No. 16-514

In The
Supreme Court of the United States

ROMANOFF EQUITIES, INC.,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF AMICI CURIAE OWNERS' COUNSEL OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, CATO INSTITUTE, PROFESSOR PAULA A. FRANZESE, PROFESSOR JAMES ELY, NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS, PROPERTY RIGHTS FOUNDATION OF AMERICA, CITIZENADVOCACY CENTER IN SUPPORT OF PETITIONER

Robert H. Thomas
Counsel of Record
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street
1600 Pauahi Tower
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Karen R. Harned
Luke A. Wake
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, NW
Suite 200
Washington, D.C. 20004
(202) 314-2048
karen.harned@nfib.org

Counsel for Amici Curiae
[additional counsel on inside cover]

Additional counsel

Ilya Shapiro
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, D.C. 20001301
(202) 842-0200
ishapiro@cato.org

Joseph T. Waldo
Jeremy P. Hopkins
WALDO & LYLE, P.C.
West Freemason Street
Norfolk, Virginia 23510
(757) 622-5812
jtw@waldoandlyle.com

QUESTIONS PRESENTED

When the Court of Appeals confronts a novel or unsettled question of state law, should the court certify the question to the state's highest court or should the federal court make an *Erie*-guess about how the state's highest court might decide the issue?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONS, STATUTES, AND RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

INTEREST OF AMICI CURIAE

1. Owners' Counsel of America. Owners' Counsel of America (OCA) is an invitation-only national network of the most experienced eminent domain and property rights attorneys.[1] They have joined together to advance, preserve and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008). OCA is a non-profit 501(c)(6) organization sustained solely by its members. Only one member lawyer is admitted from each state. OCA members and their firms have been counsel for a party or amicus in many of the property cases this Court has considered in the past forty years, and OCA members have also authored and edited treatises, books, and law review articles on property law and property rights.

2. NFIB Legal Center. The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be

1. Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Evidence of consent has been filed with the Clerk of the Court. Counsel of record for the parties received notice of the intention to file this brief not less than ten days prior to the due date of this brief. Pursuant to Rule 37.6, amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission.

the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitols. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

NFIB represents 325,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

3. Cato Institute. The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

4. Legal Scholars. Professor Paula Franzese is the Peter W. Rodino Professor of Law at Seton Hall University School of Law, and is one of the country's leading experts in property law. She has written extensively on property law, and is a member of the editorial board of the peer-reviewed Land Use, Real

Estate and Environmental Law Journal. She has a professional interest in the issues presented by this case.

Professor James Ely is a professor of law at Vanderbilt University. He is a renowned legal historian and property rights expert whose career accomplishments were recognized with both the Brigham-Kanner Property Rights Prize and the Owners' Counsel of American Crystal Eagle Award in 2006. He is the author of several books that have received widespread critical acclaim from legal scholars and historians, including *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008), *The Fuller Court: Justices, Rulings and Legacy* (2003) in which he examines the work of the Supreme Court between 1888 and 1910, and *Railroads and American Law* (2001) in which he systematically explores the way that the rise of the railroads shaped American legal culture. Accordingly, he has a professional interest in the issues presented in this case. .

5. National Association of Reversionary Property Owners. The National Association of Reversionary Property Owners (NARPO) is a Washington State non-profit 501(c)(3) educational foundation whose primary purpose is to educate property owners on the defense of their property rights, particularly their ownership of property subject to railroad right-of-way easements. Since its founding in 1989, NARPO has assisted over ten thousand property owners and has been involved in litigation concerning landowners' interests in land subject to active and abandoned railroad right-of-way easements.

6. Property Rights Foundation of America. The Property Rights Foundation of America, Inc., founded in 1994, is a national, non-profit educational organi-

zation based in Stony Creek, New York, dedicated to promoting private property rights.

7. Citizen Advocacy Center. Citizen Advocacy Center (CAC) is a non-profit, non-partisan, free community legal organization. Founded in 1994, CAC's mission is to build democracy for the 21st Century by strengthening the citizenry's capacities, resources, and institutions for self-governance. CAC operates through the use of community lawyers who protect the public's assets and promote meaningful participation in the democratic process.

