2019-1385

United States Court of Appeals for the Federal Circuit

NORMA E. CAQUELIN,

Plaintiff – Appellee,

v.

UNITED STATES,

Defendant – Appellant.

On Appeal from the United States Court of Federal Claims in No. 1:14CV37, Judge Charles F. Lettow

CORRECTED BRIEF FOR NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS, CATO INSTITUTE, SOUTHEASTERN LEGAL FOUNDATION, REASON FOUNDATION, INVERSECONDEMNATION.COM, AND PROFESSOR JAMES W. ELY, JR., AS *AMICI CURIAE* IN SUPPORT OF APPELLEE URGING AFFIRMANCE

MARK F. (THOR) HEARNE, II
STEPHEN S. DAVIS
LARSON O'BRIEN LLP
112 S. Hanley Road, Suite 200
St. Louis, MO 63105
(314) 296-4000
Thor@larsonobrienlaw.com

555 South Flower Street, Suite 4400
Los Angeles, CA 90071

440 First Street, NW, Suite 450
Washington, DC 20001

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION

To avoid paying the Caquelin family $900, the government wants a panel of this Court to ignore four of this Court's prior decisions representing the collective wisdom of more than ten members of this Court and adopt a new rule that is contrary to the Supreme Court's and this Court's Takings Clause jurisprudence. This Court should affirm Judge Lettow's well-reasoned decision that faithfully followed this Court's controlling precedent.

The Supreme Court recently reminded us that the "government violates the Takings Clause when it takes property without compensation, and that a property owner may bring a Fifth Amendment claim *** at that time." *Knick v. Scott Township*, 139 S.Ct. 2162, 2177 (2019). The Supreme Court continued, "because the violation *is complete at the time of the taking*, pursuit of a remedy in federal court need not await any subsequent state action." *Id.* (emphasis added). The government took the Caquelin family's property and must pay them.

INTEREST OF *AMICI CURIAE*[1]

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

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

---

[1] This brief is not authored, in whole or part, by any party's counsel. No party, party's counsel, or person other than *amici curiae*, their members or counsel contributed money intended to fund the preparation or submission of this brief. Ilya Shapiro, Director of Cato Institute's Robert A. Levy Center for Constitutional Studies, Kimberly S. Herman, General Counsel for the Southeastern Legal Foundation, Manuel S. Klausner, legal counsel for Reason Foundation, and Robert H. Thomas, author of Inversecondemnation.com, have authorized the filing of this brief on behalf of their respective organizations. Professor James W. Ely, Jr., has authorized the filing of this brief on behalf of himself. Appellee Norma Caquelin consents to the filing of this brief. Appellant United States has no objection to the filing of this brief.

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

Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

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

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

Inversecondemnation.com is a law blog, published since 2006 by Robert H. Thomas, which focuses on recent developments and analysis of regulatory takings, eminent domain, inverse condemnation, property rights, and land use law.

Professor James W. Ely, Jr., is the Milton R. Underwood Professor of Law Emeritus at Vanderbilt University Law School. Professor Ely is the co-author of the leading treatise on the law of easements, *The Law of Easements and Licenses in Land* (revised ed. 2018), and is the author of *The Guardian of Every Other Right: A*

Constitutional History of Property Rights (3rd ed. 2008). The Supreme Court recently relied upon Professor Ely's scholarship in *Brandt*, 572 U.S. at 96.

STATEMENT OF THE CASE

I. Congress amended the Trails Act to pre-empt landowners' state-law "reversionary" rights.[3]

Congress wanted to preserve otherwise-abandoned railroad corridors by delaying the railroad's authority to abandon the corridor for six-months, to allow the railroad to possibly sell the right-of-way to a non-railroad for a public recreational trail. See *National Wildlife Federation* v. *I.C.C.*, 850 F.2d 694, 697 (DC Cir. 1988). But this didn't work. The Supreme Court observed that "by 1983, Congress recognized that these measures [the public use provision delaying disposition for six-months] 'ha[d] not been successful in establishing a process through which railroad rights-of-way which are not immediately necessary for active service can be utilized for trail purposes.'" *Preseault I*, 494 U.S. at 6. Delaying abandonment for six months didn't succeed because, under state law, the railroad had nothing to sell.

[3] "Reversionary" is a shorthand term for the fee owner's interest. "Instead of calling the property owner's retained interest a fee simple burdened by the easement, this alternative labels the property owner's retained interest *** a 'reversion' in fee." *Preseault* v. *United States*, 100 F.3d 1525, 1533 (Fed. Cir. 1996) (en banc) (*Preseault II*). See also *Brandt*, 572 U.S. at 105, n.4.

