No. 16-316

In The
Supreme Court of the United States

DOROTHY L. BIERY, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF AMICI CURIAE OWNERS' COUNSEL OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether trial courts have discretion to make across-the-board percentage adjustments to the lodestar fee and, if so, what "specific proof" or "explanation" must the court provide so the adjustment is "objective and reviewable"?

2. Whether a trial court must consider "specific proof" to determine prevailing market rates for legal services and, if the trial court uses *Laffey*-rates to calculate a lodestar fee, should the thirty-year-old *Laffey*-rates be adjusted for inflation using (a) the Consumer Price Index (CPI) (what the court below did); or, (b) the Legal Services Index (LSI)—which is how the Third Circuit and DC Circuit adjust *Laffey*-rates?

3. Whether the "no-interest-rule" in *Shaw v. Library of Congress*, 478 U.S. 310 (1986), prohibits trial courts from following this Court's direction in *Missouri v. Jenkins*, 491 U.S. 274 (1989), and *Perdue v. Kenny A.* ex. rel. *Winn*, 559 U.S. 542 (2010), that attorney fees should be calculated using hourly rates in effect on the date of payment?

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INTEREST OF AMICI CURIAE

I. OWNERS' COUNSEL OF AMERICA

Owners' Counsel of America (OCA) is an invitation-only national network of the most experienced eminent domain and property rights attorneys.[1] They have joined together to advance, preserve and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights (2d ed. 1998). As the lawyers on the front lines of property law and property rights, OCA members understand the importance of the issues in this case, and how property owners should not have their requests for attorneys' fees in takings cases arbitrarily reduced by across-the-board percentage cuts without even an explanation why.

OCA brings unique expertise to this task. OCA is a non-profit 501(c)(6) organization sustained solely by its members. Only one member lawyer is admitted from each state. Since its founding, OCA has sought to use its members' combined knowledge and experi-

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1. Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Evidence of consent has been filed with the Clerk of the Court. Counsel of record for the parties received notice of the intention to file this brief not less than ten days prior to the due date of this brief. Pursuant to Rule 37.6, amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission.

ence as a resource in the defense of private property ownership, and OCA member attorneys have been involved in landmark property law cases in nearly every jurisdiction nationwide. Additionally, OCA members and their firms have been counsel for a party or amicus in many of the property cases this Court has considered in the past forty years, including *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990), and most recently *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257 (2014); *Arkansas Game and Fish Comm'n v. United States*, 133 S. Ct. 511 (2012), and *Koontz v. St. Johns River Water Mgmt Dist.*, 133 S. Ct. 2586 (2013).[2] OCA members have also authored and edited treatises, books, and law review articles on property law and property rights.[3]

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2. *See also Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection*, 130 S. Ct. 2592 (2010); *Winter v. Natural Resources Def. Council*, 555 U.S. 7 (2008); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

3. *See*, *e.g.*, Michael M. Berger, Taking Sides on Takings Issues (Am. Bar Ass'n 2002) (chapter on *What's "Normal" About Planning Delay?*); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U.J.L. & Policy 99 (2000); Michael M. Berger & Gideon Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's"*

(…footnote continued on next page)

II. NFIB LEGAL CENTER

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitols. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

NFIB represents 325,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees.

Views on Just Compensation for Regulatory Taking of Property, 9 Loy. L.A.L. Rev. 685 (1986); William G. Blake, The Law of Eminent Domain—A Fifty State Survey (Am. Bar Ass'n 2012) (editor); Leslie A. Fields, Colorado Eminent Domain Practice (2008); John Hamilton, Kansas Real Estate Practice And Procedure Handbook (2009) (chapter on *Eminent Domain Practice and Procedure*); John Hamilton & David M. Rapp, Law and Procedure of Eminent Domain in the 50 States (Am. Bar Ass'n 2010) (Kansas chapter); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of Penn Central Transportation Co. v. City of New York*, 13 Wm. & Mary Bill of Rts. J. 679 (2005); Dwight H. Merriam, Eminent Domain Use and Abuse: *Kelo* in Context (Am. Bar Ass'n 2006) (coeditor); Michael Rikon, *Moving the Cat into the Hat: The Pursuit of Fairness in Condemnation, or, Whatever Happened to Creating a "Partnership of Planning?"*, 4 Alb. Gov't L. Rev. 154 (2011); Randall A. Smith, *Eminent Domain After Kelo and Katrina*, 53 La. Bar J. 363 (2006); (chapters on *Prelitigation Process* and *Flooding and Erosion*).

