No. 12-1173

IN THE

Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND AMERICAN PLANNING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

LISA SORONEN
Executive Director
STATE & LOCAL LEGAL CENTER
444 North Capitol Street NW
Suite 515
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

CHARLES H. MONTANGE
Counsel of Record
LAW OFFICES OF CHARLES H. MONTANGE
426 NW 162d Street
Seattle, WA 98177
(206) 546-1936
c.montange@frontier.com

Counsel for Amici Curiae

December 23, 2013

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

MARVIN M. BRANDT REVOCABLE TRUST, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND AMERICAN PLANNING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*[1]

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 states, its commonwealths, and territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing

[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the amici made a monetary contribution to its preparation (Rule 37.6).

state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits amicus briefs to this Court in cases, like this one, that raise issues of vital state concern.

The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,068 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The U. S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The American Planning Association (APA) is a nonprofit public interest and research organization founded in 1978 exclusively for charitable, educational, literary, and scientific research purposes to advance the art and science of planning—including physical, economic, and community planning—at the local, regional, state, and national levels. The APA's mission is to encourage planning that will contribute to the public's well being today, as well as to the well being of future generations, by developing sustainable and healthy communities and environments. The APA has 47 regional chapters and represents approximately 40,000 professional planners, planning commissioners, and citizens involved with urban and rural planning issues, nationwide.

This case on its face involves whether there is a retained federal interest in the General Railroad Right of Way Act of 1875, 43 U.S.C. §§ 934-39 (1875 Act), sufficient for application of 43 U.S.C. § 912, as modified by 16 U.S.C. § 1248(c), to sustain a U.S. Forest Service trail where it traverses an inholding on an 1875 Act federally granted railroad right of way (FGROW). But the issue as framed by Petitioners has far broader implications. Petitioners argue that 43 U.S.C. § 912 does not apply to 1875 Act FGROW. State and local governments have long relied upon 43 U.S.C. § 912 and two related statutes, 43 U.S.C. § 913 and 23 U.S.C. § 316, for the location of public streets and highways in and across FGROW. In addition, prior to

the National Trails System Improvements Act of 1988, 16 U.S.C. § 1248(c)-(g), 43 U.S.C. § 912 provided that all FGROW upon judicially determined actual abandonment would belong to towns and cities within municipal limits. So, prior to 1988, towns and cities depended upon section 912 for their title within municipal limits for federally granted rail corridor for general purposes. This raises significant reliance and expectation issues, should the statute be ruled inapplicable to 1875 Act rights of way, as argued by Petitioners.

Amici have an interest in preserving state and local transportation systems and municipal development, long dependent upon application of 43 U.S.C. § 912 to 1875 Act FGROW. *Amici* accordingly support the position of the Respondent that 43 U.S.C. § 912 applies to FGROW granted pursuant to the 1875 Act, and that the judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

SUMMARY OF ARGUMENT

State and local governments have long relied upon application of 43 U.S.C. § 912 to FGROW, including 1875 Act FGROW, to secure title to public highways in and across FGROW. Petitioners' claim that section 912 does not apply to 1875 Act FGROW ignores the reasonable reliance on the dispositional regime provided by that section. 1875 Act FGROW, like other FGROW, is established and governed by federal, not state, law. Petitioners' contention that the 1875 Act represents a policy shift by Congress making 1875 Act FGROW different from prior FGROW is not supported by statutory language or directly relevant legislative history. Moreover, but for 43 U.S.C. § 912, the 1875 Act right of way at issue here would not terminate, for

there is no other statute governing its forfeiture. In that event, the Petitioners would still not receive possession or use of the surface estate in the 1875 Act right of way they claim.

ARGUMENT

I. State and Local Governments Have Long Relied upon 43 U.S.C. § 912 to Control Disposition of the Surface Estate in 1875 Act Federal Rights of Way.

State and local governments are interested in preserving 43 U.S.C. § 912 to secure local and state governments title to their highways inside federally granted railroad rights of way. Since federal rights of way cannot be occupied by state or local highways but for 43 U.S.C. § 912 and § 913 (and 23 U.S.C. § 316), and since state and local governments have long relied (implicitly or explicitly) on these statutes for their highway uses inside federal rail corridors, the construction of these statutes advocated by Petitioners not to apply to 1875 Act rights of way is a considerable novation, and rather alarming in light of past reliance. This concern applies not only to trails established by state and local governments on FGROW, but to all manner of public highways.

43 U.S.C. § 912, applicable to 1875 Act FGROW, so-called "charter" FGROW of the Civil War era, and to pre-Civil War FGROW represents an instance of constructive federalism. No one knows better than state and local governments how difficult is the task of assembling or expanding transportation rights of way in the United States, nor how troubling the loss of such

facilities.[2] For this reason, state and local governments have long viewed existing transportation corridors as a kind of natural resource, worthy of preservation for current as well as future needs.[3]

Consistent with this recognition, section 912 since its adoption in 1922 has allowed state and local governments reliably to use all FGROW, regardless of the era of its grant, for public highway purposes. Many state and local governments have relied on section 912 to establish public highways or segments of highways, on FGROW. That reliance is entitled to greater protection than mere private property rights because these lands are infused with a public trust for transportation and communications uses.

In addition, prior to the National Trails System Improvements Act of 1988, 16 U.S.C. §§ 1241-1251, 43 U.S.C. § 912 provided that local governments obtained title to all federal rights of way within municipal limits in the event no public highway was established within the FGROW within one year of a judicial declaration of abandonment. Thus, under 43 U.S.C. § 912, municipalities traversed by federal rights of way—200 feet wide in the case of the 1875 Act, and up to 400 feet wide in the case of some of the "charter" railroad rights of way—have obtained title for all manner of

---

[2] "To assemble a right of way in our increasingly populous nation is no longer simple. A scarcity of fuel and the adverse consequences of too many motor vehicles suggest that society may someday have need either for railroads or for the rights of way over which they have been built." *Reed v. Meserve*, 487 F.2d 646, 649-50 (1st Cir. 1973).

