**2016-1663**

# United States Court of Appeals for the Federal Circuit

NORMA E. CAQUELIN, KENNETH CAQUELIN, For Themselves and as Representatives of a Class of Similarly Situated Persons,

*Plaintiffs – Appellees,*

*v.*

UNITED STATES,

*Defendant – Appellant.*

*On Appeal from the United States Court of Federal Claims in No. 1:14-CV-0037-CFL, Judge Charles F. Lettow*

**BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION AND PROPERTY RIGHTS FOUNDATION OF AMERICA IN SUPPORT OF APPELLEES AND SUPPORTING AFFIRMANCE**

Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street
1600 Pauahi Tower
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

*Counsel for Amici Curiae*

December 28, 2016

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

Caquelin **v.** United States

Case No. 2016-1663

**CERTIFICATE OF INTEREST**

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ☒ (amicus) ☐ (name of party)

Southeastern Legal Foundation and Property Rights Foundation of America

certifies the following (use "None" if applicable; use extra sheets if necessary):

| 1. Full Name of Party Represented by me | 2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is: | 3. Parent corporations and publicly held Companies that own 10 % or more of stock in the party |
|---|---|---|
| Southeastern Legal Foundation | Same | None |
| Property Rights Foundation of America | Same | None |
| | | |
| | | |

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

n/a

December 28, 2016
Date

/s/ Robert H. Thomas
Signature of counsel

Please Note: All questions must be answered

Robert H. Thomas
Printed name of counsel

cc:

## TABLE OF CONTENTS

***Page***

## TABLE OF AUTHORITIES

***Page(s)***

**Cases**

**Statutes**

**Other Authorities**

## INTEREST OF *AMICI CURIAE* [1]

The Southeastern Legal Foundation, founded in 1976, is a national non-profit, public interest law and policy center advocating constitutional principles, individual liberties, limited government, and free enterprise in the courts and public opinion. The Foundation drafts model legislation, educates the public on policy issues, and regularly litigates before the Supreme Court. *See, e.g.*, *Utility Air Regulation Group, et al. v. EPA*, 134 S. Ct. 2427 (2014).

The Property Rights Foundation of America, Inc., founded in 1994, is a national, non-profit educational organization based in Stony Creek, New York, dedicated to promoting private property rights.

*Amici* support affirmance of the decision below and oppose the government's request to overturn *Caldwell v. United States*, 391 F.3d 1226 (Fed. Cir. 2004), *Barclay v. United States*, 443 F.3d 1368 (Fed. Cir. 2006), *Illig v. United States*, 274 Fed. App'x 883 (Fed. Cir. 2008), and *Ladd v. United States*, 630 F.3d 1015 (Fed. Cir. 2010) (*Ladd I*), because doing so will unsettle existing property rights. *Amici* believe they will provide this Court a helpful perspective. Should this

[1] In accordance with Fed. R. App. P. 29(c)(5), *amici* state that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money intended to fund the preparation or submission of this brief. Both parties have consented to the filing of this brief.

Court overturn these four decisions, landowners whose property is encumbered by existing or abandoned railroad right-of-way easements will not know when, or if, the government has in fact taken their property and no one—neither the owners, the government, nor the courts—will know when the government's invocation of section 8(d) of the Trails Act has actually taken an owner's land and when the statute of limitations begins to run on an owner's right to seek compensation.

## STATEMENT OF THE CASE

The Caquelin family owns the fee estate in land in Franklin County, Iowa. The Caquelins' land was encumbered with an easement for a railroad right-of-way originally established in the late 1800s. The railroad no longer needed the right-of-way and petitioned the Surface Transportation Board (STB) for authority to abandon railroad service over the corridor. The STB granted the railroad authority to abandon the right-of-way. But two different trail groups told the STB they wanted the land for a public recreational trail and asked the STB to invoke section 8(d) of the National Trails System Act.[2]

Section 8(d) provides "railbanking" and public recreational "use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." The government's invocation of section 8(d) forestalled the Caquelins' state law "reversionary" right to use and possess their land.[3] Under Iowa law the railroad had no right to use the Caquelins' land for anything other than the operation of a railroad. The railroad had no right to possess

[2] 16 U.S.C. § 1241, *et seq.* Section 8(d) is codified as 16 U.S.C. § 1247(d).

