No. 21-70

In The

Supreme Court of the United States

GARY E. ALBRIGHT, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE CATO INSTITUTE, NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS, REASON FOUNDATION, SOUTHEASTERN LEGAL FOUNDATION, AND PROPERTY LAW PROFESSORS SHELLEY ROSS SAXER AND JAMES W. ELY, JR., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

When the Court of Appeals confronts a novel or unsettled question of state law, should that federal court certify the question to the state's highest court or should the federal court make an *Erie*-guess about how the state's highest court might decide the issue?

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INTEREST OF AMICI CURIAE[1]

The **Cato Institute** is a nonpartisan public-policy research foundation established in 1977 and 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 constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

The **National Association of Reversionary Property Owners** is a Washington State-based nonprofit foundation defending landowners' Fifth Amendment right to compensation when the government takes private property under the federal Trails Act. Since its founding in 1989, the Association has assisted over ten thousand property owners and has been extensively involved in litigation concerning landowners' interests in their land subject to active and abandoned railroad right-of-way easements. See, *e.g.*, *National Ass'n of Reversionary Property Owners* v. *Surface Transp. Bd.*, 158 F.3d 135 (D.C. Cir. 1998), and *amicus curiae* in *Preseault* v. *Interstate Commerce Comm'n*, 494 U.S. 1 (1990) (*Preseault I*), and *Brandt Rev. Trust* v. *United States*, 572 U.S. 93 (2014).

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. Further, no party's counsel authored this brief in any part and amicus alone funded its preparation and submission.

1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason participates as *amicus curiae* in cases raising significant constitutional or legal issues.

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.

Professor Shelley Ross Saxer is the Laure Sudreau Chair in Law at Pepperdine University Caruso School of Law, where she has taught courses in real property, land use, community property, remedies, environmental law, and water law. She has also authored numerous scholarly articles and books on property and takings law. See, *e.g.*, Shelley Ross Saxer, David L. Callies & Robert H. Freilich, *Land Use* (American Casebook Series) (7th ed.); Shelley Ross Saxer, Colleen Medill, Grant Nelson, and Dale Whitman, *Contemporary Property* (West Academic 5th ed. 2019).

Professor James W. Ely, Jr., is the Milton R. Underwood Professor of Law Emeritus at Vanderbilt University Law School. He is a renowned property rights expert whose career accomplishments were recognized with both the Brigham-Kanner Property Rights Prize and the Owners' Counsel of America Crystal Eagle Award in 2006. 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). Professor Ely also served as an editor of both the second edition of the Oxford Companion to the Supreme Court, and the second edition of the *Oxford Guide to Supreme Court Decisions*. The Supreme Court relied upon Professor Ely's scholarship in *Brandt*, 572 U.S. at 96.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Circuit erred by not certifying this novel question of state law to the Oregon Supreme Court. The Federal Circuit erred further when it wrongly guessed how Oregon's highest court may decide this question of Oregon property law. See *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 78-79 (1997). Contrary to this Court's guidance in *Arizonans*, *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and *Railroad Comm'n of Texas* v. *Pullman*, 312 U.S. 496 (1941), the Federal Circuit did not certify (or abstain from deciding) a novel question of Oregon property law. Instead of certifying this question, the Federal Circuit made an *Erie*-guess about how it believed Oregon's highest court might decide this unsettled question of Oregon law.

In doing so, the Federal Circuit unsettled Oregon property law and undermined the certainty of land title contrary to this Court's admonition in *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 687-88 (1979) ("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.").

This is a Trails Act taking case involving issues of Oregon state property law. The federal government converted an otherwise abandoned railroad right-of-way into a public park. But for the federal government's order invoking section 8(d) of the Trails

Act, these Oregon landowners would have enjoyed unencumbered title to, and exclusive possession of, their land. But, because the government invoked the Trails Act, these landowners lost their state law right to their land. *Preseault I*, 494 U.S. at 8 (section 8(d) "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").

Had it not been for the Board's order invoking section 8(d) of the Trails Act, these Oregon landowners would have unencumbered use and possession of their land. See *Brandt*, 572 U.S. at 104-05 ("if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land"). The Board's invocation of section 8(d) of the Trails Act encumbered these owners' land with a new and different easement. See *Trevarton* v. *South Dakota*, 817 F.3d 1081, 1087 (8th Cir. 2016) ("Congress and the Trails Act intended to convey to the interim trailuser a property interest that includes the right to use the acquired right-of-way for recreational trail purposes. …[A]s a matter of federal law it granted 'a new easement for a new use.'") (quoting *Preseault* v. *United States*, 100 F.3d 1525, 1550 (Fed. Cir. 1996) (*en banc*) (*Preseault II*)).