[3] *See also Preseault v. ICC*, 494 U.S. 1, 19 (1990) ("Congress apparently believed that every line is a potentially valuable national asset that merits preservation even if no future rail use is foreseeable").

development projects. It is a very late date to upset these old dispositions.

II. Congress Intended 1875 Act Rights of Way to Embody the Same Federal Interest as Charter Rights of Way.

In this case there is no question that the FGROW has priority over Petitioner Brandt. Brandt admitted below that the original railroad in this case (Laramie, Hahn's Peak, and Pacific Railway Co.) obtained its 1875 Act right of way "about 1908." Pet'rs' 10th Cir. Br. 4. The right of way clearly vested in the railroad long before Petitioners' predecessor in interest obtained the patent (Feb. 18, 1976) under which Petitioners now asserts their claim. Thus, if there is a federal interest in the right of way, that interest retains its priority over any interest asserted by Petitioners.

Petitioners' argument necessarily rests on the premise that an 1875 Act FGROW is a mere easement which, like any other state law rail easement, extinguished under state law upon the relevant railroad's consummation of the pertinent Surface Transportation Board (STB) abandonment authorization in January of 2004. Conceding that circumstances are different for pre-1875 Act FGROW (which Petitioners regards as fee in nature),[4] Petitioners argue that 43 U.S.C. § 912 simply has no application to 1875 Act FGROW, because 1875 Act FGROW are the equivalent of state common law

[4] *See* Pet'r's Br. 49-52, arguing that pre-1871 right of way grants conveyed a limited fee.

easements that disappear upon termination of STB jurisdiction.[5]

---

[5] Until recently, the circuits were in agreement on the applicability of 43 U.S.C. § 912 to FGROW. Most FGROW occurs in the Ninth and Tenth Circuits. The Tenth Circuit has consistently held that 43 U.S.C. § 912 applies to 1875 Act rights of way. *E.g., Marshall v. Chicago & N.W. Transp. Co*., 31 F.3d 1028 (10th Cir. 1994), *affirming*, 826 F. Supp. 1310 (D. Wyo. 1992); *Phillips Co. v. Denver & Rio Grande Western R.R. Co*., 97 F.3d 1375 (10th Cir. 1996), *cert. denied*, 521 U.S. 1104 (1996); *Nicodemus v. Union Pacific Corp*., 440 F.3d 1227, 1236 (10th Cir. 2006). The Ninth Circuit appears to be in accord with the Tenth Circuit. In *State of Idaho v. Oregon Short Line R.R. Co*., 617 F. Supp. 207 (D. Idaho 1985) the court held that 43 U.S.C. § 912 necessarily applied to 1875 Act FGROW and found that the United States retained an interest. The Ninth Circuit has affirmed the applicability of section 912 to so-called charter railroad grants basically for the same reasons assigned by the district court for applying section 912 to 1875 Act rights of way. *E.g., Vieux v. East Bay Regional Park District*, 906 F.2d 1330 (9th Cir. 1990) (charter grants); *Avista Corp. v. Wolfe*, 549 F.3d 1239 (9th Cir. 2008) (same). *See also King County v. Burlington Northern R.R. Co*., 885 F. Supp. 1419 (W.D. Wash. 1998) (section 912 applied to a Northern Pacific federal right of way). The Seventh Circuit originally held that FGROW conveyed a limited fee subject to a reverter, *United States v. Illinois Central*, 89 F. Supp. 17 (E.D. Ill. 1949), *aff'd on the basis of opinion below*, 187 F.2d 374 (7th Cir. 1951) (pre-Civil War grant) and applied section 912 to FGROW. *See Mauler v. Bayfield County*, 204 F. Supp. 2d 1168 (W.D. Wis. 2001), *aff'd*, 309 F.3d 997 (7th Cir. 2002) (pre-Civil War grant). Based on Federal Circuit precedent in cases like *Hash v. United States*, 403 F.3d 1308 (2005) (ruling that federal rights of way were mere easements for purposes of Tucker Act claims arising from STB's application of the federal "railbanking" statute, 16 U.S.C. § 1247(d), to them, the Seventh Circuit more recently ruled the opposite. *Samuel C. Johnson 1988 Trust v. Bayfield County*, 634 F. Supp. 2d 956 (W.D. Wis. 2009), *rev'd*, 649 F.3d 799 (7th Cir. 2011) (no application to same pre-Civil War grant). (Petitioners treat *Samuel C. Johnson* as involving the 1875 Act, but the railroad right of way there in

But if pre-1875 Act FGROW is different from the 1875 Act FGROW in terms of application of 43 U.S.C. § 912, then the reason must lie in the language used to grant the FGROW, or if the language is essentially the same, then in the intent of Congress.

> It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of common law, which are properly applicable only to transfers between private parties. *Missouri, K. & T. Ry. v. Kansas Pac. Ry*., 97 U.S. 491, 497 (1878). *Accord Leo Sheep Co. v. United States*, 570 F.2d 881, 885 (10th Cir. 1977), *rev'd on other grounds*, 440 U.S. 668 (1979). ("[i]n order to determine whether there was an implied reservation of an easement of access, we look solely to the intent of Congress, as such will not be defeated by application of the rules of common law").

