No. 19-1385

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NORMA E. CAQUELIN,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

Appeal from the United States Court of Federal Claims
No. 1:14-cv-00037 (Hon. Charles F. Lettow)

BRIEF OF IOWA FARM BUREAU FEDERATION, ILLINOIS AGRICULTURAL ASSOCIATION, KANSAS FARM BUREAU, AND MISSOURI FARM BUREAU FEDERATION AS *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE

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I. INTEREST OF *AMICI*[1]

Iowa Farm Bureau Federation is the largest general farm organization in Iowa with over 159,000 members, in a state where 20% of jobs are in agriculture and related fields. Iowa agriculture contributes over $29 billion in direct economic output a year.

Illinois Agricultural Association (also known as the Illinois Farm Bureau) is a non-profit, membership organization directed by farmers who join through their county Farm Bureaus. The Illinois Farm Bureau represents 75% of all Illinois farmers, with over 384,000 members and 77,000 voting members, all with livelihoods tied to agriculture.

Kansas Farm Bureau is a general farm organization, incorporated under the Kansas Cooperative Marketing Act, K.S.A. § 17-1601, *et seq*. Kansas Farm Bureau represents over 30,000 Kansas families directly engaged in agricultural pursuits. Its members include farmers and ranchers in every Kansas county.

Missouri Farm Bureau Federation is a not-for-profit organization dedicated to supporting Missouri agriculture, offering benefits to over 130,000 state-wide members. Not every member of Missouri Farm Bureau Federation is actively

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E)(i)-(iii), the *amicus* parties state that no part of this Brief was authored in whole or part by counsel for a party. No party, party's counsel, or any person other than *amici* contributed money intended to fund preparing or submitting this Brief.

engaged in agricultural pursuits, but virtually all support the rural way of life and recognize the vital role agriculture plays across the state and the globe.

All four *amici* and their thousands of members have a vital and direct interest in the outcome of this case. Many members own land and have agricultural operations in the vicinity of abandoned railroad rights-of-way that have been or may be authorized for conversion to public recreational trails pursuant to the National Trails System Act ("Trails Act"), 16 U.S.C. § 1241 *et seq*.

II. STATEMENT OF THE CASE

This case involves the government's taking of property of an elderly Iowa landowner, Norma E. Caquelin ("Ms Caquelin"). The United States Court of Federal Claims ("CFC") determined that she was entitled to compensation for the duration that her state law rights were preempted by the Surface Transportation Board's ("STB" or "Board") invocation of Section 8(d) of the Trails Act,[2] 16 U.S.C. § 1247(d).

Use of Ms. Caquelin's property for a public recreational trail was possible only because of the STB's invocation of Section 8(d) of the Trails Act. Under Iowa law, such use would have been deemed abandonment of the right-of-way for railroad purposes. *See Caquelin v. United States*, 140 Fed. Cl. 564, 578, 580 (2018). That

[2] Unless otherwise noted, the "Trails Act" refers to the National Trails System Act, Pub.L. 90-543, 82 Stat. 919 (1968), as amended by Pub.L. 98-11, 97 Stat. 48 (1983).

is the purpose of the Trails Act: avoiding abandonment and the resulting reversion[3] of property interests to the landowner. *Id.* at 580. For Ms. Caquelin, she was deprived of her property for approximately nine months, until the STB's jurisdiction ended and the railroad fully consummated abandonment. *Id.* at 570-71. During this period, she was denied any access to her property. *Id.* at 578. For the temporary taking, she received $900. *Id.* at 585.

Most landowners, however, do not fare so well. Examples of cases from *amici*'s home states illustrate the more common occurrence: the STB invokes Section 8(d) of the Trails Act by issuance of a Notice of Interim Trail Use or Abandonment order ("NITU"), which indefinitely preempts the owners' state-law rights, and the period of preemption lingers indefinitely while private parties negotiate the fate of the owners' property, all before the owners receive any compensation, and all while they are denied any access to or usage of the property.

A. Examples of Missouri Trails Act Takings Claims in the CFC

- *Abbott v. United States*, 15-cv-00211-LKG (Fed. Cl., filed Mar. 2, 2015)—STB Docket No. AB-1068-3X: The STB issued a NITU on

[3] "[A]s a matter of traditional property law terminology, a termination of the easements would not cause anything to 'revert' to the landowner. Rather, the burden of the easement would simply be extinguished, and the landowner's property would be held free and clear of any such burden." *Toews v. United States*, 376 F.3d 1371, 1376 (Fed. Cir. 2004).

February 26, 2015 and has extended it four times. The most recent extension is through August 20, 2019. The landowners have not been compensated.

