No. 22-1277

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DAVID H. BEHRENS, ARLINE M. BEHRENS, *et al*.,

Plaintiffs

MARK W. HEINTZ, HELEN M. HEINTZ, et al.

Plaintiffs-Appellants

v.

UNITED STATES,

Defendant-Appellee

Appeal from the United States Court of Federal Claims
No. 1:15-cv-00421 (Hon. Patricia E. Campbell-Smith)

CORRECTED BRIEF OF MISSOURI FARM BUREAU FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2022-1277

Short Case Caption DAVID H. BEHRENS, ARLINE M. BEHRENS, et al., and MARK W. HEINTZ, HELEN M. HEINTZ, et al., v. UNITED STATES

Filing Party/Entity Amicus Curiae

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 02/21/2022

Signature: /s/ Meghan S. Largent

Name: Meghan S. Largent

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Missouri Farm Bureau Federation		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

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I. INTEREST OF AMICUS[1]

Missouri Farm Bureau Federation ("Farm Bureau" or "Amicus") is a not-for-profit organization dedicated to supporting Missouri agriculture, offering benefits to over 130,000 state-wide members.

Amicus and its thousands of members have a vital and direct interest in the outcome of this case. Many of its members have agricultural operations in the vicinity of abandoned railroad rights of way, including the right-of-way at issue in this matter, and its members own vast amounts of land in Missouri burdened by a variety of easements with long-understood limitations on use under Missouri law. The United States Court of Federal Claims' ("CFC") decision upends settled expectations of what uses can be made of property subject to these easements.

II. STATEMENT OF THE CASE

This case involves a 144-mile railroad corridor constructed in 1901. Much of this railroad corridor was established by conveyances to the St. Louis, Kansas City & Colorado Railroad Company from the then-owners of land underlying the corridor, which spanned seven counties and cut across the midsection of Missouri. For the next century, railroads operated over the line, from the outskirts of the St. Louis

[1] Pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure 29(a)(2), all parties have consented to the filing of this Brief. Further, pursuant to Rule 29(a)(4)(E)(i)-(iii), Amicus states 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 Amicus contributed money intended to fund preparing or submitting this Brief.

region in the east, through the northern Ozarks, and into the Kansas City region in the west, connecting the eastern and western sides of the state.

In 1999, the railroad was owned by the Missouri Central Railroad ("Missouri Central"), a wholly owned subsidiary of the regional electric company, Ameren UE ("Ameren"). Press accounts of the rail-trail conversion acknowledge that this corridor has been abandoned for many decades before the events underlying this taking occurred. An article appearing in the *Columbia Missourian* in September 2019 quoted the head of the Missouri Rock Island Trail Inc., Greg Harris, stating, "We wanted to take an eyesore running through town and turn it into something meaningful." *See* Molly Hart, *The Rock Island Corridor Battle: 'How Would They Like it if I Built a Trail Through Their Backyard?'*, COLUMBIA MISSOURIAN, Sept. 5, 2019. In the same article, an affected landowner, Mark Chamberlin, told the reporter that "he planned his farm operation under the impression that the railroad was permanently abandoned" adding, "Our cows actually cross the tracks to go to pasture ... We wouldn't have done that, except it'd been empty 40 years." *Id.* The following photo shows the corridor as it existed over Chamberlin's farm in September 2019:

Id. Another article, printed by the Jefferson City based *News Tribune*, described the corridor as a "decades-dormant railroad." Allen Fennewald, *Opposition to Rock Island Trail 'Up Against Goliath'*, NEWS TRIBUNE (Dec. 24, 2017). That article also included the following photo of the railroad right-of-way:

Though long abandoned in every tangible way, for the corridor to be abandoned under federal law, Missouri Central needed to obtain permission from the Surface Transportation Board ("STB"). *See* 49 U.S.C. § 10903. In 2014, Missouri Central did just that, asking the STB for permission to abandon the line.

Shortly thereafter, the Missouri Department of Natural Resources ("DNR") asked the STB to invoke § 1247(d) of the National Trails System Act Amendments of 1983 (the "Trails Act") and convert this abandoned railroad right-of-way into a public recreational trail, and thereby preventing the owners of the underlying land from regaining unencumbered title and possession of their land. That same day, Missouri Central sent the STB a letter, agreeing to negotiate with DNR to convert the abandoned right-of-way easement into a public recreational trail.

Also that same day, the Farm Bureau contacted the STB by letter, asking the STB to not invoke the Trails Act. The Farm Bureau explained that creating a public recreational trail would impose significant burdens *on the landowners*, especially those landowners with existing agricultural operations.

Organizations supporting the trail, including the Missouri Bicycle and Pedestrian Federation, Missouri Rock Island Trail, Inc., and the national Rails-to-Trails Conservancy supported the DNR's request for a new public recreational corridor across these Missouri landowners' property. The Farm Bureau continued to oppose the request and asked the STB to, at a minimum, hold public hearings

before invoking the Trails Act. Missouri Central opposed any public hearings and asked the STB to "expeditiously issue the Notice of Interim Trail Use" ("NITU").