The basis of all of Petitioners' arguments for treating 1875 Act FGROW as "easements" rest on the notion that there was a major policy shift relating to FGROW at or shortly prior to the 1875 Act. This is a red herring. Although there was a policy shift away from providing grants in aid of construction (in the form of federal bonds or grants of every other section out to a specified distance) commencing in 1871, there was no shift in terms of grants of rights of way. To

---

dispute involved pre-Civil War statutes.) *See also* Danaya Wright, *Federal Control of FGROW Reverter Interests*, in POWELL ON REAL PROPERTY 78A15 (Michael Allan Wolf ed., 2012).

determine the intent of Congress, courts ordinarily look to the language of the statute and to its legislative history if the language is ambiguous, or even to determine if there is a policy shift that is germane. As shown below, on examination, there is no significant change in statutory language and nothing in the legislative history that supports Petitioners.

A. The right of way grants remained basically the same through 1875.

Congress adopted its first FGROW statute in 1835.[6] For the next 17 years, Congress acted upon individual requests to provide federal rights of way to particular railroads. The most significant innovation during this period came in 1850. Congress provided not only a FGROW for the Illinois Central (and several associated railroads) from Mobile to Chicago, but also, for the first time, a grant in aid of construction, in the form of every alternate even section of land in a six mile strip on each side of the road.[7]

Because of the burden of having to pass numerous individual federal grants (and to permit state chartered railroads to obtain a FGROW without specific action by Congress), Congress adopted a general right of way statute applicable both to railroads and other roads across federal lands in 1852.[8] Interestingly, the granting language used for

---

[6] *See generally* THOMAS ROOT, RAILROAD LAND GRANTS FROM CANALS TO TRANSCONTINENTALS (1986); Danaya Wright, *The Shifting Sands of Property Rights, Federal Railroad Grants, and Economic History:* Hash v. United States *and the Threat to Rail-Trail Conversions*, 38 ENV. L. 711 (2008).

[7] Act of Sept. 20, 1850, 9 Stat. 466.

[8] Act of Aug. 4, 1852, 10 Stat. 28. The 1852 Act was applicable for roads "begun within ten years from and after passage of this

the FGROW in both the 1850 Illinois Central statute and the 1852 general right of way statute was essentially identical: a "right of way through public lands" in the case of the Illinois Central grant,[9] and a "right of way . . . over and through any of the public lands of the United States. . . ." in the case of the 1852 Act.[10] Congress also adopted numerous statutes providing alternate sections of land as grants in aid of construction for individual railroads subsequent to the adoption of the 1852 Act.[11]

This situation continued with the numerous so-called "Pacific Railroad" (or "charter" railroad) grants commencing with the Civil War. Thus, in addition to granting substantial aids in construction (alternate sections of land as well as access to federal bonds) to Union Pacific and other railroads for the first great transcontinental railroad, section 2 of the Act of July 1, 1862, 12 Stat. 491, granted "the right of way through the public lands . . . for construction of said railroad and telegraph line. . . ." The subsequent "charter" railroad grants all contained similar right of way language, all the way through the last of the charter railroads (the Texas Pacific) established by the

---

Act. . . ." Congress extended the Act to all territories by the Act of Mar. 3, 1855, 10 Stat. 686, and subsequently extended its applicability for an additional five years from August 4, 1862. Act of July 15, 1862, 12 Stat. 577.

[9] Act of Sept. 20, 1850, 9 Stat. 466.

[10] Act of Aug. 4, 1852, 10 Stat. 28.

[11] Act of July 15, 1862, 12 Stat. 577. *E.g.*, Act of May 17, 1856, 11 Stat. 15 (for railroads in Florida and Alabama); Act of June 3, 1856, 11 Stat. 17 (Alabama); Act of June 3, 1856, 11 Stat. 18 (Louisiana); Act of June 3, 1856, 11 Stat. 20 (Wisconsin); Act of June 3, 1856, 11 Stat. 21 (Michigan).

Act of March 3, 1871.[12] Early Supreme Court decisions treated the FGROW as fee in nature. *E.g., St. Joseph & Denver City R.R. Co. v. Baldwin*, 103 U.S. 426 (1880).[13]

Between 1871 and 1875, Congress adopted at least 15 more statutes for specific railroads, but because of scandals relating to diversion of the "aids in construction" by management of some of the charter railroads, and because of opposition to the vast withdrawals of public lands from settlement that occurred in order to reserve checkerboard lands for the railroads, Congress granted only rights of way across the public lands. *See Great Northern Railway Co. v. United States*, 315 U.S. 262, 274 n.9 (1942).

In 1875, Congress returned to a regime similar to the 1852 Act, thus relieving itself of the necessity of acting upon specific requests for FGROW. In particular, Congress adopted the General Railroad Right of Way Act of 1875, codified at 43 U.S.C. §§ 934-39. That statute did not provide any "aids in construction" (alternate sections or federal bonds), but broadly granted "[t]he right of way through the public lands . . . to any railroad company . . . ." The granting language for the right of way under the 1875 Act was essentially the same as the granting language for the right of way under the Pacific Railroad ("charter") railroad right of way grants.[14] The 1875 Act even

---

[12] Section 7 of the Act of March 3, 1871, 16 Stat 576, grants "the right of way through public lands . . . for the construction of said railroad and telegraph line . . . ."

[13] *See* Wright, *supra* note 5, 78A.09.

[14] The 1875 Act covers lines actually constructed prior to its adoption, so long as the railroad in question filed its articles of incorporation, proof of construction, and a profile map after passage of the Act in accordance with Department of Interior

adopted the same eminent domain language as for the transcontinentals. 43 U.S.C. § 936.

