IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' RENEWED MOTION TO SEVER THE HONORÉ PLAINTIFFS' CLAIMS

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INTRODUCTION

This is a consolidated Trails Act case involving a total of 214 plaintiffs that own a total of 222 parcels of property in Sarasota County, Florida. This case is one of a series of takings cases that arose from the federal Surface Transportation Board (the Board) creating a public rail-trail corridor across an otherwise abandoned railroad right-of-way between Sarasota and Venice, Florida. The Board's earlier orders are the subject of this Court's decisions in *Rogers v. United States*, 90 Fed.Cl. 418 (2009), *Childers v. United States*, 116 Fed. Cl. 486 (2013), *McCann Holdings, Ltd. v. United States*, 111 Fed. Cl. 608 (2013), *Barron v. United States*, Case No. 21-2181, *Cheshire Hunt v. United States*, Case No. 18-111, and the other cases including the Legacy Trail corridor. These plaintiffs' land was subject to the Board's third order entered May 14, 2019, invoking Section 8(d) of the Trails Act, 16 U.S.C. 1247(d). This order extended the Legacy Trail further north into the city of Sarasota.

The strip of land taken for this public rail-trail corridor was originally granted for a right-of-way for a railway line between Sarasota and Venice, Florida built in the early 1900s. The documents establishing the railroad's interest in the strip of land used for this railway line are included in the pleadings and discussed in this Court's decisions. A number of these instruments by which the railroad's interest was established including the 1910 conveyance from Adrian Honoré to the Seaboard Air Line Railway are common to the other Legacy Trail cases. See the Fourth Amended Complaint, ECF No. 34, and the Motion for Summary Judgment, ECF No. 111, and Response, ECF No. 122. The three exhibits to the motion list all of the "source conveyances" for all the properties at issue in this case.

The government and the plaintiffs disagree about the nature of the legal interest the railroad acquired in the strip of land across which the railroad built and operated a railway line. The plaintiffs maintain the railroad was only granted an easement for a right-of-way to use this strip of

land for the operation of a railway line and that, when the railroad no longer used the strip of land for this purpose, the easement terminated. Upon termination, these owners, as successors-in-title to the owner of the fee estate who had originally granted the railroad an easement, then held unencumbered title to the fee simple estate in the land. Thus, when the federal government invoked the Trails Act to create a new easement for a public recreational trail across the strip of land, and for a possible future railroad line, the federal government took these owners' private property for which our Constitution requires the federal government to pay these Florida landowners "just compensation." The government argues the railroad actually acquired title to the fee simple estate in the strip of land across which the railroad built and operated its railway line and, thus, there is no taking.

This "fee estate versus easement" dispute between the plaintiffs and the government does not apply to a subset of the plaintiffs in this case and to plaintiffs in other Legacy Trail cases. This subset of plaintiffs are those landowners who are successors-in-title to Adrian Honoré.[1] This Court has already held, and the government agrees, that the 1910 conveyance from Adrian Honoré to the Seaboard Air Line Railway granted the railroad only an easement for operation of a railway line and this right-of-way easement terminated when the land was no longer used for the operation of a railroad. The government accepts this holding that established the government's liability and obligation to pay the plaintiffs that are successors-in-title to Adrian Honoré.[2]

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[1] **Exhibit 1** to the accompanying motion lists these plaintiffs and properties. (The "**Honoré Plaintiffs**" or the "**Honoré Conveyance Landowners**").

[2] "In the hearing held in *Cheshire Hunt v. United States*, No. 18-111, counsel for the United States stated, "this Court held in the *Rogers* case that the Honoré conveyance created an easement. And the United States is moving forth under the Court's precedent." Transcript (May 7, 2021), pp. 7-8." The government has also stipulated to which plaintiffs' predecessor-in-title was Adrian Honoré. ECF No. 70 (stipulation). This Court recognized, ""the parties in this case [*Barron*] have

Thus, for the Honoré Plaintiffs, there is no dispute that the government took their private property and must pay them. Indeed, the government knew it was taking private property from Honoré's successors-in-title when the Board issued the May 14, 2019, order invoking the Trails Act and creating a public recreational trail and future railroad corridor across these Florida owners' land. The government does not contest the right of the successors-in-title to Adrian Honoré owned the fee estate in the land taken for the rail-trail corridor. But the government opposes paying the Honoré Plaintiffs until the government's opposition to the other plaintiffs whose claims for which the government disputes its liability has been resolved.