[3] We use "reversionary" as shorthand to describe the fee estate owner's interest in land encumbered by an easement. When the easement terminates the owner's fee estate is unencumbered and the owner holds the exclusive right to use and possess the land. *See Marvin M. Brandt Rev. Tr. v. United States*, 134 S. Ct. 1257, 1266, n.4 (2014); *Preseault v. United States*, 100 F.3d 1525, 1533 (Fed. Cir. 1996).

the Caquelins' land after the railroad stopped running trains across the land. "The government acknowledges that the easements granted to North Central Railway were limited to railroad purposes and did not include recreational trail use." Opinion, p. 7. The railroad had no interest in the Caquelins' land that it could sell a non-railroad trail-user. But the STB's invocation of section 8(d) took the Caquelins' state-law reversionary right and allowed the railroad to negotiate the sale of the right-of-way to a potential trail-user. Ultimately the railroad did not agree to sell the corridor to a trail-user and, instead, consummated abandonment of the right-of-way, at which time the Caquelins regained unencumbered title and possession of their land.

Following the Supreme Court's decision in *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990) (*Preseault I*), and this Court's *en banc* decision in *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (*Preseault II*), the Caquelins sued the United States seeking that "just compensation" they are guaranteed by the Takings Clause of the Fifth Amendment. Judge Lettow of the Court of Federal Claims (CFC) awarded the Caquelins $900—the fair-market value of the Caquelins' land for nine months during which the STB's invocation of section 8(d) denied the Caquelins use and possession of their property. Opinion, p. 11.

The government agrees this Court's controlling precedent in *Caldwell*, *Barclay*, *Illig*, and *Ladd I*, compelled Judge Lettow to rule for the Caquelins. *See* Gov. Brief, pp. 1-2. But the government now asks this Court to sit *en banc* and overturn these prior decisions. *Id.* at 4.

## ARGUMENT

### I. The Takings Clause Prohibits the Federal Government from Taking An Owner's Property Without Justly Compensating the Owner

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.[4] 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.…"[5] In *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972), the Court observed, "the dichotomy between personal liberties and property rights is a false one. Property does not have rights.

---

[4] *See* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (3rd ed. 2008) (noting John Adams' proclamation "property must be secured or liberty cannot exist"); *see also* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (especially Part I, pp. 3-31).

[5] THE COMPLETE MADISON, pp. 267-68 (Saul K. Padover, ed., 1953), published in NATIONAL GAZETTE (March 29, 1792) (emphasis in original).

People have rights.…That rights in property are basic civil rights has long been recognized." *See also United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993) ("an essential principle: Individual freedom finds tangible expression in property rights").

The greatest threat to an individual's property is not theft of one owner's land by another private individual, or even the government exercising the extraordinary power of eminent domain to take private property for some public use where it acknowledges the obligation to pay compensation. No, the greatest threat to an individual's property is the government by *ipse dixit* redefining what has always been private property to be public property and in so doing, unsettling the owner's title to his or her land and denying compensation in the process. The Supreme Court observed, "[t]here is a special need for certainty and predictability where land titles are concerned [and this Court is] unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation." *Leo Sheep Co. v. United States*, 440 U.S. 668, 678-88 (1979).

When the federal government invokes section 8(d), it takes the fee owner's state-law reversionary right to unencumbered title and exclusive possession of his land. In *Preseault I*, 494 U.S. at 8, the Court explained:

> [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. While the terms of these easements and applicable state law vary, frequently the easements provide that the property reverts to the abutting landowner upon abandonment of rail operations.

Justice O'Connor (joined by Kennedy and Scalia) concurred to emphasize "[A] sovereign, `by *ipse dixit,* may not transform private property into public property without compensation …. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Id.* at 23 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 (1984), which in turn quoted *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)).[6]

Section 8(d) was adopted to prevent railroad right-of-way easements from terminating under state law and to repurpose these corridors as public recreational trails. Both are laudable objectives. But, as Justice Holmes cautioned nearly a century ago, "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving that desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *see also Armstrong v. United States*, 364 U.S. 40, 49 (1960). Because invoking section 8(d) "destroys" and "effectively

[6] In *Stop the Beach Renourishment, Inc. v. Florida*, 560 U.S. 702, 713 (2010), the Court reaffirmed the government "effect[s] a taking if they recharacterize as public property what was previously private property."

eliminates" the owner's state-law reversionary property interest, the Fifth Amendment requires an owner be fully compensated.