While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

SUMMARY OF ARGUMENT

"*A lawyer's time and advice are his stock in trade*."

— Abraham Lincoln, country lawyer.

Mr. Lincoln's famous dictum remains the core of the practice of law. The Federal Circuit's ruling undercuts that essential truth by subjecting the lawyer's most precious resource—his or her services—to a standardless process that gives too much discretion to trial judges to arbitrarily determine that a lawyer's "stock in trade" is worth less in a particular case than the market.

This brief focuses on the first Question Presented, and argues that the Federal Circuit's rejection of the lodestar method as the presumptive reasonable fee recovery—time spent by the lawyer multiplied by a reasonable rate, and the "guiding light" of fee calculations—is a recipe for capriciousness. *Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002) ("The 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence."). An opaque process not subject to uniform and understandable standards endangers access to justice, not only for property owners seeking just compensation, but for all litigants in cases where the possibility of fee-shifting is present.

This brief makes two points. First, transparent and uniform standards for the recovery of attorneys' fees and costs in litigation fosters access to justice, particularly in cases where private citizens are forced to bring claims against an opponent unconstrained by litigation budgets. Reducing a plaintiff's statutory recovery by district court fiat undermines the certainty that all parties rely on. This certainty is especially critical pre-litigation, when the parties

and the lawyers evaluating whether to take their cases should know the ground rules to make an informed judgment.

Second, we give some examples of the pattern of Government conduct in rails-to-trails cases, where it has in many instances needlessly increased the cost of litigation by its slash-and-burn approach. The case at bar must be viewed in light of the Government's failed strategies in these other cases, because needlessly increasing the costs of litigation and then objecting to the efforts which the plaintiff undertook to win brings to mind Leo Rosten's classic definition of *chutzpah*. For the district court to exercise unreviewable discretion to reduce the lodestar amount without an explanation of how or why, only adds to the injury.

This case presents a good vehicle for this Court to determine that if a district court strays from the presumptive lodestar fee, it should be required to say why, with precision. The Court should grant certiorari.

ARGUMENT

I. THE IMPORTANCE OF ATTORNEYS' FEE RECOVERY IN LITIGATION AGAINST THE GOVERNMENT

Recovery of a reasonable attorneys' fee under the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4654(c) (Relocation Act) where a property owner has been forced to sue the government to recover just compensation, serves the important purpose of upholding Congress' intent to make the plaintiff as economically whole as possible.

A. Fee-shifting helps ensure plaintiffs are made economically whole in takings cases

When the Government takes private property for public use, the Just Compensation clause requires the owner receive the "full and perfect equivalent" of the property taken. *United States v. Klamath & Moadoc Tribes*, 304 U.S. 119, 123 (1938); *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1893). The Fifth Amendment's guarantee "was 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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). This is because, as Justice Holmes reminded, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

The usual concerns supporting the "American rule" are not present in takings cases because they are not

typical civil litigation. After all, the property owners in these cases only find themselves sued or suing because they own property the Government has taken, or will be taking. They've done nothing wrong (except own the property)—breached no duty, nor repudiated a promise—yet they are forced into court. There is little they can do to stop the seizure of their property, even if owned by their family for generations, as is often the case. In inverse condemnations such as this, the Government has already seized their property but has refused to pay compensation, and the owners are involuntary plaintiffs.

But this Court has held that when the Government affirmatively takes property by eminent domain, the Fifth Amendment does not require reimbursement of the property owner's costs of litigation, even in cases where the Government's offer of compensation is woefully inadequate, and the property owner must hire attorneys and appraisers to get fair compensation. This conclusion rests of the thinnest of analytical threads: compensation "is for the property, and not to the owner." *Monongahela Navigation Co.*, 148 U.S. at 326. Written off as "indirect costs," attorneys' fees caused by the taking which the property owner must incur are generally "not part of the just compensation to which he is constitutionally entitled." *United States v. Bodcaw Co.*, 440 U.S. 202, 203 (1979).

This overlooks the "essential principle: Individual freedom finds tangible expression in property rights," as this Court recently held. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993). The constitutional right to compensation is not possessed by the property, but by its owner. *See*, *e.g.*, *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552

(1972) ("The dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights."). This Court recently affirmed this "essential principle: Individual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993)). Thus, even though the purpose of the constitutional imperative is to ensure that property owners receive the "full and perfect equivalent" of their property, and fundamental fairness dictates that property owners should be put into the same position economically as they were before their property involuntarily was pressed into public service, owners who retain counsel and pursue their rights will *always* be undercompensated, even if they prevail and they recover 100% of the just compensation they seek. Because every dollar they must spend on lawyers and appraisers is a dollar less they get for their property.