The STB did exactly what Missouri Central, DNR, and trail supporters asked. On February 26, 2015, the STB invoked § 1247(d) of the Trails Act and imposed a new easement for public recreation and so-called "railbanking" across landowners' property. The STB then granted five extensions of the NITU. On December 20, 2019, Missouri Central and DNR notified the STB that they had finally reached a trail-use agreement.

This 144-mile section of the trail is just one part of a much larger trail project in Missouri that seeks to connect 740 miles of federally converted rail-trail corridors. Landowners on other portions of rail-trail corridors have sought and received compensation from the federal government. *See Glosemeyer v. United States*, 45 Fed. Cl. 771 (2000) (landowners receiving compensation for what is now the over 200-mile Katy Trail State Park); and *Baker v. United States*, No. 1:14-cv-548-RHH, ECF No. 93 (Fed. Cl. Jan. 12, 2018) (landowners receiving compensation for this corridor, now known as the "Rock Island Spur," extending 47 miles west of the western end point of this corridor).[2]

[2] *See also* Bogan, Jesse, *Missouri Clears the Path for a Companion to the Katy Trail*, ST. LOUIS POST-DISPATCH (Dec. 13, 2015).

Like the landowners in *Glosemeyer* and *Baker,* Missouri landowners filed suit in the CFC, alleging the federal government's issuance of the NITU constituted a taking of their property because, under Missouri law, the railroad easement over their land would have extinguished upon abandonment. Unlike those earlier Missouri cases in the CFC, Judge Patricia Campbell-Smith reached a result at odds with the CFC's previous opinions and Missouri law.[3] Despite finding that the government had conceded that each relevant deed "likely conveys an easement as opposed to a fee interest because each deed involves nominal consideration," *Behrens v. United States*, 154 Fed. Cl. 227, 231, 233 (2021), that under Missouri law, such conveyances are "voluntary grants" to a railroad, and "shall be held and used for the purpose of such grant only[,]" *Id.* (citing *Brown v. Weare*, 152 S.W.2d 649, 653-54 (Mo. 1941);

[3] Missouri law permits the Missouri Supreme Court to respond to certified questions. MO. REV. STAT. § 477.004.1. However, that court has repeatedly held that the Missouri Constitution does not grant it original jurisdiction to render opinions on certified questions. *See, e.g. Jiang v. Porter*, No. 4:15-CV-1008(CEJ), 2016 WL 193388, at *2 (E.D. Mo. Jan 15, 2016) (collecting cases).

In a prior ruling in this matter, Judge Campbell-Smith expressed a desire to have the Missouri Supreme Court weigh in on the issue of whether, under Missouri law, the scope of the easements granted to the railroad included the right to use the land for a public park. *See Behrens v. United States*, No. 15-421L, 2021 WL 1264558, at *2 (Fed. Cl. Apr. 2, 2021) (ECF No. 116) (the "Stay Order"). Confronted with the Missouri Supreme Court's conclusion as to its own jurisdiction, the trial court opted not to do so, but argued that the parties should consider whether to seek guidance from Missouri high court, and stayed the case for that purpose. *Id*. The parties ultimately concluded that there was no "practical course to do so" and requested a ruling on the pending motions. *See Id*., (ECF No. 118.)

MO. REV. STAT. § 388.210(2) (West 1969)), and that all easements must have a definable scope with a "definite purpose[,]" *Id.*, (quoting *Maasen v. Shaw*, 133 S.W.3d 514, 518 (Mo. Ct. App. 2004)), the trial court nevertheless concluded, that "the easements at issue in the parties' motions for summary judgment are broad enough to encompass trail use." *Id.* at 233.[4]

The CFC's determination shocks the conscience of the Amicus whose members are some of the largest landholders in Missouri. Prior to the trial court's ruling here, Amicus could not contemplate such a result under Missouri law. The decision in this case will not only directly affect the named Plaintiffs, but it will also indirectly affect all Missouri landowners, who will be left to speculate over future unrelated uses the government may authorize along, over, and through any easements on their property.

[4] In her ruling, the trial court did not acknowledge the barriers of certifying questions, *see* note 3, *supra*, and merely noted that the parties had requested that "the court rule on their motions without guidance from the Supreme Court of Missouri." While true to a point, this ignores the practical limitations of seeking such guidance, as the court had already indicated. *See* note 3, *supra*.

Nevertheless, the trial court found itself in the precise situation which existed in *Glosemeyer*—confronted with a "novel question of Missouri property law" but arguably barred from seeking certification of that question. Stay Order, at *2 (citing *Glosemeyer*, 45 Fed. Cl. at 780, n.19). Both the *Glosemeyer* and the trial court here reached the same conclusion, to "apply Missouri law as we find it." *Glosemeyer*, 45 Fed. Cl. at 780, n.19; *Behrens*, 154 Fed. Cl. at 232. In doing so, they reached opposite results.

