No. 12-1173

In The
Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST, ET AL.,

Petitioners,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE NORTHWEST LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.2(a), Northwest Legal Foundation submits this brief amicus curiae in support of Petitioners Marvin M. Brandt Revocable Trust and Marvin M. Brandt (Brandt).[1]

The Northwest Legal Foundation was established in 1988 for the purpose of stopping government abuse of citizen's rights, specifically focusing on property rights.[2] The Northwest Legal Foundation strongly

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[1] All parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

No counsel for any party authored this brief in whole or in part and no person or entity made a monetary contribution specifically for the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] Robert Hale, a founding member of the Northwest Legal Foundation, has personally or through the Foundation asserted property rights or limited government in numerous actions, including *Hale v. State of North Dakota*, 2012 ND 148, ¶ 35, 818 N.W.2d 684, 696, *cert. denied*, 133 S.Ct. 847 (2013); *Gowan v. Ward County Commission*, 2009 ND 72, 764 N.W.2d 425, *cert. denied*, 558 U.S. 879 (2009); *City of Seattle v. McCoy*, 101 Wash.App. 815, 4 P.3d 159, Wash.App. Div. 1 (2000) (amicus brief filed by Northwest Legal Foundation involving decision of lower court to prevent property owners from using property vacated, appellate court holding (1) drug nuisance statute was unconstitutional taking of property as applied to owners; (2) common-law nuisance exception did not apply to the otherwise compensable taking; and (3) drug abatement statute violated due process as applied); *Richmond v. Thompson*, 130 Wash.2d 368, 922 P.2d 1343 (1996) ("Northwest Legal Foundation and other amici ask this court to recognize a common law absolute

(Continued on following page)

believes that property rights are fundamental rights that should be recognized as an individual right that is provided the same protections as other fundamental rights.

SUMMARY OF ARGUMENT

The fundamental connection between the protection of individual property rights and liberty interests cannot be denied. This Court has previously recognized that connection and should do so again in this case. More specifically, this Court should start from the premise that an individual's property rights are fundamental and restrict the federal government's ability to take or limit the use of that property without just compensation, as the Fifth Amendment requires.

In this light, this Court should recognize that an individual's property rights are fundamental rights

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privilege for citizen complaints concerning police conduct" – issue not raised below in a timely manner so not decided on appeal); *Postema v. Snohomish County*, 83 Wash.App. 574, 586-587, 922 P.2d 176, 183, Wash.App. Div. 1 (1996) ("Amicus Northwest Legal Foundation argues that RCW 36.70A.210 creates a city-county government in violation of Wash. Const., art. 11 § 16, which provides that '[n]o such "city-county" shall be formed except by a majority vote of the qualified electors voting thereon in the county.' NLF also argues that RCW 36.70A.210 is void for vagueness."); *Cobb v. Snohomish County*, 64 Wash.App. 451, 829 P.2d 169, Wash.App. Div. 1 (1991); *R/L Associates, Inc. v. City of Seattle*, 113 Wash.2d 402, 780 P.2d 838 (1989).

that must be protected by the courts and as such this Court should apply strict-scrutiny analysis to any government actions involving the taking of a property right from an individual or any limitation of the use of property by a property owner. In other words, this Court should reject any encumbrance or limit on a person's property unless under the strict-scrutiny analysis, there is a strong and compelling basis for such encumbrance or governmentally imposed limit on the individual's use of his or her property.

This case defines the distinction between private property rights under the law versus the assertion of control of property based on the use of raw force rather than the common law of property rights.

If the judiciary does not resume its proper role as a protector of rights and a limiter of the government and government actions, there is no law or rule of law and the government becomes an instrument of inequity and the facilitator of the denial of the rights of its citizens.

The Northwest Legal Foundation agrees with the assertion made in the amicus brief submitted by the Cato Institute, that the Federal Circuit "got it right" in *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005):

> the Federal Circuit held the United States did not retain any "implied" reversionary interest in land encumbered by railroad rights-of-way established under the 1875 Act. Thus,

> under *Hash*, the Brandt family – not the government – owns the land.

