2022-1277

United States Court of Appeals for the Federal Circuit

DAVID H. BEHRENS, ARLINE M. BEHRENS, *et al.*,

Plaintiffs,

MARK W. HEINTZ, HELEN M. HEINTZ, *et al.*,

Plaintiffs-Appellants,

– v. –

UNITED STATES,

Defendant-Appellee.

On Appeal from the United States Court of Federal Claims in No. 1:15-cv-00421-PEC, Honorable Patricia E. Campbell-Smith, Judge

BRIEF FOR PROFESSOR JAMES W. ELY, JR. AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS URGING REVERSAL

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MARCH 4, 2022

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number	22-1277
Short Case Caption	Behrens v. United States
Filing Party/Entity	Amicus Curiae Professor James W. Ely, Jr.

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: March 4, 2022

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

Name: Mark F. (Thor) Hearne, II

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
James W. Ely, Jr.		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

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INTEREST OF *AMICUS CURIAE*[1]

Professor James W. Ely, Jr., is the Milton R. Underwood Professor of Law Emeritus at Vanderbilt University Law School. Professor Ely is a renowned property law expert and legal historian whose accomplishments have been recognized with the Brigham-Kanner Property Rights Prize bestowed by William & Mary Law School and the Owners' Counsel of America Crystal Eagle Award.

Professor Ely is the co-author of the leading property law text, *The Law of Easements & Licenses in Land* (revised ed. 2021). The U.S. Supreme Court recently cited and followed Professor Ely's treatise in a major case involving the nature of easements and the Trails Act, *United States Forest Serv. v. Cowpasture River Preservation Ass'n*, 140 S.Ct. 1837, 1844 (2020) (quoting *The Law of Easements and Licenses in Land* §1:1 (2015), pp. 1-5). This Court, sitting *en banc*, also cited and followed this "leading treatise" in *Preseault v. United States*, 100 F.3d 1525, 1542 (Fed. Cir. 1996) (quoting *The Law of Easements and Licenses in Land* (1995 rev. ed.) ¶8.02[1]).

Professor Ely is also the author of several books that have received widespread critical acclaim from legal scholars and historians, including *The Guardian of Every*

[1] This brief is not authored, in whole or part, by any party's counsel. No party, party's counsel, or person, other than *amicus curiae* or his counsel, contributed money intended to fund the preparation or submission of this brief. Professor James W. Ely, Jr., authorized the filing of this brief on his own behalf. All parties have consented to the filing of this brief.

Other Right: A Constitutional History of Property Rights (3rd ed. 2008), *Railroads & American Law* (2001), and *The Contract Clause: A Constitutional History* (2016). The Supreme Court also relied upon Professor Ely's scholarship in *Marvin M. Brandt Rev. Trust v. United States*, 572 U.S. 93, 96 (2014), a case examining the character and scope of railroad easements. Professor Ely was also an editor of the *Oxford Companion to the Supreme Court* (2nd ed.) and the *Oxford Guide to Supreme Court Decisions*.

INTRODUCTION

The U.S. Court of Federal Claims (CFC) erred when it incorrectly held that easements granted a railroad in 1901 for the explicit purpose of operating a railway line were "unrestricted conveyances" that are "broad enough to encompass trail use." *Behrens v. United States*, 154 Fed. Cl. 227, 232, 233 (2021). Chief Justice Roberts explained the "well settled...matter of property law" that a railroad easement, like any other easement, terminates when it ceases to be used for the *purpose* for which it was intended and created. *Marvin M. Brandt Rev. Trust v. United States*, 572 U.S. 93, 104-05 (2014). Judge Campbell-Smith's notion that there is such a thing as an "easement for anything" is contrary to Missouri law and contrary to foundational tenants of property law generally that have been established since before Blackstone. This Court should correct Judge Campbell-Smith's error by affirming the principle that a conveyance granting a railroad a right-of-way easement to operate a railway

across a strip of land is a limited right to use the land for operation of a railroad and the easement terminates when the railroad line is abandoned.

Judge Campbell-Smith erred when she concluded Missouri recognizes the notion of an "unrestricted"[2] easement. Judge Campbell-Smith wrongly believed a conveyance granting an easement to a railroad for construction and operation of a railroad burdened the owner's land with a right of anyone to use the owner's land for any purpose. Judge Campbell-Smith incorrectly held that "Missouri law does not support a presumption that easements conveyed to a railroad by voluntary grant are limited in scope to railroad purposes only." 154 Fed. Cl. at 229. This statement is not only wrong as a matter of Missouri law, it is contrary to fundamental principles of property law. A railroad right-of-way is like a turtle on a fencepost. It didn't get there by itself. Rather, it was established for a specific purpose intended by the railroad and the landowners at the time the right-of-way easement was established.

