No. 12-1173

IN THE
Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST
AND MARVIN M. BRANDT, TRUSTEE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae New England Legal Foundation ("NELF") seeks to present its views, and those of its supporters, on the question presented in this case, namely, whether the United States retained an implied reversionary interest in rights of way granted under the General Railroad Right of Way Act of 1875, 18 Stat. 482 (1875) ("1875 Act" or "Act"). Because NELF believes that the interest granted under the Act was an easement and not any form of fee, NELF believes that the United States retained *no* reversionary interest in the rights of way.

NELF is a nonprofit, nonpartisan, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England and the nation, protecting the free-enterprise system, and defending individual economic rights and the rights of private property. NELF's members and supporters include both large and small businesses located primarily in the New England area. NELF has previously filed amicus briefs in this Court,

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[1] Pursuant to Supreme Court Rule 37.6, Amicus states that no party or counsel for a party authored this brief in whole or in part and that no person or entity, other than Amicus, made a monetary contribution to the preparation or submission of the brief.

Pursuant to Supreme Court Rule 37.3(a), Amicus also states that on October 21 counsel for Petitioners filed with this Court a general written consent to the filing of amicus briefs in support of either or neither party, and by letter of November 20 the Solicitor General granted consent, on behalf of Respondent United States, to the filing of this brief.

advocating, among other things, in defense of private property rights.[2]

NELF's association with "rails to trails" litigation extends back to the 1990s, when it commenced *pro bono* representation of the Preseaults. After this Court's decision in *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990), NELF successfully represented the Preseaults before the Federal Circuit. *See Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996). NELF therefore views with growing concern the protracted saga of "rails to trails" litigation that land owners across the country have had to endure because of the refusal of the United States to recognize their property rights and to compensate them for the use it wishes to make of their property for recreational trails.

The Government's dogged refusal is matched only by its willingness to adopt, over the years, virtually any position that will enable it to obtain something for nothing. In 1942, in *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942), when it sought ownership of mineral rights lying beneath a right of way, the Government argued that the 1875 Act granted easements; in the 1990s, in *Preseault*, when it wanted to acquire abandoned rights of way for free so that it could use them as trails, the Government argued that while the Act created easements, they had evaporated long ago as a result of federal regulation of railroads; now, thwarted by citizens, like the Petitioners, who refuse to settle for

[2] *See, e.g., West Linn Corporate Park, L.L.C. v. City of West Linn*, No. 11-299 (cert. denied); *Vance v. Ball State*, 133 S.Ct. 2434 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

anything less than their full rights, the United States has discovered that the Act never created any easements at all, so that there now exist no Fifth Amendment impediments to its acquiring the rights of way free of charge.

For the reasons set forth in this brief, as well those set out in the Petitioners' brief, NELF believes that the Act did indeed create easements and that it did so without any special implied reversionary interest in favor of the United States. Indeed, there would have been no reason for the United States to retain an interest in strips of land only a few hundred feet wide once they were abandoned for railroad use. Since the Government's purpose in facilitating the building of railroads was to encourage settlement of the vast expanses of this country, *Great Northern*, 315 U.S. at 272, the most sensible and effective policy was, as the Act provides, to let land formerly used for the rights of way pass into the hands of those best able to make the fullest use of it—the homesteaders whose properties were crisscrossed by the rights of ways and whose ties to the land were the very thing that the Government sought to encourage.

SUMMARY OF ARGUMENT

The possessory element found in railroad rights of way has long been recognized as an intrinsic consequence of the nature of railroad operations. For a variety of compelling, practical reasons, a railroad must enjoy exclusive, or nearly exclusive, use and occupancy of its right of way. Both before and after the passage of the 1875 Act, courts and legal authorities commonly regarded such rights of way as easements. In 1898 this Court too recognized that there could be a "corporeal,"

possessory aspect to easements, such as those used as rights of way by railroads.

The Government's denial of the 1871 shift in congressional policy is not substantiated by the fact that Congress sometimes may have made a grant of a "strip of land" after that year. The phrase "strip of land" did not denote a fee when the grant specified the purpose of the grant and contained language limiting the interested granted to less than a fee. The Government's own example shows this to be true.

The Government badly misreads the debate that took place in the House of Representatives over the 1875 Act. The members did *not* agree that the United States would retain a property interest in the rights of way even after the underlying lands were patented away to private parties. On the contrary, the exchange the Government cites clearly demonstrates that the Act was understood to grant an easement only and that, in this regard, the Act stood in sharp contrast to legislation passed before 1871.