> The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. He is entitled to the damages inflicted by the taking.

*Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304 (1923).[7]

The fact an owner gets property back because the government rescinded the order invoking section 8(d) or the railroad elected to consummate abandonment instead of selling the right-of-way to a trail-user does not relieve the government of its constitutional obligation to compensate the owner for that time during which the government took the owner's property. *See generally First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (temporary deprivations of use are compensable under the Takings Clause), and *Lucas v. South Carolina Costal Council*, 505 U.S. 1003, 1110 (1992).

In *First English* the Court held, "These cases reflect the fact that 'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." 482 U.S. at 318; *see also San Diego Gas & Electric Co.*, 450 U.S.

[7] Citing *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893).

621, 657 (1981) (Brennan, J., dissenting) ("Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable.").

"These cases" to which the Court referred are *Kirby Forest Ind. Inc. v. United States*, 467 U.S. 1 (1984), *United States v. Dow*, 357 U.S. 17 (1958), and the World War II cases, *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), *United States v. Petty Motor Co.*, 327 U.S. 372 (1946), and *United States v. General Motors*, 323 U.S. 373 (1945). The Court explained that "in such cases compensation would be measured by the principles normally governing the taking of a right to use property temporarily." *First English*, 482 U.S. at 318.[8]

The point relevant to this dispute is that the government cannot undo its Fifth Amendment obligation to justly compensate an owner by later giving the property back. The government is constitutionally obligated to justly compensate the owner for the owner's loss of use of the property during that time the government took the owner's property. We address this point more fully below at p. 22.

[8] The Fifth Amendment is not limited to only those cases when the government takes the owner's entire fee estate. *See Horne v. Department of Agriculture*, 135 S. Ct. 2419, 2429 (2015) ("The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.").

## II. This Court Rightly Decided *Caldwell*, *Barclay*, *Illig*, and *Ladd I*, and these Decisions Should Not Be Overruled

### A. The Supreme Court found section 8(d) gives rise to a taking for which the Fifth Amendment categorically compels the federal government to compensate the owner

*Caldwell*, *Barclay*, *Illig* and *Ladd I*—which the government asks this Court to overrule—are rightly decided because, first and foremost, they are consistent with the Constitution and the Supreme Court's Takings Clause jurisprudence. In *Preseault I* the Supreme Court held (as did this Court in *Caldwell*, *Barclay*, *Illig*, and *Ladd I*) that the government's invocation of section 8(d) takes the fee owner's reversionary interest for which the government is constitutionally and categorically obligated to compensate the owner.

The Supreme Court's Takings Clause jurisprudence categorize two types of takings, "regulatory" or "physical." A regulatory taking has two essential features. First, a regulatory taking is typically an exercise of the government's police power to limit an "evil" or prohibit a nuisance. *See, e.g.*, *Pennsylvania Coal*, 260 U.S. at 393;[9] *Lucas*, 505 U.S. at 1003.[10] Second, a regulatory taking does not dispossess

[9] The owner of land containing coal deposits deeded the surface rights to buyers but expressly reserved the right to remove the coal beneath the surface. The buyers waived all rights to any damages if coal mining caused any subsidence to the surface. Years after these conveyances Pennsylvania passed the Kohler Act which forbade any mining that caused damage to the surface owner. The effect of Pennsylvania's law was to require the owner of the mineral rights to forfeit its ownership of coal the owner otherwise had a legal right to mine.

the owner's title to the property nor does the government acquire or occupy the property.[11] Rather, as the title suggests, a "regulatory" taking regulates or limits the owner's use of the property. The government does not intend to *acquire* use of the property. Rather, the government intends to *regulate* the owner's use of the property.[12] Pennsylvania Coal and Lucas still held title to their property, still possessed the ability to exclude others from their property, and could sell their property. But their property was essentially worthless because the government regulation denied all economically beneficial use of their property.

Other examples of regulatory takings are found in *Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978) (historic preservation ordinance prohibited construction of office building on top of Penn Central Station), *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (denying a permit to fill wetland), *Tahoe-Sierra*

---

[10] In *Lucas*, South Carolina adopted a regulation prohibiting land within a designated coastal zone from being developed. The effect of the regulation prohibited essentially all economically beneficial use of two residential lots the Lucas family owned on a barrier island near Charleston. Lucas could still grow salt hay on the land, could still exclude others from the property, but could not build homes on the land.