III. SUMMARY OF THE ARGUMENT

> This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation.

Leo Sheep Co. v. United States, 440 U.S. 668, 687-88 (1979) (Rehnquist, J.).

The CFC's decision is not merely out-of-step, but is, in fact, directly contrary to Missouri law and prior precedent. It violates the fundamental tenet of property law that there must be certainty and predictability when it comes to property rights. No Missouri court has ever found a railroad easement to be for anything other than railroad purposes. The ruling is contrary to Missouri law and should be reversed.

IV. ARGUMENT IN SUPPORT OF REVERSAL

The government is liable for a taking when it issues an order, such as the NITU, invoking the provision of the Trails Act that expressly preempts state law inconsistent with the Trails Act. *See* 16 U.S.C. § 1247(d). To determine the government's liability, landowners alleging a taking must show that the NITU did, in fact, contravene state law. The law of this Circuit is clear that:

> the determinative issues for takings liability are
>
> (1) who owns the strip of land involved, specifically, whether the railroad acquired only an easement or obtained a fee simple estate;
>
> (2) if the railroad acquired only an easement, were the terms of the easement limited to use for railroad purposes, or did they include future use as a public recreational trail (scope of the easement); and

> (3) even if the grant of the railroad's easement was broad enough to encompass a recreational trail, had this easement terminated prior to the alleged taking so that the property owner at the time held a fee simple unencumbered by the easement (abandonment of the easement).

Ellamae Phillips Co. v. United States, 564 F.3d 1367, 1373 (Fed. Cir. 2009) (citing *Preseault v. United States*, 100 F.3d 1525, 1533 (Fed Cir. 1996) (hereinafter "*Preseault II*")).

The Federal Circuit has repeatedly held recreational trail use is not within the scope of an easement for railroad purposes. While these prior cases have dealt with easements under Vermont law (*Preseault II*),[5] California law (*Toews v. United States*, 376 F.3d 1371 (Fed. Cir. 2004)) and the General Railroad Right-of-Way Act of 1875 (*Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005)), this Court's strong pronouncements were not dependent on the individual state laws, but rather focused on the "common sense" conclusion that railroad use and trail use are fundamentally different uses of land. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2074 (2021) (rejecting as a matter of "common sense" the argument that determining whether the deprivation of a fundamental property right, the right to exclude others,

[5] *Preseault II* in turn relied upon decisions from Washington, *Lawson v. State*, 730 P.2d 1308 (Wash. 1986) (*en banc*), Wisconsin, *Pollnow v. State Dep't of Natural Res.*, 276 N.W.2d 738 (Wis. 1979), and Illinois, *Schnabel v. Cnty. of DuPage*, 428 N.E.2d 671 (Ill. App. Ct. 1981). *See also Mich. Dep't of Natural Res. v. Carmody-Lahti Real Estate, Inc.*, 699 N.W.2d 272, 285–86 (Mich. 2005).

results in a taking is dependent on the duration of deprivation and not the deprivation in the first instance).

This Court has been unequivocal in its finding that a recreational trail does not fit within the scope of an easement for railroad purposes:

> Although a public recreational trail could be described as a roadway for the transportation of persons, the nature of the usage is *clearly different*. In the one case, the grantee is a commercial enterprise using the easement in its business, the transport of goods and people for compensation. In the other, the easement belongs to the public, and is open for use for recreational purposes, which happens to involve people engaged in exercise or recreation on foot or on bicycles.

Preseault II, 100 F.3d at 1542-43 (emphasis added).

A few years later in *Toews*, this Court again found that use of the right-of-way by the public to be wholly different from the use of the right-of-way for a railroad:

> And it appears beyond cavil *that use of these easements for a recreational trail*—for walking, hiking, biking, picnicking, frisbee playing, with newly-added tarmac pavement, park benches, occasional billboards, and fences to enclose the trailway—*is not the same use made by a railroad*, involving tracks, depots, and the running of trains. The different uses create different burdens ….
>
> Some might think it better to have people strolling on one's property than to have a freight train rumbling through. But that is not the point. *The landowner's grant authorized one set of uses, not the other*. Under the law, it is the landowner's intention as expressed in the grant that defines the burden to which the land will be subject. The Government does not dispute this proposition—the Government agrees that, consistent with the state's law, the landowner's grant defines the burden with which the land is burdened.

376 F.3d at 1376-77.

Until recently, the CFC had repeatedly rejected the government's contention that public recreation or "railbanking" are uses within the scope of an easement granted for operation of a railroad, and had so ruled as to every state whose law was put before it.[6]

A. Missouri Law Dictates the Same Result as *Toews* and *Preseault II*. In Missouri, an Easement Granted *to* a Railroad is *for* a Railroad.