The plaintiffs bring this renewed motion to sever or bifurcate the Honoré Plaintiffs in order that the compensation the Honoré Plaintiffs are due may be resolved and paid. Plaintiffs ask this Court, under Rule 20(b) and Rule 21, to sever the Honoré Plaintiffs' claims so that these Honoré Plaintiffs (listed in **Exhibit 1** to the renewed motion to sever) may finally be paid for that private property the government took from them almost six years ago.

ARGUMENT

I. The Constitution requires this Court to *promptly* determine and award an owner compensation when the government takes private property.

The government took these owners' private property almost *six years ago*. The government has *a categorical* duty to pay these owners just compensation. *Horne v. Department of Agriculture*, 576 U.S. 350, 358 (2015) (when the government "depriv[es] the owner of the right to possess, use and dispose of the property," and denies the owner's right to exclude others from his or her property, the government has a "categorical" duty to compensate the owner). The Government has not paid, nor offered to pay these landowners. Every day that passes without

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stipulated that the Honoré deed conveyed only an easement that was not broad enough to include recreational trail use." *Barron*, ECF No. 59, p. 9. The government acknowledged this point.

these owners being paid is a further violation of these citizens' civil rights. *Knick v. Township of Scott*, 588 U.S. 180, 190 (2019) ("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"). See also, *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021).

In *Folsom v. City of New Orleans*, 109 U.S. 285 (1883), the Fifth Circuit relegated private landowners to a "*Folsom* Prison" in which the government sought to perpetually delay its obligation to pay plaintiffs.[3] In *Folsom*, Justice Harlan wrote, "[t]o withhold from the citizen who has a judgment for money the judicial means of enforcing its collection...is to destroy the value of the judgment as property." *Folsom*, 109 U.S. at 294, 297 (Harlan, J., dissenting). Justice Harlan explained that "[s]ince the value of the judgment, as property, depends necessarily upon the remedies given for its enforcement, the withdrawal of all remedies for its enforcement, and compelling the owner to rely exclusively upon the generosity of the judgment debtor, is, I submit, to deprive the owner of his property. *Id.* at 295. Justice Harlan continued, "it is said that the plaintiffs are not deprived of their judgments, so long as they continue to be existing liabilities against the city. My answer is, that such liability upon the part of the city is of no consequence, unless, when payment is refused, it can be enforced by legal proceedings." *Id.* (citing *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 177 (1871)).[4]

[3] *Folsom* is not a Fifth Amendment taking case but a statutory case. 109 U.S. at 287 (The city's "liability for the damages is created by a law of the legislature, and can be withdrawn or limited at its pleasure.").

[4] Fourteen years following his dissent in *Folsom*, Justice Harlan would write the opinion for this Court in *Chicago, Burlington & Quincy Railroad Co. v. Chicago*, 166 U.S. 226, 241 (1897), applying the Fifth Amendment to the states.

Justice Brennan followed Justice Harlan's lead, dissenting in *San Diego Gas & Electric v. San Diego*, 450 U.S. 621, 654 (1981), to explain that the Fifth Amendment guarantee of just compensation is self-executing:

> *As soon as private property has been taken*, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has already suffered a constitutional violation, and *the self-executing character of the constitutional provision with respect to compensation is triggered.* This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: *once there is a "taking" compensation must be awarded*.[5]

Although Justice Brennan's view in *San Diego Gas* was stated in dissent. The Supreme Court later recognized its wisdom and expressly adopted Justice Brennan's analysis as the Court's holding in *First English Evangelical Lutheran Church of Glendale v. County of Lost Angeles*, 482 U.S. 304, 318 (1987).[6] This Court explained in *Knick*,

> In holding that a property owner acquires an irrevocable right to just compensation immediately upon a taking, *First English* adopted a position Justice Brennan had taken in an earlier dissent. In that opinion, Justice Brennan explained that "once there is a 'taking,' compensation *must* be awarded" because "[a]s soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation."
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> 588 U.S. 180, 193-194 (emphasis in original).

