2021-2133, -2220

United States Court of Appeals for the Federal Circuit

JEFFREY MEMMER, GILBERT EFFINGER, LARRY GOEBEL, SUSAN GOEBEL, OWEN HALPENY, JOSEPH JENKINS, MICHAEL MARTIN, RITA MARTIN, MCDONALD FAMILY FARMS OF EVANSVILLE, INC., REIBEL FARMS, INC., JAMES SCHMIDT, ROBIN SCHMIDT,

Plaintiffs-Appellants,

– v. –

UNITED STATES,

Defendant-Cross-Appellant.

On Appeal from the United States Court of Federal Claims in Case No. 1:14-cv-00135-MMS, Honorable Margaret M. Sweeney, Senior Judge

BRIEF FOR NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS, CATO INSTITUTE, OWNERS' COUNSEL OF AMERICA, SOUTHEASTERN LEGAL FOUNDATION, REASON FOUNDATION, AND PROFESSOR JAMES W. ELY, JR., AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS JEFFREY MEMMER, ET AL., URGING DENIAL OF THE UNITED STATES' PETITION FOR REHEARING *EN BANC*

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2021-2133, -2220

Short Case Caption Memmer, et al. v. United States

Filing Party/Entity Amici Curiae

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

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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
National Association of Reversionary Property		
Cato Institute		
Owners' Counsel of America		
Southeastern Legal Foundation		
Reason Foundation		
Professor 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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Alexander, et al. v. United States, No. 1:18CV4371	U.S. Court of Federal Claims	Counsel for Amici Curiae are counsel for Plaintiffs
Brott, et al. v. United States, No. 1:14CV567	U.S. Court of Federal Claims	Counsel for Amici Curiae are counsel for Plaintiffs
Butler, et al. v. United States, No. 1:17CV667	U.S. Court of Federal Claims	Counsel for Appellants are counsel for Plaintiffs

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 *AMICI CURIAE*[1]

The National Association of Reversionary Property Owners is a nonprofit foundation dedicated to defending the Fifth Amendment right to compensation when the government takes an owner's property under the federal Trails Act.[2]

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government.

Owners' Counsel of America is a national not-for-profit organization of lawyers dedicated to the principle that the right to own and use property is the guardian of every other right and the basis of a free society.

Southeastern Legal Foundation is a national nonprofit, public-interest law firm and policy center advocating constitutional individual liberties, limited government, and free enterprise.

Reason Foundation is a nonpartisan public policy think tank whose mission is to advance a free society by developing and promoting libertarian principles and

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[1] This brief is not authored, in whole or part, by any party's counsel. No party, other than *amici curiae*, their members or counsel contributed money intended to fund the submission of this brief. All *amici* parties have authorized the filing of this brief. Both Plaintiffs-Appellants and Defendant-Cross-Appellant have consented to the filing of this brief. Counsel for the United States stated the "United States consents to the filing of a timely *amicus* brief that complies [with] the applicable rules."

[2] The National Trails System Act Amendments of 1983, 16 U.S.C. §1241, *et seq.*

policies, including free markets, individual liberty, and the rule of law.

Professor James W. Ely, Jr., is the Milton R. Underwood Professor of Law, Emeritus, and Professor of History, Emeritus, at Vanderbilt University.

INTRODUCTION

The government asks this Court to sit *en banc* to overturn a generation of Trails Act jurisprudence and adopt a novel rule that is contrary to the Supreme Court's Takings Clause jurisprudence.

This Court's established precedent holds that the Trails Act gives rise to a *per se* physical taking (not a regulatory taking) of a landowner's private property when the government first invokes section 8(d) of the Trails Act. This rule follows directly from the Supreme Court's holding in *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."), and this Court's *en banc* decision in *Preseault* v. *United States*, 100 F.3d 1525, 1550 (Fed. Cir. 1996) (*en banc*) (*Preseault II*) (Trails Act imposes "a new easement for the new use, constituting a physical taking of the right of exclusive possession that belonged to the [landowners]."). See also *Toews* v. *United States*, 376 F.3d 1371, 1376, 1381 (Fed. Cir. 2004), *Caldwell* v. *United States*, 391 F.3d 1226, 1229 (Fed. Cir. 2004), *Barclay* v. *United States*, 443 F.3d 1368, 1378 (Fed. Cir. 2006), *Illig* v.

