No. 18-838

IN THE

Supreme Court of the United States

SCOTT KASEBURG, For Himself
and As a Representative of a Class of Similarly
Situated Persons,

Petitioners,

v.

PORT OF SEATTLE, a municipal corporation, PUGET SOUND ENERGY INC; COUNTY OF KING, a home rule charter county; CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY,

Respondents.

(For Continuation of Caption See Inside Cover)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

STEVEN M. WALD
Counsel of Record
STEWART WALD
& MCCULLEY LLC
12747 Olive Boulevard, Suite 280
St. Louis, MO 63141
(314) 720-0220
wald@swm.legal

THOMAS S. STEWART
ELIZABETH G. MCCULLEY
STEWART WALD
& MCCULLEY LLC
2100 Central, Suite 22
Kansas City, MO 64108
(816) 303-1500

Counsel for Petitioners

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287270

THOMAS E. HORNISH and SUZANNE J. HORNISH JOINT LIVING TRUST, For Itself and As Representatives of a Class of Similarly Situated Persons,

Petitioners,

v.

COUNTY OF KING, a home rule charter county,

Respondent.

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I. INTRODUCTION.

This case raises a fundamentally important question regarding the balance of federal/state jurisdiction. Respondents attempt to characterize the issue as merely involving the claimed misapplication of a properly stated rule of law, but that is not so. The Ninth Circuit's decision conflicts with relevant decisions of this Court,[1] the result of which would open federal courts to a wide variety of state law causes of action simply due to the fact that the case touches upon some federal issue. While Respondents admit it is a "rare quiet title case"[2] that warrants federal court jurisdiction, they at the same time tout the Ninth Circuit's misguided conclusion that there is somehow a "substantial federal interest" that fits this case within the "special and small category" *Grable*-type jurisdiction. To the contrary, as Plaintiffs have repeated *ad nauseum* to the deaf ears of the Respondents, there can be no federal interest here because Plaintiffs admit that a recreational trail can be placed on the railroad corridor at issue and that future railroad activation can occur, thus the purposes and operation of the Trails Act to do just that are not interfered with in any manner. Moreover, it is obvious that Plaintiffs' and Respondents' claimed property rights derive wholly from state law conveyances and that no private right of action exists under the Trails Act. The Trails Act issue only arises in the context of the Respondents' defense that they have state law incidental rights pursuant to a state law railroad purpose easement that Plaintiffs contend was extinguished by virtue of *trail use* legally imposed by the Trails Act.

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1. *See, e.g.*, *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005).

2. Respondents' Brief in Opposition, at 13.

Furthermore, even if it is determined that subject matter jurisdiction exists, there is another important issue regarding the property characterization of the Trails Act, involving a split in Circuits. While the Ninth Circuit concludes that the federal Trails Act operates *per se* to preserve pre-existing state law railroad purpose easements, the Federal Circuit rightly recognizes that the Trails Act "converts" an old easement into a new one and in doing so correctly frames the issue of the continuing existence *vel non* of the old easement as involving the state law determination of whether *trail use* is beyond the scope of the railroad purpose easement and/or whether the railroad purpose easement was abandoned under state law. Nothing in Respondents' often inaccurate recitation of the context and operation of the Trails Act logically rebuts the Federal Circuit's correct interpretation. The reality is that both the Ninth Circuit's and Respondents' view conflict with the Supreme Court's own analysis of basic property law concepts as cited in *Preseault v. Interstate Commerce Comm'n.*, 494 U.S. 1 (1990) ("*Preseault I*") and *Brandt v. United States*, 572 U.S. 93 (2014).

II. THE DECISIONS BELOW CONFLICT WITH DECISIONS OF THIS COURT REGARDING THE EXTENT OF *GRABLE*-TYPE SUBJECT MATTER JURISDICTION.