- *Bratcher v. United States*, 15-cv-00986-EDK (Fed. Cl., filed Sep. 4, 2015)—STB Docket No. AB-33-297X: The STB issued a NITU on February 4, 2012, which was extended thirteen times and was in effect nearly seven years before a trail-use agreement was reached on January 19, 2017.

B. Examples of Kansas Trails Act Takings Claims in the CFC

- *Pankratz v. United States*, 07-cv-00675-NBF (Fed Cl., filed Sep. 9, 2007)—STB Docket No. AB-870X: The STB issued a NITU on June 2, 2005, and a trail-use agreement was executed the next day. In September 2009, the trail group requested substitution of another trail user. The trail user was again substituted in March 2010 and in April 2016.
- *Anna F. Nordhus Trust v. United States*, 09-cv-00042-TCW (Fed. Cl., filed Jan. 21, 2009)—STB Docket No. AB-33-208X: The STB issued a NITU on December 15, 2003, and a trail use agreement was executed in December 2005. In October 2014, a new trail-user was substituted for the original trail group.

C. Examples of Illinois Trails Act Takings Claims in the CFC

- *Balagna v. United States*, 14-cv-00021-EDK (Fed. Cl., filed Jan. 8, 2014)—STB Docket No. AB-6-486X: The STB issued a NITU on May 24, 2013, which was extended twelve times. The last extension expired in November 2018. The railroad has sought and obtained authority to consummate abandonment by January 2020.
- *Barlow v. United* States, 13-cv-00396-LKG (Fed. Cl., filed June 13, 2013)—STB Docket No. AB-33-262X: The STB issued a NITU on November 12, 2008, which has been extended twenty-one times, most recently through October 2019.

D. Examples of Iowa Trails Act Takings Claims in the CFC

- *Burgess v. United States*, 09-cv-00242-FMA (Fed. Cl., filed Apr. 20, 2009)—STB Docket No. AB-33-316X: The STB issued a NITU on December 10, 2013, which was extended eleven times until a trail use agreement was reached in February 2019.
- *Phipps v. United States*, 14-cv-00424-MBH (Fed. Cl., filed May 16, 2014)—STB Docket No. AB-6-479X: The STB issued a NITU on June 7, 2012, which was extended eight times before a trail-use agreement was reached on October 9, 2016.

These examples are representative of cases around the country.[4] In *Brown v. United States*, 14-cv-00094-RAH (Fed. Cl., filed Jan. 31, 2014), involving land in Tennessee, the NITU issued on August 13, 2009 in STB Docket AB-55-694X and has been extended twenty times, spanning a decade. In *D'Ostroph v. United States*, 13-cv-00789-VJW (Fed. Cl., filed Oct. 10, 2013), involving land in New York, the STB issued a NITU on November 4, 2008 in STB Docket AB-369-7X. The STB extended the NITU seventeen times until a trail-use agreement was reached in May 2018.

These cases illustrate a common theme: landowners' state law property rights preempted by a federal order, often for years before a trail use agreement is reached (or not) between third parties. To be compensated for this taking, the landowner must file a claim within the six-year statute of limitations of the Tucker Act. *See* 28 U.S.C. §§ 1491, 2501.

The government now seeks to overrule long-standing precedent by declaring that it should be permitted to issue orders preempting landowners' state law rights, for which it *might* provide compensation, depending on events that *may* occur at

[4] In its *Amicus* Brief, the Rails-to-Trails Conservancy ("RTC") states that within the last 6 years, 82 NITUs had been issued: 32 resulted in the railroad and trail group notifying the STB that a trail-use agreement had been reached; 50 either expired without an agreement or remain in effect. (RTC Br., 26.)

some indefinite point after the taking. The government's position is as untenable from an equitable perspective as it is unconstitutional from a legal perspective.

The Court's decision in this case will affect not only Ms. Caquelin, but also the landowners whose claims are pending in the cases above, the landowners in other states with pending claims before the CFC, and future landowners who will be indefinitely deprived of their state-law property rights by virtue of federal order.

III. SUMMARY OF THE ARGUMENT

This Court's precedent, holding that the government violates the Fifth Amendment to the Constitution when it blocks the landowner's state-law rights by invocation of Section 8(d) of the Trails Act without compensation, was correctly decided. Moreover, the government's proposed rule would create an unworkable standard unmoored from any precedent of this Court or the Supreme Court.

IV. ARGUMENT IN SUPPORT OF AFFIRMANCE

A. A Fifth Amendment Taking Occurs When the Government Blocks a Landowner's State Law Property Rights by Invocation of Section 8(d) of the Trails Act.

This Court has repeatedly held, contrary to the government's current position, that a Fifth Amendment taking occurs, for which just compensation must be provided, when a landowner's state law property rights are preempted, *i.e.*, when the STB issues a NITU under Section 8(d) of the Trails Act.