Contrary to the CFC's holding, in Missouri, it is illegal to attempt to repurpose a century-old railroad easement for a public park without consent and compensation to the underlying landowners. Yet, the CFC arrived at an opposite conclusion, at odds with the longstanding Missouri law.

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[6] *See, e.g., Biery v. United States*, 99 Fed. Cl. 565, 576 (2011) (Kansas) ("Indeed, a recreational trail is only viable where the operation of trains has ceased."); *Ellamae Phillips Co. v. U.S.*, 99 Fed. Cl. 483, 487 (2011) (Colorado) ("There is clear consensus that recreational trail use is fundamentally different in nature than railroad use."); *Capreal, Inc. v. United States*, 99 Fed. Cl. 133, 145 (2011) (Massachusetts) ("A railroad ... has the primary purpose of transporting goods and people. The purpose of a recreational trail is fundamentally different"); *Ybanez v. United States*, 98 Fed. Cl. 659, 668 (2011) (Texas) ("The original parties … would not likely have contemplated use of the right-of-way as a recreational trail. Such a use would be 'clearly different' from railway operations."); *Macy Elevator, Inc. v. United States*, 97 Fed. Cl. 708, 730 (2011) (Indiana) ("The taking arises because recreational trail use does not fall within the scope of the original railroad easement."); but, *cf. Romanoff Equities, Inc. v. United States*, 815 F.3d 809 (Fed. Cir. 2016) (holding that an easement "for railroad purposes and for such other purposes as the Railroad Company, its successors and assigns, may from time to time or at any time or times desire to make use of the same" to include trail use under New York state law) (New York); *but cf. Hardy v. United States*, 127 Fed. Cl. 1, 19-20 (2016) (finding Georgia law wholly inconsistent with New York law in this respect), *aff'd in part, rev'd in part* 965 F.3d 1338 (Fed. Cir. 2020).

An easement is the right to use someone else's property for a particular use. The Supreme Court of the United States has recently opined on the extent of railway easements:

> The essential features of easements—including, most important here, what happens when they cease to be used—are well settled as a matter of property law. An easement is a "nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." ... "[E]asements ... may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude." ... [I]f the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land.

Marvin M. Brandt Revocable Tr. v. United States, 572 U.S. 93, 104-05 (2014) (quoting RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 1.2(1); 1.2, Comment d; 7.4, Comments a, f (1998)).

Missouri follows this common-law, common sense, principle. Under Missouri law, easements granted *to* a railroad are easements *for* a railroad. "In Missouri, an easement granted for a particular purpose 'terminates as soon as such purpose ceases to exist, is abandoned, or is rendered impossible of accomplishment.'" *Glosemeyer*, 45 Fed. Cl. at 778 (quoting *Ball v. Gross*, 565 S.W.2d 685, 689 (Mo. Ct. App. 1978)). "Land or a right of way acquired by a railroad 'may be used for any legitimate, incidental purpose that is reasonably necessary or convenient to the construction, maintenance, and operation of the railroad.'" *Id.* (quoting *Rombauer v. St. Louis-San Francisco Ry. Co.*, 34 S.W.2d

155, 156 (Mo. Ct. App. 1931)). The scope of an easement in Missouri is limited to its specific use: "a right to use the land for particular purposes." *Barfield v. Sho-Me Power Elec. Coop.*, 852 F.3d 795, 799 (8th Cir. 2017) (quoting *St. Charles Cnty. v. Laclede Gas Co.,* 356 S.W.3d 137, 139 (Mo. banc 2011)) (citing *Farmers Drainage Dist. of Ray Cnty. v. Sinclair Ref. Co.,* 255 S.W.2d 745, 748 (Mo. 1953) ("An 'easement' is not the complete ownership of land with the right to use it for all lawful purposes perpetually and throughout its entire extent, but it is a right only to one or more particular uses...."); *Hinshaw v. M-C-M Props., LLC,* 450 S.W.3d 823, 828 (Mo. Ct. App. 2014) ("Plaintiff cannot argue it has rights beyond what is reasonably necessary for the purpose of the easement.")

The ruling in *Barfield* is particular noteworthy, as the Eighth Circuit was asked to determine whether an electric cooperative could grant an easement for fiber optic cables within its own easements for electrical service. 842 F.3d at 797. The argument there was that "an easement granted or reserved in general terms without any limitations as to its use, is one of unlimited reasonable use." *Id*. at 802 (quoting *Mo. Pub. Serv. Co. v. Argenbright*, 457 S.W.2d 777, 783 (Mo. 1970)). The Eighth Circuit held that the cooperative could make "*unlimited reasonable use* of the easements, so long as each 'easement's use is limited *to the purposes for which it was created*.'" *Id*. (quoting *Maasen*, 133 S.W.3d at 519 (Mo. Ct. App. 2004)

(emphasis added). But, as the underlying easement was limited to "electric transmission," the use for fiber optic cables was beyond the scope. *Id.*

The *Barfield* court based its ruling, in part, on an earlier case involving railroad easements. *Illig v. Union Elec. Co*., 652 F.3d 971, 977-78 (8th Cir. 2011). In *Illig*, a railroad possessed an easement for "railroad purposes." 652 F.3d at 974. Thereafter, the railroad entered into an agreement to install power lines. *Id.* The court concluded that, under Missouri law, the agreement was valid, so long as the electrical lines were used "for railroad purposes," which was the scope of the underlying easement. *Id.* at 977. Simply put, both courts reached the conclusion that "an easement can only be used for the purpose for which it was created." *Barfield*, 852 F.3d at 802.

