain strip of land off the Westerly portion of the above described property." Appx902-903. And that same language was used in the deeds preceding the deed to Louis Merwitzer. See Appx897, Appx899-900.

In sum, use of this same "less" and "except" in the Zena Gardens and Princess Park plats, drawn from the language used in the deeds through which the developers of the subdivisions (Merwitzer and Moss) first acquired the land, makes clear that Merwitzers' and Mosses' intentions were not to reserve an ownership interest in the land underlying the railroad easement. Instead, these references in the plats were simply recitals of deed language that had been passed down from one owner to the next, and the ownership interests acquired by the plaintiffs when they purchased their platted parcels was no different, and no less than, the ownership interests of their predecessors in title who owned the land before the subdivision plats were created.

In short, the Merwitzers and Mosses clearly intended to include everything they owned in the plats. Nothing in their plat language, the language of their deeds, or the language of the deeds of their various predecessors in title, is sufficient to separate the ownership of the land underlying the railroad right-of-way from the ownership of those parcels directly adjacent to the right-of-way. And now that the railroad right-of-way has been abandoned, the plaintiffs, as the undisputed fee owners of the directly adjacent parcels, are also the owners (pursuant to the centerline presumption) of the land underlying the abandoned right-of-way easement, to the centerline of that easement.

CONCLUSION

Under Florida law, these present-day owners of the lots in the Zena Gardens and Princess Park Manor subdivisions whose platted lots adjoin the former Florida East Coast railroad right-of-way easement hold title to the fee estate in the land to the centerline of the adjoining right-of-way. We ask this Court to reverse the decision of the CFC, and remand this case with instructions to enter summary judgment in favor of the plaintiffs in relation to the ownership issues discussed herein.

Respectfully submitted,

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