Cato Institute Brief, page 20. Implicit in the Federal Circuit ruling is the reality that the powers of government, and particularly the federal government, are limited. By the same token, the rules that apply to everyone else should apply equally to the federal government, particularly in relation to property rights and the requirement under basic real property law that any transfer of property rights must be explicit and not implied. An individual's property rights should be recognized as a fundamental interest deserving the application of strict-scrutiny analysis, or at the very least heightened scrutiny.

ARGUMENT

I. Property Rights are a Fundamental Right Retained by Individuals

"Property ownership and political liberty have long been linked in Anglo-American constitutional thought." James W. Ely, Jr., *Property Rights and the Supreme Court in the Gilded Age*, 2013 Vol. 38, No. 3 JOURNAL OF SUPREME COURT HISTORY 331 (forthcoming publication Dec. 2013). Indeed, a citizen's right to be secure in the ownership of his or her property is one of the primary purposes behind the formation of our national government. According to Professor Ely, United States Supreme Court cases demonstrate a long history of protecting property rights and

engender two primary themes: first, "the protection of private property [serves] as a means to uphold individual liberty against governmental overreaching," and second, "this commitment to liberty [is] reinforced by a second theme, the importance of secure property rights as the basis for economic growth." *Id.*; see generally James W. Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT – A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS, 2d ed., Oxford University Press (1998).

An individual's right to property is a fundamental right. Justice Alito recently described "fundamental rights" as rights and liberties that are deeply rooted in our Nation's history and tradition and implicit in the concept of ordered liberty that without such right liberty or justice would not exist.[3] The rights of

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[3] Justice Alito stated

> But it is well established that any "substantive" component to the Due Process Clause protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' " *Washington v. Glucksberg*, 521 U.S. 702, 720-721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997); *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674 (1934) (referring to fundamental rights as those that are so "rooted in the traditions and conscience of our people as to be ranked as fundamental"), as well as " 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' " *Glucksberg*, *supra*, at 721, 117 S.Ct. 2258 (quoting *Palko v. Connecticut*, 302 U.S. 319 (1937)).

U.S. v. Windsor, ___ U.S. ___, 133 S.Ct. 2675 (2013) (Alito, J., dissenting).

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an individual to own property, possess property, and be safe from intrusions and limits upon the ownership and use of property are the hallmark of our country.

The review of the law conducted by Professor Ely, along with his citation to this Court's early decisions relating to property as a right that is part and parcel to individual rights, is superbly described in his May 2012 paper (which is being published this December in JOURNAL OF SUPREME COURT HISTORY). Significantly, Professor Ely demonstrates that the individual's property rights are "deeply rooted in this Nation's history and tradition," are "rooted in the traditions and conscience of our people as to be ranked as fundamental," and that these important rights are "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' " *See* cases cited and language quoted in *U.S. v. Windsor*, *supra* footnote 2.

According to Professor Ely, the rights relating to property are linked to liberty itself:

> Since the time of Magna Carta respect for private property set the bounds of legitimate government. Political dialogue associated liberty and property rights during the colonial era. "Liberty and property are not only

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We note that this Court recently analyzed whether the right to bear arms is a fundamental right in *McDonald v. City of Chicago, Ill.*, ___ U.S. ___, 130 S.Ct. 3020 (2010), at Part III, at 3036-3042, finding that it is a fundamental right.

> join'd in common discourse," a correspondent observed in the Boston Gazette in 1768, "but are in their own natures so nearly ally'd, that we cannot be said to possess the one without the enjoyment of the other."[4]

Any attempt to separate liberty and property in the original American scheme of political thought would be improper:

> The founding generation saw liberty and property as inseparable. "Property must be secured," John Adams succinctly proclaimed, "or liberty cannot exist."[5] By defending the rights of property owners the Court in the late nineteenth century followed this well-marked path and sought to safeguard individual liberty by curtailing the reach of government.[6]

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[4] Ely's Footnote 7, citing Boston *Gazette*, February 22, 1768, p. 1.