This outcome remains true, even where the underlying easement is very broad in scope. *Rombauer,* 34 S.W.2d at 157 (with the court finding it "difficult to imagine a broader and more general grant than that contained in the deed in question"). Even determining that the broad deed language could permit any "legitimate, incidental purpose that is reasonably necessary or convenient to the construction, maintenance, and operation of the railroad," and even where deference could be given to the railroad as to whether a given use of the land "is necessary for railroad purposes," the use must still be "reasonably necessary for, and incidental to, railroad purposes," adding that there was no question that "the railroad company can acquire no greater

right or interest in the land, or subject it to a more extensive easement or a heavier burden, than is passed or authorized by the deed." *Id*. at 156-57.

Finally, the Missouri Court of Appeals in *Boyles v. Missouri Friends of Wabash Trace Nature Trail, Inc.* specifically rejected the argument that a public hiking and biking trail fell within an easement for "railroad purposes." 981 S.W.2d 644, 649-50 (Mo. Ct. App. 1998). The court did not mince words, concluding: "The proposed development of a hiking, biking, cross-country skiing, and nature trail is completely unrelated to the operation of a railway and consistent only with an intent to wholly and permanently cease railway operations." *Id.* at 649-50.

Importantly, the CFC has previously recognized "a preference in Missouri law for construing ambiguous instruments to railroads as easements," *see Miller v. United States*, 67 Fed. Cl. 542, 547 (Fed. Cl. 2005),[7] and that "for a deed to convey fee interest to a railroad the language in the deed must be clear." *Moore v. United States* ("*Moore v. U.S.*"), 58 Fed. Cl. 134, 136 (Fed. Cl. 2003). This view is partly the result of the Missouri Supreme Court's seminal decision in *Brown*, sixty years earlier. 152 S.W.2d 649. There, the court noted that that the grant of an easement to a railroad affords a different consideration than if the grantee was one "whose right to hold land in fee was not limited by law, as is the right of a railroad company

[7] Citing *Brown*, 152 S.W.2d 649; *Chouteau v. Mo. Pac. R.R. Co.*, 22 S.W. 458 (Mo. 1893); *Jordan v. Stallings*, 911 S.W.2d 653, 658 (Mo. Ct. App. 1995).

in certain cases," *Id*. at 653,[8] and that deeds to a railroad corporation, "must be read with the limitations and conditions which the law puts into it and in the light of the public policy of this State." *Id.* (citing 2 Elliott Railroads, § 1153). *See also Schuermann Enters., Inc. v. St. Louis Cnty*., 436 S.W.2d 666, 668-69 (Mo. 1969) ("However, a definite policy has been established in this state which particularly controls the nature and extent of the interest of railroads in real estate.").

Brown clarified that railroad easements are *sui generis* in the sense that they are tantamount to the fee estate *when the railroad is using it for a railroad*, but that does not mean their right of use extends beyond those railroad purposes:

> It is apparent that the legislature intended positively to interfere in the dealings of a railroad company with the landowners and to protect the latter if the railroad was never constructed, and also if the railroad company abandoned land acquired for its use.

Id. at 654 (finding a deed with $1 consideration was an easement pursuant to Missouri's statutes even though it was a deed for station grounds).

The consistency of these holdings are a direct result the consistency of Missouri law on these issues. At the time of the execution of the deeds in this case, section 765(2) of the Missouri Revised Statutes of 1879 was in effect. *Weeks v. Missouri Pac. R.R. Co*., 505 S.W.2d 33, 38 (Mo. 1974) (citing MO. REV. STAT. §

[8] *See id.*, 152 S.W.2d at 656 (acknowledging that the state policy of Missouri differs from other states, when it comes to interpreting deeds to railroad corporations).

765(2) (1879). This language was the result of the Missouri 1853 General Railroad Corporation Law. *G.M. Morris Boat Co. v. Bishop*, 631 S.W.2d 84, 87 (Mo. Ct. App. 1982). However both laws are currently recodified under section 388.210(2), unchanged, wherein "voluntary grants shall be held and used for the purpose of such grant only." MO. REV. STAT. § 388.210(2); *Weeks*, 505 S.W.2d at 38; *G.M. Morris*, 631 S.W.2d at 87. As noted in *G.M. Morris*:

> [S]ection 388.210(2) has been construed to mean that an interest in land acquired by a railway company without valuable consideration is an easement no matter what interest the deed purported to convey, *and this easement ceases to exist when the land is no longer used for railroad purposes*.