Since the language of the various FGROW grants is basically the same that leaves the legislative history as the sole source on which a court might attempt to distinguish 1875 Act FGROW from those previously granted. No court that has yet ruled on the subject has addressed the relevant legislative history of the 1875 Act, and there is no indication that any litigant (or *amicus*) has yet either, until now.[15]

B. The relevant legislative history of the 1875 Act confirms that Congress intended no change in the nature of the right of way grant.

Contrary to the arguments of the Petitioners and their *amici*, the legislative history of the 1875 Act shows that the right of way interest granted under the 1875 Act is more than a state law easement, and instead is what FGROW have always been. More

---

procedures. *Boise Cascade Corp. v. Union Pac. R.R. Co*., 630 F.2d 720, 723 (10th Cir. 1980), *cert. denied*, 450 U.S. 995 (1981).

[15] Darwin Roberts demonstrates in *The Legal History of Federal Granted Railroad Rights of Way and the Myth of Congress's "1871 Shift*," 8 COLO L. REV. 1, 14 (2011) that no litigant brought any relevant legislative history to the attention of the Supreme Court in *Great Northern v. United States*, 315 U.S. 262 (1942), on which Petitioners heavily rely, and all the other cases on which Petitioners relies. Mr. Roberts indicates that instead the Solicitor General in his brief claimed there was a policy shift between 1871 and 1875, as there was in respect to grants in aid of rail construction. Without a logical basis or legislative history, he suggested to the Supreme Court that this amounted to a change as to the right of way grants themselves. The Seventh Circuit evidently was aware of Mr. Robert's article in *Samuel L. Johnson*, 649 F.3d 799.

specifically, Congress rejected the construction that Petitioners advocate.

During floor debate on the bill from the House Committee on Public Lands, Congressmen Holman and Hoar, both opponents of subsidies for railroads, each offered floor amendments enhancing the power of states in connection with 1875 Act rights of way. Congressman Hoar's proposal is the more relevant. Congressman Hoar acknowledged prior court decisions construing FGROW to reserve a property interest in the United States sufficient to defeat state law even if the United States later parts with all its public lands in the vicinity. He explained that he wished to alter that situation for the rights of way to be granted under the legislation that became the 1875 Act:

> "what would be the condition of the road-bed? It is a tract of land owned by the United States, over which a railroad under the authority of the United States passes. Now, if the State undertakes to meddle with that location, it is meddling with lands within its limit the property of the United States, and with a right of way within its limits granted by the United States. The United States may in the course of years or generations have parted with all its public lands in the State or in the vicinity of the road, and still, whenever the State undertakes to exercise the ordinary local authority of permitting a highway across the track of the road, or a bridge to be built over it, or requiring the railroad in a populous city to move its tracks from a street in the central part of the city to the outskirts, or another of those acts which State authorities exercise, *the railroad will meet the State with the constitutional objection that this*

> *land you are dealing with is the property of the United States*; the eminent domain did not come from your State to us as in ordinary cases, and the right of way with which we are clothed was given by the United States. In that case the people of the State would either have to come to Congress for a remedy or be without it."

Congressman Townsend, the floor manager for the bill, responded:

> "Is not that the condition in which the Union Pacific Railroad stands in Kansas and has stood, and in California too?"

Congressman Hoar replied:

> "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.
>
> And now if my friend will permit me I will read the amendment which I propose to offer:
>
> > *Provided, All such rights of way shall be subject to the authority of any State hereafter formed through which such road shall pass, as if the land occupied by such way had been originally granted by such State*.
>
> There can be no objection to that."

Congressman Townsend then stated: "I accept the amendment." 3 CONG. REC. 406 (Jan. 12, 1875) (emphasis added). After a debate on Congressman

Holman's floor amendment,[16] Congressman Hoar's amendment was adopted by the House. *Id*. at 407.

Had Congressman Hoar's amendment gone into law, it would have made 1875 Act rights of way nothing more than state law easements, controlled by state law, with no retained federal interest. But Congressman Hoar's amendment did *not* become law. The Conference Committee report deleted both the Holman and Hoar amendments. Congressmen Hoar and Holman strenuously objected, with Congressman Holman accusing the leadership of attempting to perpetrate "a fraud on the House." The House nonetheless accepted the conference report. *See* CONG. REC. 2217-18 (Mar. 3, 1875). The President signed the bill into law on the same day. *Id*. at 2210.

The only inference that this history allows is that Congress intended 1875 Act FGROW to be regarded exactly like other FGROW; that is, in the words of Congressman Hoar, as "property of the United States." This is consonant with the actual granting language in 43 U.S.C. § 934, which, as already demonstrated, is essentially identical to prior right of way granting statutes. When Congress knows the law, as manifest in the floor debates, and enacts language previously construed to create a federal interest, then it must be deemed to have adopted that interpretation. *See Canon v. University of Chicago*, 441 U.S. 696-98 (1979); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

---

[16] Congressman Holman's amendment would have allowed states to regulate interstate commerce on the 1875 Act rights of way. Congressman Holman was forced to agree to limit state regulatory power to intrastate commerce. 3 CONG. REC. 406-07 (Jan. 12, 1875).

See generally 2B SUTHERLAND STATUTORY CONSTRUCTION § 49:8 (7th ed. 2013).

Petitioners assert that nothing in the 1875 Act suggests it is granting "anything but common law easements" but the truth is quite to the contrary. Petitioners would have this Court do what Congress rejected. This legislative history is hardly consistent with a claim of a policy shift sufficient to change the nature of the right of way into that which Congress rejected. This should not be surprising. Congress opted for a uniform federal policy with respect to FGROW.