The Fifth Amendment's self-executing guarantee of "just compensation" is a guarantee of "just compensation" rooted in the Magna Carta and mandates that the determination of the

[5] Emphasis added.

[6] *First English* held, "a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation.'" 482 U.S. at 315 (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980) (emphasis added).

compensation due an owner is an "inherently judicial" responsibility that cannot be assumed or barred by the legislature (or the executive branch).[7]

Blackstone instructed, "The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisition, without any control or diminution, save only by the laws of the land."[8] Kent similarly observed the constitutional protection of property is a "principle in American constitutional jurisprudence, [that] is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law."[9] "As Chancellor Kent explained when granting a property owner equitable relief, the Takings Clause and its analogs in state constitutions required that 'a fair compensation must, in all cases, be *previously* made to the individuals affected.'" *Knick*, 588 U.S. 200.[10] The Supreme Court explained that from our Nation's founding,

> [i]f a government took property without payment, a court would set aside the taking because it violated the Constitution and order the property restored to its owner. The Framers meant to prohibit the Federal government from taking property without paying for it. Allowing the government to keep the property pending subsequent compensation to the owner, in proceedings that hardly existed in 1787, was not what they envisioned.

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[7] Chief Justice Roberts explained, "The principle reflected in the [Just Compensation] Clause goes back at least 800 years to Magna Carta.... Clause 28 of that charter forbade any 'constable or other bailiff' from taking 'corn or other provisions from any one without immediately tendering money therefor....' The colonists brought the principles of Magna Carta with them to the New World, including that charter's protection against uncompensated takings of personal property." *Horne*, 576 U.S. at 358. See also *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327-28 (1893).

[8] William Blackstone, *Commentaries on the Law of England* (1768), Book I §§191-92 (the three rights are: "the right of personal security, the right of personal liberty, and the right of private property").

[9] James Kent, *Commentaries on American Law*, Lecture XXXIV.

[10] Quoting *Gardner* v. *Newburgh*, 2 Johns, Ch. 162, 166 (N.Y. 1816) (emphasis added by the Supreme Court).

Id.

A landowner's right to be secure in his property is one of the primary objects for which the national government was formed. In *United States v. Jones*, 565 U.S. 400, 405 (2012), the Supreme Court recalled Lord Camden's famous holding in *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765), a "case we have described as a 'monument of English freedom' 'undoubtedly familiar' to 'every American statesman' at the time the Constitution was adopted...." Quoting Lord Camden, the Supreme Court stated, "[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave...if he will tread upon his neighbour's ground, he must justify it by law. *Jones*, 565 U.S. at 405.[11] Evoking John Locke, Lord Camden further declared, "The great end, for which men entered into society, was to secure their property."[12]

The Framers drafted our Constitution embracing the Lockean view that "preservation of property [is] the end of government, and that for which men enter into society...." John Locke, *Second Treatise on Civil government*, Ch. XI §138. Madison declared, "government is instituted to protect property of every sort.... This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."[13] In *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972), the Supreme Court observed, "the dichotomy

[11] Quoting *Entick*, 95 Eng. Rep. at 817.

[12] *Entick*, 95 Eng. Rep. at 817. See also James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3rd ed. 2008), p. 4 ("The framers of the Constitution were deeply concerned with the need to safeguard property rights.").

[13] Saul K. Padover, ed., *The Complete Madison* (1953), pp. 267-68 (published in *National Gazette* (March 29, 1792)) (emphasis in original).

between personal liberties and property rights is a false one. Property does not have rights. People have rights.... That rights in property are basic civil rights has long been recognized."[14]

The Supreme Court has long held the Fifth Amendment guarantee of compensation does not depend on the good graces of Congress, explaining landowners are "entitled to bring an action in inverse condemnation as a result of the 'self-executing character of the constitutional provision with respect to compensation'...." *First English*, 482 U.S. at 315. This Court has "frequently repeated...that, in the event of a taking, *the compensation remedy is required by the Constitution*." *Id.* at 316.[15] More recently Chief Justice Roberts declared, "a property owner has a Fifth Amendment entitlement to compensation *as soon as* the government takes his property without paying for it." *Knick*, 588 U.S. at 190. (emphasis added.)