The Supreme Court explained, "many railroads do not own their rights-of-way outright but rather hold them under easements [and] *** the property reverts to the abutting landowner upon abandonment of rail operations." *Preseault I*, 494 U.S. at 7. Congress adopted section 8(d) to fix this problem by pre-empting state law and allowing a railroad to sell the otherwise abandoned right-of-way to a non-railroad trail-user notwithstanding the fee owner's state law reversionary interests.

The Supreme Court explained section 8(d) "pre-empt[s] the operation and effect of certain state laws that 'conflict with or interfere with federal authority over the same activity.'" *Preseault I*, 494 U.S. at 21 (O'Connor, J., concurring). State courts "cannot enforce or give effect to asserted reversionary interests ***." *Id.* at 22. When the Surface Transportation Board (the Board) invokes section 8(d), it denies an owner his reversionary right to possess his land and perpetually forestalls termination of the railroad easement. See *National Wildlife*, 850 F.2d at 705; *Citizens Against Rails-to-Trails* v. *Surface Transportation Board*, 267 F.3d 1144, 1149 (DC Cir. 2001) (*CART*); *NARPO*, 158 F.3d at 139.

If the railroad and trail-user agree, the railroad transfers the right-of-way to the trail-user. The agreement between the railroad and trail-user is a private agreement not filed with the Board, and affected landowners are never told of the

agreement between the railroad and trail-user.[4] As a further consequence of invoking section 8(d), the Board retains jurisdiction of the corridor, perpetually pre-empting state law, and may authorize *any* railroad (not just the original railroad) to build a new railroad line across the owner's land. The Board can indefinitely extend the period for the railroad to reach a trail-use agreement. See *Birt* v. *Surface Transportation Board*, 90 F.3d 580, 589 (DC Cir. 1996); and *Rail Abandonments – Supplemental Trails Act Procedures*, 4 I.C.C.2d 152 (1987). The Board will also freely issue "replacement NITUs," substituting new and different trail-users even after the trail-use negotiating period has expired. See *Barclay v. United States*, 443 F.3d 1368, 1376 (Fed. Cir. 2006) (despite expiration of the original NITU, replacement NITU precluded consummation of abandonment and reversion of landowners' interest).

The duration between when the government originally invokes section 8(d) and when trail-use is established or negotiations with trail-users end without any agreement frequently lasts a decade or longer – far longer than the six-year statute of limitations. See, *e.g.*, *Wisconsin Cent. Ltd.*, No. AB-303 (Sub-No. 18X) (Surface Trans. Bd. July 28, 2009) (NITU issued March 1998 and extended until January 2010). Thus, if a reversionary landowner is required to wait until the outcome of the

[4] See *Twenty-Five Years of Railbanking: A Review and Look Ahead, Hearing before the Surface Transportation Board*, Ex Parte No. 690 (July 8, 2009).

original invocation of section 8(d) is concluded – with either construction of a public recreational trail or the government surrendering jurisdiction of the corridor without a public trail – the statute of limitations will have expired. During this time the landowner's reversionary interest has been forestalled.

II. An owner's claim for compensation arises when the owner first has notice of the Board's decision invoking section 8(d).

The government spawned an additional line of Trails Act litigation when it argued owners' claims were time-barred. The government said the six-year limitation period in 28 U.S.C. 2501 begins to run when the government first invokes section 8(d). This Court announced a "bright-line rule" that a Trails Act taking occurs, and an owner's claim for compensation accrues, when the Board first invokes section 8(d) because that is the only *government action* that blocks an owner's state-law reversionary right from vesting. See *Caldwell v. United States*, 391 F.3d 1226, 1233-34 (Fed. Cir. 2004).

The government successfully argued in *Caldwell* that the landowners' right to compensation was time-barred because their claims accrued when the railroad agreed to sell the right-of-way to the trail-user. 57 Fed. Cl. at 197. This Court explained, "The issuance of the NITU is the only *government* action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way."

Caldwell, 391 F.3d at 1233-34 (emphasis in original). The owners sought rehearing, but the government opposed, and this Court denied, rehearing. This bright-line rule was affirmed and reinforced by this Court in *Barclay*, 443 F.3d at 1373, *r'hg denied* September 5 and 12, 2008, *Illig* v. *United States*, 274 Fed. App'x 883, 884 (2008), *r'hg denied* October 1, 2008, and *Ladd* v. *United States*, 630 F.3d 1015, 1025 (Fed. Cir. 2010) (*Ladd I*), *r'hg denied*, 646 F.3d 910 (2011), and *Ladd* v. *United States*, 713 F.3d 648, 652-53 (Fed. Cir. 2013) (*Ladd II*).