SUMMARY OF ARGUMENT

Words have meaning. Especially words in a document conveying an interest in real property. These words must be viewed in light of the intent of the parties as expressed by the terms of the instrument, state law, and the "special need for certainty and predictability where land titles are concerned." *Leo Sheep Co. v. United States*, 440 U.S. 668, 687-88 (1979). This rule does not exist for its own sake, but because it forms the foundation of every civil right. The Federal Circuit violated these principles when instead of certifying the question to the New York courts, it discovered in the Romanoff conveyance something never before seen in New York law: a "general easement," which can be used "for any purpose for which the grantee wishes." In doing so, it permitted the Romanoff family's property—conveyed for railroad purposes—to be pressed without compensation into public service as a recreational space.

This brief presents four arguments. *First*, property rights are the basis of a free society, and the foundation on which all other civil rights stand. *Second*, judicial federalism requires certification of novel state property issues to state courts. *Third*, by failing to certify the question to the New York Court of Appeals, the Federal Circuit undermined certainty and predictability by concluding that the words in the Romanoff conveyance mean something other than what they say. *Fourth*, the need for certification is greatest where a court of national jurisdiction considers takings claims based on novel issues of state property law.

ARGUMENT

I. THE NATIONAL GOVERNMENT WAS FORMED IN LARGE MEASURE TO PROTECT OWNERS' RIGHTS TO BE SECURE IN THEIR PROPERTY

The Fifth Amendment provides, "nor shall private property be taken for public use, without just compensation," and recently, this Court affirmed this "essential principle: Individual freedom finds tangible expression in property rights." U.S. Const. amend. V. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993). The Court also recently held that railroad right-of-way easements are common law easements granted for the specific purpose of operating a railroad, and terminate when no longer used for that purpose. *Marvin M. Brandt Rev. Trust v. United States*, 134 S. Ct. 1257 (2014). The Court has also observed, "Property does not have rights. People have rights. . . . That rights in property are basic civil rights has long been recognized." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (citations omitted).

The Framers recognized that the right to own and use property is "the guardian of every other right" and the basis of a free society, and the Constitution embraces the Lockean view that "preservation of property [is] the end of government, and that for which men enter into society." *See* James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008) (noting John Adams' proclamation that "property must be secured or liberty cannot exist"). John Locke, *Second Treatise on Civil Government*, XI § 138.

We begin from these foundational principles because the Fifth Amendment right to be secure in property is undermined—or, as in the present case, forfeited entirely—when title to land is not governed by established rules of property and principles of common law. It is essential that courts faithfully and

consistently apply settled principles of property to secure an owner's fundamental rights. Settled expectations lie at the core of the protection of civil rights, and the Court has recognized that the means to protect this foundation is a system which fosters "certainty and predictability" in land titles. *See Leo Sheep,* 440 U.S. at 687-88.[2]

This principle is at its zenith in cases such as this, in which the Romanoffs' predecessor-in-title voluntarily conveyed its interest in the land with the understanding that if the railroad uses which it permitted ever ceased, the property would be restored to the owners, and not impressed into public service as a recreational venue, or any use which the

2. State courts also recognize this principle. For example, the Michigan Supreme Court held that "stability, predictability, and continuity" are the foundations of property law because they induce reliance, and that "[j]udicial 'rules of property' create value, and the passage of time induces a belief in their stability that generates commitments of human energy and capital." *2000 Baum Family Trust v. Babel*, 793 N.W.2d 633, 655 (Mich. 2010) (internal citations omitted). This is not limited to the United States. Peruvian economist Hernando de Soto Polar has argued that capitalism's success "depended largely on a formal system of documented property—the key to unlocking capital," and has written that the "Arab Spring" was not a revolution fueled by politics, but "was economics," because it was a cry for the establishment of systems to validate property rights, which would allow all to prosper. *Time to give meaning to land ownership*, Live Mint (Apr. 12, 2016) ("Ill-defined property rights and high transaction costs in land market have become one of the most significant factors depressing [India]'s ease of doing business."), *available at* http://www.livemint.com/Opinion/XC8uj9GE7vwMyxyL5VA6rI/Time-to-give-meaning-to-land-ownership.html (last visited Nov. 14, 2016). *See* Hernando de Soto Polar, *The Real Mohammed Bouazizi*, Foreign Policy (Dec. 16, 2011), *available at* http://foreignpolicy.com/2011/12/16/the-real-mohamed-bouazizi/ (last visited Nov. 14, 2016).

