2023-1760

United States Court of Appeals for the Federal Circuit

ATS FORD DRIVE INVESTMENT, LLC, *et al.*,

Plaintiff,

GODBY PROPERTIES, LP, REZIN FAMILY INVESTMENTS LLS, c/o Greenstone Asset Management, BRIAN L. SCHOONVELD, GRACE L. SCHOONVELD, Co-Trustees of the Brian L. Schoonveld and Grace L. Schoonveld Revocable Trust UTA 6/13/00, MAYS PROPERTY MANAGEMENT COMPANY LLP, JULIA ANN MCKIM, KIMBERLY A. JONES, CAESAR B. DOYLE, VASCO WALTON, BRINKLEY INVESTMENT GROUP, LLC,

Plaintiffs-Appellants,

– v. –

UNITED STATES,

Defendant-Appellee.

On Appeal from the United States Court of Federal Claims in No. 1:19-cv-00471-MMS

BRIEF OF INDIANA LANDOWNERS, PROFESSOR JAMES W. ELY, JR., AND PROFESSOR SHELLY ROSS SAXER AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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OCTOBER 23,2023

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2023-1760

Short Case Caption ATS Ford Drive Investment, LLC v. United States

Filing Party/Entity Amici Curiae

Instructions:

1. Complete each section of the form and select none or N/A if appropriate.
2. Please enter only one item per box; attach additional pages as needed, and check the box to indicate such pages are attached.
3. In answering Sections 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance.
4. Please do not duplicate entries within Section 5.
5. Counsel must file an amended Certificate of Interest within seven days after any information on this form changes. Fed. Cir. R. 47.4(c).

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

Date: 10/23/2023

Signature: s/ Steven M. Wald

Name: Steven M. Wald

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
See Attached Exhibit A		
Professor James W. Ely, Jr.		
Professor Shelley Ross Saxer		

☑ 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).

☑ None/Not Applicable ☐ Additional pages attached

5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

☑ Yes (file separate notice; see below) ☐ No ☐ N/A (amicus/movant)

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). **Please do not duplicate information.** This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

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).

☑ None/Not Applicable ☐ Additional pages attached

EXHIBIT A – AMICUS CURIAE INDIANA LANDOWNERS

Akers, Diane M. & William
Alexander, Myrna
Ambs, Joseph & Cristina
Anderson, Herbert
Ardsley Maintenance Services, Inc.
Asphalt Patching, Inc.
AY Comp, LLC
Barron, Samuel & Audrey
Bartlett Reserve Indy, LLC
Bayhill Realty, LLC
Black Diamond North, LLC
Bock, Brian & Melissa
Bower, John J.
The Jaime Brener Separate Property Trust 8/22/97
Brockton Capital Partners LLC
Bruce Gunstra Builders, Inc.
Buckingham DA, LLC
Bullock Stony Creek, LLC
Buselli, Mark & Andrea
C & J Office Park LLC
Castleton Buildings Company LLC
Cockrum, Brandon & Melissa
Collins, Michael L.
Craig 220, LLC
Crown Technology, Inc.
CSS V LLC
Cunningham, David
D and D Transmissions, LLC
The Estate of Richard Dayan
Dohner, Robin
Edwards, Terry & Mildred
Farrell, Jennifer
Featherston, Ronald & Robin
Flanagan, Carol & Timothy
Flannery, Thomas & Rosemary
Foster, Paul & Mary
Fred, Carol Kim

Funderburk, Thomas & Aija
Goodman, David & Kathryn
Graves, LLC
Grotz, Michael & Donna
Hawthorn Park, LLC
Hendrixson, Carmen
Hoffman, Marilyn
Holom, Michael
Hunter, Kirk & Carla
J & J Moore Properties LLC
Jackson, James & Evelyn
Jat Properties LLC
Keck, Robert & Sheri L.
Kent, Deanna & Ronald
Leslie P. Konicki Declaration of Trust
Latty, Christopher & Sallie
Leslie Coatings, Inc.
Lovette, Terri & Tamara
Martin, Paul
Martin, Julia A.
Masters 96th LLC
McClellan, Douglas E. & Donna J.
MCS Realty
Meeta & Vimal, LP
Mejia, Maria I.
Miller, Kayla
Millwork Acquisition, LLC
Morris, Nicole & Christopher
Moyer, John & Kristen
Odin Corporation
Partazian, Soraya
Railroad SC Realty LLC
Rbs Realty
Real Estate Technologies LLC
Realty Income Corporation
Reese, Rita
Reuther, Jackie & Jeffrey
Richardson, Joshua & Kari
Rife, David & Katrian Howard-Rife

Rock Investment, LLC
Shank, William
Spencer, Leslie
Stanley, Chad
Sullivan Corporation
Thornburg, Roger
Two Metroplex LLC
Uptown Village, LLC
Vargas, Alicia
Vokt-Tord, Kelli
Wheaton Van Lines, Inc.
421 Realty Company Inc.
Beckonshire LLC
King Systems Corporation
Maehling, Stephen & Mary Pat
LMM Enterprises LLC