This Court recently emphasized the obligation the government owes private landowners when the government imposes an easement across owners' land. In *Cedar Point Nursery* v. *Hassid*, this Court held that "[w]hen the government physically acquires

private property for a public use, the Takings Clause imposes a *clear and categorical obligation* to provide the owner with just compensation." 141 S.Ct. 2063, 2071 (2021).[2] This Court further explained that the "government commits a physical taking *** when the government physically takes possession of property without acquiring title to it." [3] *Id.* This sort of "physical appropriation[ ] constitute[s] the 'clearest sort of taking,' and we assess them using a simple, *per se* rule: *The government must pay for what it takes*." *Id.* [4] And, this Court continued, "even if the Government physically invades only an easement in property, it must nonetheless pay just compensation." *Id.* at 2073.[5]

The Federal Circuit erred in its application of Oregon law and held the government did not take an easement across these Oregon landowners' property. Oregon law provides that a railroad may obtain only that interest necessary to carry out its chartered purpose – by either its eminent domain power or by conveyance. Oregon case law and scholarly

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[2] Citing Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 321 (2002); emphasis added.

[3] Citing United States v. Pewee Coal Co., 341 U.S. 114, 115-17 (1951).

[4] Emphasis added; citations omitted; citing Tahoe-Sierra, 535 U.S. at 322, and quoting Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).

[5] Quoting Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979), and citing United States v. Causby, 328 U.S. 256, 265 (1946).

interpretation of that law (relied by the Oregon Supreme Court) further explain that deeds conveying a "strip of land" as surveyed/located across the grantor's land convey only an easement.

This Court should grant certiorari because the Federal Circuit violated foundational principles of federalism when it refused to certify a novel issue of state law to the state's highest court.

In a similar Trails Act case Federal Circuit Judge Moore observed "given what an awful job we obviously do of interpreting state law, why don't we just send this [case] to [the state court], so that we don't make another mistake?"[6] The Federal Circuit should have followed Judge Moore's advice.

The Federal Circuit's refusal to certify questions of state law violates this Court's guidance and is out of step with the other circuits. This case provides the opportunity for this Court to direct lower federal courts when they should (indeed must) certify unsettled questions of state law to the state's highest court. This guidance is especially needed in the Federal Circuit because Congress granted the Federal Circuit exclusive national jurisdiction of every Fifth Amendment taking case against the United States,

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[6] Oral argument in Rogers v. United States, No. 2013-5098 (Fed. Cir. July 10, 2014), available at <http://www.cafc.uscourts.gov/oral-argument-records>.

and inverse condemnation cases most often involve interpretation of state property law.

ARGUMENT

The Federal Circuit's decision should be reversed because the Federal Circuit should have certified this question of Oregon law to the Oregon Supreme Court.

Under *Erie*, a federal court cannot presume to independently declare state law; it must defer to the interpretation of the highest state court. Particularly when state law is unsettled, federalism concerns strongly favor certifying questions of state law to a state's highest court instead guessing how the state's highest court would decide the question.

Long before certification became widely available, this Court held that principles of federalism required federal courts to abstain from deciding unsettled questions of state law when a definitive state court determination would allow the federal court to avoid adjudicating a federal constitutional issue. See *Pullman*, 312 U.S. at 501, and *Clay* v. *Sun Ins. Office Ltd.*, 363 U.S. 207 (1960). "Certification today covers territory once dominated by a deferral device called "*Pullman* abstention ***." *Arizonans*, 520 U.S. at 75-76. This Court recently affirmed the significance and unique value of *Pullman* certification. *McKesson* v. *Doe*, 141 S.Ct. 48, 51 (2020) ("the dispute presents novel issues of state law peculiarly calling for the

exercise of judgment by the state courts") (citing *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974).

Fifth Amendment taking cases frequently involve the intersection of unsettled questions of state property law and important federal constitutional issues – precisely the combination that *Arizonans* held compelled certification. See *Arizonans*, 520 U.S. at 79 ("Taking advantage of certification made available by a State may 'greatly simplif[y]' an ultimate adjudication in federal court.").

Landowners vindicating their Fifth Amendment right to just compensation against the federal government do not have the option of litigating their constitutional claim in state court or even in a local federal district court. See 28 U.S.C. §§1346(a), 1491(a).