Id. (citing *Coates & Hopkins Realty Co. v. Kansas City Terminal Ry. Co.,* 328 Mo. 1118, 43 S.W.2d 817, 821-822 (Mo. banc 1931)) (emphasis added). *Cf. Koviak v. Union Elec. Co*., 442 S.W.2d 934, 937 (Mo. 1969) (easements received by a railroad company for railroad purposes and later abandoned should follow the same rule as for highways; the land should revert to the original owner free from public use or easement); *Ball*, 565 S.W.2d at 689 (holding that an easement in Missouri for a particular purpose "terminates as soon as such purpose ceases to exist, is abandoned, or is rendered impossible of accomplishment.").

The entirety of these rulings was then summarized in *Boyles*:

> A railroad may hold, purchase, or convey the fee in land when acquired by general warranty deed without restriction on the quantum of title conveyed and for valuable consideration. Where the acquisition is for right-of-way only, however, whether by condemnation, voluntary

> grant, or conveyance in fee upon valuable consideration, the railroad takes only an easement over the land and not the fee.

981 S.W.2d at 648.[9] Missouri law leaves no doubt when interpreting a deed to a railroad: when the acquisition of land is for a right-of-way, it is an easement, and is, by law, for railroad purposes only.

B. The CFC's opinion in *Behrens* is a misapplication of Missouri law.

The decision below is an outlier that cannot be reconciled with the CFC's previous opinion in *Glosemeyer* and the federal courts' interpretation of Missouri law in *Barfield* and *Illig*.

Much of Judge Campbell-Smith's reported opinion is spent hand-wringing at the task before her:

> The evidence before the court presents a complicated question of interpretation in this case….
>
> * * *
>
> While the court recognizes the force of these rules under Missouri law, they do not fit comfortably with the language in the deeds that seems to indicate the intention to convey a fee interest in the properties.
>
> …The tension in this analysis is marked.

---

[9] *See also Moore*, 991 S.W.2d at 683, holding that a deed:

> in consideration of the sum of one dollar and the building maintaining and operating of a railroad ... did not convey that interest for valuable consideration, and thus the railroad did not receive title to the land in fee simple absolute, but rather received an easement to use the land until such time as the use for railroad purposes was abandoned. Once abandoned, title to the tracts reverted to the Respondents as the adjacent landowners.

Behrens, 154 Fed. Cl. at 231 (internal citations removed). But, Judge Campbell-Smith answers her own question of Missouri law at the beginning of the opinion by acknowledging that section 388.210(2) of the Missouri statutes states "voluntary grants … shall be held and used for the purpose of such grant only." *Id.* at 231.

Having reached this answer, the trial court then inexplicably ignores this statute and proceeds into a circular and illogical analysis that ultimately holds that the scope of these easements must be broad enough to include trail use because they are actually fee estates, but that they are not fee estates:

> In the court's view, the broad granting language and habendum clauses in the deeds at issue are convincing evidence that the grantors intended unrestricted conveyances. The legal construction of these conveyances as easements does not change that apparent intent. The court does not find, however, that these conveyances are in fee—Missouri law clearly does not allow for such a conclusion given the nominal consideration.
>
> ….
>
> In the court's view, it would violate the primacy of the grantor's intent to find that the deeds—which otherwise appear to convey a fee interest—should be artificially limited to plaintiffs' definition of railroad purposes simply because Missouri law construes conveyances for nominal consideration to be easements.

Id. at 232-233.

Judge Campbell-Smith then recognized that, in the absence of a controlling statute, Missouri law looks to the language of the deed to discern the grantor's intent regarding the scope of an easement; but absent clear language, Missouri law would

allow extrinsic evidence including "the circumstances surrounding creation of the easement, its location, and its prior use." *Id.* at 229.

> The parties have offered several pieces of extrinsic evidence in support of their positions. Plaintiffs note that the grantee was a railroad, and the long, narrow shape of the property at issue. For its part, defendant points to relatively recent uses of the property—including the installation of fiber optic cable and the use of recreational vehicles on the property.

Id. at 231. Judge Campbell-Smith then determines this extrinsic evidence is "inconclusive." *Id.* at 231-232 ("Unfortunately, the evidence submitted by the parties in the briefs now before the court is inconclusive.").

But, the Judge's balancing of the parties' competing evidence of use is flawed. The fiber optic easement within the railroad right-of-way is not a permissible use of the easement under Missouri law, a fact that was challenged in a 2004 federal class-action case brought by landowners asserting that the railroad did not have the right to grant an easement for fiber optic cables because the railroad's easement was limited to "railroad purposes" under Missouri law. *See* Pls.' Mem. in Support of Class Certification, *Cirese Inv. Co. v. Qwest Commc'ns Co. LLC.*, 4:00-cv-42-HFS, ECF No. 38 (W.D. Mo., Oct. 18, 2000). The case was certified as a class action and settled, with landowners executing new easements to defendants in return for compensation. *Id.,* ECF No. 136 (Order & Judgment adopting settlement); and ECF No. 139 (Court-ordered easement from landowners to fiber optic companies).