Respondents incorrectly state that Plaintiffs do not contest that the federal issue is actually disputed and capable of resolution in federal court without disrupting the federal/state balance.[3] The reality is that the rationale underlying the Ninth Circuit's decision would decisively

3. Respondents' Brief in Opposition, at 9.

tip the balance towards a much-too-broad application of federal jurisdiction. All one would have to do is mention some federal issue, and then, irrespective of whether the claim arises under a state or federal cause of action, or whether there truly is a substantial federal interest involved, federal jurisdiction would exist. That is not at all what *Grable* meant to do. Rather, *Grable* acknowledges that there is a "special and small category" of cases in which federal jurisdiction must be exercised even though there is no federal cause of action. This is not such a situation. Literally all of the source property rights of all the parties arose from state law conveyances – even the underlying railroad purpose easement. The fact that the Trails Act is being discussed to determine if Respondents may make state law incidental uses (that is, *non-trail and non-railroad uses*) of the pre-existing state law railroad purpose easement in light of imposition of recreational trail use under the Trails Act, cannot rationally be said to implicate any real federal interest, let alone any substantial federal interest. One knows this definitively because the federal interest the Trails Act was meant to address – preserving the corridor by imposing current recreational trail use and the possibility of future railroad reactivation – is not affected or interfered with in any way by this lawsuit. Regardless of the outcome of this suit, trails will still be created and rail lines will continue to be preserved.

Respondents rely upon the fact that the federal issue was raised by Plaintiffs' amended complaint.[4] However, as the Ninth Circuit acknowledged, Plaintiffs' cause of action

4. Respondents' Brief in Opposition, at 10; *see also* Pet. App. at 10a.

was not created by state law.[5] Hence, that the federal issue was raised by Plaintiffs is of no moment—that is, such does not answer the question of whether under *Grable* the case raises a "substantial" federal interest. It cannot, since the fundamental purpose of the Trails Act – to allow current recreational trail use and preserve corridors for potential future railroad reactivation – was not challenged or implicated in any way and Plaintiffs freely admit Respondents can use the land for current recreational trails and that the corridor is subject to possible future railroad reactivation.

The substance of the claim is what must be analyzed to determine subject matter jurisdiction, as shown in *Franchise Tax Bd. of Cal.*, where the plaintiff asked for Declaratory Judgment that ERISA preempted a defense, yet this Court held there was no subject matter jurisdiction.[6] So too in *Phillips Petroleum Co.*, where the plaintiff alleged that a federal statute governing helium sales required further payment, yet this Court held there was no subject matter jurisdiction.[7]

Respondents contend that because Plaintiffs claim that the new federal easement that burdens Plaintiffs'

5. Pet. App. at 8a ("Most directly, and most often, federal jurisdiction attaches when federal law creates the cause of action asserted. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1569 (2016). *The parties agree that such is not the case here*.") (emphasis added).

6. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27–28 (1983).

7. *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 129 (1974).

property was created by the Trails Act, such means that Plaintiffs did not merely plead the Trails Act as a defense.[8] To the contrary, Plaintiffs simply identify the predicate as to why the Respondents' defense based on the state law incidental use doctrine fails, *i.e.*, the Trails Act validly allows for current recreational *trail use*, and such *use* under state law extinguishes the state law railroad purpose easement. This in turn means that the Respondents' claim that they can make non-trail and non-railroad incidental uses involving local infrastructure (power lines and the like) pursuant to a state railroad purpose easement, *ipso facto* cannot be correct.

Respondents erroneously argue that Plaintiffs ignore the practical effect of a finding of no subject matter jurisdiction, *i.e.*, that state court decisions would then decide the scope of easements protecting the nation's rail transportation corridors. In making this argument, Respondents rely on false assumptions. This case has nothing to do with protecting rail corridors. This case is about – while recognizing that Respondents can currently operate a recreational trail and that the corridor is subject to potential future railroad reactivation – stopping local governmental entities from trampling over many dozens of landowners' property rights by effectively making a land grab for *non-railroad* and *non-trail* purposes, under the guise of a Trails Act that gives no such rights. In relying upon their false assumption, Respondents ignore Plaintiffs' repeated admission that nothing about this lawsuit will affect rights under the Trails Act to currently operate a recreational trail, to potentially reactivate a railroad in the future, or to utilize the federal program.

8. Respondents' Brief in Opposition, at 10-11.

Respondents' discussion about the supposed federal interest in preservation or resurrection of railroad easements[9] misses the point. The real point is that the actual Congressional purpose behind the Trails Act is not interfered with, which is to preserve the corridor by placing upon its surface an easement for present trail use and potential future railroad reactivation. That does not mean this case is about a federal action or interest. There simply can be no substantial federal interest where the purpose of the Trails Act is not being interfered with by Plaintiffs' claims in any manner. Rather, Plaintiffs' claims only seek to prevent obvious overreach by the Respondents involving incidental uses for local infrastructure purposes.