During the interval between adoption of the 1875 Act and Congress's adoption of 43 U.S.C. § 912, Supreme Court decisions contend to construe the scope of FGROW broadly, to provide exclusive possession and use of the surface to the railroad, to forbid alienation of the surface, and to exist until an act of forfeiture was adopted by Congress. In *New Mexico v. United States Trust Co*., 172 U.S. 171, 181 (1898), this Court treated a pre-1875 Act FGROW as fee in nature. In *Northern Pacific R.R. v. Townsend*, 190 U.S. 267 (1903), also involving a pre-1875 Act federal corridor, this Court ruled that although state law adverse possession is ordinarily applicable to parcels held in fee, a federal grant had an implied condition of reverter keeping the entire grant intact for railroad purposes. The Court described the FGROW held by the railroad as a "limited fee, made on condition of reverter [to the United States] in the event that the company ceased to use or retain the land for the purpose that was granted." 190 U.S. at 271. This Court reasoned that the railroad could neither voluntarily nor involuntarily transfer the

FGROW to another for a purpose other than that for which the right of way was granted. *Id*.[17]

The Supreme Court in *Rio Grande Western v. Stringham*, 239 U.S. 44 (1915), consonant with the relevant legislative history, treated 1875 Act right of way the same as other federal rights of way: as a base (or limited) fee subject to a reverter to the United States. As a limited fee, the property was withdrawn from the public domain for purposes of subsequent patents to the legal subdivision traversed by the right of way. Under this construction, which comports with the language of the statute and the relevant legislative history, Petitioners' predecessor in interest never had an interest in the FGROW parcel Petitioner now claims.

C. 43 U.S.C. § 912 and § 913 confirm Congress's intent.

Congressman Hoar's objection to FGROW in the debate on the 1875 Act included three elements: he complained that state and local highways could not be built across it, that eminent domain was impossible, and that it got in the way of urban development, essentially forever. As cases like *H.A. & L.D. Holland Co. v. Northern Pac. Ry. Co*., 214 F. 920 (9th Cir. 1914), holding that FGROW were exclusive confirm, he had a point. As the West and Midwest (where most FGROW are located) continued to grow, Congress finally turned its attention to the federal interest in FGROW commencing in 1920.

Petitioners and their *amici* make much of conflicting interpretations of the nature of FGROW by the

---

[17] *See, e.g., The Richardson Real Estate Mining Commercial Corp. v. Southern Pacific Co*., 260 P. 195 (Ariz. 1927) (similar).

Department of the Interior. But the Interior Secretary told Congress when 43 U.S.C. § 912 was adopted, referencing *Townsend* and *Stringham*, that the railroads obtained a base fee with an implied condition of reverter. Specifically the Secretary said: "It follows . . . that upon abandonment . . . legal title to the land included in such [FGROW] reverts to and becomes the property of the United States and does not pass to any patentee . . . to whom patents were issued [for the legal subdivision traversed]." S. REP. NO. 388, at 2 (1922); H.R. REP. NO. 217, at 2 (1921). The relevant congressional committees explicitly adopted this construction in framing section 912. *See* S. REP. NO. 388, at 1-2, and H.R. REP. NO. 217, at 1-2. This Court's decisions were discussed on the House floor. *E.g.*, CONG. REC. H6473-74, H8046-47 (1920) (statement of Rep. Christopherson). The Secretary of Interior also informed Congress that title to the right of way should not vest in any subsequent party after abandonment until there was an Act of Congress finding forefeiture or a judicial declaration of abandonment, in order "to avoid confusion, controversies, and litigation." H.R. REP. NO. 851, at 2 (1920). Recognizing that FGROW on abandonment "makes a very good foundation for a public highway," and "realizing that highways were of public importance," Congress expressly prioritized public highway uses in FGROW. *E.g.*, CONG. REC. H4496-97 (1921).

When Congress, aware of a Supreme Court case, adopts legislation effectively incorporating this Court's interpretation, the action constitutes a ratification of the interpretation, not a repeal of it. *See Georgia v. United States*, 411 U.S. 526, 532-33 (1973) (re-enacting Congress presumed to adopt interpretation where aware of it). Congress neither disavowed *Townsend* and *Stringham*, nor otherwise

said that federal rights of way should be treated as state law easements. Instead, Congress responded by addressing the problem which motivated Congressman Hoar in the first place: Congress provided that state and local governments could use federal rights of way for public highways, and that municipalities could obtain those rights of way upon judicial declaration of abandonment for urban development.

In particular, rather than overruling court decisions indicating that the railroad in the surface state was in the nature of a base fee subject to reverter. Congress in 1920 adopted 43 U.S.C. § 913, allowing co-location of public highways on FGROW,[18] and in 1922 adopted 43 U.S.C. § 912, which was intended to be applicable to the final disposition of all FGROW upon reverter.

D. The alleged policy change in the 1870's did not occur.

Petitioners' argument about a policy shift in the 1875 Act such that FGROW is now some kind of state law easement does not appear to take into account relevant legislative history. In *Great Northern v. United States*, 315 U.S. 262 (1942), the United States sought to enjoin the railroad from drilling for or removing oil and gas under an 1875 Act right of way. The Solicitor General argued that there had been a major policy shift in 1871 such that 1875 Act rights of way were really easements rather than fees, and that

[18] 43 U.S.C. § 913, permitted state and local governments to use FGROW for public highways so long as a width fifty feet on each side of the centerline was preserved for rail. This authorization was later expanded to the entire federal corridor in 23 U.S.C. § 316 to ensure authorization of crossings and streets and highways in more cramped quarters.