ARGUMENT

I. At The Time Of The 1875 Act, It Was Well Understood That A Railroad's Exclusive Use And Possession Of A Right Of Way Did Not Mean That The Railroad's Interest Could Not Be An Easement.

The Government has argued to this Court that when a railroad company was granted a right of way under the 1875 Act, the company's exclusive use and possession of the way meant that the interest granted was to be understood to be a fee interest. *See* Brief for the United States (in response to

petition for certiorari) ("U.S. Response Br.") at 5, 7, 9-10, 15. In fact, however, both before and after the Act was passed, it was widely recognized in the United States that a railroad right of way need not be a fee interest, but may be treated merely a distinctive type of easement, one rationally adapted to the purpose for which the right of way was granted.

While "[a] grant of a right of way to a railroad company is a grant of an easement merely, and the fee remains in the grantor," Leonard A. Jones, *A Treatise on The Law of Easements* § 211 at 178 (New York, Baker, Voorhis 1898), such an easement was understood to have distinctive features.

> "The easement is not that spoken of in the old law books, but is peculiar to the use of a railroad which is usually a permanent improvement, a perpetual highway of travel and commerce, and will rarely be abandoned by nonuser. The exclusive use of the surface is acquired, and damages are assessed, on the theory that the easement will be perpetual; so that, ordinarily, the fee is of little or no value unless the land is underlaid by quarry or mine."

2 Byron K. Elliott and William F. Elliott, *A Treatise on the Law of Railroads* § 938 at 432 (2d ed. 1907) (quoting *Smith v. Hall*, 103 Iowa 95, 72 N. W. 427, 428 (1897)). *See also* 1 Isaac F. Redfield, *The Law of Railways* § 69 at 261 (J. Kendrick Kinney ed.) (6th ed. Boston, Little, Brown 1888) ("The right acquired by the corporation, although technically an easement, yet requires for its enjoyment a use of the land permanent in its nature and practically

exclusive.") (quoting *Hazen v. Boston & Maine Railroad Co*., 2 Gray 574, 68 Mass. 574, 580 (1854)).

The reason for these possessory features was traced back to the purpose for which the easement was given—to operate a railroad for the benefit of the public. *See* 2 Elliott, *Treatise* § 792 at 212-13 (railroads "affected with a public interest"); Edward L. Pierce, *A Treatise on the Law of Railroads* 158 (Boston, Little, Brown 1881) (grant of right to take land for purpose of railroad creates easement, and "property is . . . to be deemed taken for a public use itself"). The operation of a railroad entails responsibilities for both timely, reliable transportation and the safety of the public and of the company's employees.

> The interest of a railroad company in its location, although technically an easement, is not limited to an ordinary right of way, such as is acquired for highways, but it justifies a use of the land for all the purposes of a railroad. Its possession, except at crossings established by law, is permanent in its nature, and practically exclusive, such possession being essential to a safe and effective working of its machinery.

Id. at 159. As explained in another treatise of the time, "[t]he railway company must, from the very nature of their operations, in order to [i.e., for the purpose of] the security of their passengers, workmen, and the enjoyment of the road, have the right at all times to the exclusive occupancy of the land." 2 H. G. Wood, *A Treatise on the Law of Railroads* § 242 at 769 n.1 (Boston, Boston Book 1889).

The same author quotes at length *Kansas Cent. Ry. Co. v. Allen*, 22 Kan. 285, 1879 WL 836 (1879), which dealt with "a strip of land" taken by a railroad as a right of way under an 1868 Kansas statute. *See id.* at 771 n.2. Formerly, Kansas law had provided that a title in fee simple was acquired. *Allen*, 1879 WL 836, at *5. After 1868, however, although the railroad continued to enjoy "perpetual use of the land," the law provided for a "mere easement," and then, "[u]pon the discontinuance or abandonment of the right of way, the entire and exclusive property and right of enjoyment revest in the proprietor of the soil." *Id.* *See also* An Act Concerning Suspended Railroads, 1868 Ohio Laws 142, 143 § 6 (providing for forfeiture of railroad right of way and reversion "to the owner of the fee of the land covered by the easement and right of way"). Until abandonment, "[t]he paramount right is with the railroad company, and the land-owner can do nothing which will interfere with the safety of its road, appurtenances, trains, passengers, or workmen," and this was true even if "[i]n some cases, the right of the owner of the soil would practically not amount to anything, because the purposes of a railroad company might require the use of all the land taken to such a degree as to forbid the owner from any benefit whatever." *Allen*, 1879 WL 836, at *5.