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae include certain Indiana landowners who brought Fifth Amendment takings claims against the United States under the case captioned *Pressly, et al. v. United States*, CFC Case No. 18-1964L (consolidated with *Jones v. United States*, CFC Case No. 19-1375L) for takings of their land through operation of the Trails Act (the "Indiana Landowners").[2] The outcome of this appeal will directly affect the Indiana Landowners, as they base their claims on the same category of source conveyance instruments at issue in this appeal. Indeed, the CFC's decision that is the subject of this appeal also dismissed the Indiana Landowners' takings claims. Because an amicus brief is normally allowed when the *amici* have an interest in another case that may be affected by the Court's decision in the appeal, the Indiana Landowners' Brief is properly filed. *See Northern Securities Co. v. United States*, 191 U.S. 555, 556 (1903); *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

[1] Pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure, all parties have consented to the filing of this Brief. Further, pursuant to Rule 29(a)(4)(E)(i)-(iii), *amici* state that party counsel did not author this Brief in whole or in part, and further, no party, party's counsel, or any person other than *amici* contributed money intended to fund this Brief's preparation or submission.

[2] The Indiana Landowners' *amicus curiae* counsel, Stewart, Wald, & Smith, LLC, also represent their claims in *Pressly*. The Indiana Landowners are identified in the attached Exhibit A.

Joining the Indiana Landowners as *amici curiae* are Professors James W. Ely, Jr., and Shelley Ross Saxer.[3] Professor James W. Ely, Jr., is the Milton R. Underwood Professor of Law Emeritus at Vanderbilt University Law School. Professor Ely is a renowned property law expert and legal historian whose accomplishments have been recognized with the Brigham-Kanner Property Rights Prize bestowed by William & Mary Law School and the Owners' Counsel of America Crystal Eagle Award.

Professor Ely is the co-author of the leading property law text, *The Law of Easements & Licenses in Land* (revised ed. 2021). The U.S. Supreme Court has cited and followed Professor Ely's treatise in a major case involving the nature of easements and the Trails Act. *See United States Forest Serv. V. Cowpasture River Preservation Ass'n*, 140 S.Ct. 1837, 1844 (2020) (quoting *The Law of Easements and Licenses in Land* § 1:1 (2015), pp. 1-5). Moreover, this Court, sitting *en banc*, also cited and followed this "leading treatise" in *Preseault v. United States*, 100 F.3d 1525, 1542 (Fed. Cir. 1996) (quoting *The Law of Easements and Licenses in Land* (1995 rev. ed.) ¶8.02[1]).

[3] Pursuant to the Court's leave, Professors Ely and Saxer were added as *amici*. To stay in compliance with the Court's Rules on word count, this Brief received minor edits, all of which subtracted language without substantive change.

Professor Shelley Ross Saxer is the Laure Sudreau Chair in Law at Pepperdine University Caruso School of Law, and she has served as faculty at Pepperdine Law since 1991. Professor Saxer is a renowned and prolific scholar and writer and has published dozens of articles in respected law reviews and journals across the country, including the Journal of Law, Economics & Public Policy, the Washington University Law Review, the Duke Environmental Law & Public Policy Forum, and the Indiana Law Review.

Professor Saxer is a co-author of several nationally recognized and widely used casebooks on property law, including *Land Use* (West Academic, 8th ed. 2021) and *Contemporary Property* (West Academic, 5th ed. 2019). Professor Saxer has also participated in numerous amicus briefs accepted before the United States Supreme Court and the United States Court of Appeals for the Sixth Circuit.

INTRODUCTION

Appellants allege that the federal government took their property for a federal recreational rail-trail and a potential future railway, based upon the Surface Transportation Board's invocation of section 8(d) of the Trails Act. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 8 (1990); *Preseault v. United States*, 100 F.3d 1525, 1550 (Fed. Cir. 1996) (*en banc*) (*Preseault II*). The CFC directed Appellants, whose property relates to a specific type of mid-nineteenth century instrument (the "Releases"), to file a summary judgment motion regarding whether

the Releases conveyed a fee simple interest or an easement to the Peru and Indianapolis Railroad ("PIR").

Even though the fee versus easement question (as it pertained to the Releases) presented a complex and novel issue of Indiana law that clearly warranted, if not outright necessitated, certification to the Indiana Supreme Court, as has been done before in a Trails Act case,[4] the CFC improperly decided that the Releases conveyed fee simple title to PIR, which blocked government liability for the taking of Appellants' property. In doing so, in this instance, the CFC eschewed proper procedure and substituted its own judgment for that of the State of Indiana's.

Despite a long line of Indiana decisions that support a construction that an overwhelming number of elements in the Releases indicate an intent to grant an easement, including that the subject in the granting clause of the Releases is a "right of way," no monetary consideration, and the parties' use of a pre-printed railroad form, the CFC bought the argument that two earlier decisions from the mid-nineteenth century mandate a contrary interpretation—*Newcastle & Richmond R. Co. v. Peru & I.R. Co.*, 3 Ind. 464 (Ind. 1852), and *Indianapolis, P&C Ry. Co. v. Rayl*, 69 Ind. 424 (Ind. 1880).

[4] *See Howard v. United States*, 948 N.E.2d 1179 (Ind. 2011).