BACKGROUND

A century ago, the St. Louis, Kansas City & Colorado Railroad Company and the Chicago, Rock Island & Pacific Railroad Company (the Rock Island Railroad) wanted to construct and operate a more-than 144-mile-long railway line across Missouri between St. Louis and Kansas City. The then-owners of the land granted the railroad right-of-way easements allowing the railroad to construct and operate

[2] *Behrens*, 154 Fed. Cl. at 232.

this railroad line across their land. The CFC recognized that there is no dispute that the interest granted the railroad was an easement and not title to or ownership of the fee estate. *Behrens*, 154 Fed. Cl. at 231 ("[d]efendant concedes that each identified deed likely conveys an easement as opposed to a fee interest").

An easement is a servitude that burdens the fee estate in land owned by another.[3] See *Restatement (Third) of Property: Servitudes* §1.1 ("A servitude is a legal device that creates a right or obligation that runs with the land or an interest in land."). "An easement is commonly defined as a nonpossessory interest in land of another." Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land* §1:1 (revised ed. 2021).

The original conveyances to the Rock Island Railroad in 1901 limited the scope of the easements and the purpose for which the easements were established to be the construction and operation of a railroad line (*i.e.*, laying tracks and ties with rails across which locomotives pulling train cars could operate). See Brief for Plaintiffs-Appellants, pp. 22-25. The conveyances granted the railroad a right-of-way corridor across the grantors' land to operate a railroad and the related rights "for the purpose of cuttings and embankments necessary for the proper construction and security of said railroad across the tracts of land described aforesaid, the additional

[3] A servitude also includes profits and covenants that burden land. *Restatement (Third) of Property: Servitudes* §1.1 (2).

strips or parcels of land described as follows...." *Id.* at 22. These provisions refer to the Rock Island Railroad project of constructing and operating a railroad line across the land. There is absolutely no mention of a public recreational hiking and bicycling trail or any use of the land other than the construction and operation of a railroad line.

The Rock Island Railroad built the railway line and for seven decades operated trains across this railway line.[4] The railway was part of the "corridor known as the former Rock Island line," which was constructed "during the first five years of the 20th century" and "became bankrupt in the 1970s."[5] After the railway became unprofitable, the Rock Island's successor-railroads, the Missouri Central Railroad Company and the Central Midland Railway Company, petitioned the Surface Transportation Board (the Board) for authority to abandon railroad service over this railway line.[6] The Missouri Department of Natural Resources (DNR) requested that the Board issue an order invoking Section 8(d) of the National Trails Act, 16 U.S.C.

[4] See Combined Environmental and Historical Report, Surface Transportation Board Docket No. AB-1068 (Sub. No. 3X) (filed Oct. 28, 2014), p. 16.

[5] *Id.*

[6] See Notice of Exemption, Surface Transportation Board Docket No. AB-1068 (Sub. No. 3X) (filed Nov. 18, 2014).

§1247(d), so that the abandoned railway line could be converted into a public recreational trail.[7]

The landowners filed this lawsuit against the United States seeking "just compensation" for the taking of their private property in violation of the Fifth Amendment. See *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 8 (1990) (*Preseault I*) (the Trails Act "gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests"), *Preseault v. United States*, 100 F.3d 1525, 1550 (Fed. Cir. 1996) (*en banc*) (*Preseault II*) ("The taking of possession of the lands owned by the [private landowners] for use as a public trail was in effect a taking of a new easement for that new use, for which the landowners are entitled to compensation."), and *Toews v. United States*, 376 F.3d 1371, 1376, 1381 (Fed. Cir. 2004) ("It is elementary law that if the Government uses…an existing railroad easement for purposes and in a manner not allowed by the terms of the grant of the easement, the Government has taken the landowner's property for the new use. …. As a result of the imposition of the recreational trail and linear park,

[7] See Trail Use Request, Surface Transportation Board Docket No. AB-1068 (Sub. No. 3X) (filed Dec. 17, 2014).

the easement for railroad purposes was converted into a new and different easement.").

The CFC dismissed the landowners' Fifth Amendment claims, concluding the original easements granted to the Rock Island Railroad in the late 1800s and early 1900s were "unrestricted" easements that allowed the land to be used for any purpose including a public recreational trail. *Behrens*, 154 Fed. Cl. at 232.