[11] In *Lucas* the Court cautioned that "regulations that leave the owner of land without economically beneficial or productive options for its use…carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." 505 U.S. at 1018.

[12] *See supra*, note 11.

*Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (temporary moratorium on construction in the Lake Tahoe watershed awaiting an environmental study).

In these later cases the Court applied an *ad hoc* analysis to determine whether the government owed the owner compensation. The *ad hoc* analysis included considering "the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo*, 533 U.S. at 617. *See generally* Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 S. Ct. Rev. 1; RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); and STEVEN J. EAGLE, REGULATORY TAKINGS (5th ed. 2012).

So-called "physical" takings, by contrast, are not the government exercising its police power but are, rather, the government acquiring the owner's property (or some portion of the owner's interest in property)[13] for a public or governmental use or a government action that destroys an owner's property. A physical taking occurs

[13] *See United States v. General Motors Corp.*, 323 U.S. 373, 382 (1945) (noting that the government may "not take [an owner's] entire interest, but by the form of its proceeding chops it to bits, of which it takes only what it wants.").

when the owner is practically ousted from possession, the government "by *ipse dixit*" transforms private property into public property, the government imposes a servitude upon the owner's property or the government destroys the owner's property. In these cases the Supreme Court declares the Just Compensation Clause "categorically" obligates the government to pay the owner. *See Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012).

In *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871), a private company acting under government authority flooded an owner's land. The defendant argued it needn't compensate the owner because the owner remained in possession of the land even though the land was under water. And, the defendant argued, the flooding was incidental to the federal government's authority to regulate navigable waters. The Supreme Court emphatically rejected this argument:

> The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.
>
> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without

> making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.

*Id.* at 176-77 (emphasis in original).

*Kaiser Aetna v. United States*, 444 U.S. 164 (1979), *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *United States v. Dow*, 357 U.S. 17 (1958), and *Arkansas Game & Fish Comm'n*, 133 S. Ct. at 518, provide other examples of physical takings for which the government is categorically obligated to compensate the owner.

In *Kaiser Aetna* a government-imposed navigational servitude requiring an owner to allow the public access over the owner's riparian property. The Court held, "even if the Government physically invades only an easement in property, it must nonetheless pay compensation." 444 U.S. at 176. In *Loretto*, the government required owners to allow cable television companies to place equipment on the owner's property. The Court held this was a taking for which the government was categorically obligated to compensate the owner because the government interfered

with the owner's right to use and possess her property. 458 U.S. at 435-436.[14] In *Arkansas Fish* and *Dow* the Court held the government had a "categorical" duty to compensate the owner when the government destroyed the owner's property by intermittently flooding the land.

> The Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." And "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." These guides are fundamental in our Takings Clause jurisprudence.[15]

---

[14] "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" *General Motors*, 323 U.S. at 378. "To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. *See Kaiser Aetna*, 444 U.S., at 179-80; *see also* RESTATEMENT OF PROPERTY § 7 (1936). Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property…. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." *Loretto*, 458 U.S. at 435-36.

[15] *Arkansas Game and Fish*, 133 S. Ct. at 518 (quoting and citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *First English*, 482 U.S. at 318-19; *Penn Central*, 438 U.S. at 123-25; *Tahoe–Sierra*, 535 U.S. at 322) (citations omitted from quote).

But it is not necessary for government boots to be on the ground to find the government has a categorical duty to compensate the owner. In other words, the government (or a third party acting under the government's authority) need not "physically" occupy the owner's property for the government to be categorically obligated to compensate the owner.

For example, when the government redefines an owner's state-law property interest by *ipse dixit* the government has a categorical duty to compensate the owner. In *Preseault I*, the Court held, "a sovereign, 'by *ipse dixit*, may not transform private property into public property without compensation. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.'" 494 U.S. at 23 (quoting *Webb's Fabulous Pharmacies*, 449 U.S. at 164 (a government regulation holding the interest earned on interplead funds inured to the government),[16] and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (a government regulation compelling Monsanto to publically disclose trade secrets is a compensable taking)).

[16] *See similarly Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (a government regulation stating that interest on client trust fund accounts inured to the government is a compensable taking).