In *Monongahela*, the federal government acquired a privately-owned lock and dam. The parties disputed the value of that property the government took. The government argued that Congress determined the amount of compensation the owner was entitled to be paid when Congress passed the legislation authorizing the taking and appropriated a specific sum for compensation. The Supreme Court rejected the government's argument and held the determination of "just compensation" is an exclusively judicial inquiry. The Supreme Court further held that private property may not be taken "unless a full and exact equivalent for it be returned to the owner." 148 U.S. at 326.

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[14] Citations omitted. See also Ely, *supra*, note 23, p. 9 ("given the framers' concern with protecting property as well as the nearly 150 years of Supreme Court activity in this field, the relegation of property rights to a lesser constitutional status is not historically warranted. The framers did not separate property and personal rights.").

[15] Emphasis added; citations omitted; quoting *Clarke*, 445 U.S. 253, 257 (1980).

Only after the owner has been fully and justly compensated for the "true value" of his property can "it be said that just compensation for the property has been made." *Id.* at 337. In *Monongahela*, the Supreme Court explained,

> The right of the legislature of a state by law to apply the property of the citizen to a public use, and then to constitute itself the judge of its own case, to determine what is the "just compensation" it ought to pay therefore...*cannot for a moment be admitted or tolerated under our constitution*.
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> 148 U.S. at 327-28 (emphasis added).

In *Seaboard Air Line Ry. v. United States*, the Supreme Court, citing *Monongahela,* held a landowner is "entitled [to] the full and perfect equivalent of the property taken," and the owner must be put "in as good position pecuniarily as he would have been if his property had not been taken."[16] 261 U.S. 299, 304 (1923). The determination of "just compensation" is exclusively a function of the judicial branch. *Monongahela*, 148 U.S. at 327.

In *Cedar Point Nursery*, the Supreme Court, quoting John Adams, reaffirmed the foundational tenet that "[p]roperty must be secured, or liberty cannot exist." 594 U.S. 139, 147 (2021). The Court "noted that protection of private property rights is 'necessary to preserve freedom' and 'empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.'" *Id.*[17] Put simply, "[t]he government must pay for what it takes." *Id.*

The government's taking of these Florida landowners' private property and the government's delay honoring its obligation to pay these Florida landowners evokes the long-

[16] The Fifth Amendment requires that "when [an owner] surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Monongahela*, 148 U.S. at 325.

[17] Quoting *Murr* v. *Wisconsin*, 582 U.S. 383, 394 (2017).

established legal principle, *ubi jus, ibi remedium*,[18] elucidated by Blackstone, applied by John Marshall in *Marbury* v. *Madison*,[19] and repeated by John Marshall Harlan in *Folsom*. By delaying these Florida landowners that compensation guaranteed by the Fifth Amendment, the Department of Justice has essentially and practically nullified these landowners' fundamental constitutional right to "just compensation." As the Supreme Court explained, "[t]he word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity.'" *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950).

Just compensation indefinitely delayed is just compensation denied. In *First English* and *Armstrong v. United States*, 364 U.S. 40, 48 (1960), the Supreme Court reaffirmed its "frequently repeated" view that "in the event of a taking, the compensation remedy is required *by the Constitution*." 482 U.S. at 316 (emphasis added).

Chief Justice Marshall explained in *Marbury*:

> The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.
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> 5 U.S. at 176-77.

The right to just compensation under the Fifth Amendment demands a remedy. As Chief Justice Marshall further declared in *Marbury*,

> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. ... [W]here a

[18] "Where there is a right, there must be a remedy." 3 William Blackstone, *Commentaries on the Laws of England* 23 (1768).