In truth, the root of the error was the trial court's reliance on the prior case of *Burnett v. United States*, 139 Fed. Cl. 797 (2018), because *Burnett* itself is a misapplication of Missouri law at odds with *Glosemeyer*, *Moore*, and all other Missouri precedent. The *Burnett* opinion relies on a single Missouri appellate court case. 139 Fed. Cl. at 805 (citing *Bayless v. Gonz*, 684 S.W.2d 512 (Mo. Ct. App. 1984)). In *Bayless*, the dispute was whether the railroad held two strips of land on either side of its right-of-way that were acquired for a depot as an easement or in fee. 684 S.W.2d. at 513 (noting the deed at issues granted the railroad two twenty-five foot tracts "for and in consideration *of the location of a depot* and five dollars.") (emphasis added). The *Bayless* court recognized, as discussed herein, that in Missouri, railroads only acquired an easement in their rights-of-way regardless of the form of conveyance. *Id*. ("However, where the acquisition is for right-of-way only, whether by condemnation, voluntary grant or conveyance in fee upon a valuable consideration, the railroad takes only an easement over the land and not the fee.") (citing *Schuermann*, 436 S.W.2d at 668; *Brown,* 152 S.W.2d at 652; *G.M. Morris*, 631 S.W.2d at 88). The court then unremarkably held that the extra strips on the edge of the railroad's right-of-way for a depot were conveyed in fee. *Bayless*, 684 S.W.2d at 513. There is absolutely nothing in the *Bayless* decision regarding the scope of railroad easements. Despite this being the *only* Missouri decision relied upon, the court in *Burnett* held that certain easement deeds to the railroad included

use of the easement for a public park at the time they were created. 139 Fed. Cl. at 811-13. This is simply incorrect.

Burnett also relied on the language "grant, bargain, and sell" as purportedly evidence of the parties' intent to convey unlimited use of their land.

> While there is no dispute that a fee simple interest was not conveyed to the railroad here—given that the consideration provided in these deeds is only one dollar—the inclusion of the phrase "grant, bargain and sell," nonetheless, indicates that the parties intended to convey a broad easement to the railroad.

Id. at 812. Missouri courts put no reliance on such language in determining the scope of an easement. *See City of Columbia v. Baurichter*, 729 S.W.2d 475, 481 (Mo. Ct. App. 1987) ("Appellants dwell upon the phrase 'grant, bargain and sell' as the magic phrase to convey a fee simple absolute. However, [the Missouri Supreme Court in] *Schuermann [],* 436 S.W.2d at 669, does not follow this interpretation.") (internal citations removed).

More than a decade after *Bayless* was decided, the same Missouri appellate court reexamined *Bayless*, and found the prior holding to be an aberration, holding that a deed to a railroad conveyed an easement and that "use of other words consistent with a warranty deed or conveyance of fee simple does not change the fact that the interest conveyed was that of a right of way which results in the conveyance of an easement only." *Jordan*, 911 S.W.2d at 658 (citing *Brown*, 152

S.W.2d at 652; *G.M. Morris Boat Co.*, 631 S.W.2d at 88.) (specifically rejecting the court's analysis in *Bayless*).

Both the *Behrens* and *Burnett* opinions suffer from flaws in their application of Missouri law. In fact, both opinions barely cite to any Missouri law to support their conclusions. This Court should not rely on these prior opinions that fail to reconcile the following federal and Missouri cases that are at odds with their analysis as discussed herein, including: *Barfield*; *Illig*; *Glosemeyer*; *Ball*; *Argenbright*; *St. Charles Cnty.*; *Farmers Drainage Dist.*; *Maasen;* and *Rombauer.*[10]

C. The CFC erred in not allowing the landowners to put forth evidence of abandonment.

This Court has set forth with clarity that if a railroad acquired only an easement, "even if the grant of the railroad's easement was broad enough to encompass a recreational trail," the government is liable if "this easement terminated prior to the alleged taking so that the property owner at the time held a fee simple unencumbered by the easement (abandonment of the easement)." *Ellamae Phillips,* 564 F.3d at 1373 (quoting *Preseault II,* 100 F.3d at 1533.)

Even if this Court were to accept the CFC's conclusion that the scope of these easements was "unknowable," the landowners' still possess meritorious taking

[10] *See also Eureka Real Estate & Inv. Co. v. S. Real Estate & Fin. Co.*, 200 S.W.3d 328, 332-33 (Mo. 1947).

claims, as these easements would have terminated under Missouri law prior to the taking. Yet, the CFC did not even consider this argument or allow the landowners to put forth their argument. This is not a harmless error, because the evidence in the record and Missouri law indicate the landowners would nonetheless prevail under this analysis.