grantee desired. After all, as Justice Holmes reminded us, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). This Court reaffirmed that principle in *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 8 (1990), which held the National Trails System Act, 16 U.S.C. § 1241, *et seq*., "gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests."

II. JUDICIAL FEDERALISM REQUIRES CERTIFICATION OF NOVEL STATE PROPERTY LAW ISSUES

Our constitutional republic is premised on the idea that there are two separate sovereigns with power to protect our rights. Indeed, this "dual sovereignty" was seen by the Founders as one of the most important bulwarks against tyranny provided by the Constitution. *See* The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) ("a double security arises to the rights of the people" because "in the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments"); *see also Bond v. United States*, 564 U.S. 211, 222 (2011) ("[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.").

The protective ideal of federalism and state sovereignty—as it pertains to the judicial power—was conveyed by Justice Brandeis:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.

Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

Of course, as the present case exemplifies, it is not always possible to identify a state law rule of decision that should be applied when one has not been previously considered by the state's legislature or highest court. Before the process of certification was widely available, judges, in many cases, would have to make an "*Erie* guess" as to how the state's highest court would rule on a determinative legal issue. *See Salve Regina College v. Russell*, 499 U.S. 225, 241 (1991) (Rehnquist, C.J., dissenting) ("[W]here the state law is unsettled . . . the [federal] courts' task is to try to predict how the highest court of that State would decide the question."); *see also*, Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. Pa. L. Rev. 1459, 1548 (1997) (noting unsettled questions of state law are those for which "existing sources of state law do not supply determinative answers.").

The "*Erie* guess," however, creates serious constitutional concerns and flies in the face of this Court's concern for judicial federalism pronounced in *Erie*. *See id.* at 1471-72. As the Court indicated in *Erie*,

there is no federal common law, and "no clause in the Constitution purports to confer . . . power upon the federal courts" to "declare substantive rules of common law applicable in a state." *Erie*, 304 U.S. at 78. That does not mean that federal courts cannot ascertain or identify state law precedent—when the legal issue is specific to the issue before the court—but they cannot implement policy preferences by creating new common law that is properly the domain of state courts. *See Clark*, *supra*, at 1472. Thus, when federal courts "declare" substantive rules of decision that are not ascertainable through state legislative rules or judicial precedent, they are "invade[ing] rights which . . . are reserved by the Constitution to the several States." *Erie*, 304 U.S. at 78.

The necessity of making an "*Erie* guess" was greatly reduced, however, when many states began to pass statutes allowing federal courts to certify unsettled questions of state law to the state's highest court. *See Clark*, *supra*, at 1545. And this Court has repeatedly recognized the appeal of certification. *See e.g.*, *Clay v. Sun Ins. Office*, 363 U.S. 207, 212 (1960) (citing *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959) ("[W]e have frequently deemed it appropriate, where a federal constitutional question might be mooted thereby, to secure an authoritative state court's determination of an unresolved question of its local law."); *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974) ("[R]esort to [certification] would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law . . . we have referred to ourselves on this Court in matters of state law, as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction.")).

In *Arizonians for Official English v. Arizona*, 520 U.S. 43 (1997), the Court reiterated the rationale for certification and essentially created a presumption in favor of certifying novel or unsettled state law legal issues. As Justice Ginsburg explained: "[F]ederal courts lack competence to rule definitively on the meaning of state legislation . . . [and] . . . certification procedures . . . allow a federal court faced with a novel state-law question to put the question directly to the State's highest court." *Id*. at 76-77. Further, the certification procedure reduces delay, cut costs, and increases the assurance of gaining an authoritative response.