SUMMARY OF ARGUMENT

Judge Campbell-Smith's notion of an "unrestricted" easement for anything is contrary to fundamental principles of property law and settled Missouri law as declared by the Missouri Supreme Court and interpreted by the Eighth Circuit. An easement for anything is a judicial unicorn. Judge Campbell-Smith's holding that these railroad deeds – which expressly specified that the railroad right-of-way was conveyed "for the purpose of cuttings and embankments necessary for the proper construction and security of [the] railroad across the tracts of land" – actually conveyed "unrestricted" easements for any purpose – including "recreational trail [use] for walking, hiking, biking, picnicking, Frisbee playing"[8] – is flatly contrary to this Court's Trails Act jurisprudence since *Preseault II* and the Supreme Court's decision in *Preseault I*. This Court should reverse Judge Campbell-Smith's decision

[8] *Toews*, 376 F.3d at 1376-77. See also discussion, *infra*, pp. 22-24.

and hold, consistent with this Court's *en banc* decision in *Preseault II* and its decision in *Toews*, that these railroad right-of-way easements are limited in scope to railroad purposes, and therefore, the federal government is liable for a taking under the Trails Act.

ARGUMENT

I. Under Missouri law the easements granted the Rock Island Railroad were limited to use of the strip of land for the operation of a railway line.

In Trails Act takings litigation, this Court has consistently held that whether the original conveyances granted the railroad a right-of-way *easement* to use the strip of land across which the railroad built its railway line or whether the original landowners intended to convey the railroad *title to the fee estate* in the land itself is a principal matter of state law. (The "fee versus easement" question.) See *Preseault II*, 100 F.3d at 1533. If the railroad was granted an easement, the court must determine whether the original landowner granted the railroad this easement for the purpose of operating a railway line across the strip of land or whether the original owners intended to grant the railroad an easement for a public recreational trail. (This is the "scope of the easement" question.) See *id.* at 1542 ("When the easements here were granted to the Preseaults' predecessors in title at the turn of the century, specifically for transportation of goods and persons via railroad, could it be said that the parties contemplated that a century later the easements would be used for recreational hiking and biking trails, or that it was necessary to so construe them in

order to give the grantee railroad that for which it bargained? We think not."). See also *Toews*, 376 F.3d at 1376; *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009) (citing *Preseault II*, 100 F.3d at 1533); *Trevarton v. South Dakota*, 817 F.3d 1081, 1087 (8th Cir. 2016) ("Though the conveyance here took the form of a quit claim deed from [the railroad] to Defendants, as a matter of federal law it granted 'a new easement for the new use.'") (quoting *Preseault II*, 100 F.3d at 1550).

The answer to both of these questions is determined by applying state law (here Missouri law) to define the scope of the servitude granted the railroad. The scope of the easement is determined by the text of the original right-of-way conveyances, the purpose for which the easement was granted, and considering Missouri law at the time these conveyances were executed. "State law generally governs the disposition of reversionary interests, subject of course to the [federal government's] 'exclusive and plenary' jurisdiction to regulate abandonments.…" *Preseault I*, 494 U.S. at 8. Justice O'Connor further explained in *Preseault I*,

> state law creates and defines the scope of the reversionary or other real property interests affected by the ICC's actions pursuant to [section 8(d) of the Trails Act]. In determining whether a taking has occurred, we are mindful of the basic axiom that [p]roperty interests ... are not created by the Constitution. Rather, they are created and their

> dimensions are defined by existing rules or understandings that stem from an independent source such as state law.[9]

Missouri law on the scope of railroad easements is clear. Judge Campbell-Smith erred by failing to properly apply settled Missouri law and by failing to consider the Eighth Circuit's recent decision in *Barfield v. Sho-Me Power Elec. Cooperative*, 852 F.3d 795 (8th Cir. 2017). The Eighth Circuit's unanimous decision in *Barfield* is compelling authority on Missouri law because it is a unanimous decision authored by Judge Duane Benton, who was formerly Chief Justice of the Missouri Supreme Court, and joined by Judge Gruender, who is also a distinguished Missouri jurist and the former United States Attorney for the Eastern District of Missouri.

In *Barfield* the Eighth Circuit (relying upon a century or more of Missouri law) explicitly rejected the premise upon which Judge Campbell-Smith rested her interpretation of these railroad right-of-way conveyances. *Barfield* was a "case is about the scope of easements under Missouri law and the remedies if easement holders exceed their rights." 852 F.3d at 797. Landowners sued the rural electric cooperative, claiming that the electric cooperative exceeded the scope of its electric-transmission easement across the owners' land when it installed fiberoptic cable

[9] *Id.* at 20 (citing and quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)) (internal quotation omitted).

along the easement corridor. *Id.* at 797-98. The Eighth Circuit applied Missouri law, holding that "[a]n easement is 'a right to use the land *for particular purposes*.'" *Id.* at 799 (quoting *St. Charles County v. Laclede Gas Co.*, 356 S.W.3d 137, 139 (Mo. 2011), and *Farmers Drainage Dist. of Ray County v. Sinclair Ref. Co.*, 255 S.W.2d 745, 748 (Mo. 1953)) (emphasis added). The Eighth Circuit held that, under Missouri law, when the easement-holder "exceed[ed its] rights by using [the easement] for unauthorized purposes, [its] use of the [fiberoptic] cable becomes a trespass." *Id.* at 803. The Eighth Circuit held that the trespassing easement-holder must pay compensation to the landowners. *Id.* at 805.