1. Federal preemption of state law is necessary to achieve the government's goal of preserving railroad rights-of-way for future use.

In 1839, Justice Taney noted, "One of the most important objects and interests for the preservation of the Union is the establishment of railroads." *Bank of Augusta v. Earle*, 38 U.S. 519, 526 (1839). Indeed, railroads have been a cornerstone of commerce in this country for roughly two centuries. As Justice Brennan noted in 1990, railroads reached a peak of 272,000 track miles in 1920, but had decreased to only 141,000 miles in use, with continued losses over time. *Preseault v. I.C.C.*, 494 U.S. 1, 5 (1990) ("*Preseault I*"). As competing technologies became more prevalent, railroad use decreased, such that between 1947 and 1975, railroad earnings (adjusted for inflation) decreased by 25%. *See, e.g.* S.REP. 94-499, at 2, *reprinted in* 1975 U.S.C.C.A.N. 14, 15-16. This in part led to the passage of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), Pub.L. 94-210, 90 Stat. 31 (1976). Section 809 of the 4-R Act provided for the allocation of funding "to other Federal programs concerned with recreation or conservation."

This did not solve the problem. As noted in *Preseault I*, the measures "ha[d] not been successful in establishing a process through which railroad rights-of-way which are not immediately necessary for active service can be utilized for trail purposes." 494 U.S. at 6 (alternation in original) (citing H.R.REP. No. 98-28, at 8, *reprinted in* 1983 U.S.C.C.A.N. 112, 119). Under the then-existing law, formal

abandonment for railroad purposes was required, which would normally trigger state law reversion, so that "once a right-of-way [was] abandoned for railroad purposes there may be nothing left for trail use." *Id.* at 8-9 (citation omitted).

A solution was crafted in the 1983 Amendments to the Trails Act. As amended, Section 8(d) preempts state law and allows a railroad to sell its rights to an otherwise abandoned right-of-way to a third-party for "interim trail use." 16 U.S.C. § 1247(d). Such use is "not be treated, for any purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." *Id.*

Under the Trails Act, a railroad, seeking to remove its responsibility for a rail corridor, must first petition the STB for authority to abandon the right-of-way. 49 U.S.C. § 10903. The STB grants such a petition when it concludes that the right-of-way is not needed for present or future transportation needs. 49 U.S.C. § 10905; 49 C.F.R. § 1152.28.[5] Interested parties wishing to use a proposed *abandoned* rail corridor for a public trail must submit a request to the STB pursuant to 49 C.F.R. § 1152.29(a). The railroad then acknowledges its willingness, or not, to negotiate an interim trail use agreement.

[5] The government's assertion that "railbanking" is an "additional option" to abandonment or discontinuance of a rail line is incorrect. (Appellant's Br., 6-7) Every railroad right-of-way subject to a NITU has been sought first to be *abandoned* by the railroad pursuant to 49 U.S.C. § 10903. There is no third or "additional option." Abandonment of the right-of-way is a prerequisite to trail use.

It is at that point that the STB invokes Section 8(d) and issues a NITU, which is published in the Federal Register. Though the rail-to-trail conversion may be years later, this is the government's final act. The STB maintains jurisdiction over the land at issue so that it may authorize a new railroad line in the future (often referred to as "railbanking"). Otherwise, the STB's involvement has concluded, leaving the parties to reach an agreement as to the sale of the railroad's rights. While a NITU typically provides 180 days to reach a trail use agreement, unlimited extensions are permitted. 49 C.F.R. § 1152.29(e). Should an agreement not be reached, 49 C.F.R. § 1152.29(d)(1) permits the line to be fully abandoned, and the land to "revert" to the landowners.

If the parties do agree, the railroad's rights are transferred to the trail operator and the force of the NITU extends indefinitely for the duration of trail use. *Caldwell v. United States*, 391 F.3d 1226, 1230 (Fed. Cir. 2004). The trail-use agreement itself, between private parties, need not be filed with the STB. Landowners might never know that any change to their land occurred until a public trail is constructed through it.

2. When the government invokes Section 8(d) of the Trails Act, a Fifth Amendment taking occurs for which landowners must be paid just compensation.

The decisions from the Supreme Court and this Court, among others, are clear: when the government invokes Section 8(d) of the Trails Act, a Fifth Amendment taking occurs for which landowners must be paid just compensation.