Recognizing this inherent unfairness, Congress adopted the Relocation Act and determined that in cases where a property owner brings a claim against the Government under either the Big or Little Tucker Act for the taking of her property, she is entitled to recover "such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding." 42 U.S.C. § 4654(c). The only measure of justice in most takings cases is economic (indeed the Fifth Amendment is the only provision in the Bill of Rights expressly couched in economic terms), and a property owner's right to recover the fees must be zealously protected by the courts. *See*,

e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 718 (1999) (jury's role in regulatory takings cases).

B. Fee award opacity prevents parties and counsel from evaluating cases

Let's be frank: in our experience, most judges dislike fee requests, even where the law requires fee shifting. Admittedly, they can be tedious. Does anyone like going over years of timesheets and billing records, and haggling over whether a task should have reasonably taken one hour versus five? Fee motions are satellite litigation, often raising a new round of contentiousness after the main issues in a case have been determined by the court, or even settled by the parties by agreement. Moreover, many courts are not really attuned to the real-world financial realities of how litigation is funded, and appear to believe the judicial role is to cut down on what the court views as an excessive fee request to whatever level the court believes is acceptable. As a consequence of all of these factors, it can be a remarkably capricious process.

Fee shifting, however, is obviously vitally important in civil rights cases such as these, because transparent and uniform standards for the recovery of attorneys' fees and costs in litigation fosters access to justice, particularly in cases where private citizens are forced to bring claims against an opponent unconstrained by a litigation budget. Reducing a property owner's statutory recovery without a careful explanation of why—so that the parties and a reviewing court can understand by what metric the district court believed that a fee request was not "reasonable," or the fees and costs "actually in-

curred"—undermines the certainty that all parties need. This certainty is especially critical pre-litigation, when the parties and the lawyers evaluating whether to take their cases should know the ground rules in order to make an informed judgment about whether a case is "worth it." Fee shifting statutes allow parties (and the lawyers who consider taking their cases) to evaluate whether pursuing or defending an action makes economic sense. Arbitrary denial of statutorily-required fee recovery adds uncertainty to this process, and if affirmed, the Federal Circuit's approach here would undermine those purposes. For example, in *Bell v. United Princeton Properties, Inc.*, 884 F.2d 713 (3d Cir. 1989), the Third Circuit stated:

> [A] court may not sua sponte reduce the amount of the award when the defendant has not specifically taken issue with the amount of time spent or the billing rate, either by filing affidavits, or in most cases, by raising arguments with specificity and clarity in briefs (or answering motion papers).

Id. at 720, 721. In *Rode v. Dellarciprete*, 892 F.2d 1177, 1187 (3d Cir. 1990), the Third Circuit explained that the district court must "explain why it concludes hours expended on a task are excessive" and that it must "specify the number of hours that would be reasonable and why those hours would be reasonable." The court also reiterated "[t]he district court cannot 'decrease a fee award based on factors not raised at all by the adverse party.'" *Id.* at 1183 (quoting *Bell,* 884 F.2d at 720).

The issues presented by this petition are not limited to takings cases. "More than 150 federal statutes

now authorize attorney fee shifting." Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 Law & Contemp. Probs. 233 (1984). Most of these statutes were adopted in response to *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), in which this Court declined to deviate from the American Rule absent clear legislative intent. *Id.* at 247. Fee shifting statutes were created "to encourage public interest litigation by removing some of the economic disincentives facing public interest litigants." Percival, 47 Law & Contemp. Probs. at 237. "Court awards of attorney fees to public interest plaintiffs are designed to encourage public interest litigation." *Id.* at 239. In *Alyeska* this Court acknowledged that Congress by enacting fee shifting statutes "has opted to rely heavily on private enforcement to implement public policy and to allow counsel feels so as to encourage private litigation." Percival, 47 Law & Contemp. Probs. at 237 (quoting *Alyeska Pipeline*, 421 U.S. at 263). "In general, fee shifting statutes provide an incentive only for meritorious litigation because attorney fee awards are authorized only for successful parties." *Id.* at 241.