Another authority, also approximately contemporary with the 1875 Act, summarized the law of the time concerning the scope of a railroad easement and the nature of railroad operations:

> There is no question but that the company is entitled to the exclusive possession of the right of way, *if such possession is necessary to the proper*

> *operation of the road*. Some courts hold that the company is entitled to such exclusive possession from the nature of the case and as matter of law. Other courts hold that it is a question of fact whether the necessities of the company require the exclusive occupancy of the right of way, and what use of the same by the owner of the fee is not inconsistent with the company's rights. The latter is the prevailing doctrine, where only an easement vests in the company.

John Lewis, *A Treatise on the Law of Eminent Domain in the United States* § 586 at 755-56 (Chicago, Callaghan 1888) (emphasis in original).

This Court itself also has recognized that railroads may enjoy right-of-way easements that confer on them rights of exclusive use and occupancy. In *Territory of New Mexico v. United States Trust Co. of New York*, 172 U.S. 171, 181-82 (1898), the Court said of a right of way, "Obviously, it may mean one thing in a grant to a natural person for private purposes, and another thing in a grant to a railroad for public purposes, as different as the purposes and uses and necessities, respectively, are."

The issue before the Court in that case was whether various items of a railroad's personal property, by being permanently attached to its right of way, could be taxed by the territory, for the railroad had been federally chartered under an act of 1866 and its right of way was exempted by Congress from taxation. *Id*. at 175-176. The territorial taxing authorities argued that the personal property of the railroad could not escape taxation by being,

supposedly, made part of the right of way, because the property, being tangible, could not become part of something abstract like a right of way. *See id.* at 181. The railroad countered that its right of way was a fee or, alternatively, if a lesser interest, then still "such a tangible and corporeal property . . . that all that was attached to it became part of it and partook of the exemption from taxation." *Id.* The Court found it unnecessary to decide the exact nature of the interest, whether fee or easement, ruling simply that the railroad's right of way did possess a "corporeal quality," and thus the property permanently affixed to it was tax-exempt. *Id.* at 184-85.

In its reasoning, the Court first noted that in the usual case an easement involves "noncontinous" use, whereas "a way not of that character, whose use would be continuous, not occasional, and which would embrace the entire beneficial occupation and improvement of the land [i.e., like a railroad right of way], *might* require the fee for its enjoyment,—certainly would require more than a mere right of passage." *Id.* at 183 (emphasis added). But then the Court went on to consider the alternative possibility, advanced by the railroad, that the company enjoyed a "tangible and corporeal" but non-fee interest. *Id.* at 181. The Court quoted the same Iowa and Massachusetts cases also quoted by the treatises discussed above. *See supra* pp. 5-6. First, it quoted *Smith v. Hall* for the proposition that a railroad "easement is not that spoken of in the old law books, but is peculiar to the use of a railroad," and then it quoted *Hazen v. Boston & Maine* for the proposition that the right acquired by a railroad company was an easement that "requires for its enjoyment a use of the land permanent in its nature

and practically exclusive." *See New Mexico*, 172 U.S. at 183.

The Court then turned to several other state cases. Notably, in one, *City of Winona v. Huff,* 11 Minn. 119, 1866 WL 1507 (1866), a case where private land was dedicated for use as a public square, the Supreme Court of Minnesota ruled that although the fee remained with the grantor "subject to the dedication," an interest passed that was not a "mere easement," echoing the Massachusetts and Iowa cases quoted by the Court in *New Mexico*. *Id*., 1866 WL 1507, at *11. Observing that "different purposes may require different interests or estates to support them," the Minnesota court understood the dedication statute in question to pass not merely an easement for use of the land but also for "the possession thereof, so far as is *necessary* to accomplish these objects," i.e., the "public purposes" for which the grant was made. *Id.* (emphasis in original). Again, all the while, the actual fee simple remained indisputably in other hands, "subject to the dedication." *Id*.

In another case cited by the Court, *Southern Pacific Co. v. Burr*, 86 Cal. 279, 282, 283, 24 P. 1032 (1890), the California Supreme Court, considering a railroad right of way granted in 1862 by Congress, was asked to decide whether the railroad had a sufficiently tangible interest in the land to support an action for ejectment or whether it enjoyed "only an easement," an "incorporeal hereditament." The court upheld the ruling of the lower court that the grant of a 200-foot wide right of way, dedicated to the public purpose of constructing a railroad, "necessarily involves a right of possession." *Id*., 86 Cal. at 284.

> [I]n order that the plaintiff in the case at bar may make such use of the land as the grantor intended it should under the grant of a right of way, it becomes necessary to take and keep an actual possession of the land. It must also be a possession exclusive of all other persons. This is obvious enough as to all the land upon which a track, a depot, or other superstructure is placed, and we think the same is true of the whole two hundred feet on each side of the track.