United States, 274 Fed. App'x 883 (Fed. Cir. 2008), *cert. denied*, 557 U.S. 935 (2009), *Ladd* v. *United States*, 630 F.3d 1015, 1023-24 (Fed. Cir. 2010), *reh'g and reh'g en banc denied*, 646 F.3d 910 (Fed. Cir. 2011) (*Ladd I*), *Ladd* v. *United States*, 713 F.3d 648, 652 (Fed. Cir. 2013) (*Ladd II*), and *Behrens* v. *United States*, 59 F. 4th 1339, 2023 WL 1944933, *2 (Fed. Cir. Feb. 13, 2023) ("It is now well-settled that the issuance of a NITU under the Trails Act may result in a taking of property owned by the original grantor of the easement.").

At least twelve members of this Court have affirmed and recognized this fundamental principle of Trails Act jurisprudence.[3]

The Government's petition for rehearing *en banc* should be denied for two distinct reasons.

First, the government asks this Court to overturn a settled rule of law that has guided this Court, the government, and landowners for a generation. In *John R. Sand*

[3] The *Preseault II* majority included Judges Plager, Rich, Newman, Mayer, Rader, and Lourie. Judges Dyk and Prost joined in this Court's decisions in both *Caldwell* and *Barclay* (with Judge Newman dissenting). *Illig* was a summary affirmance by Judges Dyk, Mayer, and Linn. *Ladd I* and *Ladd II* were unanimous decisions of Judges Rader, Linn, Moore, and Lourie. This Court denied the government's petition for rehearing *en banc* in *Ladd I* by a vote of nine (Judges Rader, Newman, Lourie, Bryson, Linn, Dyk, Prost, O'Malley, and Reyna) to two (Judges Gajarsa and Moore). Significantly, Judge Newman, who dissented in both *Caldwell* and *Barclay*, did not dissent from the denial of the government's petition for rehearing in *Ladd I*. *Caquelin*, explicitly and specifically re-affirmed *Ladd I*, was a unanimous decision of Judges Taranto, Prost, and Linn. This Court's decision in this appeal was the unanimous decision of Judges Dyk, Taranto, and Hughes.

& Gravel v. *United States*, 552 U.S. 130, 139 (2008), the Supreme Court wrote, "Justice Brandeis once observed that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.'" A "precedent that creates a rule of property—a widely relied-on legal principle established by judicial decision or series of decisions related to title to real, personal, or intellectual property—is generally treated as inviolable." Bryan A. Garner, *The Law of Judicial Precedent* (2016), §51, p. 421.

Second, even if this Court were to sit *en banc* and adopt the government's new rule, doing so is contrary to the Supreme Court's Takings Clause jurisprudence.

ARGUMENT

I. The Trails Act is a *per se* taking for which the government has a "categorical" obligation to pay the landowner.

Government action confiscating an owner's property or "practically oust[ing]" an owner from possession of his property "is perhaps the most serious form of invasion of an owner's property interests, depriving the owner of the "the rights to possess, use and dispose of the property" for which the government has a "categorical" duty to pay the owner. *Horne* v. *Department of Agriculture*, 576 U.S. 350, 358, 360 (2015) (internal quotation omitted). The "appropriation of an easement constitutes a physical taking***." *Cedar Point Nursery* v. *Hassid*, 141 S.Ct. 2063, 2073 (2021). Even if the duration of the taking is temporary, it is still a

per se physical taking for which the government must pay the owner. *Id.* at 2074.[4] "The duration of an appropriation—just like the size of an appropriation—bears only on the amount of compensation." *Id.* (citation omitted).