In sum, the argument the government makes today is the opposite argument the government made previously, and the government's new argument has been considered and rejected by five panels of this Court, and this Court has rejected rehearing this argument *en banc* four times. More than ten members of this Court (Judges Prost, Dyk, Rader, Linn, Lourie, Bryson, O'Malley, Reyna, Newman, and Michel) voted to reject rehearing this argument *en banc*.[5] Furthermore, more than four times the Supreme Court denied certiorari and refused to hear this argument. In fact, the U.S. Supreme Court recently affirmed that "a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it." *Knick*, 139 S.Ct. at 2170.

[5] While Judge Newman originally dissented in *Caldwell* and *Barclay*, Judge Newman did not dissent from the denial of rehearing in *Ladd I*. And, while Judges Moore and Gajarsa voted to rehear this argument, they recognized this Court's holding in *Caldwell*, *Barclay*, and *Illig* is settled law.

ARGUMENT

I. Judge Lettow faithfully followed this Court's precedent.

A. Judge Lettow correctly held that the government's invocation of section 8(d) is a *per se* taking of the owner's state law right to his property.

Congress wanted to preserve otherwise abandoned railroad rights-of-way for public use as recreational trails and "railbanking" the corridor for possible future railroad. But landowners' state-law reversionary right to use and possess the land were a "problem." *Preseault I*, 494 U.S. 1, 8, 19 (citing H.R. Rep. No. 98-28, pp. 8-9, U.S. Code Cong. & Admin. News 1983, pp. 119, 120). So, in 1983 Congress amended the Trails Act to add section 8(d). Section 8(d) provides, "interim [trail] use [or railbanking] shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes."[6] 16 U.S.C. 1247(d). Congress adopted section 8(d) for the express purpose of "destroying" and "effective eliminating" landowners' reversionary property interests to allow the Board to impose a new easement for railbanking and public recreation on the strip of land. See *Preseault I*, 494 U.S. at 8.[7]

---

[6] Congress adopted section 8(d) to *confiscate* the owner's state-law reversionary right to use and possess the land, not to *regulate* railroads. This point is manifest from the codification of the law. Regulation of transportation is under Title 49 of the United States Code. Federal parks and recreation is under Title 16 of the Code.

[7] "It is settled law that a Fifth Amendment taking occurs in Rails-to-Trails cases when government action *destroys* state-defined property rights by converting a railway easement to a recreational trail, if trail use is outside the scope of the original

The Board's invocation of section 8(d) imposes a new and different easement upon the owner's land, which is a "direct appropriation of [the owner's reversionary] property, or the functional equivalent of a practical ouster of the owner's possession." *Lucas* v. *South Carolina Coastal Comm'n*, 505 U.S. 1003, 1014 (1992). The government's invocation of section 8(d) encumbers the owner's land with a new and different easement for railbanking and public recreation. See *Preseault II*, 100 F.3d at 1550 ("a new easement for a new use"); *Trevarton* v. *South Dakota*, 817 F.3d 1081, 1087 (8th Cir. 2016) ("as a matter of federal law it granted 'a new easement for a new use'" *** the 'new easement' [the trail user] acquired under the Trails Act, [is] an interest which authorized [the trail user] to use the Trail for Trails Act purposes.").

B. Under the Supreme Court's takings jurisprudence, the Board's invocation of section 8(d) is a physical taking for which the Just Compensation Clause categorically requires the government to compensate the owner.

When the government occupies an owner's land or "depriv[es] the owner of the right to possess, use and dispose of the property" the government has a "categorical" duty to compensate the owner. *Horne* v. *Department of Agriculture*, 135 S.Ct. 2419, 2426 (2015). Government action that confiscates an owner's

---

railway easement." *Ladd I*, 630 F.3d at 1019 (emphasis added). See also *Caldwell*, 391 F.3d at 1228 ("a Fifth Amendment taking occurs when, pursuant to the Trails Act, state law reversionary interests are *effectively eliminated* in connection with a conversion of a railroad right-of-way to trail use") (emphasis added).

property or "practically ousts" the owner from possession of his property (a *per se* taking) is "perhaps the most serious form of invasion of an owner's property interest, depriving the owner of the right to possess, use and dispose of the property." *Id.* at 2427 (internal quotation omitted). The Takings Clause requires the government to compensate the owner for what the owner lost, not what the government gained. See also *Boston Chamber of Commerce* v. *City of Boston*, 217 U.S. 189, 195 (1910) ("the question is, What has the owner lost? not, What has the taker gained?") (Holmes, J.). The Just Compensation Clause is self-executing. *San Diego Gas & Elec. Co.* v. *City of San Diego*, 450 U.S. 621, 654 (1981) (dissenting opinion of Justice Brennan, which was later adopted by the Court in *First English Evangelical Lutheran Church of Glendale* v. *County of Lost Angeles*, 482 U.S. 304, 318 (1987)). The Supreme Court reaffirmed this point in *Arkansas Game & Fish Comm'n v. United States*, stating, "'When the government physically takes possession *of an interest in property* for some public purpose, it has a categorical duty to compensate the former owner.'"[8]

Physical takings include the government imposing an easement upon an owner's property even when the government does not take or itself occupy the land. See, *e.g.*, *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 841-42 (1987)

[8] 568 U.S. 23, 31 (2012) (emphasis added).