The outcomes in *Newcastle* and *Rayl* result from language in the charter establishing that the PIR could acquire its right of way from landowners who "relinquish" their land to the railroad. *Newcastle* and *Rayl* contain a brief statement to the effect that the charter's language that the railroad "shall be seized in fee-simple of the **right** of such land" was a declaration by the Indiana legislature that the railroad would always acquire the fee simple **in the land**. As will be pointed out in more detail below, the statements relating to the charter language were irrelevant to the outcome of the decisions. As such, the statements are arguably *dicta*, or at the least should not be considered binding on the question of whether the Releases convey the fee simple or an easement. Furthermore, as is evident by the evolution of Indiana law in later decisions, the cases' references to fee simple are properly interpreted as a reference to the extent and duration of the easement acquired, *i.e.*, that the railroad would acquire a fee simple in its easement. This interpretation is bolstered by the wealth of Indiana decisions following *Newcastle* and *Rayl* that maintain that instruments using the terms of these Releases are invariably construed as grants of easements. A different interpretation contravenes later Indiana decisions and undermines Indiana public policy concerning the alienation of strips of land.

Later decisions support a more nuanced view of *Newcastle* and *Rayl* and are critical of the notion that *Newcastle* and *Rayl* stand for the proposition that the PIR always obtained the fee in the land of its railroad under its charter. Additionally, the

suggestion that the PIR would always obtain the fee simple for any written conveyance is too sweeping to be accurate, as the view would circumvent a party's right to contract for less of an estate. Given the abundance of Indiana case law that demonstrates a contrary interpretation to the CFC's finding and the overall complexity of the issue, it was unquestionably prudent to certify the question to the Indiana Supreme Court, yet the CFC chose not to, and that constitutes reversible error. The importance of this issue to Hoosier landowners, including the *amici* Indiana Landowners, weighs heavily in favor of certification.

ARGUMENT

I. THE OVERWHELMING WEIGHT OF INDIANA LAW SHOWS THAT INTERPERTATION OF THE RELEASES IS A COMPLEX, NOVEL ISSUE THAT IS RIPE FOR RESOLUTION IN INDIANA

A. The holdings from *Newcastle* and *Rayl* do not actually address the fee versus easement interpretation question.

The CFC based its holding that the Releases conveyed fee simple upon portions of the decisions in *Newcastle* and *Rayl*. Yet, in both cases, the issue of whether the PIR received the fee simple or an easement was irrelevant to the outcome. *Newcastle* concerned a conflict between the PIR and the Newcastle & Richmond Railroad Co ("NRR"). After the PIR had established its right of way under its charter, the NRR, under its charter, planned to have its line intersect with the PIR line. The PIR resisted this, claiming it would violate its exclusive rights in its road. According to the PIR, it had "the exclusive right to the use of the ground

over which the track of their road passes." *Id*. at 468. The PIR's argument was based on section 19 of its charter, which stated "that when said corporation shall have procured the right of way … they shall be seized in fee simple of the right to such land, and they shall have the sole use and occupancy of the same." *Id*. at 468. According to the PIR, this was intended as "a contract on the part of the state for the exclusive possession by said company of the lands mentioned." *Id*. The PIR did not base its argument on a claim that it held the "fee simple in the land" but instead that it possessed the "fee simple of the **right** to such land." *Id.* (emphases added).

The court rejected the PIR's argument, stating that the phrase was "whether [the releases and condemnations] should be taken to convey an easement, a right of way merely, or a fee-simple title, and declaring it should be the latter." *Id.* The court further explained that the PIR did not receive as extensive a license as it thought, in that the PIR's charter could not be "taken to be a relinquishment on the part of the state of the right to charter any other company whose improvement would be in competition with the [PIR]." *Id.* at 469. Thus, *Newcastle* merely settled a dispute between two railroads that wished to establish their respective lines over the same areas of Indiana.

Newcastle is not a fee versus easement railroad case. In fact, the outcome of the case does not turn on *Newcastle*'s statement that the PIR attained the fee pursuant to sections 15, 16, and 19 of its charter. *Newcastle* simply settled a disagreement

between two railroads on whether one railroad could cross the right of way of another. Whether the right of way was held as an exclusive easement, a non-exclusive easement, or whether the right of way was owned in fee simple, was irrelevant. In each instance, the outcome of the case would be the same. If the PIR held the fee simple estate, its interest was subject to the NRR's right to cross the PIR's tracks. Likewise, if the PIR held an easement, its interest was still subject to the NRR's right to cross the PIR's tracks. Accordingly, any reference to the interest obtained under the charter is likely *dicta* under Indiana law. *See Koske v. Townsend Eng'g Co.*, 551 N.E.2d 437, 443 (Ind. 1990) ("statements not necessary in the determination of the issues presented are *obiter dictum.* They are not binding and do not become the law.").

The decision in *Rayl* is much the same. In *Rayl*, landowners sued the Peru, Indianapolis, & Chicago Railroad ("PICR") following the railroad's construction of a railroad side-track in an area adjacent to their lots that had formerly been used as a road. *Rayl*, 69 Ind. at 425. The suit was brought by landowners (the Rayls) who sought relief against the railroad for unlawfully obstructing the street and depreciating the value of the Rayls' lots, and the Rayls challenged the railroad's authority to widen the area it occupied for the operation of its railroad. *Id.* at 425. The court began by examining the railroad charter that established the basis of the railroad's right to construct its line—the charter of the PIR. *Id.* at 425–26. The court

considered section 13 of the charter, which permitted the PIR to locate and establish a right of way of not more than eighty feet in width. *Id.* at 428–29. The court also reviewed certain provisions contained within sections 15 and 19 of the charter, including a reference that the PIR "shall be seized in fee-simple **of the right** of such land." *Id.* at 425–26 (emphasis added).