This Court, in *Hendler* v. *United States*, explained that the government, "could subsequently decide to return the property to its owner, or otherwise release its interest in the property. Yet no one would argue that would somehow absolve the government of its liability for a taking during the time the property was denied to the property owner." 952 F.2d 1364, 1376 (Fed. Cir. 1991). This Court continued, "[a]ll takings are 'temporary,' in the sense that the government can always change its mind at a later time***." *Id.* Chief Justice Roberts emphasized this point, explaining, "[a] bank robber might give the loot back, but he still robbed the bank." *Knick* v. *Township of Scott*, 139 S.Ct. 2162, 2172 (2019).

II. A landowner's right to compensation arises immediately when the Trails Act is invoked and does not depend upon the railroad and trail-sponsor reaching a private agreement.

During the early years of Trails Act litigation, the government said the six-year limitation period in 28 U.S.C. §2501 begins running when the government first issues an order invoking the Trails Act. This Court accepted the government's argument and announced a "bright-line rule" that a Trails Act taking occurs, and a

[4] See also *Arkansas Game and Fish Comm'n* v. *United States*, 568 U.S. 23, 32 (2012) ("our decisions confirm that takings temporary in duration can be compensable").

landowner's claim for compensation accrues, when the government first invokes section 8(d). *Caldwell*, 391 F.3d at 1235 ("We therefore hold that the appropriate triggering event for any takings claim under the Trails Act occurs when the NITU is issued."), *Illig*, 274 Fed. App'x at 883; *Ladd I*, 630 F.3d at 1023-24, *reh'g and reh'g en banc denied*, 646 F.3d at 910 ("[I]t is settled law. A taking occurs when state law reversionary property interests are blocked. *** *The issuance of the NITU is the only event that must occur to entitle the plaintiff to institute an action*.") (emphasis added; internal quotations omitted). In *Barclay*, 443 F.3d at 1374, this Court reaffirmed this bright-line rule, stating, "state law reversion was still delayed by the issuance of the NITU, and the claim still accrued with the issuance of the NITU. It similarly makes no difference that railroad use may have continued after the NITU issued. The termination of railroad use was still delayed by the NITU."

When the landowners in *Illig* sought a writ of certiorari, then-Solicitor General Elena Kagan wrote,

> The issuance of the NITU "thus marks the 'finite start' to either temporary or permanent takings claims." When the NITU is issued, all the events have occurred that entitle the claimant to institute an action based on federal-law interference with reversionary interests, and any takings claim premised on such interference therefore accrues on that date.
>
> Brief for the United States in Opposition to Petition for Writ of Certiorari, 2009 WL 1526939, *12-13 (quoting *Caldwell*, 391 F.3d at 1235).

Solicitor General Kagan continued, "under *Caldwell*, landowners may seek compensation for an alleged taking immediately upon issuance of the NITU, even though no trail use agreement has been reached, and any taking that may later be found would only have been temporary." *Id.* at *15.

This Court reaffirmed this "bright-line rule" in *Caquelin* v. *United States*, stating,

> The NITU***was a government action that compelled continuation of an easement for a time; it did so intentionally and with specific identification of the land at issue; and it did so solely for the purpose of seeking to arrange, without the landowner's consent, to continue the easement for still longer, indeed indefinitely, by an actual trail conversion.
>
> 959 F.3d 1360, 1367 (Fed. Cir. 2020)
> (citing *Brandt* v. *United States*, 572 U.S. 93, 104-05 (2014)).

This Court held in *Caquelin*, "*Ladd I* remains governing precedent and has not been undermined by *Arkansas Game* in favor of a non-categorical [taking] approach." 959 F.3d at 1370. And in *Knick*, the Supreme Court reaffirmed the principle that "because a taking without compensation violates the self-executing Fifth Amendment *at the time of the taking*, the property owner can bring a federal suit at that time." 139 S.Ct. at 2172 (emphasis added).

III. Encumbering an owner's land with a Trail Act easement is a *per se* taking, not a "regulatory" taking subject to *Penn Central* analysis.