[19] 5 U.S. 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.").

> specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

5 U.S. at 163, 166.

The Supreme Court later applied Chief Justice Marshall's declaration specifically in the context of the Fifth Amendment, stating, "In any society the fullness and sufficiency of the securities which surround the individual in use and enjoyment of his property constitute one of the most certain tests of the character and value of government." *Monongahela*, 148 U.S. at 324.

While the government's power of eminent domain allows it to take private property without paying the owner "up front," the payment of "just compensation" must be certain and prompt. When he spoke of the legislation establishing the Court of Federal Claims, President Lincoln told Congress, "It is as much the duty of government to render *prompt justice* against itself, in favor of its citizens, as it is to administer the same, between private individuals." Abraham Lincoln, *First Annual Message to Congress*, December 3, 1861, Cong. Globe, 37th Cong., 2d Sess., app. 2 (1862) (emphasis added). This declaration is, literally, lapidary as it is now displayed at the doors of the Court of Federal Claims.

In *Bragg v. Weaver*, the Supreme Court stated, "where adequate provision is made for the certain payment of the compensation *without unreasonable delay* the taking does not contravene due process of law in the sense of the Fourteenth Amendment merely because it precedes the ascertainment of what compensation is just." 251 U.S. 57, 62 (1919). Likewise, in *Joslin Mfg. Co. v. City of Providence*, the Court explained, "the taking of property for public use...need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when the public faith and credit are pledged to a *reasonably prompt ascertainment and payment*, and there is adequate provision for enforcing the pledge." 262 U.S. 668, 677 (1923) (citing *Sweet*

v. Rechel, 159 U.S. 380, 400, 404, 407 (1895) (emphasis added).

Sweet v. Rechel involved a Massachusetts statute enabling a city to condemn properties lacking adequate drainage as a nuisance in order to protect public health. 159 U.S. at 393. The owner of a condemned lot argued the statute violated the state constitution because "it did not provide for compensation to be made to the owners of the property *in advance* of its actual appropriation by the commonwealth." *Id.* at 396 (emphasis added). The Supreme Court held, "it is a condition precedent to the exercise of [the government's eminent domain] power that the statute make provision for reasonable compensation to the owner." 159 U.S. at 399 (Harlan, J.).

The Massachusetts statute complied with the Fifth Amendment, the Court held, because it provided that "the owner became, *from the moment the property was taken, absolutely entitled to reasonable compensation*, the amount to be *ascertained without undue delay*, in the mode prescribed, and its *payment* to be *assured*, if necessary, *by decree against the city*, which could be *effectively enforced*." *Id.* at 407 (emphasis added). In so holding, Justice Harlan analyzed and followed, *inter alia*, a New York state court decision, where that court explained,

> It certainly was not the intention of the framers of the constitution to authorize the property of a citizen to be taken and actually appropriated to the use of the public, and thus to compel him to trust to the future justice of the legislature to provide him a compensation therefor. The compensation must be either ascertained and paid to him before his property is thus appropriated, or an appropriate remedy must be provided, and upon an adequate fund, whereby he may obtain such compensation through the medium of the courts of justice....[20]

[20] Writing for the New York court, Chancellor Walworth continued, "I hold that *before* the legislature can authorize the agents of the state and others to enter upon and occupy, or destroy or materially injure the private property of an individual, except in cases of actual necessity which will not admit of any delay, *an adequate and certain remedy must be provided whereby the owner of such property may compel the payment of his damages, or compensation; and that he is not bound to trust to the justice of the government to make provision for such compensation by future legislation*." *Bloodgood* v. *Mohawk & Hudson Railroad Co.*, 18 Wend. 9, 17, 1837 WL 2871, at

Sweet, 159 U.S. at 405-06.[21]

The Supreme Court reviewed the constitutionality of a Massachusetts condemnation statute, which limited the height of buildings in a certain part of Boston, in *Williams* v. *Parker*, 188 U.S. 491, 503 (1903). In *Williams* the Court found the Massachusetts statute supplied an "adequate provision for the payment of the damages sustained by the taking" because the statute provided "a direct and appropriate means of ascertaining *and enforcing* the amount of all such damage." 188 U.S. at 504 (emphasis added). See also *Crozier v. Fried. Krupp Aktiengesell-schaft*, 224 U.S. 290, 306 (1912) (payment of compensation need not be paid in advance, but it is "sufficient...that adequate means be provided for a reasonably just and *prompt* ascertainment *and payment* of the compensation") (emphasis added).