Yet, when New York law did not provide a determinative rule of decision here—and certification was available to the New York Court of Appeals—the Federal Circuit ignored all of the rationales mandating certification and took it upon themselves to make an "*Erie* guess" as to how New York courts would construe the easement at issue—essentially making state common law. *See* Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va. L. Rev. 1671 (1992) ("The federal judge's prediction of state law in the absence of a dispositive holding of the state supreme court often verges on the lawmaking function of that state court. . . . The law that is the resulting product is not found, but made.") (internal quotation marks and citations omitted).

New York courts have never definitively recognized the existence of a "general easement" essentially granting a fee simple property interest. The Federal Circuit—while conceding there was no case on point—attempted to base its rationale on a case from 1931, which "signal[ed]" or "suggest[ed]" that New

York courts would recognize an easement for "any purpose for which the grantee wishes." *See* Pet. App. 31a; *Romanoff Equities v. United States*, 815 F.3d 809, 813 (Fed. Cir. 2016). .

That wording denotes vast uncertainty in the precedent. The Federal Circuit should have sought a definitive determination of state law from New York's highest court.

III. CREATING A "GENERAL EASEMENT"— NO DIFFERENT THAN A FEE INTEREST— UNDERMINED CERTAINTY AND PREDICTABILITY

Owners' rights to be secure in their property are only as secure as the government's—primarily the judiciary's—fealty to what the Court in *Leo Sheep* described as "settled expectations" of land title. *Leo Sheep*, 440 U.S. at 687-88. The task of defining the scope of these interests is mostly assigned to state legislatures and courts. *See*, *e.g.*, *Damon v. Hawaii*, 194 U.S. 154, 157 (1904) (local law defines "property"). It is highly doubtful that a New York court—were it given the opportunity to consider the question—would conclude than an interest labeled by the grantor as an "easement" (usually defined as use for a "*special* purpose"), is a "general easement" that contemplated use for *any* purpose. *See* Jon W. Bruce and James W. Ely, Jr., *The Law of Easements and Licenses in Land* § 1:1 (2016 ed.). For a widely-accepted definition of roughly contemporaneous with the original conveyance here, see *Black's Law Dictionary* 408-09 (2d ed. 1910) (defining easement as a "right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general

property in the owner"). Especially uses as admittedly unrelated to the easement's main railroad purpose as tai chi, "gender bending performances from the club and theater stage," garden tours, and "stargazing." *See*, *e.g.*, *Upcoming Events*, Friends of the High Line, *available at* http://www.thehighline.org/occurrences?start_date=2016-05-28 (last visited Nov. 14, 2016). Here, we have a very specific easement which was for railroad purposes to eliminate at-grade crossings. The history of the Highline's use as a 13-mile elevated rail line to eliminate at-grade railroad crossings is detailed in *New York City Council v. City of New York,* 770 N.Y.S.2d 346, 348-49 (App. Div. 2004). But even if the easement was granted in general terms, under New York law, the rule of construction is to construe the extent of its use only as is "necessary and convenient for the purpose for which it is created." *Mandia v. King Libr. & Plywood,* 583 N.Y.S.2d 5 (App. Div. 1992). An easement to do anything the grantee wants for as long as it wants isn't really an "easement," it is a grant of fee simple by another name. The Federal Circuit effectively converted the grant of an easement for railroad purposes into a fee simple estate, contrary to both the terms of the instrument and New York law. That court failed to follow *New York City Council v. City of New York*, which held that the easement ended by virtue of the New York Central's surrender of the easements relating to the Highline to the 23 owners of the servient estate. That court held the property owners reacquiring the easements simply removed an encumbrance, and because the process of merger represents the extinction—not the conveyance—of an interest in real estate, no acquisition of real property was contemplated. The court

quoted *Alfassa v Herskowitz,* 657 N.Y.2d 10003 (App. Div. 1997): "It is fundamental that where the title in fee to both the dominant and servient tenants become vested in one person, an easement is extinguished (by merger)." *New York City Council*, 770 N.Y.S.2d at 350.