The court then considered a conveyance, a release, made to the PIR by Corydon Richmond, a predecessor-in-interest to the land owned by the Rayls, which the PICR argued gave the PIR—and thereby the PICR as its successor—the right to establish its right of way over the main line and the side track over the street adjacent to the Rayls' property. *Id.* at 426–27.

The Rayls argued they should be entitled to relief for two reasons: 1) the release did not specify the extent or width of the land intended to encompass the right of way; and 2) because legal title to the land was not yet formally in Richmond's possession at the time of the release, the land still belonged to the United States government. *Id.* at 428. The Rayls did not argue the right of way was held as an easement that was abandoned or relinquished prior to construction of the side tract, nor did they argue that title to the fee simple be quieted in their favor.

The court ruled against the Rayls and in favor of the PICR. The court explained: 1) pursuant to the referenced sections of the charter and the release given, the railroad had the discretion to choose where over the lands of the grantor to locate

its railroad; and 2) after giving the release, whatever title was subsequently acquired by Richmond (once he ultimately secured his patent) inured to the benefit of the railroad. *Id.* at 429. The court further explained that the subsequent acts of Richmond—platting the subdivision, leaving vacant and not identifying the vacant forty-foot strip as a road—indicated an affirmation that the release was valid. *Id.*

After the court clarified that the railroad had every right to lay its side-track, it made a brief statement in reference to the interest potentially acquired by the PIR under its charter—that the release, supplemented with the charter, "**purported to**" convey "an estate in fee-simple to so much of the land described in it as constituted the right of way through the land under such [release]." *Id.* at 429 (emphasis added).

This brief statement should not be taken as an explicit statement that the PIR acquires the fee simple in land whenever a right of way is relinquished to it. Setting aside that such an outcome would be bizarre in and of itself, attention should be paid to the fact that the court, at most, reports that the railroad charter **purports to** convey to the company an estate in fee simple. "Purported to" has the same meaning as the phrase "alleged to." The phrase cannot be taken as an express statement of what is, only what has been alleged. Thus, *Rayl* does not state "the act of incorporation, enacting that the right of way, when acquired, should be held by the company in fee-simple, **conveyed** to the company an estate in fee-simple." Rather, *Rayl* only identifies that the charter **suggests** that such might be the case, given the language

of the charter. It makes sense that *Rayl* does not affirmatively state that the fee simple was conveyed, especially because the case does not cite to *Newcastle* for that proposition of law. If this were necessary or important to the holding, it follows that the Indiana Supreme Court would have referred to such precedent.

Rayl does not explicitly rule that the PIR charter mandated that PIR should receive the fee simple in land relinquished to it. Therefore, it *is* **not** a railroad fee versus easement case. All that *Rayl* decided was whether the railroad should have a forty-foot right of way or an eighty-foot right of way. The decision goes no farther.[5]

Again, whatever interest the railroad owned—fee simple or easement—had no influence on the outcome in *Rayl*. Whether a fee simple or easement, the PIR would nonetheless have had the right to the discretion of the location of its right of way, it nonetheless could lay out its right of way up to a maximum of eighty feet, and whatever interest eventually obtained by Richmond would have inured to the benefit to the railroad and had the same effect, *i.e.*, whether the PIR had an easement or fee simple, it would have been able to expand its corridor to eighty feet. Accordingly, like *Newcastle*, the portion of the case relied on to demonstrate that PIR gained the fee in the railroad line in this case should be treated like *dicta*. *Rayl*

[5] Indeed, in *Uhl v. Ohio River R. Co.*, 41 S.E. 340 (W. Va. 1902), the Supreme Court of Appeals of West Virginia, after considering the analysis of numerous other jurisdictions, including Indiana, rejected *Rayl* as authority on the construction of railroad deeds.

is properly characterized as a right of way width case and should be limited to that holding.

B. Most Indiana cases following *Newcastle* and *Rayl* illustrate Indiana's shifting view of the impact of railroad charter provisions.

Both *Newcastle* and *Rayl* do not actually provide authority on whether the Releases convey fee simple or an easement, which is especially clear after considering subsequent precedent. Most Indiana decisions citing *Rayl* fail to cite the case as authority that the provisions in sections 15 and 19 mandate a construction that written releases to the PIR give the railroad the fee simple in the land. Rather, and as expected, most cite *Rayl* as authority on issues of the width of right of way claimed by railroads. *See, e.g.*, *Peoria & E. Ry. Co. v. Attica, C. & S. Ry. Co.*, 56 N.E. 210 (Ind. 1900); *Indianapolis & V.R. Co. v. Lewis*, 21 N.E. 660 (Ind. 1889); *Indianapolis & V.R. Co. v. Reynolds*, 19 N.E. 141 (Ind. 1888); *Burrow v. Terre Haute & L.R. Co.*, 8 N.E. 167 (Ind. 1886); *Ritz v. Indiana & Ohio R.R.*, 632 N.E.2d 769, 774 (Ind. Ct. App. 1994); *Lake Erie & W.R. Co. v. Michener*, 20 N.E. 254 (Ind. 1889).