Initially, in *Preseault I*, the Supreme Court clarified that the Trails Act is constitutional so long as the landowner is paid just compensation. There, the Interstate Commerce Commission (the "ICC," predecessor to the STB) approved an agreement for interim trail use over the landowners' opposition. 494 U.S. at 9-10. In doing so, the ICC reasoned that "[i]nevitably, interim trail use will conflict with the reversionary rights of adjacent land owners, but that is the very purpose of the Trails Act." *Id.* at 10 (alteration in original). The landowners appealed, arguing, *inter alia*, that Section 8(d) was "unconstitutional on its face because it takes private property without just compensation." *Id.* Ultimately, the Supreme Court explained that the Fifth Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power," *i.e.*, payment of just compensation to the landowner. *Id.* at 11 (citation omitted). Phrased differently, as this Court later did, "having and exercising the power of preemption is one thing; being free of the Constitutional obligation to pay just compensation for the state-

created rights thus destroyed is another." *Preseault v. United States*, 100 F.3d 1525, 1537 (Fed. Cir. 1996) (en banc).

If, when, and under what circumstances the use of Section 8(d) constitutes a taking went partially unanswered in *Preseault I*, as the question was deemed premature—the landowners had not yet availed themselves to the Tucker Act. 494 U.S. at 17. The Supreme Court showed its hand though, observing that while "only some rail-to-trail conversions will amount to takings[,]" this was because "[s]ome rights-of way are held in fee simple" while others are "easements that do not even as a matter of state law revert [to the landowner] upon interim use as nature trails." *Id*. at 16. The implication, of course, being that where a reversionary property right exists and is delayed by the government's exercise of Section 8(d), a taking has occurred for which compensation must be provided.

By 2010, this Court was unequivocal, pronouncing that it was "settled law" that a taking occurs "when government action **destroys** state-defined property rights by converting a railway easement to a recreational trail." *Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010) (emphasis added), *reh'g denied*, 646 F.3d 910 (Fed. Cir. 2011).[6]

[6] This Court is not alone in its holding. The D.C. Circuit and the Eighth Circuit have held similarly. *See Citizens Against Rails-to-Trails v. S.T.B.*, 267 F.3d 1144, 1149 (D.C. Cir. 2001); *Grantwood Vill. v. Mo. Pac. R.R. Co.*, 95 F.3d 654, 658-59 (8th Cir 1996).

i. *This Court has repeatedly held that the statute of limitations begins to run when the landowners' claims accrue – upon the STB's first invocation of Section 8(d) of the Trails Act.*

In prior cases, the government has successfully blocked landowners' otherwise meritorious claims by invoking the Tucker Act's six-year statute of limitations. This Court has held, without exception, the statute of limitations begins to run—because the landowners' claims accrued—on the date the STB first invokes Section 8(d) of the Trails Act, ***regardless of subsequent events***. As this Court explained in *Caldwell*, the operative action is the government's issuance of the NITU, not the negotiation of a private agreement between third parties:

> The issuance of the NITU is the only *government* action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way. The task of finalizing the trail use agreement under the Trails Act falls entirely on the railroad and trail operator. Indeed, the regulations do not even require the railroad and the trail operator to notify the STB that an agreement has been finalized . . . .

391 F.3d at 1233-34.

Two years later in a case originating out of Kansas, *Barclay v. United States*, this Court reaffirmed its decision in *Caldwell*:

> Thus, a Trails Act taking begins and a takings claim accrues, if at all, on issuance of the NITU. We explicitly held in *Caldwell* that "[w]hile the taking may be abandoned . . . . by the termination of the NITU[,] the accrual date of a single taking remains fixed." The issuance of the NITU is the only event that must occur to "entitle the plaintiff to institute an action." Accrual is not delayed until a trail use agreement is executed or the trail operator takes physical possession of the right-of-way.

443 F.3d 1368, 1373 (Fed Cir. 2006) (citations omitted). In *Barclay*, this Court rejected as "bizarre" the government's instant argument, *i.e.*, that the NITU can result in two different takings, one temporary and the latter permanent:[7]

> [W]e agree with the district court's conclusion that the series of STB NITU orders must be viewed as part of a single and continuous government action rather than as new takings. Any other approach would result in multiple potential takings of the same reversionary interest. In *Caldwell*, we rejected that approach, following *United States v. Dow*, 357 U.S. 17, 24 [](1958), where the Supreme Court dismissed as "bizarre" the contention that there could be "two different 'takings' of the same property, with some incidents of the taking determined as of one date and some as of the other." So long as abandonment was not consummated, the STB retained jurisdiction over the right-of-way. Thus, any extensions or modifications of the original NITU were not separate potential takings.