Thus, the Supreme Court has allowed the government to take private property without first paying compensation *only so long as* the government provides the means to enforce and compel prompt payment of the "just compensation."

Justice Thomas concurred in *Knick v. Township of Scott*, 588 U.S. 180, 206 (2019), to

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*17 (N.Y. 1837) (emphasis added) (following Chancellor Kent's decision in *Rogers* v. *Bradshaw*, 20 Johns. R. 735 (N.Y. 1823), holding "it was sufficient if a certain and adequate remedy was provided by which the individual could obtain such compensation without any unreasonable delay.").

[21] Quoting *Bloodgood v. Mohawk & Hudson Railroad Co*., 18 Wend. 9, 17 (N.Y. 1837). Justice Harlan likewise quoted and followed the New York Supreme Court's decision in *People ex rel. Utley v. Hayden*, 6 Hill 359, 1844 WL 4447 (N.Y. Sup. Ct. 1844), holding that "[a]lthough it may not be necessary, within the constitutional provision, that the amount of compensation should be actually ascertained and paid before property is thus taken, it is...the settled doctrine...that, at least, certain and ample provision must be first made by law, except in cases of public emergency, so that the owner *can coerce payment through the judicial tribunals or otherwise without any unreasonable or unnecessary delay*." *Sweet*, 159 U.S. at 406 (emphasis added). "Otherwise," the court concluded, "the law making the appropriation is no better than blank paper." *Hayden*, 6 Hill at 361.

emphasize that the government's "'sue me' approach to the Takings Clause is untenable." Justice Thomas wrote, "[t]he Fifth Amendment does not merely provide a damages remedy to a property owner willing to 'shoulder the burden of securing compensation' after the government takes property without paying for it. Instead, it makes just compensation a 'prerequisite' to the government's authority to 'tak[e] property for public use.' A 'purported exercise of the eminent-domain power' is therefore 'invalid' unless the government "pays just compensation before or at the time of its taking.'" *Knick*, 588 U.S. at 207 (quoting dissent from the Court's denial of cert. in *Arrigoni Enterprises v. Durham*, 578 U.S. __, 136 S.Ct. 1409 (2016)).

Here, the government took these landowners' private property almost six years ago in 2019 and has not yet paid these Florida landowners anything for that property the government took from them. An almost decade-long delay in payment defies any notion of promptness. The government's obligation to pay landowners whose predecessor-in-title was Adrian Honoré was known, established beyond cavil and acknowledged by the government *before* the Surface Transportation Board issued the order taking these owners' land in May 2019. The six-year delay by failing to honor this Constitutional obligation the government utterly fails to comport with the "reasonably prompt" or "without unreasonable delay" requirement of due process and the Fifth Amendment.

II. The government's opposition to severing the Honoré Plaintiffs' claims is without merit.

In its past three filings opposing severing or bifurcating the Honoré Plaintiffs' claims, the government raised two objections. The government claimed doing so would be "inefficient" and "that is not how we handled other Trails Act cases." ECF Nos. 43, 88, and 103. The government is wrong. The government's supposed justification of "efficiency" and past practice for this six-

year delay in determining and paying the Honoré Plaintiffs' just compensation (even if true) does not override the Constitutional mandate that the compensation due the Honoré Plaintiffs be promptly ascertained and paid.

A. Supposed "inefficiency" does not justify the ongoing violation of these owners' Constitutional right to be justly compensated.