Quick v. Taylor, 16 N.E. 588 (Ind. 1888), is an exception. In *Quick*, there arose a question of whether a right of way obtained via condemnation gave the condemning railroad a fee. *Id*. at 589. *Rayl* was cited as a case that was an exception to the general rule that a fee simple could be acquired in condemnation proceedings only in those instances where there was an express statute authorizing the

appropriation of the fee simple. *Id.* Yet, and importantly, *Rayl* was not cited for the proposition that a written release (or any other written conveyance, for that matter) would **always** convey the fee simple because the statute so called for it, regardless of whatever language used. *Rayl* was cited because it happened to be one of the few early railroad charters that allowed railroads to appropriate the "fee simple" in condemnation proceedings. *Id*.

Another outlier is *Douglass v. Thomas*, 2 N.E. 562 (Ind. 1885). In *Douglass*, the court discussed *Rayl* and stated that the charter provided that the right of way, when acquired, would be held in fee-simple by the railroad. *Id*. at 563. Nonetheless, it does not cite *Rayl* in support of a ruling that a deed conveying "the right of way" did, in fact, convey the fee. *Douglass* only identified *Rayl* to establish the framework that a charter **could allow** for the railroad to gain the fee in condemnation proceedings. *Id*. *Douglass* simply noted that the charter was not part of the record, and therefore, the court did not have anything before it that might support the party's contention that the railroad obtained the fee under the deed. *Id*. at 564.

Several Indiana decisions citing and discussing *Newcastle*, the effect of the railroad charters on deed construction, and the importance of considering the terms in the written instrument, illustrate Indiana's departure from the peculiar conclusions that the CFC improperly drew from *Newcastle* and *Rayl*. For example, 25 years after *Newcastle*, the Indiana Supreme Court decided *Indianapolis, P. & C.R. Co. v. Hood*,

66 Ind. 580, 583 (Ind. 1879). *Hood* concerned several lots located in Peru, Indiana, which had been the PIR purchased through a deed. *Id*. at 582. To discern the rights of the parties, the court examined the deed and determined that the deed granted to the PIR the lots upon the condition subsequent that it would permanently locate and construct its depot on the lots. *Id*. at 584. Accordingly, the moving of the depot was a breach, which worked a forfeiture of the railroad's estate under the deed. *Id*. at 585.

Hood is interesting because it completely ignores *Newcastle*. No examination of the charter is provided, and there is no indication *Hood* ever considered sections 15, 16, or 19 to have any impact on the outcome. This is true even though the case involves a grant to the PIR, which invokes the railroad's charter. If the Indiana Supreme Court had simply applied the meaning of *Newcastle* as the CFC interpreted it—that all grants to the PIR were grants of the fee simple—then the outcome would have been different. The successor to the railroad would have acquired the fee simple. As a result, the railroad could have done anything it wished with the land. *Hood* supports the theory that the language from the actual deed controls, not the statute that created the railroad company.

The Indiana Supreme Court further abrogated *Newcastle* in *Cleveland, C., C. & I.R. Co. v. Coburn*, 91 Ind. 557 (Ind. 1883). *Coburn* was a quiet title suit brought by a railroad in relation to an eighty-foot-wide strip of right of way over land alleged

to be owned by a group of adjacent landowners. The railroad claimed ownership in the strip as the successor-in-interest to the Indianapolis and Bellefontaine Railroad Company, a railroad chartered in 1848, pursuant to a familiar-looking instrument substantially similar to the Releases at issue in this case. *Id*. at 560. The Indianapolis and Bellefontaine Railroad Company's charter contained sections that were nearly identical to those of the PIR. *Id*. at 558 (emphasis added). The court considered whether, pursuant to the release and in light of the above sections, the Indianapolis and Bellefontaine Railroad held fee simple title to the strip of land. The court noted that the language of section 21 was "somewhat obscure," and further that it "does not expressly provide that the company shall be seized in fee simple of the land," only that the railroad would be "'seized in fee simple of the **right** of said land, and shall have the sole use and occupation of the same, and no person shall interfere herewith.'" *Id*. at 559 (emphasis in original). The court then explained that were it not for any other judicial construction of the charter's language, "[section 21] might be supposed to mean that the company shall be the owner of the right relinquished, which might be a fee, or a less estate, or a mere easement," but that **such construction would be dependent on the terms of the written instrument**. *Id*. But the court lamented that such was not the case, since *Newcastle* interpreted essentially the same section of the PIR's charter as vesting a railroad with the fee simple in the land under any release or relinquishment. *Id*.

Yet, rather than simply apply such a reading of *Newcastle*, the *Coburn* court did an about-face and held that "**the statute under consideration can not be held to impair the right to make contracts**." *Id*. at 560 (emphasis added). The court went on to state that if the railroad made the choice to forego condemnation proceedings and proceed to accept a written release and relinquishment with terms and conditions, then it must perform those terms and conditions or risk forfeiture of the estate. *Id*. From that point on, *Coburn*'s focus was on the terms of the release, the terms of other transactions concerning the strip, and the exigent circumstances. *Id*. at 560–66. No further consideration of the relevant railroad charter was taken to decide the matter. *Coburn* therefore arguably overrules any suggestion that *Newcastle* (and *Rayl*, for that matter) mean that any written release or relinquishment gives a fee, regardless of the terms of the instrument, and requires a more nuanced view whereby the terms of the instrument are considered.