443 F.3d at 1375-76 (internal citation removed).

In *Illig v. United States*, the government again successfully used the "bright-line" rule in *Caldwell* to bar the otherwise meritorious claims of dozens of Missouri landowners. 274 F. App'x 883 (Fed. Cir. 2008). The landowners petitioned the Supreme Court for review. In arguing against *certiorari*, the government lauded the "virtue" and correctness of this Court's holdings:

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[7] Although nothing about a trail-use agreement is inherently "permanent," *see, e.g.*, the Kansas cases, *Pankratz* and *Anna F. Nordhus Trust*, *supra* § II.B, trail users can sell their interest decades after the NITU. And in a case in Newton County, Georgia, the trail-use agreement has taken the form of a year-to-year lease. STB Docket AB-290-343X; *see also Jackson v. United States*, 14-cv-00397-MCW (Fed. Cl., filed May 9, 2014) (Fifth Amendment claims brought by adjacent landowners in Newton County, Georgia).

Petitioners contend that any taking that commences upon issuance of the NITU is "temporary at the outset," and that their takings claim should not accrue until the taking is "transformed into a permanent interference." The court of appeals has correctly rejected that contention. *See Caldwell*, 391 F.3d at 1235. As the court explained, under the current regulations implementing the Trails Act, "issuance of the NITU is the only government action in the railbanking process that operates to prevent abandonment of the corridor and to preclude the vesting of state law reversionary interests in the right-of-way." *Id*. at 1233-1234. To the extent the government's action results in a taking of property, it is a "single taking," *id*. at 1235, of a "single reversionary interest," *Barclay*, 443 F.3d at 1378.

The issuance of the NITU thus "marks the 'finite start' to either temporary or permanent takings claims." *Caldwell*, 391 F.3d at 1235. When the NITU is issued, all the events have occurred that entitle the claimant to institute an action based on federal-law interference with reversionary interests, and any takings claim premised on such interference therefore accrues on that date. *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1355-1356 (Fed. Cir. 2006), *aff'd*, 128 S. Ct. 750 (2008) (internal quotation marks and citations omitted). The fact that any taking resulting from the interference may later prove to have been temporary is irrelevant; as the court of appeals has explained, "[i]t is not unusual that the precise nature of the takings claim, whether permanent or temporary, will not be clear at the time it accrues." *Caldwell*, 391 F.3d at 1234.

Finally, accepting the proposition that the NITU marks the "finite start" of their claim based on the preclusion of reversionary interests, petitioners contend that the preclusion does not "stabilize[]," and the claim thus does not accrue, until the rail carrier and the trail operator enter into a trail use agreement. Petitioners rely for that contention on *United States v. Dickinson*, 331 U.S. 745 (1947), in which the Court held that the statute of limitations did not bar a claim for a taking of property by gradual flooding "when it was uncertain at what stage in the flooding operation the land had become appropriated to public use." *United States v. Dow*, 357 U.S. 17, 27 (1958). In this case, however, petitioners do not dispute that the preclusion of reversionary interests on which their takings claim rests occurred immediately upon issuance of the NITU, rather than gradually, as in *Dickinson*. That it may not

> have been clear at the outset whether the preclusion was indefinite or merely temporary does not change the fact that the NITU marked the "finite start" to the preclusion. *Caldwell*, 391 F.3d at 1235.

Brief for the United States in Opposition to Petition for Writ of Certiorari at 12-13, *Illig v. United States*, (U.S. May 29, 2009) (No. 08-852), 2009 WL 1526939, at *12-13.[8]

After *Caldwell*, *Barclay*, and *Illig*, a group of Arizona landowners heeded this Court's directive: file your claims as soon as the government takes your property, regardless of if or when a trail use agreement is reached. *Ladd*, 630 F.3d at 1017-18. This Court underscored yet again its holdings in *Caldwell* and *Barclay*:

> Because according to our precedent, a takings claim accrues on the date that a NITU issues, events arising after that date—including entering into a trail use agreement and converting the railway to a recreational trail—cannot be necessary elements of the claim. Hence it is irrelevant that no trail use agreement has been reached and that no recreational trail has been established.

630 F.3d. at 1024; *see also id.* at 1023 ("The NITU is the government action that prevents the landowners from possession of their property unencumbered by the easement.").

[8] In *Marvin M. Brandt Revocable Tr. v. United States*, the government argued a position contrary to that which it took 70 years earlier regarding the reversionary interest the United States retained in railroad rights-of-way. 572 U.S. 93 (2014). Acknowledging as much, the Supreme Court explained, "The Government loses that argument today, in large part because it won when it argued the opposite before this Court more than 70 years ago[.]" *Id*. at 102. Likewise, the government, having won the argument in *Caldwell Barclay*, and *Illig*, should lose this argument today.

In *Bright v. United States*, a case originating out of Kansas and Missouri, this Court reaffirmed this point, stating, "[T]he effect of the NITU was to stay railroad abandonment during the pendency of trail use. A further effect of the NITU was to accrue an action for compensation by any affected landowners based on a Fifth Amendment taking." 603 F.3d 1273, 1276 (Fed. Cir. 2010).