[5] Ely's Footnote 8, citing "Discourses on Davila," in Charles Francis Adams, ed., *The Works of John Adams* 10 vols. (Boston: Little, Brown, vol. 6, 1851), 280.

[6] Ely's Footnote 9, citing Owen M. Fiss, *History of the Supreme Court of the United States, Volume 8: Troubled Beginnings of the Modern State, 1888-1910* (New York: Macmillan, 1993), 389 ("Liberty was the guiding ideal of the Fuller Court, the notion that gave unity and coherence to its many endeavors."): Michael J. Phillips, *The* Lochner *Court: Myth and Reality: Substantive Due Process from the 1890s to the 1930s* (Westport, Conn.: Praeger, 2001), 115 ("From all this, one might conclude that the justices' motives aligned with their words: that they were trying to protect liberty and property against government actions that would deprive people of either or both.").

Significantly, the Justices of this pre-New Deal period recognized in the Court's opinions the importance of property as a mainstay to liberty itself:

> Leading justices . . . repeatedly articulated the view that property was essential for the enjoyment of individual liberty. In contrast to post-New Deal jurisprudence, the justices believed that property and other rights were interdependent. Justice Stephen J. Field, whose long and influential career on the Court can be seen as an exploration of the meaning of liberty,[7] best summarized this relationship between rights in an 1890 address: "It should never be forgotten that protection of property and person cannot be separated. Where property is insecure, the rights of persons are unsafe. Protection to one goes with protection to the other; and there can be neither prosperity nor progress where either is uncertain."[8] . . . Members of the Court regularly equated property and liberty. For instance, Field pointedly insisted that the Fourteenth Amendment "places

[7] Ely's Footnote 10, citing Paul Kens, *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age* (Lawrence, Kansas: University Press of Kansas, 1997).

[8] Ely's Footnote 11, citing Stephen J. Field, "The Centenary of the Supreme Court," February 4, 1890, reprinted in 134 U.S. 729, 745.

> property under the same protection as life and liberty."[9]

James W. Ely, Jr., *Property Rights and the Supreme Court in the Gilded Age*, 2013 Vol. 38, No. 3 JOURNAL OF SUPREME COURT HISTORY 332 (forthcoming publication Dec. 2013).

The entire purpose of a fundamental right, and the recognition of a fundamental right, is to protect citizens from government overreach.

II. An Impediment or Encumbrance by the Government on a Person's Property Rights Should Engender Either Strict Scrutiny or at the Very Least a Heightened Scrutiny

The federal government was explicitly created as one of limited powers. Indeed, the Framers of the Constitution took the time to list specific enumerated powers in Article I, Section 8. Moreover, ratification of the new Constitution was initially thwarted by the arguments of the Anti-Federalists until there was a consensus that upon ratification a Bill of Rights would be proposed by the First Congress as a limit on the federal government's powers. Twelve amendments were proposed by Congress in 1791, ten of which were ratified and became our Bill of Rights.

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[9] Ely's Footnote 13, citing *Munn v. Illinois*, 94 U.S. 113, 141 (1877) (Field, J., dissenting).

This constitutional history clearly indicates that the Framers and the states that ratified the Constitution intended that the federal government would be a limited federal government, not only by the powers explicitly conferred on that new government, but also as an additional limiting factor the adoption of the Bill of Rights themselves. And of course, any acts of Congress and any principles employed to interpret the powers of Congress or the Constitution should include, as a starting point, this reality that the powers of the federal government are limited and should be construed accordingly.

This limiting concept should apply also through any application of the due process clause or the equal protection clause applicable to all government entities through the Fifth and Fourteenth Amendments to the Constitution. Unfortunately, many courts (including this one) have failed to apply this basic concept of limited government and have instead countenanced numerous government actions and takings through the application of the "rational-basis test." The rational basis test is in actuality inherently *irrational* in that it relegates complete discretion to the governmental entities. Such deference to the government action negates not only the limited role of government itself and the federal government in particular; it also concomitantly negates the inherent rights of individuals, including property rights. Simply put, the rational basis test protects the government instead of its citizens.