In *Stop the Beach Renourishment, Inc. v. Florida Dep't. of Environmental Protection*, 560 U.S. 702, 715 (2010), the Court held, "If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." *See also United States v. Causby*, 328 U.S. 256, 265 (1946) (intermittently flying aircraft over a chicken farm was a categorical taking for which the government owed the owner compensation), and *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329 (1922) (intermittently firing artillery shells across an owner's land was "the imposition of such a servitude [that] would constitute an appropriation of property for which compensation should be made").

In their dissent from rehearing *Ladd I*, Judges Gajarsa and Moore wrote that this Court's "precedent, however, assumes that the issuance of an NITU is a physical taking." *Ladd v. United States*, 646 F.3d 910, 912 (Fed. Cir. 2011). But Judges Gajarsa and Moore dissented because they disagreed and believed, "The Government effects a physical taking only where it *requires* the landowner to submit to the *physical occupation* of his land." *Ladd II*, 646 F.3d at 912 (emphasis in original). Judge Gajarsa and Moore's dissent was premised upon a misapprehension of the Supreme Court's jurisprudence.

As demonstrated above, the Supreme Court does not cabin takings in which the government has a categorical obligation to compensate the owner to only those situations when the government puts "boots on the ground" and physically occupies the owner's land. The government has a categorical duty to compensate the owner when the government destroys the owner's property and when the government redefines the owner's state-law property interest by *ipse dixit*.

Furthermore, as it relates to the government's invocation of section 8(d) of the Trails Act, the Supreme Court has already settled this question. In *Preseault I*, the Court viewed the Trails Act's redefinition of an owner's state-law reversionary interest to be a categorical taking for which the government must compensate the owner. The Supreme Court equated the government's invocation of section 8(d) with the appropriation of interest in *Webbs Fabulous Pharmacy* or the forced disclosure of trade secrets in *Monsanto*.

The Takings Clause is intended to protect *what the owner lost, not what the government gained*. *See Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910). Justice Holmes wrote, "the question is, What has the owner lost? not, What has the taker gained?" In *General Motors*, 323 U.S. at 378, the Court explained, "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking."

One of the most essential features of property is the right to exclude others. "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" *Loretto* 458 U.S. at 436 (quoting *General Motors*, 323 U.S. at 378). The invocation of section 8(d) "destroys" and "effectively eliminates" the owner's state-law reversionary interest in their land.[17] Before the STB invoked section 8(d), the Caquelins held unencumbered title and exclusive possession of their land. After the STB invoked section 8(d), the Caquelins had no greater right to use this strip of land than did the general public subject to the STB's jurisdiction.

Then-Solicitor General Kagan was correct when she explained, "The issuance of the NITU thus 'marks the "finite start" to either temporary or permanent takings claims.' *Caldwell*, 391 F.3d at 1235. 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."[18]

---

[17] "It is settled law that a Fifth Amendment taking occurs in Rails-to-Trails cases when government action destroys state-defined property rights by converting a railway easement to a recreational trail, if trail use is outside the scope of the original railway easement." *Ladd I*, 630 F.3d at 1019.

[18] Brief for the United States in Opposition to Petition for Writ of Certiorari, 2009 WL 1526939, at *12-13.

### B. *Caldwell*, *Barclay*, *Illig*, and *Ladd I* are compelled by, and consistent with, this Court's Trails Act jurisprudence

In *Preseault II* this Court rejected the notion that invoking section 8(d) is merely a "regulatory" taking for which the owner is not entitled to compensation. This Court explicitly rejected the government's regulatory taking argument. This Court held the "issue of title and ownership expectations must be distinguished from the question that arises when the Government restrains an owner's *use* of property, through zoning or other land use controls, without disturbing the owner's *possession*. *Preseault II*, 100 F.3d at 1540 (emphasis in original). This Court continued, "The Government's attempt to read the concept of 'reasonable expectations' as used in regulatory takings law into the analysis of a physical occupation case would undermine, if not eviscerate, long-recognized understandings regarding protection of property rights; it is rejected categorically." *Id.*

The government argued landowners had no reasonable expectation of compensation when the invocation of section 8(d) destroys the owner's state-law reversionary interest in the land. This Court "reject[ed] the Government's central thesis that general federal legislation providing for the governance of interstate railroads, enacted over the years of the Twentieth Century, somehow redefined state-created property rights and destroyed them without entitlement to

compensation." *Preseault II*, 100 F.3d at 1530. As "Justice O'Connor succinctly pointed out in her concurring opinion [in *Preseault I*], having and exercising the power of preemption is one thing; being free of the Constitutional obligation to pay just compensation for the state-created rights thus destroyed is another." *Id.* at 1537.