(easement for a public walkway along owner's land), *Dolan* v. *City of Tigard*, 512 U.S. 374, 396 (1994) ("The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be done."), *Kaiser Aetna* v. *United States*, 444 U.S. 164, 180 (1979) (navigation easement for public imposed upon privately-owned harbor), *United States* v. *Causby*, 328 U.S. 256, 266 (1946) (avigation easement for government aircraft flying over chicken farm); and *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U.S. 327, 329 (1922) (easement for intermittently firing artillery shells over privately-owned land).

Even when the duration of the taking is temporary, it is still a physical taking for which the government has a "categorical" duty to compensate the owner. In the case of a physical takings the court does not engage in a multi-factor analysis to determine if a taking occurred. This is so even when the physical taking is of limited duration. In a physical taking the duration of the taking goes to the compensation due the owner not whether the government is liable for a taking.

The Supreme Court explained, "[a] temporary takings claim could be maintained as well when government action *occurring outside the property* gave rise to 'a direct and immediate interference with the enjoyment and use of the land.'" *Arkansas Game*, 568 U.S. at 33 (emphasis added) (citing and quoting *Causby*, 328 U.S. at 266). This Court, in *Hendler* v. *United States*, explained that

the government, "when it has taken property by physical invasion, could subsequently decide to return the property to its owner, or otherwise release its interest in the property. Yet no one would argue that would somehow absolve the government of its liability for a taking during the time the property was denied to the property owner." 952 F.2d 1364, 1376 (Fed. Cir. 1991). This Court continued, "All takings are 'temporary,' in the sense that the government can always change its mind at a later time ***." *Id.*

The government's invocation of section 8(d) falls squarely into this class of categorical physical takings for two reasons. *First*, the government's invocation of section 8(d) "destroys" and "effectively eliminates" the owner's established state law property interest thereby dispossessing the owner of his right to use the land and to exclude others from using the land. *Second*, the government's invocation of section 8(d) imposes a "new easement" upon the owner's land for railbanking and public recreation. By government fiat, the railroad is granted a right the railroad did not hold under state law. Apart from the Board invoking section 8(d) the railroad had interest in the right-of-way and terminated the railroad's state-law interest. And the railroad had no ability to transfer any interest in the right-of-way to a non-railroad. See *East Alabama Rwy.* v. *Doe*, 114 U.S. 340, 350-51 (1885) ("the grant to the 'assigns' of the [railroad] corporation cannot be construed as extending to any assigns except one who should be the assignee of its franchise to establish and run a

railroad"). See also *Brandt*, 572 U.S. at 105 ("Unlike most possessory estates, easements *** may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude.") (quoting *Restatement (Third) of Property: Servitudes* §1.2(1)).

In a series of decisions over the past two decades, this Court held the invocation of section 8(d) is a *per se* categorical taking of the fee owner's property. See *Caldwell*, *Barclay*, *Illig*, *Ladd I*, *Ladd II*, *Rogers v. United States*, 814 F.3d 1299, 1303 (Fed. Cir. 2015), and *Navajo Nation* v. *United States*, 631 F.3d 1268, 1274-75 (Fed. Cir. 2011).

II. The government's new "temporary regulatory taking theory" is contrary to controlling precedent and is a logical and practical disaster.

The government's argument – that the Board's invocation of section 8(d) gives rise to only a temporary regulatory taking that must be evaluated under some *ad hoc* multi-factor paradigm – is contrary to this Court's and the Supreme Court's settled jurisprudence. The government's argument supposes the Board's invocation of section 8(d) gives rise to multiple different takings – both temporary regulatory takings and permanent physical takings – the timing and character of which depend upon non-government actors (the railroad and trail-user) negotiating an agreement that is not public and is not provided to the government or to the landowners. The government now argues that, until the railroad and trail-user reach an agreement, the Board's invocation of section 8(d) places landowners into a Trails Act limbo where

the government has denied them use and possession of their land but the government's constitutional obligation to compensate the owner is not "triggered" until these private parties subsequently reach a private agreement to which the government and owners are not party and of which the owners do not even have knowledge.[9] The government's new theory throws landowners into a Dantesque purgatory taking their property but denying the owners their constitutional right to compensation invites a parade of profoundly perplexing practical problems.