This "shift" was further evident in *Cincinnati, I., St. L. & C.R. Co. v. Geisel*, 21 N.E. 470 (Ind. 1889), whereby the Indiana Supreme Court explicitly stated that merely because a charter might allow for the acquisition of the fee, the document nonetheless controls. *Id*. at 470. *Geisel*'s interpretation of the release at issue was short and to the point: "A right of way is an incorporeal hereditament, and this is all that the deed conveys." *Id*. Nonetheless, the court continued and further emphasized that it was the release's grant of "the right of way" that controlled its construction.

The court stated that "[t]he grant of a right of way is the grant of an easement, and implies that the fee remains in the grantor. A person who has a right of way has nothing more than a right of passage, and cannot be the owner of the corpus of the land." *Geisel*, 21 N.E. at 470. Given the overwhelming influence of the phrase, *Geisel* did not consider the provisions of the Lawrenceburg & Upper Mississippi Railroad Company's charter relevant.

> In dismissing the railroad's charter, the Indiana Supreme Court stated:
>
> > We do not think the question before us affected by the provisions of the charter of the appellant's grantor, for here the right is **founded entirely upon contract**, and not upon proceedings under the right of eminent domain. The question is not what estate might have been acquired, but what estate did the one party bargain for and the other convey? It does not follow that because a railroad company may take an estate in fee, or a right of way of a defined width, that it does take such an estate or such a right of way; for parties may, by their contract, create a less estate than a fee, or a right less in extent than that which the law authorizes the grantee to acquire.

Id. (emphasis added). *Geisel* stands for the proposition that notwithstanding what a charter may say, in those instances where the railroad's interest is derived from a written instrument, the language used in the instrument is "entirely" controlling. *Id.* *Geisel* says that only where the railroad acquires its right of way by condemnation proceedings, and the charter establishes that pursuant to such proceedings a fee simple is taken, that the court will allow a railroad to own the fee. *Id*. In all other cases, the terms of the written instrument control. *Id*. These are broad statements

applying to all railroad charters, suggesting that, even if *Newcastle* and *Rayl* stand for the proposition that a fee is taken in all instances, such has been overruled.

Indiana's evolving view of railroad deed cases continued with *Meyer v. Pittsburgh, C., C. & St. L. Ry. Co.*, 113 N.E. 443 (Ind. 1916). *Meyer* addressed the question of what interest—fee simple or easement—was acquired by a railroad in its right of way established by possession and use of the land for railroad purposes. *Id*. at 444. In support of its claim to the fee simple, the railroad pointed to the act of the General Assembly of Indiana, approved February 2, 1832 ("1832 Act"), which created the railroad that established title to the right of way. *Id*. at 444–45. The 1832 Act contained the same provisions as those of the PIR, including PIR charter sections 15 and 16, and it also cited the same section 19. *Id*. *Meyer* observed that the 1832 Act outlined two ways in which the railroad might acquire its right of way, "by relinquishment and by condemnation." *Id*. at 445. The court further observed that section 19 did not "literally" state that where the right of way was procured by either method "should" be held in fee simple. *Id*. Rather, the charter states that "the corporation 'shall be seised in fee simple **of the right** to such lands.'" *Id*. (emphasis added.)

In *Meyer*, the court further explained that when "[l]iterally construed" the language used "seems to refer to a right in the land as distinguished from the land itself," which in the court's view was a logical interpretation, since a fee can exist in an

easement. *Id*. (citing *Branson v. Studebaker*, 33 N.E. 98, 103 (Ind. 1892)). In support of its view, *Meyer* looked to additional safeguarding provisions in the charter that would be superfluous if the charter necessarily passed the fee estate. *Id*. Specifically, *Meyers'* point is directed at the phrase "and have the sole use and occupancy of the same," as this phrase would be redundant and unnecessary if a fee simple were being conveyed. Obviously, there is no reason to pronounce the fee simple is being given and then explain what that entails. The fee simple accomplishes all that is necessary to give the "exclusive use and occupancy." Nonetheless, and seemingly begrudgingly, *Meyer* took note of the outcome in *Newcastle*, and the provisions of the PIR charter, which again were identical to the 1832 Act charter, which stated that the PIR should acquire the fee simple. *Id*. The court then considered *Coburn*, and provided its assessment of the case, explaining *Coburn* holds that a railroad charter are not exclusive and "do not destroy or prohibit the exercise of the common-law power to contract." *Id*. at 446 (emphasis added). *Meyer* did not involve the interpretation of any written instrument—the railroad's claim to the fee simple was based on its use of the land by prescription. Nonetheless, of importance to the court was that even though "prescription creates the presumption of a grant," the grant is not presumed to be of the fee simple in those instances where it is legally possible for the grantee to "acquire an estate less in quantity or different in quality." *Id*.

Accordingly, as was the case in *Coburn*, the court noted that "a fee may exist in an easement." *Id*.