Id. at 285. The court found this possessory element to be sufficiently corporeal, even in the absence of a fee, to support an action for ejectment. *See id*. at 284-86 (relying in part on *City of Winona*).

That this Court understood both *City of Winona* and *Burr* to involve *easements* is readily apparent from the remark it made differentiating a third case from these two. The Court noted that "[i]n this [third] case it was held that the interest taken by the railroad was not an easement." *New Mexico*, 172 U.S. at 184 (citing *New York, S. & W. R. Co. v. Trimmer*, 53 N. J. Law 1, 20 Atl. 761 (1890)).

Thus, contrary to the Government's view of *New Mexico* and of railroad rights of way, nothing about the manner in which railroads used and occupied rights of way granted under the 1875 Act requires a fee, as courts and legal authorities generally recognized in the era of the Act itself and as the Court recognized again, much later, in *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 272 (1942) (use for railroad "does not compel a

construction of the right of way grant as conveying a fee title to the land").

Moreover, there is an additional reason why the 1875 Act should be read as having granted rights of way as easements. This Court has noted "the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *United States v. Union Pacific Railroad Co.*, 353 U.S. 112, 116 (1957). To the extent, therefore, that there may be any "doubts" about the operation of the 1875 Act, the more parsimonious view should be taken and the Act viewed as having granted an *easement* because, even with possessory features like those described above, such a grant represents the relinquishment of a lesser Government interest than would the grant of a fee.

Indeed, the Government itself once argued strenuously to this Court in favor of such a reading of the Act. *See* Brief of the United States, *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942) (No. 149), 1942 WL 54245, at 12-14, 36-37 ("The mere fact that the right of way has some of the attributes of a fee—'perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property'—does not require the conclusion that the right of way is not an easement.") (citing *New Mexico*).

II. In Its Effort To Obscure The Fact That The 1875 Act Granted Only Easements, The Government Obscures The Meaning Of Texts It Quotes.

A. The 1871 Shift To Easements Cannot Be Denied Merely Because "A Strip Of Land" May Have Been Granted After That Year.

In *Great Northern*, the Court found that in 1871 Congress shifted from granting railroads land in fee to granting them rights of way in the form of easements. 315 U.S. at 273-75. In an attempt to undermine the historical reality of this shift, the Government, in its response to the petition for certiorari, pointed to acts, passed *after* 1871, in which Congress grants a railroad a "strip of land," a phrase, the Government asserts, "generally" implying a fee and not an easement. U.S. Response Br. at 12-13. The Government states that the interest conveyed turns on "whether the granting clause conveys a *designated strip or piece of land* or whether it basically refers to a right or privilege with respect to the described premises." A. E. Korpela, Annotation, *Deed to Railroad Company as Conveying Fee or Easement* § 3[b], 6 A.L.R. 3d 973, 978 (1966)), quoted in U.S. Response Br. at 13 (emphasis added by Government).

In fact, the authority the Government quotes is careful to say that "a strip of land" generally implies a fee "[i]n those instances in which . . . there is no language in the deed relating to the use or purpose of the grant, or limiting directly or indirectly the estate conveyed." *Id*. The post-1871 act that the Government uses as its example contained *both* kinds of qualifiers. It stipulated that the strip of

land was granted "for the purpose of aiding in the construction of a railway and telegraph-line," and it provided that the lands "over which the line of said road shall pass shall be sold . . . *subject to such right of way*," phrasing that clearly indicates that the interest granted is a mere servitude imposed on the lands "over which the line of said road shall pass."[3] *See* Act of February 5, 1875, ch. 35 §§ 1, 2, 18 Stat. 306-307.

In short, both the text of the Government's own cited authority and that of its own example contradict its denial of the shift that took place in congressional policy in 1871.

B. The Government Cannot Impress The Congressional Record Into The Service Of Supporting Its Case.

As the Petitioners have shown, the legislative history of the 1875 Act amply supports their position. A significant shift in congressional policy toward railroads really did take place in 1871, memorialized most notably in the 1875 Act.

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[3] In its response to the petition for certiorari, the Government dismissed the legal effect attributed to such "subject to" expressions by the Court in *Great Northern*, stating that such phrases have been used by the Court itself to refer to a fee. *See* U.S. Response Br. at 13-14. Of course, however, merely using a phrase beginning with "subject to" in the course of discussing property relations is not the same as using the phrase in an utterance that has the legal effect of *creating* a specific kind of property relation, as did the Act of February 5, 1875, cited by the Government. The Government also argued that such phrases do not imply an easement because they are known to occur in grants of "a strip of land." *See* U.S. Response Br. at 13. As discussed above, it is precisely when a fee is granted "subject to" a strip of land that the latter is understood to be an easement.