A. The Supreme Court's and Federal Circuit's controlling precedent refute the government's new Trails Act taking theory.

The government's new Trails Act takings theory fails for five fundamental reasons.

1. The Takings Clause concerns what the owner lost not what the taker gained.

The Takings Clause protects what the owner lost, not what the government gained. In *Boston Chamber of Commerce*, 217 U.S. at 189, Justice Holmes explained, "the question is, What has the owner lost? not, What has the taker gained?" What these owners lost is their right under state law to the exclusive use

[9] We describe the government's current argument as the "government's new theory" because the government previously argued the exact opposite position. See *Caquelin v. United States*, No. 2016-1663, Brief for *Amici Curiae* National Association of Reversionary Property Owners, National Cattlemen's Beef Association, and Public Lands Council, 2017 WL 388589 (filed Jan. 19, 2017); Brief for *Amici Curiae* Southeastern Legal Foundation and Property Rights Foundation of America. See also the government's briefing in *Caldwell*, *Barclay*, and *Illig*.

and possession of their land. This "destruction" and "elimination" of an owner's state law reversionary right occurred when the Board first invoked section 8(d). See *Caldwell*, *Barclay*, *Illig*, *Ladd I*, *Navajo Nation*, and *Rogers.* The owner's right to the exclusive use and possession of their the land is perpetually eliminated so long as the Board invokes section 8(d) and retains jurisdiction of the rail-trail corridor. Whether a third-party trail-user does, or does not, negotiate an agreement with the railroad has *nothing* to do with what the owner lost.

2. The government wrongly contends a *temporary physical* taking is a *regulatory* taking.

The government wrongly conflates a *temporary* taking with a *regulatory* taking. That the government took an owner's property for an indefinite period or that the government may later return the property to the owner does not excuse the government from its constitutional obligation to compensate the owner. In *Hendler*, this Court wisely observed, "All takings are 'temporary,' in the sense that the government can always change its mind at a later time ***." 952 F.2d at 1376. The government must compensate the owner for the value of the property during that time the government took the owner's property. See *First English*, 482 U.S. at 318. The Board's invocation of section 8(d) continues to perpetually encumber these owners' land and continues to preclude these owners from using or possessing their land. That the Board's preemption of these owners' state-law property interest may

possibly end sometime in the indefinite future does not relieve the government of its obligation to compensate the owner.

In *Arkansas Game*, the Supreme Court explained, "[T]his Court's decisions confirm, if government action would qualify as a taking when permanently continued, temporary actions of the same character may also qualify as a taking." 568 U.S. at 26. The Court continued, "our decisions confirm that takings temporary in duration can be compensable. This principle was solidly established in the World War II era, when '[c]ondemnation for indefinite periods of occupancy [took hold as] a practical response to the uncertainties of the Government's needs in wartime.'" *Id.* at 33 (quoting *United States* v. *Westinghouse Elec. & Mfg. Co.*, 339 U.S. 261, 267, (1950)). See also *United States* v. *Pewee Coal Co.*, 341 U.S. 114, 117 (1951), *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 7, 16 (1949), and *United States* v. *General Motors Corp.*, 323 U.S. 373, 382-83 (1945). After reviewing these World War II cases the Court explained, "we have rejected the [government's] argument that government action must be permanent to qualify as a taking. Once the government's actions have worked a taking of property, 'no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Arkansas Game*, 568 U.S. at 33.

In *Yuba Nat. Resources* v. *United States*, 904 F.2d 1577, 1580-81 (Fed. Cir. 1990), a panel of this Court, including Chief Judge Markey, similarly held, "In the

case of a temporary taking, however, since the property is returned to the owner when the taking ends, the just compensation to which the owner is entitled is the value of the use of the property during the temporary taking, *i.e.*, the amount which the owner lost as a result of the taking."[10] "[T]he Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this [temporary] period."). The Federal Circuit then held, "[t]he usual measure of just compensation for a temporary taking, therefore, is the fair rental value of the property for the period of the taking." *Id.* at 1581 (citing *Kimball*, 338 U.S. at 7).

3. *Confiscating* an owner's property is not *regulation* of the owner's property.

The government seeks to avoid its constitutional obligation to justly compensate owners whose property the government has taken by attempting to reframe a *per se* physical taking for which the government is "categorically" obligated to compensate the owner as a "temporary" or "regulatory" taking for which some multi-factor test excuses the government from compensating the owner. The government believes that under its proposed "multi-factor" analysis the government will avoid having to compensate these owners.