Meyer further noted the general rule with respect to railroad rights of way acquired by prescription, whereby the railroad only takes an easement. *Id*. The court reiterated that in the past when considering various railroad charters, such as the act creating the PIR, it has been held that lands have been acquired in fee by condemnation and release "in the absence of a contract to the contrary." *Id*.

In addition, *Meyer* noted that aside from railroads, the public improvement acts of 1835 and 1836 allowed the taking of the fee simple in condemnation proceedings. *Id*. Even so, the court reported that the line of cases upholding that rule of law have done so only "reluctantly." *Id*. *Meyer* further explained that Indiana courts have been unwilling to extend the doctrine that a fee simple would transfer in those instances that did not involve condemnation proceedings. *Id*. *Meyer* was therefore left with a set of circumstances that made it impossible to accept the railroad's position, that rights of way established by prescription gave the railroad an estate "coextensive in quantity and identical in quality with the grant which appellee's predecessor was authorized to take." *Id*. at 447. This was so, because even though the railroad was authorized to take the fee, such did not prohibit the right to contract for a lesser estate. *Id*. Accordingly, it was improper to presume a

grant of the fee, and so the ruling in *Meyer* was that the railroad only acquired an easement for railroad purposes. *Id*.

In *Vandalia R. Co. v. Topping*, 113 N.E. 421 (Ind. 1916), the Indiana Supreme Court built on the concepts set forth in *Geisel* and *Meyer*, but in the context of another written release to a railroad. *Id*. at 422. In *Topping*, the railroad alleged ownership of the fee simple in the land in its right of way pursuant to the written release, and further alleged a right of way of one hundred feet in width. *Id*. at 423. The landowners also claimed fee ownership, and further disputed the railroad's claim to one hundred feet of right of way. *Id*. Taking note that the railroad was incorporated under the general railroad law applicable at that time, the Indiana Supreme Court held the railroad received an easement, citing and quoting from *Geisel* the above-referenced law concerning the grant of a "right of way." Although the railroad statute in *Topping* was dissimilar to the charter in *Newcastle* and *Coburn*, *Topping* is an important case because it stands for the Indiana Supreme Court's clear modernized view—post-*Newcastle* —that railroads and Hoosiers were, and always have been, free to contract for easements, notwithstanding whether it was possible for railroads to acquire the fee simple.

Indiana continued to depart from the views in *Newcastle* and *Rayl* with *L&G Realty & Const. Co. v. City of Indianapolis*, 139 N.E.2d 580 (Ind. Ct. App. 1957), and *Ross, Inc. v. Legler*, 199 N.E.2d 346 (Ind. 1964). *L&G Realty* and *Ross* dealt

solely with the issue of whether a railroad deed conveyed fee simple title or an easement. In *L&G Realty*, the Indiana Court of Appeals gave an overview of the prevailing law concerning railroad conveyances, concluding that, generally, conveyances to railroads of a strip of land, without either additional language as to use or purpose or limiting language, are construed as passing fee title, but reference to a right of way also generally limits the grant to an easement. *L&G Realty*, 139 N.E.2d at 585. The case marks a further departure from any contrary interpretation about *Newcastle* and *Rayl*, whereby the court's analysis is guided solely by the written instrument between the railroad and the landowner.

In *Ross*, the Indiana Supreme Court confirmed that the prevailing view of Indiana law concerning railroad conveyances had been correctly stated in *L&G Realty* and announced the following rule of law in Indiana:

> Public policy does not favor the conveyance of strips of land by simple titles to railroad companies for right-of-way purposes, either by deed or condemnation. This policy is based upon the fact that the alienation of such strips or belts of land from and across the primary or parent bodies of the land from which they are severed, is obviously not necessary to the purpose for which such conveyances are made after abandonment of the intended uses as expressed in the conveyance, and that thereafter such severance generally operates adversely to the normal and best use of all the property involved. Therefore, where there is ambiguity as to the character of the interest or title conveyed such ambiguity will generally be construed in favor of the original grantors, their heirs and assigns.

199 N.E.2d at 348. *Ross* therefore establishes Indiana's current public policy with respect to the treatment of railroad rights of ways, one that disfavors granting fee

simple title to railroads, regardless of whether acquired by condemnation or grant. *Ross* explains that such policy is consistent with the applicable law concerning the acquisition of railroad right of ways in condemnation proceedings, which **did not allow** for the acquisition of the fee simple. *Id*. *Ross* ultimately ruled that the conveyance transferred an easement, based solely on the deeds reciting that it granted "all of that right of way." *Id*. *Ross* thus firmly establishes the modern public policy in Indiana while continuing to emphasize that the terms used in written contracts control what interest is conveyed to railroad companies. *See id*. at 347 ("Obviously our decision in this case must rest upon a construction of the deeds by which the above conveyances were executed.").

In *Penn Central Corp. v. U.S. R.R. Vest Corp.,* 955 F.2d 1158, 1160 (7th Cir. 1992), Judge Posner provided the following superb summary of Indiana's public policy favoring the construction of railroad transfers as conveying easements:

> If the railroad holds title in fee simple to a multitude of skinny strips of land now usable only by the owner of the surrounding or adjacent land, then before the strips can be put to their best use there must be expensive and time-consuming negotiation between the railroad and its neighbor—that or the gradual extinction of the railroad's interest through the operation of adverse possession. It is cleaner if the railroad's interest simply terminates upon the abandonment of railroad service. A further consideration is that railroads and other right of way companies have eminent domain powers, and they should not be encouraged to use those powers to take more than they need of another person's property—more, that is, than a right of way.