> Despite differences in the standards employed in the various fee shifting statutes, a reasonably consistent theme runs throughout. Congress generally authorizes fee shifting where private action serves to effectuate important public policy objectives and where private plaintiffs cannot ordinarily be expected to bring such actions on their own. Fee shifting is designed to remove some of the disincentives facing public interest litigants, thus increasing access to the courts for groups who

> otherwise might be unrepresented or underrepresented.

Id. This Court has reiterated that the "important public purpose" of a fee shifting statute is to make "it possible for persons without means to bring suit to vindicate your rights." *Perdue v. Kenny A.*, 559 U.S. 542, 559 (2010). "Congress included a vigorous fee-shifting provision in the URA because Congress places a high premium on the government's obligation to protect American citizens' Fifth Amendment right to their property and to receive 'just compensation' when the government has taken their property." Mark F. (Thor) Hearne, II, Steven Haskins, & Meghan S. Largent, SU027 ALI-ABA 345 (2013). The purpose of the fee shifting aspect of the URA is to "assure that the person whose property is taken is no worse off economically than before the property was taken." *Haggart v. Woodley*, 809 F.3d 1336, 1357 (Fed. Cir. 2016) (quoting URA Legislative History, S.1, Senate Floor Remarks, Congressional Record, Senate, 115 Cong. Rec. 31533 (Oct. 27, 1969), Uniform Relocation Assistance and Land Acquisition Policies Act of 1969).

II. GOVERNMENT TACTICS HAVE INCREASED THE COST OF LITIGATION

Fee shifting requests can result in an odd dynamic: the party which lost the case often second-guesses the efforts it took to win it, in the process increasing the cost of the litigation. This section of our brief provides examples of rails-to-trails cases which illustrate the approach the Government often takes.

In *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990) (*Preseault I*), this Court sustained the federal rails-to-trails program as a valid exercise of

the federal commerce power, 16 U.S.C. § 1241, *et seq*., but concluded that converting an abandoned railroad right of way to trail use may "giv[e] rise to just compensation claims" under the Takings Clause. *Id*. at 13. Justices O'Connor, Scalia, and Kennedy elaborated, concluding that the conversion to trail use "may delay property owners' enjoyment of their reversionary interests, but that delay burdens and defeats the property interest rather than suspends or defers the vesting of those property rights." *Id*. at 22 (O'Connor, J., concurring). In the subsequent Tucker Act case, the Federal Circuit held the Government liable for compensation when recreational trail use exceeds the scope of the original railroad right of way. *Preseault v. United States*, 100 F.3d 1525, 1541 (Fed. Cir. 1996) (en banc) (*Preseault II*). That decision set out the elements of a rails-to-trails takings case:

> Under *Preseault II*, the determinative issues for takings liability are (1) who owns the strip of land involved, specifically, whether the railroad acquired only an easement or obtained a fee simple estate; (2) if the railroad acquired only an easement, were the terms of the easement limited to use for railroad purposes, or did they include future use as a public recreational trail (scope of the easement); and (3) even if the grant of the railroad's easement was broad enough to encompass a recreational trail, had this easement terminated prior to the alleged taking so that the property owner at the time held a fee simple unencumbered by the easement (abandonment of the easement).

Ellamae Phillips Co. v. United States, 564 F.3d 1367, 1372-73 (Fed. Cir. 2009) (citing *Preseault II*, 100 F.3d at 1533).

However, the Government refused to accept the situation and undertook an approach that recently led the Federal Circuit to wonder aloud "exactly what this *sturm und drang* is about" in rails-to-trails cases. *Evans v. United States*, 694 F.3d 1377, 1381 & n.7 (Fed. Cir. 2012) (citing Friedrich Maximilian Klinger, Der Wirrwarr, oder Sturm und Drang (1776)). The court in that case criticized the Government's borderline frivolous strategy:

> And even more puzzling is why the Government, after *Bright* was decided, 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 have the district court judgments put aside and to proceed on the merits in the Court of Federal Claims.

Evans, 694 F.3d at 1381 (citing *Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010)). This is not an isolated example of the "scorched earth" approach. In 2002 Congress held hearings into rails-to-trails takings cases, and directed the Government to resolve these cases more quickly and more fairly than it had been. *See Litigation and Its Effect on the Rails-to-Trails Program: Hearing Before the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary*, 107th Cong.June 20, 2002), *available at* http://commdocs.house.gov/committees/judiciary/hju80320.000/hju80320_0f.htm. As described by a noted property owners' lawyer in a recent law review article, "[i]n the first several years following the *Preseault II* decision, the Department of Justice (DOJ) continued to challenge the United States' liability by recycling the unsuccessful argument it has made in *Preseault II*." Cecilia