Because the Federal Circuit correctly had questions about the state of New York property law, it should have certified the question to New York's courts, rather than take its best guess about how they might view the words "for other such purposes."

IV. THE NEED FOR CERTIFICATION IS GREATER WHERE NOVEL ISSUES OF STATE LAW DETERMINE TAKINGS CLAIMS IN A COURT OF NATIONAL JURISDICTION

Congress granted the Federal Circuit exclusive nationwide jurisdiction over every appeal against the federal government of a landowner's Fifth Amendment right to just compensation. *See* 28 U.S.C. § 1491(a)(1). This exclusive jurisdiction, because it calls for judges sitting in a court in Washington, D.C. to determine rights of individuals in various states, heightens the need for a robust judicial federalism and therefore certification. *See Lehman Bros.*, 416 U.S. at 386. Indeed, the Court in *Lehman Bros.*, a case in which a New York court had interpreted the state law of Florida, acknowledged that:

> [R]esort to [certification] would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant State. When federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on

> this Court in matters of state law, as "outsiders" lacking the common exposure to local law which comes from sitting in the jurisdiction.

Id. at 390-391.

The nature of a Fifth Amendment takings claim also warrants this Court's review of the Federal Circuit's decision. In such cases, state law property interests are determinative of whether a taking has occurred. *See e.g.*, *Preseault v. United States*, 494 U.S. 1, 20 (1990) (O'Connor, J., concurring) ("In determining whether a taking has occurred, we are mindful of the basic axiom that 'property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'") (citations omitted). Those property interests will be different in each individual state, which requires the expertise of judges familiar with particular state law. Indeed, the Federal Circuit has recognized the divergence of property law and the advantage of certification in a recent case involving easements and takings claims. *Rogers v. United States,* 814 F.3d 1299, 1304-05 (Fed. Cir. 2015) (certifying unsettled question of Florida property law to the Florida Supreme Court).

There are vast differences in how the individual states and territories treat property rights. Federal judges in Washington—with (understandably) little familiarity with the jurisprudence of the various states—should not be fashioning those states' laws with no basis in state court precedent. Here, a panel of federal judges in Washington guessed how the courts of New York would rule on an important issue of state property law—the interpretation and construction of a common law easement—with very

little basis in the current law of the state. By allowing the panel's decision to stand, this Court will set a precedent of federal judges' making substantive decisions regarding state law all over the country.

Moreover, the Federal Circuit inverted the inquiry, placing the burden on Romanoff to show that the New York courts have *not* recognized a "general easement" of virtually unlimited scope. Pet. App. 33a; *Romanoff Equities,* 815 F.3d at 814 ("Romanoff does not point to any authority that stands for that proposition [that New York law does not recognize a "general easement"]."). However, in the next paragraph, the panel also acknowledged that New York has not considered whether a conveyance which allows the grantee to use the grantor's property literally in any way desired could be considered an "easement," and the "closest New York case" involved the dissimilar situation where the grantees' use was related to the use for which the easement was granted. *Id*. The panel should have avoided needlessly wading into this void, and should have certified this question of state law to the New York Court of Appeals. Here, there is no question that the uses which are currently being made of the Romanoffs' property are not at all related to the railroad use for which the easement was originally granted, and indeed, directly contradict the terms of the grant.

CONCLUSION

This Court should grant the petition and review the judgment of the Federal Circuit.

Respectfully submitted.

Robert H. Thomas
Counsel of Record
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street
1600 Pauahi Tower
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Karen R. Harned
Luke A. Wake
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, NW
Suite 200
Washington, D.C. 20004
(202) 314-2048
karen.harned@nfib.org

Ilya Shapiro
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, D.C. 20001301
(202) 842-0200
ishapiro@cato.org

Joseph T. Waldo
Jeremy P. Hopkins
WALDO & LYLE, P.C.
West Freemason Street
Norfolk, Virginia 23510
(757) 622-5812
jtw@waldoandlyle.com

Counsel for Amici Curiae

NOVEMBER 2016.