Stringham was thus wrongly decided. This Court found for the United States, accepting the Solicitor General's contention about a policy shift, and stated that 1875 Act rights of way were easement in nature—at least so as not to convey the mineral estate in a right of way to the railroad. There is no indication that the Court either was offered any of the 1875 Act legislative history or was apprised of Congress's ratification of *Stringham* in the process of adopting 43 U.S.C. § 912 and § 913.[19]

In *United States v. Union Pacific*, 353 U.S. 112 (1957), the issue again was whether the United States owned the mineral estate, this time associated with a "charter" railroad grant. This Court held that the exception of mineral lands in section 3 of the Pacific Railroad Act of 1862 for grant in aid sections also applied to the right of way grant itself. The majority reasoned that the railroad's interest was in the nature of an easement, so that the United States retained the mineral estate. In dissent, Justice Frankfurter accused the majority of ignoring the major change in policy that supposedly occurred in the 1870's. 353 U.S. at 128. Again, neither the majority nor the dissent appeared aware of 43 U.S.C. § 912 or the relevant legislative history.

There was a shift in policy beginning in 1871 away from grants in aid of construction, but (as Congressman Hoar underscored) it had nothing to do with the federal property interest in the FGROW.[20]

---

[19] *See* Roberts *supra* note 15.

[20] Under the Pacific Railroad Acts (and presumably all other statutes where end points for construction were specified), priority to right of way arose when the railroad grant at issue was passed by Congress, making known the general location of the

E. Even if 1875 Act FGROW were somehow less than charter right of way, they still manifest a substantial federal retained interest.

Petitioners and their *amici* are misleading in their argument that FGROW is just another state law easement for another set of reasons: they mischaracterize state law railroad easements, and they fail to recognize Congressional power over termination of FGROW, even if it were otherwise construed to be some sort of easement. Speaking about railroad easements generally, and not simply FGROW, the early decisions of this Court explained that "[a] railroad easement is a very substantial thing. It is more than a mere right of passage. It is more than an easement." *Western Union Telegraph Co. v. Pennsylvania Railroad Company*, 195 U.S. 540, 570 (1904). "A railroad's right of way has, therefore, the substantiality of a fee . . . ." *Id*. at 571. If a railroad's right of way was an easement it was "one having the attributes of a fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it corporeal, not incorporeal, property." *New Mexico v.*

---

road. *See St. Joseph & D.C. RR v. Baldwin*, 103 U.S. at 426 (1880). The federal right of way grant became definite as to location only upon filing the map of definite location or by construction. *See Nielsen v. Northern Pac. R. Co*., 184 F. 601 (9th Cir. 1911). Under the 1875 Act, there was no longer a specific granting statute specifying end points. Instead, the railroad filed a profile of its road, or actually constructed it, and it obtained priority over subsequent claimants from the date of filing of the profile, or actual construction, whichever first occurred. *See* 43 U.S.C. § 937; *Boise Cascade Corp. v. Union Pac. R. Co*., 630 F.2d 720, 723 (10th Cir. 1980), *cert. denied*, 450 U.S. 995 (1981). This shift was not a policy shift, but merely a consequence of no longer identifying end points.

United States Trust Co., 172 U.S. 171, 183 (1898). The Court likened a railroad easement to a "fee in the surface." *Id*. *See generally Chicago Great Western R.R. Co. v. Zahner*, 177 N.W. 350, 351 (Minn. 1920) (a railroad easement is unlike any other; it commands "uninterrupted and exclusive possession and control of the land . . . except where built on a public highway or over public crossings" and the "former owner has no right to occupy" the surface estate except by consent of the railroad). In short, under state common law, an underlying fee owner had no right of occupancy or possession at all in a rail easement. This was the prevailing view in the states. *See id*.

In the case of FGROW, the grant of the surface estate to the railroad was at least as onerous as it would have been under a state law easement, because, as Congressman Hoar implicitly recognized as the 1875 Act was adopted, Congress intended a uniform policy across all states and territories: "state law cannot operate to 'impair the efficacy' of a federal grant or vest title in someone other than the federal grantee." *Boise Cascade Corp*., 630 F.2d at 724, citing *Packer v. Bird*, 137 U.S. 661, 669 (1891), *Shively v. Bowlby*, 152 U.S. 1, 44 (1894), and *Northern Pacific Ry. Co. v. Townsend*, 190 U.S. 267, 270 (1903).[21] States could not interrupt a federal corridor even by eminent domain. Establishing a street upon it was impossible, even in cities growing up around the FGROW. *H.A. &*

[21] In *Northern Pacific Ry. Co. v. Townsend*, 190 U.S. at 272, this Court explained that in providing for a FGROW, Congress conclusively determined the strip covered was necessary for an important public work: "The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes."

L.D. Holland Co. v. Northern Pac. Ry. Co., 214 F. at 926.

There is another aspect of FGROW germane here: its perpetual duration. Under applicable Supreme Court cases, railroad grants, once made, last forever, even if they require a road to be constructed within a specific time period, unless Congress adopts a specific Act declaring forfeiture or the United States brings a proceeding authorized by law to determine forfeiture. *See, e.g., Schulenberg v. Harriman*, 88 U.S. 44, 62-64 (1875) (forfeiture for non-construction is a condition subsequent which can only be raised by the United States, either in a proceeding authorized by law or by a "legislative assertion of ownership . . . for breach of the condition").[22]

Congress responded to *Schulenberg* by adopting the Act of Sept. 29, 1890, 26 Stat. 496, basically providing for forfeiture of grants in aid in the event of non-construction. But the statute did not apply to FGROW and station lands by its terms. Congress addressed forfeiture of some 1875 Act FGROW for non-construction in the Act of June 26, 1906, 34 Stat. 482, codified as amended at 43 U.S.C. § 940.[23] But these statutes still did not provide a means to terminate

---

[22] *Schulenberg* involved the same rail line at issue in the Seventh Circuit's *Samuel L. Johnson* decision.