The Supreme Court is emphatic in holding the Constitution's protection of private property and right to due process is a foundational self-executing principle upon which our Nation is established. See p. 3-13, supra. As the Supreme Court has held repeatedly, this right is not protected unless the owner is *promptly* paid "just compensation." The fact that the government may find severing the Honoré Plaintiffs' claims inconvenient or "inefficient" is of no weight when balanced against the government's Constitutional obligation to *promptly* pay these Florida landowners for that property the government took. Thus, the Constitution trumps the government's supposed concern about any "inefficiencies" the government alleges will occur if the Honoré Plaintiffs' claims are severed.

Second, there is no basis for the government's contention that severing the Honoré Plaintiffs' claims will be inefficient. How is it inefficient to sever and pay the Honoré Plaintiffs' compensation sooner rather than wait for the government's dispute with the other landowners to first be resolved? The government provides no credible explanation for its contention of supposed "inefficiency."

Indeed, far from being inefficient or requiring additional resources, severing and paying the Honoré Plaintiffs' claims will actually *save* the taxpayers significant cost and avoid further waste of this Court's resources. The "just compensation" the government must pay the Honoré Plaintiffs includes interest on the principal compensation for the property taken. Interest is

compounded and accrues from May 14, 2019, until these owners are paid. The property the government took is valuable and the interest that continues to accrue on the government's obligation is substantial. For the six years from the date of taking (May 2019 through May 2025) the total interest at the compounded Moody's Aaa rate adjusted annually is more than 61% of the principal value of the property taken. Thus, if the compensation due the Honoré Plaintiffs is $10 million (the actual compensation due these owners is likely much greater than this), the interest the government must pay for its six-year-delay in paying these owners is $6,113,840.[22]

While the government acknowledges the government must pay interest on the compensation it owes the Honoré Plaintiffs, the government never explains how paying six years of accrued interest of potentially $6 million, or more, is justified by avoiding the "inefficiencies" attendant to separately resolving the compensation due the Honoré Plaintiffs.

In addition to interest on the compensation, the government's delay ascertaining the specific compensation due each Honoré Plaintiff also increases the attorney fees and litigation expenses the government must reimburse these plaintiffs. The Uniform Relocation Assistance and

[22] The Annual Moody's Aaa rates are from those in the table the Federal Reserve Bank of St. Louis published. The Moody's Aaa rate is the rate of interest this Court, the Federal Circuit, and the parties agree the government must pay in past taking cases. "[T]he parties agreed that any just compensation ultimately awarded would include interest calculated in accordance with Moody's Seasoned AAA Corporate Bond Index (Moody's index), beginning on the date of take and continuing through the date of payment, compounded annually." *See* ECF 195; *see, e.g.*, *United States v. Thayer-W. Point Hotel Co.*, 329 U.S. 585, 588, (1947) "[W]here the United States takes property under its power of eminent domain ... it has consistently been held that the Fifth Amendment's reference to 'just compensation' entitles the property owner to receive interest from the date of the taking to the date of payment as a part of his just compensation." *Collective Edge, LLC v. United States,* 171 Fed. Cl. 736, 775 (2024) and *Hardy v. United States*, 138 Fed. Cl. 344, 356 (2018) "the court concludes that the Moody's rate is the appropriate measure of delay damages in the instant case. It will not depart from the consensus that has emerged since 2009 in the Court of Federal Claims that the Moody's rate is the appropriate benchmark by which to award delay damages in the Rails-to-Trails context. … the court concludes that interest shall be compounded quarterly in accordance with the Prudent Investor Rule."

Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4654(c) (URA), provides, "[t]he court rendering a judgment for the plaintiff...awarding compensation for the taking of property by a Federal agency, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees…" Until the Honoré Plaintiffs are paid and the compensation they are due is finally resolved these other costs that the government (meaning the taxpayers) are incurring continues to increase. So, too, are the expenses the government's lawyers and this Court's resources.

B. "We've always done it this way" is a similarly fallacious justification to oppose severing the Honoré Plaintiffs' claims.

The government next says, "there is no reason to diverge form the normal course of action", ECF No. 103, P. 2. This Court accepted this justification when the Court denied the plaintiffs' prior motion to sever the Honoré Plaintiffs' claims. See ECF Nos. 48 and 106, see also motion paragraphs 18 and 27.