This makes the input state courts can provide through certification all the more valuable. And the concentration of takings cases in a single federal circuit makes this Court's supervision and direction even more necessary.

In *Pullman*, this Court required a federal court to abstain from deciding an issue of Texas law because the proper resolution of that issue would avoid "an unnecessary ruling of a federal court." 312 U.S. at 500. As this Court explained, "no matter how seasoned the judgment of the district court may be [on matters of state law], it cannot escape being a forecast rather than a determination." *Id.* at 499.

In the decades since *Pullman*, almost all states adopted procedures allowing federal courts to certify

unsettled questions of state law directly to the state's highest court for resolution. See *McKesson* v. *Doe*, 141 S.Ct. 48, 50-51 (2020) ("Fortunately, the Rules of the Louisiana Supreme Court, like the rules of 47 other States, provide an opportunity to obtain such guidance."). See also Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after* Erie, 145 U. Pa. L. Rev. 1459, 1548 (1997). This Court has repeatedly urged federal courts to use certification to resolve unsettled questions of state law. See *Lehman Bros.*, 416 U.S. at 390-91 (reversing a lower federal court's failure to certify an unsettled question of state law).

In *Arizonans* this Court admonished a lower federal court for deciding a challenge to a novel Arizona constitutional amendment (requiring that the state act only in English) without first certifying the meaning of the Arizona law to the Arizona Supreme Court. "Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Arizonans*, 520 U.S. at 78-79.

This Court stressed that the advantages of certification over abstention only strengthen the case for using certification.

> *Pullman* abstention proved protracted and expensive in practice, for it entailed a full round of litigation in the state court system before any resumption of proceedings in federal court.

> Certification procedure, in contrast, allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response.
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> *Arizonans*, 520 U.S. at 76.[7]

Arizonans ultimately concluded that the lower federal courts should not have decided the constitutionality of the challenged amendment because the case became moot when the plaintiff left her employment with the state. 520 U.S. at 72. Nonetheless, this Court went out of its way to discuss certification and provide lower federal courts guidance on when to certify a case to local state court to provide local counsel and an explanation. This Court directed "[a] more cautious approach was in order." *Id.* at 77. "Given the novelty of the question and its potential importance to the conduct of Arizona's business *** the certification requests merited more respectful consideration than they received in the proceedings below." *Id.* at 78.

Here, if the Federal Circuit had given Oregon state law "more respectful consideration," it would have certified the unsettled question of state law before declaring this rule of property to be so without any controlling state law on point. "Federal courts lack competence to rule definitely on the meaning of state legislation ***." *Arizonans*, 520 U.S. at 48. When a federal court elects to decide "a novel state [law

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[7] Citations omitted.

question] not yet reviewed by the State's highest court," it "risks friction-generating error." *Id.* at 78-79.[8]

Oregon invites federal courts to certify questions of Oregon law to its Supreme Court. See Or. Rev. Stat. §28.200. Indeed, the Oregon Supreme Court not only recognizes the utility of certification in settling questions of state law, it has explained that comity to federal courts often requires acceptance of certified questions.

> Although certification is not a procedural necessity in most cases, the certifying court nonetheless has made the unusual decision to seek certification and thereby bypass its own decision-making authority. Our respect for the discretionary judgment of our fellow courts and our commitment to participating as a member of a federal system of decisional law, sometimes referred to as "comity," are both factors favoring acceptance of certification. Because of considerations of comity, to which may be added the fact that there is no present Oregon decision on the point, the considerations that inform our decision whether to allow a petition for review will be of somewhat less significance

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[8] Justice O'Connor (sitting by designation on the Second Circuit) reiterated this Court's direction that interpretation of state law is a "job surely best left to the state courts, especially when they 'stand willing to address questions of state law on certification from a federal court.'" Osterweil v. Bartlett, 706 F.3d 139, 142 (2nd Cir. 2013) (citing Arizonans, 520 U.S. at 79, and quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 510 (1985) (O'Connor, J.)).

> in the certification context. We may, on occasion, accept certification of questions that, were they tendered to us in a traditional petition for review, we would decline to address. Of course, the presence of one or more of the traditional considerations justifying review in the questions propounded on certification will make acceptance even more likely.
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> *Western Helicopter Servs., Inc.* v. *Rogerson Aircraft Corp.*, 811 P.2d 627, 632-33 (Pa. 1991).