[23] In a fashion similar to the Act of Sept. 29, 1890, for grants in aid, Congress provided for forfeiture of 1875 Act FGROW not in compliance with the five year deadline for construction specified in 43 U.S.C. § 937. However, section 940 applied only to pre-1909 grants under the 1875 Act. As the legislative history of section 912 indicates, Congress was well aware prior legislation did not address other forfeitures, nor termination of a FGROW if rail used ceased, or if there was a relocation.

most FGROW. Congress ultimately settled on a two-step process for terminating FGROW.

Prior to the end of World War I (when the built-rail system was at its peak), abandonments of railroad rights of way (including FGROW) were rare, and generally not permitted by the state charters and laws under which railroads operated. In 1920, Congress gave plenary and exclusive authority over railroad construction and abandonment to the Interstate Commerce Commission (ICC), *see Colorado v. United States*, 271 U.S. 153, 164-65 (1926). Although the ICC was abolished in 1996, Congress transferred the agency's jurisdiction over economic regulation of railroads, including its exclusive jurisdiction over rail abandonments and discontinuances, to the Surface Transportation Board (STB). *Compare* 49 U.S.C. § 10501(b) (express preemption of state abandonment regulation) with 49 U.S.C. § 10903 (STB authority over abandonment).

It is well-established that ICC (and STB) do not determine if a railroad line is "abandoned." Instead, if ICC—now STB—determines that the "present or future public convenience and necessity require or permit abandonment," (49 U.S.C. § 10903(d)), the agency may authorize it. Any state law relating to disposition of railroad lines (*e.g.*, law regarding easement extinctions and eminent domain) is preempted until ICC (now STB) authorizes abandonment and that authorization becomes effective.[24] Whether a federally-regulated common

---

[24] *See Hayfield Northern R.R. Co. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622 (1984) (eminent domain only after abandonment authorization is effective); *Kansas City Area Transp. Co. v. Ashley*, 555 S.W.2d 9 (Mo. 1977), *cert. denied*, 434 U.S. 1066 (1978) (no state law abandonment absent ICC

carrier service over the line is in fact "abandoned" then depends on the actions and intent of the railroad. *E.g., Vieux v. East Bay Regional Park District*, 906 F.2d 1330, 1339 (9th Cir. 1990), cert. denied, 498 U.S. 967 (1990). Even if ICC (now STB) authorized abandonment (of federally-regulated common carrier service on a line), the railroad may continue use of the line for non-common carrier purposes (*e.g.*, car storage or industrial track), in which case it is not in fact abandoned for purposes of extinguishment of state law easements or base fee reversions. *See, e.g., State of Idaho v. Oregon Short Line*, 617 F. Supp. 213 (D. Idaho 1985) (line authorized for ICC abandonment but not abandoned because of car storage use). But if the rail line is authorized for abandonment, and that abandonment is consummated by cessation of service and other indicia such as removal of tracks, then it may be deemed "abandoned" under state law (what most lay people probably mean when they say "abandonment). In all circumstances, only after ICC/STB abandonment authorization can state law be applied to determine whether state railroad easements automatically extinguish, and whether state base (or determinable) fees revert.

There is, however, an additional step before a FGROW may be deemed actually abandoned. This additional step flows from the fact that FGROW lasts in perpetuity unless the United States terminates it. Congress addressed the issue of termination of FGROW in a comprehensive fashion for the first time in 43 U.S.C. § 912. That statute on its face applies to all FGROW, from the original 1835 grant to those

---

authorization); *Trustees of the Diocese of Vermont v. State*, 496 A.2d 151, 154 (Vt. 1885) (similar). Preemption is specifically provided in 49 U.S.C. § 10501(b).

created under the 1875 Act. The section 912 "trigger" for termination of the FGROW parcels is a judicial decree of abandonment or forfeiture, or an Act of Congress providing for forfeiture. An ICC (now STB) authorization for abandonment is not equivalent to a determination of abandonment; and Congress wanted certainty on whether a FGROW was abandoned. For one year following the date of the trigger, a state or local government may "establish" a public highway on the FGROW. If a state or local government does so, then it is automatically vested with the FGROW. If it does not, then section 912 provided that the FGROW vested automatically in any municipality which it traversed, or in the owner(s) of the legal subdivision(s) traversed if the FGROW was not located within a municipality.

The legislative history for section § 912 makes it clear that Congress meant exactly as is portrayed above. H.R. REP. NO. 851, at 2 indicates that (following the advice of the Department of Interior) the language in the current statute was modified:

> [S]o it may be clear vesting of title in the landowner and his right to occupy and use the same shall only occur after there has been a forfeiture of the right of the railroad company or when an abandonment has been actually ascertained and decreed. The bill [as it previously stood] might [have been] construed to leave the determination of abandonment to the landowner, which is manifestly unworkable.

When Congress adopted the National Trails System Improvements Act of 1988, it modified 43 U.S.C. § 912 by providing that upon the section 912 "trigger" event (generally the judicial declaration of abandonment), the FGROW interest vests in the United States unless

a state or local government establishes a public highway on the FGROW within one year of the "trigger." As a result of Congress's control over the termination of FGROW, there is necessarily a retained federal interest in all FGROW, and however that is characterized, it is a sufficient operational basis for Congress to determine who uses and possesses the surface estate and when. Thus, although the surface estate in all FGROW is better analyzed as a kind of limited fee, over which the United States has a reverter or power of appointment, there is sufficient federal interest for application of section 912 to 1875 Act FGROW.