Regulatory takings, unlike *physical* takings, do not take or destroy an owner's state-law right to use and possess their land, nor do regulatory takings oust the owner

[10] Quoting *First English*, 482 U.S. at 319

from his property or deny the owner his right to exclude others from the owner's land. An owner whose property is subject to a regulatory taking still enjoys the state-law right to use and possess their land and the owner has the right to exclude others from using the land. *Physical* categorical takings are when the government occupies, acquires, confiscates, or destroys an owner's state-law right to use, possess, and dispose of the owner's property. A *regulatory* taking, on the other hand, is the government exercising its police power (typically a zoning or land-use regulation) to limit the manner an owner may use or develop their property. A regulatory taking does not deny the owner's state-law right to exclude others from the owner's property.

4. *Arkansas Game* repudiates the government's new theory.

The government rests its new Trails Act takings theory upon the government's supposition that *Arkansas Game* somehow upended the Supreme Court's Takings Clause jurisprudence, overturned twenty years of Federal Circuit precedent and created a new *ad hoc* "multi-factor" analysis that transmogrifies *per se* takings into regulatory takings.

The government, while acknowledging the Corps intermittently flooded the Commission's land for six years, argued that the Corps stopped flooding the Commission's land, the taking was "only" a "temporary" taking for which the government needn't compensate the Commission. See *Arkansas Game & Fish*

Comm'n v. *United States*, 637 F.3d 1366, 1372 (Fed. Cir. 2011). Judge Lettow rejected this argument and ordered the government to pay the Commission $5 million for the value of the timber destroyed by the government-induced flooding. The government appealed, and a split panel of the Federal Circuit overturned Judge Lettow. The Supreme Court unanimously reversed the panel.

The government lost *Arkansas Game*. Now, upon the shards of the government's defeat, the government endeavors to construct a new and different Fifth Amendment Taking Cause jurisprudence. Like a kidnapper assembling a ransom note with words and phrases cut from magazines, the government cuts and pastes snippets of *Arkansas Game* attempting to craft an amalgamation of phrases the government claims support the government's new argument.

Not only does *Arkansas Game not* support the government's new theory, *Arkansas Game repudiates* the government's new theory. The Supreme Court said, "[t]he question presented [in *Arkansas Game*] is whether a taking may occur within the meaning of the Takings Clause when government-induced flood invasions, although repetitive, are temporary." 568 U.S. at 26. The Supreme Court answered this question, holding that even when the duration of the government's taking of private property is temporary, the government has a "categorical" constitutional duty to justly compensate the owner. "We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings

Clause inspection." *Id.* at 38. The government ignores the actual language and holding of *Arkansas Game* and claims *Arkansas Game* held that all "temporary" takings of any type, including *physical* takings, must now be analyzed under some "multi-factor test" the government derives from *Arkansas Game*. The government's view of *Arkansas Game* is wrong.

5. The government's new theory is impossible to implement.

This Court held there must be a bright-line rule to establish the date of a Trails Act taking. This Court held the government takes the owner's property when *the government* first invokes section 8(d), not when the railroad and trail-user subsequently negotiate an agreement. The Court concluded a Fifth Amendment taking must be based upon "*government action*," not some subsequent action by private actors. See *Caldwell*, 391 F.3d at 8-9 ("Under the Trails Act, the STB takes only one action – it issues the NITU – that might cause one taking."); *Barclay*, 443 F.3d at 1373 ("We concluded [in *Caldwell*] that '[t]he issuance of the NITU is the only *Government* action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right of way.'") (emphasis in original).

However, rather than a single government action occurring when the Board first invokes section 8(d), the government now asks this Court to adopt the supposition that the Board's original invocation of section 8(d) gives rise to a series

of multiple different takings "triggered" by private agreements of third-parties reached during the decade or more after the government first preempted these owners' state-law right to use and possess their land. The government's new theory supposes a series of multiple temporary regulatory takings when the Board invokes section 8(d) or issues orders modifying its original invocation of section 8(d), and a subsequent permanent *per se* taking when the railroad and trail-user reach a trail use agreement. The government's proposed regime that is impossible to implement.

The government's new theory (that a permanent *per se* physical taking occurs when the railroad and trail-user reach an agreement and a series of temporary regulatory takings occur when the Board first invokes section 8(d)) is extremely problematic. There is no way owners or the government can know the railroad and trail-user have reached an agreement. An agreement between the railroad and trail-user is private and is not filed with the Board nor made public. See *Twenty-Five Years of Railbanking: A Review and Look Ahead, Hearing Before the Surface Transp. Bd.*, Ex Parte No. 690, 51-55 (July 8, 2009); see also Hearne, *et al.*, *The Trails Act: Railroading Property Owners and Taxpayers for More Than a Quarter Century*, 45 Real Property, Trust & Estate Law Journal 115 (Spring 2010). Also, when is the "agreement" reached? What if the railroad and trail-user amend the agreement? In many Trails Act cases there are multiple agreements and amendments to agreements between the railroad and trail sponsor, and the agreement may be