This Court followed the Supreme Court's direction in *Boston Chamber of Commerce*, *General Motors*, and *Preseault I*, rightly focusing on what the owner lost when the government invokes section 8(d). For example, in *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004), this Court held it is "elementary law that if the Government uses (or authorizes the use of…) an existing railroad easement for purposes and in a manner not allowed by the terms of the [original] easement, the Government has taken the landowner's property for the new use…. But the private property interests taken are not free; the Government must pay the just compensation mandated by the Constitution." 376 F.3d at 1376, 1379. Similarly in *Caldwell*, *Barclay*, and *Illig*, this Court held the taking caused by section 8(d) is the owner's loss of their state-law reversionary right. And it is no less a taking if the owner is only temporarily deprived of his or her reversionary interest.

### C. The duration of a taking goes to the amount of compensation the owner is due, not whether the government has taken the owner's property

If the government takes your house for six months instead of permanently dispossessing you from your home it doesn't mean the Government didn't take your house, it just means that the compensation the government owes you is rent for six months, not the entire value of your home. Stated another way, the government can always give your property back to you. But, returning the property after taking it for a time does not mean the government didn't take the property in the first place, nor does it mean the government needn't pay you for the value of your property during the time the government took your property.

The Supreme Court made this point in *Lucas*, 505 U.S. at 1031, n.17, stating, "Of course, the State may elect to rescind the regulation and thereby avoid having to pay compensation for a permanent deprivation. But 'where the [regulation has] already worked a taking of all use of property, no subsequent action by the Government can relieve it of the duty to provide compensation for the period during which the taking was effective.'"[19]

[19] Quoting *First English*, 482 U.S. at 321.

This is not a remarkable holding. Who can doubt that when the government takes your property for a temporary period the government must pay you for the value of the use of your property during that time? *See United States v. Westinghouse*, 339 U.S. 261, 268 (1950) ("So long as the duration of the Government's occupancy is undetermined, the District Court must necessarily retain the case for the periodic determination and payment of rental compensation."); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 16 (1949) ("since the Government for the period of its occupancy of petitioner's plant has for all practical purposes preempted the trade routes, it must pay compensation for whatever transferable value their temporary use may have had"); *Yuba Natural Resources, Inc. v. United States*, 904 F.2d 1577, 1580-81 (Fed. Cir. 1990) ("In the case of a temporary taking, however, since the property is returned to the owner when the taking ends, the just compensation to which the owner is entitled is the value of the use of the property during the temporary taking, *i.e.*, the amount which the owner lost as a result of the taking.").

In *General Motors*, the Supreme Court explained:

> It is altogether another matter when the Government does not take [the owner's] entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the "market rental value" for the use of the chips so cut off. This is neither the "taking" nor the "just compensation" the Fifth Amendment contemplates. The value of such

> an occupancy is to be ascertained, not by treating what is taken as an empty warehouse to be leased for a long term, but what would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier.

323 U.S. at 382.

Judge Lettow correctly applied the Supreme Court's jurisprudence. Judge Lettow awarded the Caquelins $900 for the fair market value of their property for the nine months during which the government took the Caquelins' state-law reversionary right to use and possess their land.

## III. The Federal Government Is Primarily Responsible for the Cost and Expense of the Trails Act

The government and its allied *amicus*, the Rails-to-Trails Conservancy, complain about having to pay landowners when the government takes their property. *See, e.g.*, Gov. Brief, p. 2 ("*Ladd I*…has resulted in unjust and incorrect judgments against the government, but has encouraged an onslaught of takings litigation, in which attorneys' fees are guaranteed regardless of the size of the compensation awarded to plaintiffs"). The government's complaint is like Lizzie Bordon, convicted of parricide, begging the court's mercy because she is now an orphan. The government is the party responsible for the cost the Trails Act imposes upon taxpayers. The cost and burden section 8(d) imposes upon owners, the courts, and taxpayers is entirely the responsibility of Congress, the STB, and the Justice Department.