Plaintiffs' raising of the Trails Act was in anticipation of Defendants' state law defense to Plaintiffs' state law claims, *i.e.*, Plaintiffs' argument that current trail use authorized by the Trails Act extinguished the Defendants' state law railroad purpose easement (pursuant to *Lawson v. State of Washington*, 730 P.2d 1308 (Wash. 1986)) because it imposes *trail use that is beyond the scope of the state law railroad purpose easement*, is a response to the anticipated defense by Defendants that their state law railroad purpose easement and incidental uses thereto still exist. To conclude that this flimsy basis for federal jurisdiction is enough to fit this case into the "special and small category" of cases under *Grable* would be to throw open the gates of federal jurisdiction where none should exist over a local dispute.

9. Respondents' Brief in Opposition, at 13.

III. THE DECISIONS BELOW, THAT THE RAILROAD PURPOSE EASEMENT IS "PRESERVED" FOR CURRENT INTERIM RAILROAD USES DURING THE "RAILBANKING" PROCESS, CONFLICT WITH THE PLAIN WORDING OF THE STATUTE ITSELF, EXTENSIVE AUTHORITY FROM THIS COURT AND THE FEDERAL CIRCUIT, AND BASIC PROPERTY LAW.

Federal Circuit precedent plainly holds, interpreting underlying Washington state law, that *trail use* imposed by the Trails Act operates to extinguish the state law railroad purpose easement because such use is beyond the scope of the easement, which is why the Federal Circuit repeatedly uses the word "conversion."[10] Thus, even if subject matter jurisdiction exists, the Ninth Circuit's decision conflicts with the Federal Circuit's decision regarding the effect of trail use on a railroad purpose easement. In particular, the Ninth Circuit's decision that both easements, the old state law easement for railroad purposes and the new federal easement for a hiking and biking trail subject to future potential railroad reactivation, were available for use to Respondents irrespective of any inquiry whether recreational trail use terminates a railroad purpose easement under state law, is not only conflicting with the Federal Circuit and this Court's prior pronouncements, but also raises issues of importance.

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10. *See Preseault v. United States,* 100 F.3d 1525, 1543 (Fed. Cir. 1996) (*Preseault II*); *see also, e.g.*, *Caldwell v. United States*, 630 F.3d 1226, 1229 (Fed. Cir. 2004) ("We have previously held that a… taking occurs when, pursuant to the Trails Act, state law reversionary interests are effectively eliminated in connection with a *conversion* of a railroad right-of-way to trail use").

Respondents' argument that Plaintiffs "pluck one word" – conversion – to attempt to show there is a split of authority,[11] actually serves nicely to show that there is such a split of authority. Respondents' gambit is to make it seem that Plaintiffs claim the word "conversion" is used to describe a change in the scope of the easement, *i.e.*, that the effect of the Trails Act is to reform deeds creating railroad purpose easements.[12] Not so. This actually shows Respondents' misunderstanding of the situation. The word "conversion," as used by the Federal Circuit in its decisions interpreting the Trails Act, shows that a railroad purpose easement is extinguished because of the Trails Act's imposition of *trail use*, and that a new easement is created to take its place. No deed is reformed, as incorrectly argued by the Respondents.[13] Rather, it is extinguished. Indeed, the scope of the underlying railroad purpose easement does not change; it just simply does not support *trail use*, and it is the Trails Act's imposition of *trail use* that blocks vested property interests of the adjoining landowners and, under Washington state law, extinguishes the railroad purpose easement.[14] Frankly, it does not matter that the source of authority for the trail use derives from the Trails Act; whatever the source, it is the *trail use* itself that goes beyond the scope of the easement and extinguishes it (a contractual principle), and that is the salient point.

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11. Respondents' Brief in Opposition, at 14-15.

12. *Id.*

13. *Id.*

14. *Lawson* 730 P.2d at 1313.

Further, Respondents' description of *Preseault I* does not go far enough. It is not just whether a change of use amounts to abandonment, it is also about whether such use goes beyond the scope of a railroad purpose easement – again, a contractual principle – which is why the Federal Circuit in *Preseault II* established alternative routes for showing a taking occurred., *i.e.*, *either* that *trail use* exceeds the scope of the railroad purpose easement, *or* that state law abandonment occurred.[15]

Respondents' misconstruction of the context and operation of the old railroad purpose easement vis-à-vis the Trails Act is also inconsistent with the basic property law concepts that are actually involved, as illuminated by this Court's prior decisions in *Preseault I* and *Brandt*.