Judge Campbell-Smith's decision cannot be squared with the Eighth Circuit's decision in *Barfield* or with those Missouri Supreme Court decisions upon which *Barfield* relied. Under Missouri law (and the law of almost every other state), right-of-way easements granted a railroad for the construction and operation of a railway line are limited in scope to the purpose for which the easement was granted. To wit: operating a railroad. The right-of-way easements granted the Rock Island Railroad in the early-1900s were made in the context of the railroad's eminent domain authority. If these original landowners had not granted the Rock Island Railroad an easement to operate a railway across their land, the Rock Island Railroad could have taken that right under eminent domain. See MO. CONST. 1875, Art. II, §21; Mo. Rev. Stat. Ch. 63 §§2, 11-12, 14, pp. 332, 336-37 (1866). Thus, what interest the railroad

acquired in the narrow strip of land across which the railroad built its railway line must be interpreted in this context.

It is extraordinarily rare (especially in the 1800s and early 1900s) that landowners would grant a railroad title to the fee estate in a strip of land as opposed to an easement. See James W. Ely, Jr., *Railroads & American Law* (2001), pp. 197-98, p. 77. In fact,

> [p]rominent experts took the position that, absent statutory provisions expressly authorizing the taking of a fee simple, railroads should receive just an easement in land condemned for their use. "It is certain, in this country, upon general principles," Redfield declared, "that a railroad company, by virtue of their compulsory powers, in taking lands, could acquire no absolute fee-simple, but only the right to use the land for their purposes." Judicial decisions tended to adopt this line of analysis. … It was settled in most jurisdictions that the public acquired an easement in land taken for highways. The court then readily concluded that the railroad obtained only an easement, and that the original landowner retained the rights to the trees and minerals on the land. This trend to construe strictly the authority of railroads to acquire land through eminent domain accelerated in the decades following the Civil War.
>
> *Id.*[10]

In the late 1880s and early 1900s, Missouri and most other states responded to railroad corporations' overreach and political corruption by adopting a series of reforms to address the disproportionate influence that wealthy and politically-powerfully railroads possessed relative to individual rural landowners and farmers.

[10] Citing, *inter alia*, Simon F. Baldwin, *American Railroad Law* (1904), p. 77; Isaac F. Redfield, 1 *The Law of Railroads* 270 (6th ed. 1888).

See Ely, *Railroads & American Law*, pp. 84-89. Among these turn-of-the-century reforms was a model law that Missouri and other states adopted. See Mo. L. 1866, p. 27, §2 (1866) (codified as Mo. Rev. Stat. §388.210) (railroad shall have the power "to take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroads; but the real estate received by voluntary grant shall be held and used for the purpose of such grant only."). See also *Moore v. Missouri Friends of Wabash Trace Nature Trail, Inc.*, 991 S.W.2d 681, 685 (Mo. Ct. App. 1999) (quoting and interpreting constitutional provision).

Missouri and the other states adopted these reforms to still allow railroads the ability to exercise the power of eminent domain necessary to achieve the public purpose of building and operating a railway line but to also prevent railroad corporations from abusing the state-granted eminent domain authority to the detriment of landowners. Armed with the power of eminent domain a railroad corporation could enter a farmer's land and construct a railway through the farmer's property without the farmer's consent and without first paying the farmer. The farmer's only option would be to sue the railroad for compensation, but litigation is costly and takes years to resolve. So, confronting this situation, many landowners avoided the expense of an inverse condemnation lawsuit by executing a "voluntary conveyance" granting the railroad a right-of-way easement and accepting whatever

compensation the railroad offered. Many railroads surveyed rights-of-way but never actually built a railway line across the land, and the railroads would seek to resell the right-of-way to another railroad. The politically powerful railroads abuse of landowners (especially farmers) gave rise to the Granger movement. See Ely, *Railroads & American Law*, pp. 86-87. The Missouri legislature adopted §388.210 and Missouri voters adopted a provision of Missouri's constitution, Art. II §21, to address and restrain these abuses of landowners by railroad corporations. Missouri's Constitution provided that the "fee of land taken for railroad tracks without consent of the owner thereof shall remain in such owner, subject to the use for which it is taken."[11]

As part of this reform, Missouri and other states limited the interest a railroad could acquire by eminent domain or by a "voluntary conveyance" a landowner granted under threat of eminent domain. Missouri limited the interest a railroad could obtain in a strip of land across which the railroad built a right-of-way to only that interest the railroad needed to achieve its chartered public purpose – operating a railroad.[12] When a railroad acts under its state-granted eminent domain authority

[11] MO. CONST. (1875), Art. II §21. See also MO. CONST. (1945), Art. I §21.