contingent upon various subsequent events. See *Barclay*, 443 F.3d at 1376 (despite expiration of the original NITU, replacement NITU precluded consummation of abandonment and reversion of landowners' interest). How are the government, landowners and this Court to determine which of these agreements or amendments to agreements or agreements premised upon future contingent events establish the date of a physical permanent taking? The date of taking establishes the date when the statute of limitations begins running. The date of taking determines who owned the land on that date and is entitled to compensation. And the date of taking establishes when the government's obligation to pay interest begins to accrue.

In some cases the time between the Board's original invocation of section 8(d) and the railroad and trail-user reaching agreement can be a decade or more. See, *supra*, p. 7. In other cases the railroad and a trail-user reach agreement before the railroad petitions the Board to abandon the right-of-way. The statute of limitations allows owners six years to seek compensation. See 28 U.S.C. 2501. But the claim accrual rule holds the statute does not begin running until the owner has notice. See *Ladd II*, 713 F.3d at 653-54. Additionally, ownership of land subject to the Board's order invoking section 8(d) frequently changes between the government's invocation of section 8(d) and the railroad reaching an agreement. The government's new theory provides no answer to the question, "when does the statute

of limitations begin to run?" Nor does the government's new theory tell us the date a plaintiff must hold title to the land under the right-of-way to bring a claim.

Furthermore, the government should be careful about what is asks for. If the rule in Trails Act takings is changed and the owner's claim now accrues when the railroad and trail-user reach some agreement, and under the claim accrual rule in *Ladd II*, the statute of limitations does not begin to run until the owner learns of this private agreement between the railroad and trail-user, the government will find itself now obligated to compensate thousands (if not tens of thousands) of owners whose claim for compensation would be otherwise time-barred by the statute of limitations.

All these reasons, and others, demonstrate why the Federal Circuit's adoption of a "bright-line" rule for Trails Act takings is necessary and correct. The Federal Circuit held there cannot be multiple different takings arising from the same government act. The Federal Circuit also held the taking cannot turn upon the private subsequent acts of the railroad and trail-user. It is the federal government's destruction and elimination of the owner's state-law property interest that is the taking. Subsequent use of the owner's land by third-party private actors is a consequence of, not the cause of, the government's taking. See *Caldwell*, 391 F.3d at 1233-34; *Barclay*, 443 F.3d at 1373; *Illig*, 274 Fed. App'x at 884; *Ladd I*, 630 F.3d at 1025, *r'hg denied*, 646 F.3d 910 (Fed. Cir. 2011); *Ladd II*, 713 F.3d at 652-53; *Navajo Nation*, 631 F.3d at 1274; *Rogers*, 814 F.3d at 1303.

B. Even if we accepted the government's new theory that *per se* temporary takings are analyzed under a multi-factor test, the result is the same.

The government argues Trails Act takings are not physical takings but some variant of a "regulatory taking" to be analyzed under a multi-factor test. In *Arkansas Game* the Court discussed factors the Court said may relate to temporary flooding cases. The Supreme Court's analysis of temporary flooding cases in *Arkansas Game* does not extend to a perpetual physical taking arising when the government invokes section 8(d) of the Trails Act. But, even if we consider the *Arkansas Game* temporary flooding factors, the result is the same.

In *Arkansas Game,* the Court identified three factors it said the Court should consider in the context of temporary flooding: (1) "time is indeed a factor in determining the existence *vel non* of a compensable taking;" (2) "the foreseeable result of authorized government action;" and (3) "the owner's 'reasonable investment-backed expectations' regarding the land's use," noting that "consideration of the property owner's distinct investment-backed expectations [is] a matter often informed by the law in force in the State in which the property is located." 568 U.S. at 38. Applied in the context of this and other Trails Act taking cases these factors do not alter the outcome. See *Caquelin* v. *United States*, 140 Fed. Cl. 564, 579-84 (2018) (decision below).

III. Adopting the government's argument would unsettle land title throughout the country and throw this Court's Trails Act jurisprudence into chaos.

Overturning this Court's "bright-line rule" in *Caldwell* (affirmed in *Barclay*, *Illig*, and *Ladd I*) would unsettle land title and throw this Court's Trails Act jurisprudence into chaos. The CFC and other trial courts have relied upon this rule in dozens of Trails Act cases. One reason this rule has been so heavily relied upon is that it has been reinforced by multiple refusals by this Court to review this rule en banc. Contrary to its prior position, the government asks this Court to hold invocation of section 8(d) gives rise to multiple different takings occurring at different times. Accepting the government's argument will cast Trails Act takings adrift without any clear rule establishing when an owner's Trails Act claim accrues and when the statute of limitations begins to run. The government offers no coherent answer to either question.