Fex, *The Elements of Liability in a Trails Act Taking: A Guide to the Analysis*, 38 Ecol. L. Q. 673, 675-76 & n.6 (2011) (citations omitted). The article continues:

> After losing several liability arguments, culminating in a second Federal Circuit decision, *Toews v. United States*, the DOJ's challenges to the government's liability subsided. Beginning around 2003, the DOJ started stipulating to liability—or waiving the issue—instead of pursuing challenges in the courts. But the reprieve was brief.
>
> The DOJ has resurrected its challenges to the government's liability in recent years. In an apparent coordinated litigation strategy, the DOJ now routinely raises arguments that the Federal Circuit previously rejected. Worse for the attorneys and courts who do not typically deal with these Tucker Act cases, the DOJ advances these arguments without acknowledging the contrary law that was established during its earlier attempts to escape the government's liability.
>
> The DOJ's strategy relies on the marginalization of *Preseault II* as purportedly being limited to the facts in that case, glancing over the fundamental principles laid out in *Preseault I*, and ignoring *Toews* altogether. Accordingly, by recycling the arguments it made in *Preseault II* and *Toews*, the government persists in arguing in various guises that recreational use is no different from railroad use, or that railbanking is a "railroad purpose," so that nothing was taken from the landowner when the right of way became a recreational trail. In arguing that hikers and bikers are the same as railroad locomotives, the government sweeps several decades of contrary law under the rug.

Id. at 676 (citing *Toews v. United States*, 376 F.3d 1371 (Fed. Cir. 2004)). The courts have not been convinced by the Government's approach, concluding it is "obvious," and that there is a "clear consensus" that trail use is "fundamentally different" and "clearly different" than a railway. *See Anna F. Nordhus Trust v. United States*, 98 Fed. Cl. 331, 338 (2011) ("To state the obvious, removing tracks to establish recreational trails is not consistent with a railroad purpose, and cannot be regarded as incidental to the operation of trains."); *Ellamae Phillips Co. v. United States*, 99 Fed. Cl. 483, 487 (2011) ("There is clear consensus that recreational trail use is fundamentally different in nature than railroad use."); *Ybanez v. United States*, 98 Fed. Cl. 659 (2011) ("The original parties to railroad conveyances between 1887 and 1891 would not likely have contemplated use of the right-of-way as a recreational trail. Such a use would be 'clearly different' from railway operations.").

Unsuccessful in rehashing the losing *Preseault II* arguments on liability, the Government shifted to making the same argument in the context of calculating just compensation, claiming that owners are entitled only to recover the value of the land as if it were encumbered by a trail easement. This too was rejected by the CFC. *See*, *e.g.*, *Ingram v. United States*, 105 Fed. Cl. 518, 530 (2012) ("The measure of just compensation to the plaintiffs for the takings of plaintiffs' property should capture the value of the reversionary interests in their 'before taken' condition, unencumbered by the easements."); *Ybanez v. United States*, 102 Fed. Cl. 82, 88 (2011) ("The measure of just compensation is the difference between the value of plaintiffs' land unencumbered by a railroad easement, and the value of plaintiffs' land

encumbered by a perpetual easement for recreational trail use."); *Rogers v. United States*, 101 Fed. Cl. 287, 294 (2011) (measure of compensation is the difference between the land unencumbered by a railroad easement, and the land encumbered by an easement for recreational trail use and railbanking); *Raulerson v. United States*, 99 Fed. Cl. 9, 12 (2011) (same). The most recent example of a pointless argument surfaced in *Ladd v. United States*, 713 F.3d 648 (Fed. Cir. 2013), in which the Federal Circuit soundly rejected the Government's argument the statute of limitations had started even though the Government had not informed owners of the Notice of Interim Trail Use (NITU), the action triggering their right to institute a claim for just compensation. The Government itself was unaware of the NITU, yet it claimed the owners should have been.

The Government's rails-to-trails strategy has also needlessly increased the cost of resolving many of these cases, often beyond reason. For example, in *Hash v. United States*, No. 1:99-CV-00324-MHW, 2012 WL 1252624 (D. Idaho Apr. 13, 2012), the court awarded the property owners $2.24 million in attorney's fees and costs under the Relocation Act. Which means that to secure an $883,312 just compensation award, it cost the plaintiffs more than two-and-a-half times that amount, and the taxpayers even more.

CONCLUSION

This Court should grant the petition and review the judgment of the Federal Circuit.

Respectfully submitted.

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