[12] This is not to say a railroad could not obtain title to the fee estate in a tract of land used for a different purpose such as a grain elevator, depot or office building. The important distinction is between grants to a railroad for operation of a railway line across a narrow strip of land and a deed conveying title to the fee estate to a larger tract of land used for something other than a right-of-way.

(or by threatening to exercise its eminent domain authority) the railroad can acquire no greater interest in private land than the railroad could have obtained had the railroad formally invoked eminent domain and actually condemned the owner's property. In all circumstances (whether by condemnation or by voluntary conveyance) the only interest the railroad needed to acquire to achieve its public purpose of operating a railroad was (and is) an easement. An easement for operation of a railway across the strip of land is sufficient for the railroad to accomplish its chartered public purpose of operating a railroad. This does not allow the railroad to sell the right-of-way to a non-railroad for some different purpose such as public recreation.

II. The CFC erred by creating a juridical unicorn, the notion of an "unrestricted" easement for anything.

Judge Campbell-Smith erred when she embraced the notion of an "unrestricted" easement, which is contrary to fundamental principles of property law, is contrary to Missouri law as declared by the Missouri Supreme Court and frankly a nonsensical statement contrary to plain English. An "easement" is by definition the right to use the land owned by another for a limited, specified purpose. See *Restatement (Third) of Property: Servitudes* §1.1. See also *Barfield*, 852 F.3d at 799 ("An easement is a right to use the land for particular purposes.") (internal quotation omitted). Judge Campbell-Smith concluded that in 1901 the owners of the fee estate granted the Rock Island Railroad an "unrestricted" easement that Rock

Island Railroad (or its successor-railroad) could sell to a non-railroad for public recreation or any other use unrelated to the operation of a railroad. This is an error of logic as well as law. Judge Campbell-Smith's idea of an "unrestricted" easement is like calling a horse chestnut a chestnut horse.

Everyone agrees that, for the relevant portion of the former railroad right-of-way, the railroad's interest was limited to an easement. For these segments of the right-of-way there is no debate that the railroad did not acquire title to the fee estate in the strip of land across which the railroad built its railway line. Judge Campbell-Smith correctly found that the deeds at issue conveyed only an easement to the railroad and not the fee estate. *Behrens*, 154 Fed. Cl. at 232 ("The court does not find, however, that these conveyances are in fee – Missouri law clearly does not allow for such a conclusion given the nominal consideration."). But she then wrongly concluded that "the broad granting language and habendum clauses in the deeds at issue are convincing evidence that the grantors intended unrestricted conveyances." *Id.* In essence, Judge Campbell-Smith transmogrifies what she admits is an easement into title to the fee estate.

Judge Campbell-Smith's opinion is premised upon a fundamental misunderstanding of the essential nature and character of an easement. An easement is, by definition, "a nonpossessory interest in the land of another. …the holder of an affirmative easement may only use the land burdened by the easement; the holder

may not occupy and possess the realty as does an estate owner…." Bruce & Ely, *The Law of Easements* §1:1. "'An interest so extensive that it amounts to an estate is not an easement.' As indicated in this quotation, an easement is an interest in land, but is not an estate." *Id.* §1:21 (quoting Alfred F. Conrad, *Easement Novelties*, 30 *Cal. L. Rev.* 125, 150 (1942)). As the Supreme Court of Montana explained, "The important distinction between an easement and a fee simple [estate] is that the former describes the right to a use of land which is specific or restrictive in nature, while the latter is the grant of title to the land itself." *Park County Rod & Gun Club v. Dept. of Highways*, 517 P.2d 352, 355 (Mont. 1973). The defining feature of an easement is that it is for a limited and specific use of the land. "Since an easement or profit gives only *limited uses* of the servient land, the person entitled to general possession may make all other uses that do not unreasonably interfere with the easement or profit." Dale A. Whitman, *The Law of Property* §8.9, p. 462 (emphasis added).

In *Brandt* Chief Justice Roberts explained,

> The essential features of easements – including, most important here, what happens when they cease to be used – are well settled as a matter of property law. … [E]asements … 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.[13]

572 U.S. at 104-05.

The Eighth Circuit explained in *Barfield*, "[a]n easement is 'a right to use the land for particular purposes.'" 852 F.3d at 799 (quoting *St. Charles County*, 356 S.W.3d at 139, and *Farmers Drainage Dist.*, 255 S.W.2d at 748 ("An 'easement' is not the complete ownership of land with the right to use it for all lawful purposes perpetually and throughout its entire extent, but it is a right only to one or more particular uses....")). The Eighth Circuit explained that under Missouri law, when a successor to a railroad uses the easement for some use other than railroad purposes, that use exceeds the scope of the easement:

> The Supreme Court of Missouri…held that the easement did not authorize the railway's successor to permit an electric company to construct an "additional power line" that had "no connection whatever with the electric lines or purposes of the street railway."[14]

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[13] Quoting *Restatement (Third) of Property: Servitudes* §1.2(1) (1998), comment d, §7.4, comments a and f. See also *Samuel C. Johnson 1988 Trust v. Bayfield County, Wis.*, 649 F.3d 799, 803 (7th Cir. 2011) ("the termination of an easement restores to the owner of the fee simple full rights over the part of his land formerly occupied by the right of way created by the easement").