The government claims a *per se* taking of a landowner's property does not occur until the railroad and trail-sponsor execute a trail-use agreement and, until that happens, the government's taking of the landowner's property is only a "temporary regulatory" taking to be analyzed under *Penn Central Transportation* v. *City of New York*, 438 U.S. 104 (1978).

The government has repeatedly made and lost argument.[5] In *Ladd I*, Judge Moore reminded the government this argument does not work.

> Government counsel (12:37-12:47): "The [landowners] enjoy a fee interest burdened only by the railroad's right to run a railroad. That was the pre-existing situation before the NITU; that's the same situation today."
>
> Judge Moore (12:47-13:02): "That's the argument you made unsuccessfully in the Supreme Court where Justice Scalia seemed to actually make fun of you? I mean, I don't think that's going to work on us at this point. You can't say 'oh yeah, well they didn't lose anything because they didn't have anything the day before.'"[6]

Justice Scalia described the government's argument as:

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[5] This Court held, "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." *Preseault II*, 100 F.3d at 1554 (Rader, J., concurring).

[6] *Ladd I* oral argument (September 7, 2010), available at: https://oralarguments.cafc.uscourts.gov/default.aspx?fl=2010-5010.mp3.

> The ICC didn't order the railroad to keep running. *** Even though you have a deed that says if we stop using it for rail purposes its yours, you say, well you haven't lost anything because, yeah, they have stopped using it for rail purposes but they might not have. That's not very appealing to me.[7]

The government won its argument in *Caldwell*, *Barclay*, and *Illig* and avoided compensating thousands of landowners whose claims were now barred by the statute of limitations. But then, in *Ladd I*, the government made a *volte-face* and argued the landowner does not have a claim for compensation until the railroad and a trail-user reach a private agreement. This Court rejected the government's argument. The government sought rehearing *en banc*, which this Court denied. *Ladd I*, 646 F.3d at 910. The government's petition for rehearing here is *déjà vu* all over again.

The government's argument would put landowners in a Trails Act-limbo where the government has denied them use and possession of their land but the owners are not entitled to compensation unless and until the railroad and trail-sponsor reach a trail-use agreement. In *Caldwell*, this Court explained that the Supreme Court "rejected" the government's theory, as "bizarre," that "there were two different takings of the same property, with some incidents of the taking determined as of one date and some as of the other." 391 F.3d at 1235.[8] This Court

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[7] See *Preseault I* oral argument (November 1, 1989), available at: https://www.oyez.org/cases/1989/88-1076.

[8] Internal quotations omitted; quoting *United States* v. *Dow*, 357 U.S. 17, 23 (1958).

"adopt[ed]" the rule that "a taking occurs when the owner is deprived of use of the property***by blocking the easement reversion. While the taking may be abandoned***here by the termination of the NITU—the accrual date of a single taking remains fixed." *Id.* This Court reaffirmed this holding in *Barclay*, 443 F.3d at 1378 ("This is merely another version of the argument—rejected in *Caldwell*—that the original NITU should not be viewed as the taking because subsequent events might render the NITU only temporary.").

CONCLUSION

In *Leo Sheep Co.* v. *United States*, the Supreme Court explained, "this Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation." 440 U.S. 668, 687-88 (1979). The Supreme Court reaffirmed this principle in *Brandt*, stating, "[w]e decline to endorse [the government's] stark change in position, especially given 'the special need for certainty and predictability where land titles are concerned.'" 572 U.S. at 110 (quoting *Leo Sheep*, 440 U.S. at 687-88). Chief Justice Roberts, "[t]he Government loses [its] argument today, in large part because it [previously] won when it argued the opposite before this Court***." *Brandt*, 572 U.S. at 102. So too here.

This Court should deny the government's petition because the government fails to provide any reason why this Court should sit *en banc* to overturn thirty years of this Court's Trails Act jurisprudence and adopt a new rule contrary to the Supreme Court's Takings Clause jurisprudence.

Respectfully submitted,

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