Congress could have written section 8(d) to apply the direct taking procedure the federal government uses when it condemns property. *See* 40 U.S.C. § 3113. Had it done so, Congress would have limited the government's liability for attorney fees and interest and greatly reducing the judicial resources necessary to resolve Trails Act takings. Under 40 U.S.C. §§ 3114 and 3115, the owner is paid up-front and there is no provision for attorney fees unless the government abandons the condemnation or a court finds that the federal agency could not acquire the real property by condemnation. *See* 42 U.S.C. § 4654. Congress could have also required the STB to evaluate the value of any potential railroad corridor for recreational use or possible future railroad use before the STB invoked section 8(d). And Congress could limit the period during which section 8(d) forestalls an owner's state-law reversionary right so the government and owners know how long their state-law reversionary rights are subject to section 8(d)'s pre-emption.

But Congress did not do this. Congress is aware of how costly the Trails Act and Trails Act litigation is to taxpayers. *See Litigation and Its Effect on the Rails-to-Trails Program: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 107th Cong. 2, 39 (2002). Congress can still amend the Trails Act to accomplish these reforms. But it has not yet done so.

In 2009, the STB held hearings on the twenty-fifth anniversary of the Trails Act. *See Twenty-Five Years of Railbanking: A Review and Look Ahead, Hearing Before the Surface Transp. Bd.*, Ex Parte No. 690, 51-55 (July 8, 2009). Landowners recommended a number of reforms. These reforms included notifying owners when the STB issues an order invoking section 8(d), evaluating the need for a public recreational trail over the particular railroad corridor before the STB invokes section 8(d) and, once section 8(d) is invoked, cabining the period during which the owner's land may be converted to a public trail by limiting the duration of section 8(d) pre-emption of state-law reversionary interests and not granting unlimited extensions of NITUs and issuing new NITUs to different potential trail-groups.

Owners also asked the STB to require the railroad and trail-user to make any trail-use agreements public documents filed with the STB and to clarify the nature and extent of the state-law property interest the STB's invocation of section 8(d) precluded. Under *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), *Grantwood Village v. Missouri Pacific RR Co.*, 95 F.3d 654 (8th Cir. 1996), and *Preseault I*, 494 U.S. at 22, the STB's jurisdiction completely preempts any right the owner has under state law to use or occupy the land. This includes the right to cross the corridor. If it wished to mitigate this damage to the owner's property the STB could record deeds acknowledging the owner's right to

cross the abandoned railroad right-of-way. This would greatly reduce the compensation the government must pay owners and it would benefit owners by allowing them to more efficiently use land bisected by a rail-to-trail corridor. But, without the STB's consent, the owner has no legal right to cross the corridor. The STB could also require railroads and trail groups to provide owners notice of trail-use agreements or file the trail-use agreement with the STB so it is a public document available to owners.

Adopting these measures would still allow the STB to achieve Congress' two objectives—converting unused railroad rights-of-ways to public recreation and preserving these corridors for future possible railroad use. These measures would also lessen the burden on landowners and reduce the cost to taxpayers. But the STB did not adopt these regulations or policies. The STB could still adopt these policies but it has not yet chosen to do so.

The Justice Department could pursue a more just and cost effective policy of addressing the government's constitutional obligation to compensate owners for Trails Act takings. Solicitor General Lehmann famously observed, "The United States wins its point whenever justice is done its citizens in the courts." This statement is now inscribed on the Department of Justice rotunda. *Brady v.*

*Maryland*, 373 U.S. 83, 88, n.2 (1963). Sadly, the Justice Department has not heeded Solicitor Lehmann's admonition in Trails Act litigation.

In *Evans v. United States*, 694 F.3d 1377, 1381 (Fed. Cir. 2012), this Court rebuked the Justice Department for its frivolous litigation strategy. "The Government, however, foregoing the opportunity to minimize the waste both of its own and plaintiffs' litigation resources, not to mention that of scarce judicial resources, opposed plaintiffs' motions to stay, insisting that the district court suits proceed despite the pending appeal." 694 F.3d 1379. This Court found "[e]ven more puzzling is why the Government … pursued the course it chose in the district courts and in this appeal, seeking with every possible argument—even if so thin as to border on the frivolous—to avoid acquiescing in plaintiffs' effort to … proceed on the merits in the Court of Federal Claims." *Id.*

The Justice Department could manage Trail Act litigation more cost-efficiently. When the government's obligation to compensate an owner is clear, as it is in most Trails Act cases, the government lawyers should work to fairly and promptly appraise the value of the property taken and pay the owners. It makes no sense to protract litigation because the government must also pay interest for its delay in paying the owners and the government must reimburse the owners' legal fees and litigation expenses. In many Trails Act cases the interest can be almost as

much as the land value due to the delay in payment and the legal fees and litigation expenses can greatly exceed the compensation due the owners.