[14] *Barfield*, 852 F.3d at 801 (quoting *Eureka Real Estate & Investment Co. v. Southern Real Estate & Financial Co.*, 200 S.W.2d 328, 330, 332 (Mo. 1947), and citing Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*, 71 *Mo. L. Rev.* 721, 753 (2006), and *Ogg v. Mediacom*, 142 S.W.3d 801, 808-10 (Mo. Ct. App. 2004) (cable TV company's installation of fiber-optic cables not authorized by electric cooperative's prescriptive easement).

Judge Campbell-Smith concluded that "it would violate the primacy of the grantor's intent to find that the deeds – which otherwise appear to convey a fee interest – should be artificially limited to plaintiffs' definition of railroad purposes simply because Missouri law construes conveyances for nominal consideration to be easements [and therefore,] the court concludes that the easements...are broad enough to encompass trail use." *Behrens*, 154 Fed. Cl. at 233. Judge Campbell-Smith apparently supposed that, as a matter of Missouri law, unless the text of an easement "contain[s] language limiting their scope," the easement holder may use the fee owner's land for any purpose and may even sell the easement to another party to use the land for a purpose never contemplated when the original easement was established.

The notion of an "easement for anything" is a judicial unicorn. The CFC's notion of a "broad and unlimited" easement is contrary to the very definition of an *easement*. Judge Campbell-Smith's fundamental error was to accept the government's supposition that "broad and unlimited language of these conveyances" allowed the original railroad's successor-railroad to sell an easement originally established for the operation of a railway line to a non-railroad for public recreation. This view is entirely upside-down and is contrary to Missouri law and violates foundational principles of property law. An easement is, by definition, the right to

use the fee owner's land for a *specific and defined* use. *Barfield*, 852 F.3d at 799 ("An easement is a right to use the land *for particular purposes*.").[15]

Missouri follows the common-law principle Chief Justice Roberts recognized in *Brandt.* To wit: an easement is, by definition, a grant of a right to use the owner of the fee estate's land for a specific purpose, and when the easement-holder no longer uses the land for that purpose, the easement terminates. The grant of an easement is defined by the terms of the original grant. See *Glosemeyer v. United States*, 45 Fed. Cl. 771, 778 (2000) ("In Missouri, an easement granted for a particular purpose 'terminates as soon as such purpose ceases to exist, is abandoned, or is rendered impossible of accomplishment.'") (quoting *Ball v. Gross*, 565 S.W.2d 685, 689 (Mo. Ct. App. 1978); *Brown v. Weare*, 152 S.W.2d 649, 655 (Mo. 1941);

[15] Emphasis added; internal quotation omitted. See also Bruce & Ely, *The Law of Easements* §§1:1, 10:1, 10:21 (an easement is "the right to use of land which is specific or restrictive in nature"); *Thompson on Real Property* §60.02(a); *The Law of Property* §8.9, p. 458 ("The 'scope' of an easement or profit is what its holder may do with it, the purposes for which it may be used."), p. 462 ("Since an easement or profit gives only limited uses of the servient land, the person entitled to general possession may make all other uses that do not unreasonably interfere with the easement or profit.") (emphasis added); *James Kent, Commentaries on American Law*, Vol. III, Lecture LI ("By virtue of such a right [an easement], the proprietor of the estate charged is bound to permit, or not to do, certain acts in relation to his estate for the utility or accommodation of a third person."); *Blackstone (Jones Book II)*, Ch. 3 §45 (explaining "incorporeal hereditaments" are "grounded on a special permission; as when the owner of the land grants another the liberty of passing over his grounds to go to church, to market, or the like: in which case the gift or grant is particular…."); *Brandt*, 572 U.S. at 104-05. By overlooking this fundamental character of an easement, the CFC transmogrified an easement into a fee estate.