This Court should recognize that an individual's property rights are fundamental rights that must be protected by the courts and as such this Court should apply strict-scrutiny analysis to any federal government actions involving the taking of a property right from an individual or any limitation of the use of property by a property owner. In addition, any encumbrance or limit on a person's property should be rejected unless under the strict-scrutiny analysis, there is a strong and compelling basis for such encumbrance or governmental imposed limit on the individual's use of his or her property.

This case defines the distinction between private property rights under the law versus the assertion of control of property based on the use of raw force rather than the common law of property rights. If the judiciary does not resume its proper role as a protector of rights and a limiter of the government and government actions, there is no law or rule of law and the government becomes an instrument of inequity and the facilitator of the denial of the rights of its citizens.

III. The Statute of Frauds and Other Similar Legal Principles that Require Any Transfer of Real Property Interests Should Apply Equally to All, Including the Government

A fundamental aspect of property law is the requirement that property cannot be transferred except through a valid writing that is explicit and provides

unambiguous terms. Ownership of property must be clear and not subject to confusion or unexpected reversions of interest. An individual's right to use his or her land should not be subject to the whims of the government or the vagaries of quixotic legal theories.

Professors Hovenkamp and Kurtz provide a concise overview of the development the requirement of transfer of real property or real property interests in writing in Principles of Property Law (Hornbook Series 6th ed. 2005). The requirement of writing for any corporeal property transfer or noncorporeal transfer of a lesser property interest (such as reversions, remainders or easements) has existed in the common law since 1433. Moreover, this common law is considered part of American common law because the English legal framework existed and was applied at the time of the American Revolution. *Id*. at 559.

Under English common law, from 1066 to about 1433, transfer of property was effectuated by feoffment in which physical possession of corporeal property was transferred by the feoffer handing a piece of the property (a twig or a piece of the land itself) to the feoffee and verbally stating that he is transferring the land, and then walking off the land leaving the feoffee in possession. Hovenkamp & Kurtz, at 559 and 562. Beginning around 1433, incorporeal property interests were employed, such as reversions, remainders and easements, which were allowed without the transfer of physical possession. *Id*. at 560 and 562. Importantly, any such "use" of the property still owned by another must "'lie in grant,' which meant **they could**

be transferred only by a deed." *Id*. at 560 (emphasis added). Such deeds were enforced in equity courts. *Id*. at 562.

In 1535 Parliament passed the Statute of Uses. Transfer of property interests were by this time common and were effectuated by a **written** conveyance, although this was not at that point an absolute requirement or *sine qua non* of a transfer. *Id*. at 561. However, the absolute requirement of a transfer of real property interest be made in writing came about in 1677 by the passage of the Statute of Frauds; from that time forward, courts required "a writing to give effect to the conveyance of a freehold." *Id*. at 568.

In this case, there is no express reservation of a reversionary interest in the instrument reflecting the transfer to the Brandts. That instrument carves out several rights of way and states that "the easement traversed shall terminate" if unused for five years. Pet. App. at 78. It further provides that the transfer is

> SUBJECT TO those rights for railroad purposes as have been granted to the Laramie Hahn's Peak & Pacific Railway Company, its successors or assigns by permit Cheyenne 04128 under the Act of March 3, 1875, 43 U.S.C. 934-939.

Id.

This Court has construed the railroad's interests arising under transfers made pursuant to the 1875 Act "as conveying nothing but an easement." *Great*

Northern Ry. Co. v. United States, 315 U.S. 262, 276 (1942). That holding rests on a thorough consideration of the 1875 Act's text, history, and purposes and its subsequent construction by the United States. See also *Samuel C. Johnson 1988 Trust v. Bayfield County,* 649 F.3d 799, 801-805 (7th Cir. 2011).