The Ninth Circuit has affirmed the principle of *Pullman* certification and has explained the usefulness of certifying questions of state law to the Oregon Supreme Court. In *Doyle* v. *City of Medford*, 565 F.3d 536, 543 (9th Cir. 2009),[9] the Ninth Circuit stated,

> In [*Pullman*], the United States Supreme Court "held that the federal courts should abstain from deciding a case where an unsettled question of state law may be dispositive of a claim that state action violated the [United States Constitution], because the answer to the state law question may obviate the need to decide the federal constitutional question." *** [A]s the Oregon Supreme Court recognized in *Western Helicopter*, certification is appropriate in *Pullman*-type abstention cases "because the alternative to certification is federal court

[9] Certified question accepted, 210 P.3d 907 (Or. 2009), and certified question answered, 227 P.3d 683 (Or. 2010) (citing Western Helicopter, 811 P.2d at 632).

> abstention and the attendant delay until resolution of the derivative state court *** action ***.[10]

This Court resolved the problems associated with *Pullman* abstention in *Arizonans* by instructing federal court to certify unsettled questions of state law. Likewise, in *Knick* v. *Township of Scott*, this Court resolved the Catch-22 to which its precedent, *Williamson County*, [11] had consigned landowners whose property was taken by state government entities. 139 S.Ct. 2162, 2169 (2019).[12] This Court rightly declared that *Williamson County's* "state-litigation requirement relegate[d] the Takings Clause 'to the status of a poor relation' among the provisions of the Bill of Rights." *Id.* (quoting *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994)). Here, the Court should likewise direct the Federal Circuit to certify this issue in order to "restor[e these landowners'] takings claims to the full-fledged constitutional status the Framers envisioned when they included

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[10] See also Perry v. Schwarzenegger, 628 F.3d 1191, 1196 (9th Cir. 2011) (Ninth Circuit "compelled to seek *** an authoritative statement of California law" through certification).

[11] Williamson County Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985).

[12] Williamson County had held a landowner's taking claim was not ripe until the landowner first pursued all available remedies in state court and the state court denied relief. Knick, 139 S.Ct. at 2169. But when the landowner then brought his claim in federal court, "the full faith and credit statute, 28 U.S.C. §1738, required the federal court to give preclusive effect to the state court's decision, blocking any subsequent consideration of whether the plaintiff had suffered a taking within the meaning of the Fifth Amendment." Id.

the Clause among the other protections in the Bill of Rights." *Id.* at 2170.

Furthermore, the Federal Circuit does not explain how it chooses to certify questions of state law to states' highest courts. See *Chevy Chase Land Co.* v. *United States*, 158 F.3d 574 (Fed. Cir. 1998), *Klamath Irrigation Dist.* v. *United States*, 532 F.3d 1376, 1377 (Fed. Cir. 2008), and *Rogers* v. *United States*, 814 F.3d 1299 (2015).

In *Klamath Irrigation*, the Federal Circuit certified "complex issues of Oregon property law" to the Oregon Supreme Court regarding Oregon General Laws, Chapter 228, §2 (1905) and whether the statute "preclude[s] irrigation districts and landowners from acquiring a beneficial or equitable property interest in the water right" taken by the federal government. 532 F.3d at 1377-78 (citing *Western Helicopter*, 811 P.2d at 633-34).

Chevy Chase, like this case, involved a Trails Act taking case involving the interpretation of a deed under Maryland property law. Rather than attempt to interpret Maryland property law, the Federal Circuit certified three questions to the Maryland Court of Appeals. The panel noted the government's Fifth Amendment obligation "depends upon complicated issues of Maryland property law upon which this court discerns an absence of applicable and dispositive Maryland law." *Chevy Chase*, 158 F.3d at 575.

The enigmatic Federal Circuit never explained why it did not certify this unique issue of Oregon law but did certify these similar issues of Oregon,

Maryland, and Florida law. The Federal Circuit should have followed the direction of this Court and the example of the Ninth Circuit and certified this unsettled question of Oregon state law to the Oregon Supreme Court.

CONCLUSION

The Federal Circuit ruled contrary to this Court's jurisprudence. This Court should grant certiorari because federalism compels unsettled questions of state law to be certified to the respective state's highest court when such a procedure is available. As this Court explained in *Arizonans*, "[s]peculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when *** the state courts stand willing to address questions of state law on certification from a federal court." 520 U.S. at 79 (quoting *Brockett*, 472 U.S. at 510 (O'Connor, J., concurring) [13] (internal quotation omitted)). The Federal Circuit should have followed this Court's direction and given "more respectful consideration" to Oregon's authority to declare Oregon state law.

[13] See supra, note 8.

Respectfully submitted,

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