Finally, this Court again observed in *Navajo Nation v. United States*, "A takings claim must be predicated on actions undertaken by the United States . . . . What a plaintiff may challenge under the Fifth Amendment is what the government has done, not what [third parties] have done." 631 F.3d 1268, 1274 (Fed Cir. 2011) (citing *Fallini v. United States*, 56 F.3d 1375, 1383 (1995)). The *Navajo Nation* court went on to reaffirm *Ladd* ("explaining that a takings claim accrues when the government takes action which deprives landowners of possession of their property unencumbered by [an] easement, regardless of whether third parties ever take physical possession of that easement") and *Caldwell*. 631 F.3d at 1275 (internal citations and quotations omitted).

ii. *The Supreme Court left no doubt in* Knick v. Township of Scott *that a taking occurs at the point in which the government violates the constitution, regardless of subsequent events.*

On June 21, 2019, the Supreme Court issued its opinion in *Knick v. Township of Scott*, 139 S.Ct. 2162 (2019). *Knick* involved a landowner's right to bring her federal takings claim against the Township of Scott, Pennsylvania in federal court.

Id. at 2168. The Township had passed an ordinance requiring that all land upon which cemeteries were located be open to the public until dusk. *Id.* Ms. Knick's property contained a small family cemetery and was therefore required by the Township to be open to the public, though the Township eventually modified the ordinance to excuse Ms. Knick's property. *Id.*

While primarily a case regarding the right to bring a takings claim in federal court, the *Knick* Court went to great lengths to explain that the Constitution is violated when the government takes private property for a public use without compensation, and that subsequent events cannot undo the constitutional violation once it occurs:

- "A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it." *Id.* at 2167.
- "We have long recognized that property owners may bring Fifth Amendment claims against the Federal Government as soon as their property has been taken." *Id*. at 2170. "And we have explained that 'the act of taking' is the 'event which gives rise to the claim for compensation.' " *Id.* (quoting *United States v. Dow*, 357 U.S. 17, 22 (1958)).

- "The Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner. That principle was confirmed in *Jacobs v. United States*, 290 U.S. 13, [17] (1933), where we held that a property owner found to have a valid takings claim is entitled to compensation as if it had been paid contemporaneously with the taking—that is, the compensation must generally consist of the total value of the property when taken, plus interest from that time." *Knick*, 139 S.Ct. at 2170 (internal quotations omitted).
- "[A] property owner has a Fifth Amendment entitlement to compensation as soon as the government takes his property without paying for it." *Id.*
- "In sum, because a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time. Just as someone whose property has been taken by the Federal Government has a claim 'founded . . . upon the Constitution' that he may bring under the Tucker Act. . . ." *Id.* at 2172.

Particularly relevant to the government's argument in this case is the *Knick* Court's steadfast repudiation that events subsequent to a taking bear upon the government's liability; a potentially temporary taking is still a taking:

> [I]n *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 [](1987), the Court returned to the understanding that the Fifth Amendment right to compensation automatically arises at the time the government takes property without paying for it. Relying heavily on *Jacobs* and other Fifth Amendment precedents . . . *First English* held that a property owner is entitled to compensation for the temporary loss of his property. We explained that "government action that works a taking of property rights necessarily implicates the 'constitutional obligation to pay just compensation.' "

Knick, 139 S.Ct. at 2171 (quoting *First English*, 482 U.S. at 315).

The *Knick* Court held that subsequent government action that renders what at first appears to be a permanent taking into a temporary one does not cure the constitutional violation where no just compensation is paid. *Id.* The Court again underscored that later payment of compensation may remedy the violation, but it cannot nullify it:

> A later payment of compensation may remedy the constitutional violation that occurred at the time of the taking, but that does not mean the violation never took place. The violation is the only reason compensation was owed in the first place. A bank robber might give the loot back, but he still robbed the bank.

Id. at 2172.

B. <u>Preserving Precedent Is Paramount in Property Rights Cases</u>.

The Supreme Court "has traditionally recognized the special need for certainty and predictability where land titles are concerned[.]" *Leo Sheep Co. v.*

United States, 440 U.S. 668, 687 (1979). Relatedly, the doctrine of *stare decisis* "reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (internal quotation marks omitted). The Supreme Court has identified several factors to consider in deciding to overrule a past decision, including "the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision." *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps.*, 138 S.Ct. 2448, 2478-79 (2018).