In Missouri, "[a railroad right-of-way] easement is extinguished when the railroad ceases to run trains over the land." *Schuermann Enterprises, Inc.*, 436 S.W.2d at 668 (citing *State Highway Comm'n v. Griffith*, 114 S.W.2d 976, 980 (Mo. 1937)); *accord Boyles*, 981 S.W.2d at 648 ("When a railroad ceases to use the property for railroad purposes, therefore, the original owner or his grantees hold the property free from the burden of the easement."); *Moore*, 991 S.W.2d at 688 ("Abandonment is proven by evidence of an intention to abandon without an intention to again possess it.").

Cessation of railroad operations and removal of tracks and ties are strong evidence of abandonment under Missouri law. *Moore*, 991 S.W.2d at 688 ("The abandonment clearly occurred either in 1986, when all railroad operations ceased, or in 1988, when the track was pulled up. Once abandoned, title to the tracts reverted to the grantees of the original owners, free from the burden of the easement.").

> [A railroad's] contention that one of the purposes of the trail is to keep the existing corridor intact for future reactivations of rail service fails. The undisputed evidence, including the removal of the bridges, ties, and rail by [the railroad], showed that no such use is realistic. The proposed

> development of a hiking, biking, cross-country skiing, and nature trail is completely unrelated to the operation of a railway and consistent only with an intent to wholly and permanently cease railway operations.

Boyles, 981 S.W.2d at 649-50.

In *Glosemeyer*, Judge Bruggink observed that Missouri recognized the railroad's verified petition to the STB as reliable evidence of the railroad's intent to abandon the line:

> In all of these cases, the railroads' applications to the ICC for authority to abandon are clear evidence of intent to abandon their easements. ("[Railroad's] application for certificate of abandonment with the ICC together with its subsequent removal of the railroad tracks constituted evidence of its intention to abandon the railroad easement"). The applications are full of statements which unequivocally signify an intent to abandon. When a railroad's application for abandonment states that there is "no feasible alternative" to abandonment, that it seeks to "physically" abandon a rail line, or that it is "not possible to operate [a] line profitably in the future," a reader is left with no choice but to conclude that the railroad intends to abandon the rail line.

45 Fed. Cl. at 777 (citing *Boyles*, 981 S.W.2d at 649).

Judge Bruggink also relied on the fact the railroad removed tracks and ties from the rail line as evidence of abandonment under Missouri law:

> This intent was confirmed by conduct. The railroads here removed their tracks and ceased all operations. The fact that no trains have been run over these easements for years is strong evidence of abandonment ... [E]verything necessary for the operation of a rail line—the rails, ties and rail bed—have been removed.

Glosemeyer, 45 Fed. Cl. at 777-78 (citing *Moore*, 991 S.W.2d at 688).

There is nothing different here. The railroad filed a verified petition to abandon with the STB, making its intent clear—it was seeking to abandon the line.

The railroad then proceeded to remove tracks and ties from the line. Other evidence demonstrates that this rail line was abandoned long before the NITU. Press accounts demonstrate it was universally acknowledged by the railroad, the landowners, and the trail group that this railroad line was long abandoned.[11] As illustrated in these stories, landowners report grazing cattle over the right-of-way; the head of the local trail group referenced the right-of-way as an "eyesore"; and contractors removing the tracks and ties encountered a "wall of trees." *Id*.

The CFC clearly erred in disallowing the landowners to put forth evidence that, under Missouri law, this easement terminated prior to the alleged taking such that the property owners at the time held a fee simple unencumbered by the easement.

V. CONCLUSION

The question before the CFC was quite simple: in Missouri, could an easement granted to a railroad include the right to use the land for public recreation? The answer was equally simple: no. Missouri law is consistently clear that easements granted *to* railroads are easements *for* a railroad. Railroad easements cease to exist when they stopped being used for railroad purposes. The CFC's opinion is devoid of any Missouri law that supports its contrary conclusion.

[11] In addition to the articles by Jesse Bogan and Molly Hart, discussed *supra*, *see also Clearing in Progress Along Rock Island From Beaufort to Owensville; Rails Being Removed near Gerald*, GASCONADE COUNTY REPUBLICAN, Feb. 3, 2016.

Missouri landowners should be secure in their property. The CFC's opinion changes more than a century of clear Missouri jurisprudence holding that easements in the state must be used in a manner consistent with their purpose. Applying the CFC's opinion, an easement for a pipeline may be converted to a roadway a century later; or an easement for a fiber optic cable may morph into a use of the land for a water pipeline. The uncertainty created by the CFC's opinion cannot be overstated. Railroad easements are just that: a right to use the land for a railroad, nothing more and nothing less.

This Court should reverse the CFC's opinion, and remand this case for further proceedings consistent with controlling Missouri authority.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, the 24th day of February 2022, the undersigned filed the foregoing corrected brief with the United States Court of Appeals 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 6,875 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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