This followed the seminal Judge Taft (later President and Chief Justice Taft) opinion in *Paine v. Consumers' Forwarding & Storage*, 71 F. 626, 629–30, 632 (6th Cir. 1895), that established the "strips and gores" doctrine.

The preceding decisions describe a "shift" away from any contrary and perhaps opaque view that the PIR's charter (and similar railroad charters) mandates that **any** written transaction to a railroad gave the railroad the fee simple (*see Newcastle*, *Rayl*), to the unambiguous modern view that a charter does not conflict with the railroad's ability and right to contract for less than a fee in the land.[6] This is the more nuanced, logical, and fair view, that the railroad's charter only allows railroads to contract for the fee and does not mean they receive the fee automatically. The modern view also recognizes there is a presumption that property deeded to railroads is in an easement. This is exactly why the CFC's decision in this case so frustrates the Indiana Landowners' rights, and those present and future rights that may be affected. The above-cited cases clearly show a distinct shift from *Newcastle* and *Rayl*, and the Indiana Supreme Court should have the opportunity to opine.

[6] In addition to the above-cited cases, several more recent Indiana decisions have continued to de-emphasize the railroad charter's role in instrument interpretation. *See Richard S. Brunt Trust v. Plantz*, 458 N.E.2d 251 (Ind. Ct. App. 1983); *Lake Cty. Tr. Co. v. Lane*, 478 N.E.2d 684 (Ind. Ct. App. 1985); *Brown v. Penn Cent. Corp.*, 510 N.E.2d 641 (Ind. 1987); *Consolidated Rail Corp. v. Lewellen*, 666 N.E.2d 958 (Ind. Ct. App. 1996); *Tazian v. Cline*, 686 N.E.2d 95, 98 (Ind. 1997); *Clark v. CSX Transp., Inc.*, 737 N.E.2d 752 (Ind. Ct. App. 2000), *trans. denied*.

II. THE NATURE OF THE UNDERLYING ISSUE IN THIS CASE NOT ONLY WARRANTS, BUT ALSO NECESSITATES, CERTIFICATION TO THE INDIANA SUPREME COURT

Indiana allows certified questions of state law from federal courts. Ind. R. App. P. 64. In fact, the CFC has already certified a question in another rails-to-trail case to the Indiana Supreme Court, which the Indiana Supreme Court accepted. *See Howard*, 948 N.E.2d at 1179. That should have been the outcome in this case. As outlined above, when viewed as a whole, Indiana courts have thrown substantial doubt on the validity of the CFC's *Newcastle*/*Rayl* interpretation that the PIR's charter provisions (or other similar railroad charters) mandate the PIR received the fee simple in the land, regardless of the written instrument. Most importantly, no Indiana state court has taken on this precise question, and certainly not following the large body of law that implicitly rejects the CFC's findings. The CFC and the parties would have undoubtedly benefitted from the Indiana Supreme Court's guidance on the question presented—whether the PIR charter mandated that the releases gave the PIR the fee simple estate in the land considering later Indiana decisions.

The Indiana Supreme Court has even reflected on the complexity of the issue. Here is what the court said in *Louisville & Indiana R.R. Co. v. Indiana Gas Co.*, 829 N.E.2d 7 (Ind. 2005), regarding interpretation of 19th Century railroad charters:

> It is difficult to imagine the creation of such a substantial enterprise as a railroad **without** buying land in fee, **but knowing with confidence whether this was so would require considerable effort**. The meaning

> of these intertwined Nineteenth Century documents turns as much on custom and practice **as it does on Twenty–First Century rules of construction**. While information on such matters is knowable, it is not surprising that the scale of the present litigation has made it diseconomic for the parties to pursue such an investigation.
>
> **These intriguing matters would certainly be central to resolving, say, a dispute between grantee and grantor**, but that is not the nature of the litigation before us. In the end, we conclude that the statutory regimes applicable to this dispute lead to the same outcome regardless of the nature of the Railroad's ownership interest.

Id. at 9 (emphasis added).

Given this, *amici curiae* are confident that the question would be accepted by the Indiana Supreme Court. If not for the complexity of the question, then for the far-reaching consequences of the decision. Railroads in Indiana are regularly abandoned or converted to recreational trails using the Trails Act program, Indiana has a strong interest to ensure Hoosier property rights are adjudicated fairly, and at this point, that can only be done through certification to the Indiana Supreme Court.

III. CONCLUSION

For these reasons, this Court should mandate certification of the issue to the Indiana Supreme Court, so that it may have a direct voice in deciding a matter that has important present and future implications for Plaintiffs-Appellants, the Indiana Landowners, and other Hoosier landowners. Alternatively, this Court should find in favor of Plaintiffs-Appellants and reverse the CFC's finding that the Releases conveyed fee simple title to PIR.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2023, I electronically filed the foregoing brief with the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system.

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s/ Steven M. Wald
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July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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