This justification is wrong for two reasons. *First*, and most fundamentally, "we've always done it that way" does not excuse perpetuating a Constitutional violation the government has visited upon these Florida landowners whose private property the federal government took in violation of the Constitution.

Second, we have not "always" handled Trails Act cases in this manner. There is nothing in this Court Rules that provide once plaintiffs' claims have been consolidated into a single action the claims must remain consolidated "until death do they part." Indeed, as noted above, Rules 20(b) and 21 explicitly provide for claims that have been consolidated to be severed.

Furthermore, this Court frequently manages Trails Act cases involving consolidated claims by grouping the claims into separate groups and ruling upon the subgroups separately. See *Hash v. United States*, 403 F.3d 1308 (2005) (grouping Trails Act claims and ruling upon them in separate groups). This Court routinely resolves Trails Act cases with separate judgments for groups of plaintiffs with common issues.

The Justice Department's opposition to severing the Honoré Plaintiffs' claims and to further delay a resolution of these owners' right to be paid just compensation would render the Fifth Amendment guarantee of "just compensation" nothing more than a "parchment barrier,"[23] or worse, "blank paper."[24]

From Pearl Harbor and Hiroshima was less than four years (December 7, 1941, to August 6, 1945). It is incomprehensible that it takes the federal government at least a year longer than it took the United States to win World War II to resolve the "just compensation" the federal government must pay these Honoré Plaintiffs.

III. The Constitution requires the Honoré Plaintiffs' claims to be severed so the specific just compensation due each owner can be ascertained and paid.

The Honoré Plaintiffs are captive creditors of the federal government. The government took their private property in May 2019 without paying them as the Constitution requires.

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[23] See Federalist No. 48 (Madison) (Clinton Rossiter, ed., 1961), p. 308 ("Will it be sufficient to mark, with precision, the boundaries of these departments in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power?"). See also *Bank Markazi v. Peterson*, 578 U.S. 212, 249 (2016) (Roberts, C.J., dissenting) ("however difficult it may be to discern the line between the Legislative and Judicial Branches, the entire constitutional enterprise depends on there *being* such a line") (emphasis in original).

[24] See, *supra*, note 19.

President Lincoln's lapidary declaration of the aspiration for "prompt justice" is the *raison d'être* for which this Court was established. Rule 1 of this Court's Rules provides, "These rules....should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

Rule 20(b) anticipates exactly what these owners are asking this Court to do. Rule 20(b) provides "[t]he court may issue orders – including an order for separate trials – to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party." Rule 21 likewise provides, "On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party."

There is no requirement that once plaintiffs' claims are permissively joined under Rule 20, they must forever remain joined. The Rules allowing permissive joinder of different plaintiffs' claims in a consolidated action do not establish a matrimonial union of the plaintiffs with a "till death do you part" covenant. After this Court's decision in *Barron* allowing the plaintiffs that are successors-in-title to Adrian Honoré to proceed to a determination of compensation, judgment, and payment, there is no reason these plaintiffs should not similarly proceed to a determination of compensation and payment.

CONCLUSION

Since the government took the Honoré Plaintiffs' property, these plaintiffs have suffered Hurricane Ian (in 2023), and Helene and Milton, two more hurricanes of even more devastating magnitude this year. While the government is not responsible for Hurricanes Ian, Helene and Milton, the government's creation of the Legacy Trail corridor greatly increased the damage these

hurricanes caused to these owners' property. The removal of trees and the construction of an elevated public recreational corridor across theses owners' lands made these owners' homes and businesses much more exposed to damage from the hurricanes and flooding with storm water.

No one can undo the damage Ian, Helene, and Milton have wrought on these owners' properties. However, the one thing this Court can do is to sever the Honoré Plaintiffs so these owners may finally be paid that compensation the government should have paid them in May 2019.

This Court should grant the forty-seven Honoré Plaintiffs' motion under Rules 20 and 21 to sever their claims for compensation and order these owners (those listed in **Exhibit 1** to the renewed motion to sever) to immediately proceed to a final determination of the specific compensation due each owner.

Respectfully submitted,

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