It is likewise well-established that "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." *Samuel C. Johnson 1988 Trust*, 649 F.3d at 803, citing *Restatement (Third) of Property: Servitudes* § 7.4 comments a, c, f (2000). To defeat this core principle of real estate law, an implicit reservation will not do. It won't do for a private party, and the same should be true for the federal government. Cf. *Leo Sheep Co. v. United States*, 440 U.S. 668, 679 (1979) ("Given the existence of . . . explicit exceptions [in the Union Pacific Act of 1862], this Court has in the past refused to add to this list by divining some 'implicit congressional intent.' ").

Otherwise an "implicit" conveyance is nothing more than a taking by the government. Moreover, if the legal justification for the use or taking of the property (i.e., allowing an easement for a railroad) no longer exists, then this Court's affirmance of such a taking by the government is in reality a taking by brute force under the façade of a dubious legal process.

Where there is indeed a proper use and proper government interest in the taking of private land, the

law provides a method and important protections through the use of eminent domain. This process ensures not only just compensation through due process, but also requires that the public use is indeed a public use worthy of such a transgression upon the private rights of an owner of property. If the federal government has the authority to "take back" land not through an explicit grant or reversion but instead by implication of a continued easement created through a century-old statute where the specific use no longer exists (and the easement or rationale for the encumbrance has been abandoned is allowed in this case), there is no law.

IV. This Court Should Reject Any Argument which Allows an Implicit Reversion of Property Interests to the Government and Adopt the Converse Position that Any Reversion of a Property Right to an Original Owner Must be Explicitly Retained in the Original Transfer of a Property Interest, Particularly if the Grantor is the Government

Where a government is designed at the outset to be one of limited powers, and where individuals are explicitly provided individual rights – including the right to own, retain, possess, use, and control property – the use of any implicit transfer of an individual's right of property should be rejected. An implicit transfer of property rights is antithetical to literally hundreds of years of property law. Moreover,

the granting of such secret and unexpected powers inured within the federal government is just as antithetical to the original foundation of a limited federal government and the protections provided to its citizens through the amendments to the Constitution.

In this case, an implied reversionary interest cannot be conjured out of the presumption that doubts regarding the meaning of grants of federal lands are to be resolved in favor of the government. The federal government's assertion of such a reversionary interest does not, standing alone, give rise to a doubt that would then be construed in its favor. That would be nothing more than rank boot-strapping.

More to the point, this Court has explained that it "long ago declined to apply this canon in its full vigor under the railroad Acts." *Leo Sheep Co*., 440 U.S. at 682. Instead, the applicability of the presumption depends on the language of the Act involved. And, this Court resolved any such doubts in *Great Northern*, when it characterized the railroad's interest as an easement.

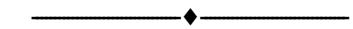
Leo Sheep is instructive for several more reasons. First, this Court rejected the government's assertion of an easement by necessity. As this Court explained, even an easement by necessity allowing for a right of passage through another's property would not clearly include "the right to construct a road for public access to a recreational area." 440 U.S. at 679. Moreover, the government has no need for an easement by necessity because it has the power of eminent domain; if it

needs something it can condemn it and pay for it. *Id*. at 679-80.

This Court's rejection of an easement by necessity in *Leo Sheep* suggests that the asserted reversionary interest for discretionary purposes should also be rejected. After all, an allegedly necessary property interest is more deserving of protection than one that would just be nice to have. Further, if the right of passage does not include a road, the railroad right of way should not be turned into a general recreational feature. Cf. *Toews v. United States*, 376 F.3d 1371, 1376 (2004) (deeming it "beyond cavil" that turning the right of way into a recreational trail is a different use from that "made by a railroad, involving tracks, depots, and the running of trains.").

Although the government retains the right to take private land through its power of eminent domain, it does not have the power to take private land through the use of an implicit reversion of an interest fully vested by the private party.

In the application of these principles in this case, the Court should reverse the tenth circuit with instructions that the lower court prohibit the reversion to the government unless the lower court finds an explicit reversionary interest.



CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Tenth Circuit should be reversed with instructions that the lower court prohibit the reversion to the government unless the lower court finds an explicit reversionary interest.

Dated this 19th day of November, 2013.

Respectfully submitted,

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