Finally, when the government's liability is nominal—as here ($900) and *Grantwood Village* ($19,000)—it is a tragic waste of public resources for the government to spend millions of the taxpayer's money litigating its long-settled constitutional obligation to compensate the owners when their property has been pressed into public service. The Justice Department's vociferous opposition causes even the smallest, most straight-forward Trails Act case to cost hundreds of thousands in legal fees. *See Town of Grantwood Village v. United States*, 55 Fed. Cl. 481 (2003) (owner incurred several hundred thousand dollars of legal fees to be paid $12,000).[20] "The government cannot litigate tenaciously and then be heard to complain about the time necessarily spent by plaintiff in response." *City of Riverside v. Rivera*, 477 U.S. 561, 581, n.11 (1986).

[20] *See* Mark F. (Thor) Hearne, II, *et al.*, *The Trails Act: Railroading Property Owners and Taxpayers for More Than a Quarter Century*, 45 REAL PROPERTY, TRUST AND ESTATE LAW JOURNAL 115 (Spring 2010); *see also* Cecilia Fex, *The Elements of Liability in a Trails Act Taking: A Guide to the Analysis*, 38 ECOLOGY L.Q. 673; *Litigation and Its Effect on the Rails-to-Trails Program: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 107th Cong. 45-54 (2002) (statement of Nels Ackerson).

In sum, Congress's adoption, the ICC's and STB's implementation, and the Justice Department defense of the Trails Act is responsible for the expense section 8(d) imposes on taxpayers. The government wrongly blames owners for this. *See* Gov. Br., pp. 2-3. The landowner is the only party with no ability to avoid, reform, or correct the burdens and expense section 8(d) imposes on taxpayers.

## CONCLUSION

This Court should deny the government's request to sit *en banc* and overturn *Caldwell*, *Barlcay*, *Illig*, and *Ladd I*. This Court should summarily affirm Judge Lettow's decision, which correctly applied this Court's controlling precedent. And the government should pay the Caquelin family the $900 it owes them for taking their property for nine months.

Respectfully submitted,

/s/ *Robert H. Thomas*
Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street
1600 Pauahi Tower
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

*Counsel for Amici Curiae*

**UNITED STATES COURT OF APPEALS**
**FOR THE FEDERAL CIRCUIT**
*Caquelin v. US, 2016-1663*

## CERTIFICATE OF SERVICE

I, Robert H. Thomas, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

On **December 28, 2016** I caused the foregoing **Brief for Amici Curiae** to be filed with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users, including any of the following:

Elizabeth McCulley
Thomas S. Stewart
Stewart Wald & McCulley, LLC
2100 Central
Kansas City, MO 64108
mcculley@swm.legal
stewart@swm.legal
*Counsel for Appellee*

Erika Kranz
Katherine J. Barton
Department of Justice,
Environment and Natural
Resources Division
PO Box 7415
Washington, DC 20044
202-307-6105
erika.kranz@usdoj.gov
katherine.barton@usdoj.gov
*Counsel for Appellant*

Any counsel for Amicus Curiae, Appearing at the time of this filing, will be served via CM/ECF Notice only. Paper copies will also be mailed to the above principal counsel for the parties at the time paper copies are sent to the Court.

Upon acceptance by the Court of the e-filed document, six paper copies will be filed with the Court within the time provided in the Court's rules.

December 28, 2016

/s/ Robert H. Thomas
Robert H. Thomas
Counsel for Amici Curiae

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

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) or Federal Rule of Appellate Procedure 28.1(e)

__X__ The brief contains 6,935 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii),or

____ The brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) or Federal Rule of Appellate Procedure 28.1(e) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6)

__X__ The brief has been prepared in a proportionally spaced typeface using MS Word 2016 in a 14 point Times New Roman font or

____ The brief has been prepared in a monospaced typeface using _____ _____in a ___ characters per inch_____ font.

December 28, 2016

/s/ *Robert H. Thomas*
Robert H. Thomas
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street
1600 Pauahi Tower
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

*Counsel for Amici Curiae*