The Government, however, in its attempt to deny this shift, has plucked a single brief passage from the Congressional Record. It claims that "in presenting the 1875 Act for a vote on the floor of the House of Representatives, the chairman of the responsible committee agreed that, even after the underlying lands were conveyed, the railroad rights-of-way would constitute 'property of the United States,' just like the rights-of-way granted in the 1862 and 1864 Union Pacific statutes," i.e., *before* the 1871 congressional shift to granting only easements. U.S. Response Br. at 14 (quoting 3 Cong. Rec. 406 (1875)).

The Government incorrectly portrays the exchange in question, however. The exchange was between the committee chairman, Mr. Townsend, and another member, Mr. Hoar. It occurred as part of an extended discussion about what powers the states should exercise over the rights of way and over the railroads. 3 Cong. Rec. 405-407. Mr. Hoar first spoke to express his concern to protect the "just authority of the States" in a number of matters relating to railroad rights of way. 3 Cong. Rec. 405. Then—at least, as the Government reads the record—after Mr. Hoar next spoke, Mr. Townsend allegedly "agreed" with him that rights of way granted under the bill would constitute United States property, "even after the underlying lands were conveyed," in the Government's words. *See* U.S. Response Br. at 14.

In fact, Mr. Townsend never agreed with any such statement because Mr. Hoar never made the statement ascribed to him by the Government. Mr. Hoar, who, as part of the same exchange, denounced the "aggressions of the railroad companies" under the preceding regime of land

grants, 3 Cong. Rec. 406, merely imagined two scenarios in which the power of the states might be thwarted by the railroads. In the first, a right of way lies on "a tract of land *owned* by the United States, over which a railroad under the authority of the United States passes." *Id.* (emphasis added). Mr. Hoar stated that any exercise of state power over "that location" would amount to ineffectual "meddling" with the property of the United States. *Id.* (Earlier he had briefly set out the same scenario, indicating that he believed the objection to be a valid one. *See* 3 Cong. Rec. 405.)

In the second scenario, however—the one on which the Government draws for support—Mr. Hoar imagined that the United States had "*parted with* all its public lands in the State," and "*still*" a railroad would object to state regulation on the grounds that the land "you are dealing with is the property of the United States." 3 Cong. Rec. 406 (emphasis added). It should be obvious that, in setting out this objection, Mr. Hoar is *not* expressing his own view, as his use of "we" and "us," referring to the railroads, highlights. *Id.* ("the right of way with which we are clothed was given to us by the United States"). He is merely imagining an objection a railroad might grasp at "still"—i.e., despite the fact that the underlying lands had been "parted with" by the United States— in the hope of being able to continue to escape state regulation and commit "aggressions" against the public. That Mr. Hoar himself fully believed that the bill granted only an *easement* is shown by his earlier observation that all that the railroads acquired under the bill was "the *use*" of the land, "so that the title consists in the *ownership by the United States*." 3 Cong. Rec. 405 (emphasis added). That means, of course, that once the United

States has conveyed the ownership of the underlying land into private hands (i.e., has "parted with" the land), the right of way, too, ceases to be the property of the United States.

The objection Mr. Hoar puts into the mouth of the railroad, then, is not supposed to be a sound objection—that's Mr. Hoar's point—just a disruptive one, aimed at thwarting the states once again and requiring, as Mr. Hoar says, recourse to Congress to straighten things out. *See* 3 Cong. Rec. 406. It is at this point in the exchange that Mr. Townsend says, "Is not that the condition in which the Union Pacific Railroad stands in Kansas and has stood, and in California too?" *Id.* Pointedly, Mr. Hoar agrees, declaring that this was one of the things *wrong with the grants made up to 1870*.

> Undoubtedly; and I desire to say, as my friend puts the question, that I regard as a most lamentable fact in our history the carelessness with which between 1863 and 1865, or 1870, Congress dealt with the great function of incorporating these great highways. . . . I think one of the most distressing facts in our history is the example of carelessness and fraud which was set in the organization of these roads.

Id.

In short, neither Mr. Hoar nor Mr. Townsend said or agreed that grants made under the 1875 Act would remain the property of the United States even after the underlying fee had been conveyed away to homesteaders or other private parties. The Government must look elsewhere for support.

CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court reverse the judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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