As Justice Kagan observed in her dissenting opinion in *Knick*, "[a]dherence to precedent is a foundation stone of the rule of law." 139 S.Ct. at 2189 (internal quotation marks omitted). Moreover:

> [T]he entire idea of *stare decisis* is that judges do not get to reverse a decision just because they never liked it in the first instance. Once again, they need a reason *other than* the idea that the precedent was wrongly decided. . . . For it is hard to overstate the value, in a country like ours, of stability in the law.

Id. at 2190 (emphasis in original) (internal quotation marks and citation omitted).

1. *Arkansas Game & Fish* changes nothing; it is "simply and only" a case about flooding.

The government attempts to position the Supreme Court's opinion in *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23 (2012), as somehow being a fundamental shift in the Supreme Court's takings jurisprudence. It is not. The Court itself could not have been clearer: "We rule today, *simply and*

only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." 568 U.S. at 38 (emphasis added); *see also id.* at 37 (describing the Court's opinion as a "modest decision").

Rather than call into question this Court's holding in *Ladd*, *Arkansas Game & Fish* underscores the correctness of this Court's wisdom. As the Court in *Arkansas Game & Fish* observed, "Once the government's actions have worked a taking of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 33 (internal quotation marks omitted)).

In an attempt to wedge Trails Act takings jurisprudence into the narrow *Arkansas Game & Fish* holding, the government argues that a NITU neither invokes Section 8(d) nor authorizes trail use. (Appellant's Br., 4-5 & 27.) Neither contention is correct. A NITU explicitly invokes Section 8(d) and explicitly allows trail use. Indeed, in this case, the NITU provided:

> [The trail group] filed a request for the issuance of a notice of interim trail use (NITU) to negotiate with the [Railroad] for acquisition of the line for use as a trail under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d) . . .
>
> * * *
>
> It is ordered: . . . [T]he notice served and published in the Federal Register on June 5, 2013, exempting the abandonment of the line described above is modified to the extent necessary to implement interim trail use/rail banking as set forth below to permit the City to negotiate with [the Railroad] for trail use for the rail line . . .

Appx. 1403, 1405.

Notably, the government previously not only agreed with, but advocated for, this view of a NITU. In its opposition brief in *Illig*, the government argued:

> The courts below correctly held that petitioners' claim was untimely because it was filed more than six years after the ICC issued a NITU, **which authorized interim trail use** and delayed abandonment of the railroad easement while the rail carrier and a trail operator negotiated a final interim trail use agreement.
>
> * * *
>
> **As the court explained in *Caldwell*, when the ICC issued the NITU, it simultaneously authorized railbanking and interim trail use, and delayed consummation of abandonment under federal law pending negotiations between the rail carrier and the trail operator.** At that point, the ICC's involvement in the disposition of the railroad easement was at its end; no further approval would be required for the trail operator to commence interim trail use. Issuance of the NITU thus marked the moment at which federal law (1) at least temporarily forestalled the vesting of any state-law reversionary interests, and (2) authorized indefinite preclusion of such reversionary interests, contingent on the finalization of an interim trail use agreement.

2009 WL 1526939, at *7, *10 (emphasis added).

2. This Court's "bright-line rule" works; the government's proposed "rule" would create chaos.

The practical effect of the government's position would be to burden landowners' property for years—possibly decades—without compensation. (*See supra* §§ II, IV.A.) The government seeks to invoke a federal statute that explicitly preempts state law property rights without paying for the damage caused by preemption until, an undefined point in the future, if ever. This approach ignores

the reality to the landowners whose property is directly impacted by the government's order.

The government would shift the focus in Trails Act takings cases to first ensuring the government has achieved its goal of "railbanking" before evaluating the effect the issuance of the government's order has on an owner's land. For more than a century, the Supreme Court has instructed courts to do just the opposite, by focusing on the landowner's loss, not the government's gain. *Bos. Chamber of Commerce v. City of Bos.*, 217 U.S. 189, 195 (1910) ("[The Fifth Amendment] merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is, What has the owner lost? not, What has the taker gained?").

Here, Ms. Caquelin was compensated $900 for the approximate nine-month period of time that her property was authorized by the federal government for use as a public recreational trail.[9] For those nine months, any purchaser of Ms. Caquelin's property would have purchased it in that condition—a condition created solely by the federal government's invocation of Section 8(d) of the Trails Act. There was no

[9] The government argues that its taking of Ms. Caquelin's property was "too inconsequential" to amount to taking. (Appellant's Br., 3; *see also id.*, 4, 44 & 55-56). This, too, is contrary to the Supreme Court precedent. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982) ("[O]ur cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.")

windfall to Ms. Caquelin and there will be no windfall to other owners who face the same situation. Many owners have their state law property rights preempted by the Trails Act for years. (*See supra* §§ II, IV.A.) During these periods of time, the landowners' property is authorized by the federal government for use as a public recreational trail, in contravention of the landowner's state law property rights. Any knowing purchaser of the landowners' property during this time would take the property in that condition. While the law may not be successful in creating a public trail in every single case (although in many it is), it is successful in blocking the owners' state-law rights in the property in every case; and for that, the owners must be compensated.