Does the owner's claim for compensation arise when the railroad agrees to sell the abandoned right-of-way to a trail-user? If so, what happens if (as in *Caldwell*) the railroad and trail-user amend the agreement, make the agreement contingent upon future events, or assign the agreement to a different trail-user? Does the owner's claim accrue when the railroad conveys title to the trail-user? Or does the owner's claim accrue when the trail-user physically constructs a trail across the

owner's land? And, if claim accrual is tied to the trail-use-agreement, how is the owner to know his claim accrued? A trail-use agreement is not a public record.

In *Leo Sheep* v. *United States*, the Supreme Court held, "this Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation." 440 U.S. 668, 687-88 (1979). The Court reaffirmed this principle in *Brandt*, 572 U.S. at 110 ("We decline to endorse [the government's] stark change in position, especially given 'the special need for certainty and predictability where land titles are concerned.'") (quoting *Leo Sheep*, 440 U.S. at 687). The Court held, "[t]he Government loses [its] argument today, in large part because it won when it argued the opposite before this Court ***." *Brandt*, 572 U.S. at 102.[11] Legal scholars have articulated that the "rule-of-property doctrine" holds "stare decisis applies with 'peculiar force and strictness' to decisions governing real property." Bryan Garner, *et al.*, *The Law of Judicial Precedent* (2016), pp. 421-22. "'Where questions arise which affect titles to land it is of great importance to the public that

[11] In *Great Northern Railway Co.* v. *United States*, 315 U.S. 363 (1942), the government argued rights-of-way granted railroads under the 1875 Act were only common-law easements and the railroad did not acquire title to the land and minerals under the rights-of-way. The government won. The government later decided it would benefit if the railroad acquired title to the fee estate allowing the railroad and the railroad's successor to use the land for any purpose.

when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change.'" *Id.* (quoting *Minnesota Mining Co. v. National Mining Co.*, 70 U.S. 332, 334 (1865)).

So too here. In *Caldwell*, *Barclay*, and *Illig* the government argued section 8(d) gives rise to a single taking when the government first invokes this provision pre-empting an owner's state-law reversionary interest. The government won and the landowners lost. Because the statute of limitations had run the government didn't pay hundreds of owners whose property the government took in *Caldwell*, *Barclay*, and *Illig* and, by reason of this precedent, the government avoided paying thousands of other owners whose property the government took because, under this precedent, these owner's right to compensation is now time-barred.

Now the government wants to run with the fox and hunt with the hounds. The government wants this Court to overturn *Caldwell*, *Barclay*, *Illig*, and *Ladd* and adopt a new rule holding the opposite. Again, the government should be careful about what it asks for. If the new rule is that a Trails Act taking claim does not accrue until the owner learns of the trail-use agreement, there are thousands of miles of abandoned railroad rights-of-way where more than six years have passed since the Board first issued an order invoking section 8(d) but there is not yet a trail-use agreement or a public trail. Under this Court's current rule these owners' claims are

time-barred, but under the government's new rule, many of these owners could now bring a claim for compensation.[12]

CONCLUSION

This Court should not overturn *Caldwell*, *Barclay*, *Illig*, and *Ladd*. These decisions are rightly-decided. But, even if one believed this Court wrongly-decided these cases, for more than a decade the government and landowners have lived under this settled jurisprudence. Overturning these decisions to announce a new and contrary rule will unsettle established land title.

In *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008), Justice Breyer said, "Justice Brandeis once observed that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.' To overturn a decision settling one such matter simply because we might believe that decision is no longer 'right' would inevitably reflect a willingness to reconsider others. And that willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability."

This Court should deny the government's request that it sit *en banc* to overturn this Court's decisions in *Caldwell*, *Barclay*, *Illig*, and *Ladd I*. This Court should

[12] Under the claim accrual rule and Due Process Clause the statute of limitations does not begin running "until the claimant 'knew or should have known' that the claim existed." *Ladd II*, 713 F.3d at 653.

instead summarily affirm the CFC's decision correctly applying this Court's controlling precedent.

Respectfully submitted,

/s/ Mark F. (Thor) Hearne, II
Mark F. (Thor) Hearne, II
Stephen S. Davis
Larson O'Brien LLP
112 S. Hanley Road, Suite 200
St. Louis, MO 63105
(314) 296-4000
Thor@larsonobrienlaw.com

555 South Flower Street, Suite 4400
Los Angeles, CA 90071

440 First Street, NW, Suite 450
Washington, DC 20001

Counsel for Amici Curiae