Bruce & Ely, *The Law of Easements* §10:8 ("An easement created to serve a particular purpose ends when the underlying purpose no longer exists.") (citing *Preseault II*, 100 F.3d at 1543). As the *Restatement* further explains,

> The fact that the grantee is a railroad may also tend to indicate that the instrument should be construed to convey an easement only. The narrowness of the parcel, the consideration paid, and the frequency with which railroad uses have been abandoned often lead to the conclusion that the grantor, as a reasonable person dealing with a railroad, intended to grant no more than an easement for the right of way, retaining ownership of the land. ... The superior sophistication and drafting opportunity of the railroad vis-à-vis the grantor may buttress this conclusion.
>
> *Restatement (Third) of Property: Servitudes* §2.2, Comment g.[16]

On the facts before this Court there can be no doubt that these easements were granted and intended for the operation of a railway line across a strip of land. That is what the text of the conveyances state, that is the context in which they were established, and that is how the railroad used the strip of land for more than one-hundred years. Nothing in the text of these easements, the context in which the easements were created, or in Missouri law suggests the original landowners and railroad contemplated the creation of an easement for public recreation and so-called "railbanking." An owner granting an easement for a specific purpose does not need

[16] Citing *Hartman v. J&A Development Co.*, 672 S.W.2d 364, 365 (Mo. Ct. App. 1984) ("Use of terms such as 'right of way,' 'road,' or 'roadway' as a limitation on the use of land is a strong, almost conclusive, indication that the interest conveyed is an easement.") (citing *Franck Bros., Inc. v. Rose*, 301 S.W.2d 806, 811 (Mo. 1957), and *Beiser v. Hensic*, 655 S.W.2d 660, 662 (Mo. Ct. App. 1983)).

to specifically exclude all other uses. For example, the owner of the fee estate granting his neighbor a right-of-way for a driveway does not need to state, "this is an easement for a residential driveway but not for fiber-optic cables, public recreation, electrical transmission lines, sewer lines, or vegetable gardens." An easement is granted for the stated purpose, and it is not incumbent upon the fee owner granting the easement to explicitly exclude all conceivable alternative uses.

Further, Judge Campbell-Smith's conclusion that railbanking and public recreation are uses permitted within the scope of an easement granted for the operation of a railroad is contrary to Missouri law, this Court's controlling precedent, and general principles of property law recognized by the Supreme Court and state courts. See *Boyles v. Missouri Friends of the Wabash Trace Nature Trail*, 981 S.W.2d 644, 649 (Mo. Ct. App. 1998) ("the recreational purposes for which Wabash proposes to use the property do not fall within the commonly understood meaning of 'railroad purposes'"); *Brown*, 152 S.W.2d at 654-55 ("Where an easement only is received by a railroad company, the same rule should apply to the lands used for railroad purposes and later abandoned as applies to a public highway…[that when] a highway is taken wholly off one man's property and…is later vacated, the use of the land goes back to the original owner…freed from the public use or easement"). See also the decisions of other state supreme courts such as *Lawson v. State*, 730 P.2d 1308 (Wash. 1986), *Pollnow v. State Dep't of Natural Resources*, 276 N.W.2d

738 (Wis. 1979), *Michigan Dep't of Natural Resources v. Carmody-Lahti Real Estate, Inc.*, 699 N.W.2d 272 (Mich. 2005), and *Schnabel v. County of DuPage*, 428 N.E.2d 671 (Ill. 1981). This Court cited *Lawson*, *Pollnow*, and *Schnabel* in *Preseault II*, 100 F.3d at 1543-44. This Court likewise explained that railbanking and public recreation are not uses within the scope of an easement granted for operation of a railway line. See *id.* at 1554 ("The vague notion that the State may at some time in the future return the property to the use for which it was originally granted, does not override its present use of that property inconsistent with the easement. That conversion demands compensation. Moreover, the United States facilitated that conversion with its laws and regulatory approval.") (Rader, J., concurring). See also *Toews*, 376 F.3d at 1376-77 ("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").[17] Indeed, using a railroad right-of-way for public recreation in Missouri is an illegal trespass. See Mo.

[17] See also *Glosemeyer v. United States*, 45 Fed. Cl. 771 (2000); *Grantwood Village v. MoPac*, 95 F.3d 654 (8th Cir. 1996); *Moore v. Missouri Friends of Wabash Trace Nature Trail, Inc.*, 991 S.W.2d 681, 688 (Mo. Ct. App. 1999) ("When a railroad ceases to use for railroad purposes property over which it has an easement, the original owners or their grantees thereafter hold the property free from the burden of the easement…."); *Strother v. Bootheel Rail Properties, Inc.*, 66 S.W.3d 751 (Mo. Ct. App. 2001); *Quinn v. St. Louis-San Francisco Ry. Co.*, 439 S.W.2d 533, 535 (Mo. 1969); *Schuermann Enter. Inc. v. St. Louis County*, 436 S.W.2d 666, 668 (Mo. 1969); *Bayless v. Gonz*, 684 S.W.2d 512, 513 (Mo. Ct. App. 1984).

Rev. Stat. §§389.650, 389.653 (trespass action lies against those who interfere with railroad property or become injured walking on tracks).