In *Preseault I*, the federal government attempted to make similar types of arguments that misconstrued the nature of railroad purpose easements, which are inherently limited in scope/usage, and this Court was unimpressed. In particular, the federal government argued that the landowners had nothing before, because their land was encumbered with a railroad purpose easement, and they have nothing after either, because the railroad did not abandon the corridor under federal law, so they do not have anything now, so they have not been deprived of anything. Justice Scalia rejected the government's argument in *Preseault I* during oral argument by stating that "even though you have a deed that says if we stop using it for railroad purposes its yours, you say well, you haven't lost anything because, yeah, we have stopped using it for rail purposes but they might not have. That's not very

15. *Preseault II*, 100 F.3d at 1550.

appealing to me." Justice Rhenquist even went further and the courtroom broke into laughter when he said that "the government's argument was like saying if my aunt were a man then she would be my uncle."[16]

Similarly, in *Brandt*, this Court identified the limited scope of a railroad purpose easement (which ultimately results here in the conclusion that it is *trail use* allowed by whatever source that violates the contractual terms of the limited easement grant and thus extinguishes it under state law): "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 'non-possessory 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.'"[17]

In any event, insofar as Respondents discuss the abandonment route in 5th Amendment rails-to-trails takings jurisprudence (as opposed to the "beyond the scope of the easement" route), Respondents' reliance on language in the Trails Act that abandonment does not occur is precisely the point – the Trails Act blocks state law abandonment. But, such a point is really far afield from the relevant point that it is *trail use* that operates to extinguish the railroad purpose easement under Washington state law, and that the only reason

16. Oral Argument, *Preseault I,* 494 U.S. 1 (No. 88-1076) (statements of Justice Scalia and Chief Justice Rhenquist), available at http://www.oyez.org/cases/1980-1989/1989/1989_88_1076/argument.

17. *Brandt v. United States*, 572 U.S. 93, 104-105 (2014).

the corridor is still intact is because the Trails Act at the same time legally creates a new easement to preserve the corridor for current trail use and potential future railroad reactivation. That just logically is not the same thing as a *current* railroad easement. The notion that a present railroad easement exists over these converted corridors where thousands of miles of recreational trails across the country are currently being operated by various public and private trail sponsors would certainly be concerning news to the trail sponsors.

Respondents also attempt to make a curious point about how rails-to-trails takings cases are valued, arguing that the description of there being potential future railroad reactivation somehow makes some type of valid point.[18] However, in those takings cases, the plaintiffs therein describe the new easement created by the Trails Act exactly right – current trail use subject to potential future railroad reactivation. That is entirely consistent with Plaintiffs' position in the present case – in fact, that is what Plaintiffs are screaming from the rooftop: that the Respondents' state law railroad purpose easement was extinguished under state law and replaced with an easement for current recreational trail use and potential future railroad reactivation. The problem addressed in this lawsuit is not potential future railroad use, it is these local government's attempt to make incidental uses of the corridor by building local infrastructure under, over, and on the surface of the corridor, which is well beyond the legitimate use of the corridor as a recreational trail in the present and potentially as a railroad in the future.

18. Respondents' Brief in Opposition, at 18.

Respondents also claim that this "merits"-based issue cannot be considered because of decisions issued by the lower courts regarding standing.[19] That is not so, primarily because there is currently an erroneous Judgment in favor of Respondents that quiets title in their favor based on their Counterclaims.[20]

IV. CONCLUSION.

For the foregoing reasons, Petitioners seek a Writ of Certiorari to review the Ninth Circuit decisions below.

Respectfully submitted,

STEVEN M. WALD
Counsel of Record
STEWART WALD
& MCCULLEY LLC
12747 Olive Boulevard, Suite 280
St. Louis, MO 63141
(314) 720-0220
wald@swm.legal

THOMAS S. STEWART
ELIZABETH G. MCCULLEY
STEWART WALD
& MCCULLEY LLC
2100 Central, Suite 22
Kansas City, MO 64108
(816) 303-1500

Counsel for Petitioners

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19. *Id.* at 14.

20. Respondents also make various counter-statements regarding the identity of the Plaintiffs and the underlying facts. While Plaintiffs disagree with many of Respondents' statements, it makes no difference to the outcome of the present Petition.