Simply put, the government cannot square its position with existing precedent that "[a]s soon as private property has been taken . . . the landowner has *already* suffered a constitutional violation, and the self-executing character of the constitutional provision with respect to compensation, is triggered." *San Diego Gas & Elec. v. City of San Diego*, 45 U.S. 621, 654 (1981) (Brennan, J., dissenting) (emphasis original) (internal citations and quotation marks omitted) (observing also that the Court "has consistently recognized that the just compensation requirement

in the Fifth Amendment is not precatory: once there is a 'taking;' compensation *must* be awarded.").[10]

After the STB issues a NITU the trail group and the railroad may fail to reach an agreement, or the railroad may ultimately consummate its abandonment authority; but as of the date of the NITU the damage (*i.e.*, taking) has occurred. As Judge Mayer of the CFC (then-United States Claims Court) eloquently explained:

> That is small comfort to a private party who cannot know in advance that the government will not exercise the statutory authority it has threatened, or that if it does Congress will not approve. It is one thing to have the sword of condemnation resting available but unpointed in the government sheath. It is another to have it suspended like that of Damocles directly above one's property . . . Plaintiffs would be imprudent indeed to invest effort or money in construction, planning, subdivision or any other potentially incompatible activity. The same goes for any putative purchasers.

Althaus v. United States, 7 Cl. Ct. 688, 696 (1985) (internal quotation marks and citation omitted).

The date of the STB's issuance of the initial NITU is important not just for statute of limitations purposes. When determining just compensation, the property is valued on the date of the initial NITU. *See McCann Holdings Ltd. v. United States*, 111 Fed. Cl. 608, 615 (2013) (citing *Miller v. United States*, 317 U.S. 369, 374

[10] A majority of the Court in *First English* would, six years later, adopt Justice Brennan's dissent from *San Diego Gas*, *see First English*, 482 U.S. at 318, which would later support Justice Brennan's ruling in *Preseault I*. 494 U.S. at 11, 14.

(1943)). Owners are entitled to interest for the delay in payment beginning on the date of the initial NITU. *See Sears v. United States*, 132 Fed. Cl. 6, 27-28 (2017). Indeed, to make a claim at all, the owner must have owned the land on the date of the initial NITU. *Brooks v. United States*, 138 Fed. Cl. 371, 380 (2018).

The government's proposal leaves open critical questions, not the least of which is, precisely when a takings claim accrues if not upon the government's order invoking Section 8(d)? Would it be the date of the trail-use agreement? Or, perhaps the date the third-parties reported the existence of the trail-use agreement to the STB? Would the nature of the trail-use agreement, such as being a year-to-year lease, matter? (*See supra* n.7.) And, what about notice to the landowners? The Court has previously found the NITU being published in the Federal Register as sufficient to provide owners with notice of their claim. *Ladd v. United States*, 713 F.3d 648, 653 (Fed. Cir. 2013). Under the government's proposed paradigm, how would landowners be notified that their constitutional rights have been violated? The government's position is not simply asking this Court to overrule *Ladd*, *Caldwell*, and *Barclay*, but rather, every tenet of property law and the Constitutional amendment upon which Ms. Caquelin's claim is premised.

V. CONCLUSION

For years, the government has successfully advocated for the STB's first invocation of Section 8(d) of the Trails Act, *i.e.*, the first issuance of a NITU, being

the date when a landowner's taking claim accrues. The body of Trails Act takings jurisprudence, largely from this Court, has evolved from this now-well established principle. The government enjoyed the advantage of this Court's rulings to deny the claims for compensation by hundreds of property owners as time-barred. The government cannot now reverse course, leaving chaos in its wake, simply because its sword has been dulled by landowners' abiding by this Court's directives and filing their claims as soon as they accrue.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, the 17th day of July, 2019, the undersigned filed the foregoing Motion and attachments with the United States Court of Appeal for the Federal Circuit through the Court's CM/ECF system. All case participants are registered CM/ECF users and service will be accomplished by the Court's CM/ECF system.

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

This brief complies with the type-volume limitation of Federal Circuit Rule 32(a). This brief contains 6,934 words, exempting the portions of the brief described in Federal Rule of Appellate Procedure 29(a)(5) and Federal Circuit Rule 32(b). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared using Microsoft Word, Microsoft Office Professional Plus 2016 in 14-Point Times New Roman, a proportionally spaced font.

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