III. The CFC compounded its error by applying its notion of an "unrestricted" easement for anything to the Trails Act.

Judge Campbell-Smith's supposition that the "unrestricted" easement allows the railroad to railbank its interest and the trail-user to convert the abandoned railroad easement to public recreational use misconstrues and misapplies the Trails Act and important principles as property law as explained by this Court in *Preseault II*. In *Preseault II*, Judge Plager explained, "we must seek the answer in traditional understandings of easement law, recognizing as we must that Vermont follows and applies common law property principles." 100 F.3d at 1542 (citing 5 *Restatement of Property* §482 (1944) and Bruce & Ely, *The Law of Easements* (rev. ed. 1995) ¶8.02[1]). Judge Campbell-Smith's notion of an "unrestricted" easement for anything – contrary to fundamental principles of property law and Missouri law[18] – confounds the Supreme Court's and this Court's Trails Act taking jurisprudence.

For the Surface Transportation Board to invoke section 8(d) of the Trails Act, the railroad must first petition the Board for authority to abandon the railway line, and the Board must find that abandoning the railway line is in the public interest.

[18] Indeed, Judge Campbell-Smith acknowledges that her decision is inconsistent with Missouri law, stating, "The court noted that under Missouri law, easements must have a definable scope...." *Behrens*, 154 Fed. Cl. at 229.

Here, the railroad petitioned the Board for authority to abandon the right-of-way, and the Board granted the railroad authority to abandon the right-of-way. But then the trail-user asked the Board to invoke section 8(d), and the Board did invoke section 8(d) when it issued the Notice of Interim Trail Use or Abandonment. The Board's invocation of section 8(d) "destroyed" and "effectively eliminated" the landowners' state law possessory right to their land and allowed the railroad to sell an interest the railroad had no right to sell under the original easements.[19] Under Missouri law and the terms of the original railroad right-of-way easements, the original easement terminated when the railroad no longer use the land for operation of a railway. See *Brandt*, 572 U.S. 104-05. The railroad could not transfer the right-of-way easement to a non-railroad for a new and different use. See *East Alabama Ry. Co. v. Doe*, 114 U.S. 340, 354 (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.").

[19] "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 railway easement." *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010) (emphasis added). See also *Caldwell v. United States*, 391 F.3d 1226, 1228 (Fed. Cir. 2004) ("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).

The Board's invocation of section 8(d) not only "destroys" and "effectively eliminates" the owners state law reversionary interest, it also encumbers the owner's land with "a new easement for the new use."[20] See *Trevarton*, 817 F.3d at 1087 (citing *Preseault II*, 100 F.3d at 1550). When the Board railbanked these owners' land, the Board assumed control of the otherwise abandoned right-of-way, and the Board destroyed these owners' state-law right to possess their land and asserted the federal government's authority to authorize *any* railroad (not just the railroad that abandoned the former right-of-way) to construct a new railway line across these owners' land in the indefinite future. It is the *federal government* that railbanked the railroad corridor, not the railroad. The railroad has no further interest in the corridor and no obligation to maintain or potentially provide rail service over the corridor. In short, the railroad is gone and has no further interest in the corridor. The parties using these owners' land are the Board (for railbanking) and the Missouri DNR (for public recreation) acting under the Board's authority.

[20] We use the term "reversionary" because such term was used in the generic sense by the Federal Circuit in *Barclay v. United States*, 443 F.3d 1368 (Fed. Cir. 2006). Technically this is not a "reversion" of the property. The landowners and their predecessors-in-title held fee title to the property, which fee title had been burdened by an easement for operation of a railroad. Upon the railroad's abandonment of this easement, the landowners' fee became "unburdened" by this easement.

CONCLUSION

In *Leo Sheep v. United States*, 440 U.S. 668, 687-88 (1979), Justice Rehnquist wrote, "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." Judge Campbell-Smith failed to heed this admonition.

Judge Campbell-Smith's decision is contrary to settled Missouri law as declared by the Missouri Supreme Court. Judge Campbell-Smith's decision is contrary to fundamental principles of property law. And Judge Campbell-Smith's decision is contrary to the Eighth Circuit's decision in *Barfield* and *Trevarton*. Were this Court to affirm Judge Campbell-Smith's decision, this Court would fail to follow its *en banc* decision in *Preseault II* and split with the Eighth Circuit and that circuit's application of Missouri law.

Under Missouri law, the original right-of-way easements granted the Rock Island Railroad in early 1900s were limited to the construction and operation of a railway line across the strip of land. Using this land for public recreation and railbanking was never contemplated by, or within the scope of, the original railroad right-of-way easements. Accordingly, this Court should reverse the CFC's decision

and remand this case for the CFC to calculate the value of the property taken by the government.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On March 4, 2022, the foregoing brief was electronically filed using the Court's CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users, including the following:

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and Federal Circuit Rule 32(a) in that the brief contains 6,985 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) in that the brief has been prepared in a proportionally spaced typeface using MS Word Version 16.58 in a 14-point Times New Roman font.

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