III. The Federal Government Has a Retained Interest in 1875 Act FGROW to Which Section 912 Applies.

As this Court has recognized many times, property rights may be relative, stronger as against one claimant and weaker as against another. *E.g., INS v. AP*, 248 U.S. 215 (1918) (property rights of competitors in business limited as between each other but not as against the public). The common law has also long recognized relativity of rights; for example, a peaceful possessor of land has superior rights to non-possessors, but not as against the true owner. *Tapscott v. Lessee of Cobbs*, 52 Va. (11 Gratt.) 172 (1854).[25]

The relativity of property rights can exist between owners and possessors, and between private owners and the government. This is clearly illustrated in the litigation on FGROW. *Stringham* and *Townsend* involved the right of the railroad (owner of a FGROW)

---

[25] *See also* Larissa M. Katz, *The Concept of Ownership and the Relativity of Title*, JURISPRUDENCE 191-203 (2011).

against private third parties. *Great Northern* and *Union Pacific* involved the rights of the railroad (owner of a FGROW) against the United States (which claimed the mineral interest). The ultimate outcome in all the cases may be correct, given the relativity of property rights, but the reasoning based on an alleged policy change in or prior to the 1875 Act is not sound. *Accord Kunzman v. Union Pacific*, 456 P.2d 743 (Colo. 1969) (reconciles *Townsend* and *Union Pacific* by observing one applies to the rail interest as against a private party and the other applies to the rail interest as against the government).

The federal retained interest is frequently analogized to a "power of termination" or "possibility of reverter."[26] Congress in effect retains a reverter, or a general power of termination, over FRGOW from their inception. Congress exercised that power on adoption of 43 U.S.C. § 912, which created an "expectancy"—not a property right—that state and local governments, municipalities, or owners of underlying legal subdivisions might eventually acquire FGROW, in accordance with, and in the order of priority, provided in the statute, in the event of a judicial declaration of abandonment. That "expectancy" was withdrawn as to all except state and local highway authorities in 1988, when 16 U.S.C. § 1248(c) was adopted. Congress was and is free to re-

---

[26] *See Samuel C. Johnson 1988 Trust v. Bayfield County*, 520 F.3d 822, 831 (7th Cir. 2008); *Marshall*, 31 F.3d at 1032, quoting *State of Idaho v. Oregon Short Line R.R. Co*., 617 F. Supp. 207. Sometimes commentators treat power of termination and possibility of reverter as essentially the same. However, one can be said to be automatic upon the occurrence of an event (reverter), and the other is discretionary in the holder (power). Allison Dunham, *Possibility of Reverter and Powers of Termination—Fraternal or Identical Twins*, 210 U. CHI. L. REV. 215 (1953).

direct the interests in the FGROW (right to exclusive possession and use of the surface), including retaining them in the United States, until title vests pursuant to a judicial declaration of abandonment or Act of Congress relating to forfeiture as provided in 43 U.S.C. § 912.[27]

Petitioners argue that the United States deeded away its retained interest when it issued the patent to Brandt's predecessor in 1976. But the FGROW grant in 1908 unquestionably had priority over the 1976 patent. As Congressman Hoar recognized in the 1875 Act legislative history already quoted, the federal interest in the FGROW continued even if all the surrounding public land was deeded away. Petitioners' predecessor took no interest in the FGROW surface estate. The Executive Branch through a patent cannot defeat a retained interest

---

[27] *Brown v. State of Washington*, 924 P.2d 908, 916-17 (Wash. 1996), illustrates the operation of the federal retained interest as a power of termination. In *Brown* the right of way of the bankrupt railroad acquired by the state pursuant to the Milwaukee Railroad Restructuring Act, 45 U.S.C. §§ 901-922, included both privately deeded parcels and 1875 Act FGROW parcels. As to the federal right of way, the Washington Supreme Court ruled that it did not vest in the owners of the underlying legal subdivisions because there had not been a judicial declaration of abandonment triggering vesting of rights under section 912. Instead, Congress had authorized the railroad (through its trustee and the reorganization court) to sell its federal right of way interest for non-railroad purposes prior to any such declaration. The concurring Justice explained that the claim of abutting landowners to FGROW is governed by 43 U.S.C. § 912 "which in effect made a conditional promise of a future gift to the abutters. That condition, a declaration of abandonment . . . by Congress or a court, never occurred . . . . [A]butters [therefore] acquired no vested rights in the land and no title to the [1875 Act] parcels." 924 P.2d at 924.

created by Congress, because that would usurp Congress's decision to bestow on state and local governments a future, contingent property interest in the right of way for public highway purposes. *See Samuel C. Johnson 1988 Trust*, 520 F.3d at 831-32.

Even if a patent could cut off some kinds of federal interest, it does not terminate the FGROW itself. The only way to do that is by judicial declaration of abandonment, or by a decree or congressional act of forfeiture. If the patent somehow renders 43 U.S.C. § 912 inapplicable to the railroad corridor, then there is no mechanism to end the existence of the right of way and Petitioners still lose.[28]

Finally, while it is clear Congress intended section 912 to apply to all FGROW, if this now somehow constitutes a "taking" because of an alleged policy shift or otherwise, then the Tucker Act of 1887, 28 U.S.C. §1491 (1887)) remedy renders it constitutional. *U.S. v. Causby*, 328 U.S. 256, 267 (1946).

[28] As discussed above, an ICC or STB abandonment authorization is not equivalent to a judicial declaration of abandonment or a congressional act of forfeiture required by section 912.

CONCLUSION

The Tenth Circuit's decision and judgment below should be affirmed.

Respectfully submitted,

LISA SORONEN
Executive Director
STATE & LOCAL LEGAL CENTER
444 North Capitol Street NW
Suite 515
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

CHARLES H. MONTANGE
Counsel of Record
LAW OFFICES OF CHARLES H. MONTANGE
426 NW 162d Street
Seattle, WA 98177
(206) 546-1936
c.montange@frontier.com

Counsel for *Amici Curiae*

December 23, 2013