No. 21-

IN THE

Supreme Court of the United States

GARY E. ALBRIGHT, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does constitutional federalism require a federal court that confronts an outcome-determinative and unresolved State law issue that is particularly within the expertise of a State court—here, whether railroad deeds created an easement or fee simple title, a question antecedent to Petitioners' Fifth Amendment takings claim—to certify the question of State law to the State's highest court rather than making an *Erie*-guess about how the State's highest court would decide the issue?

Under what standards may a federal court make an *Erie*-guess about how the State's highest court would decide an outcome-determinative issue?

LIST OF PARTIES

Arent Fox Plaintiffs: Carla Albright; Gary Albright; Edward J. Bates; Judith A. Bates; Carol Beer; Mark Beer; Rebecca A. Bridge; Todd A. Bridge; Sherry D. Crocker; Howard N. Dietrich, Sr.; Bradley C. Donohue; Bradley C. Donohue; Beverly J. Evers; Joseph A. Evers; Daniel E. Higgins, III; Christy Hitz; Jason Hitz; Dmitri Kosten; Kurt Langeberg; Linda Langeberg; James E. Mcconnell; Rita J. Mcconnell; Michael J. Opoka; Zelda L. Opoka; Lyal T. Purinton; Sandra K. Purinton; Brady A. Smith; Dominique Toews; Patrick Toews; Eric P. Williams; Karen J. Williams; Charles Winders; James P. Calpin Trust; Evers Family Farms, Inc.; Erickson Realty, Ltd.; Roderick Michael Gordon Living Trust; Lardner Family Revocable Trust; JC Purinton Group, LLC; M& GT Land Management LLC; Barbara Reimers Family Trust; Schwietert Enterprises II, LLC; Upper Crust Real Estate, LLC

Abrahamson Plaintiffs: Randy & Judy Anderson; Braukman Loving Trust; Hannelore Drugg; Sharon Newman; Thompson Revocable Living Trust (Barbara L. Thompson); William E. Waibel Living Trust and Pamela A. Waibel Living Trust; Lenhart A. Gienger Trust; Cheri Heath-Rickert; David Hirschfeld; Roberta J. Hoffard Revocable Living Trust; Claudia Jameson; Darleen Johnson; William Neuman; Donald & Linda Aten; Farmington Hubbard Adams Enterprises, LLC; Martha Lynn Trost Gray; Ronald & Julie Koch. Oregon Conference of Methodist Church; Jerry Schlegel; Deslee Kahrs; Donna Kahrs; Advance Resorts of America, Inc.; Neal Abrahamson; Diane Walters; Richard Young; Berrie Beach LLC; Maureen Berrie-Lawson; Angelina Best; Neil Brown;

Randall S. Burbach Trust; Chastain Family Limited Partnership; Rick & Barbara Hass; Betsy A. King Revocable Trust; Kevin & Carol Thomas; Brummond Family Revocable Living Trust; Falconer Family Trust; Stephan & Teresa Jones; LOLA OTT IV, LLC; Ebben McCarty; Synthia McIver; Oregon-Idaho Annual Conference of the United Methodist Church; Michael Sabin; Mary Judith Upright Living Trust; Andrea Lynn Wallace; James Haley; Terry Kline & Debbie Kline; Brecht Family Trust; Douglas Burrows; Rosalie Gehlen; James Henriksen; Patricia Shotwell; Shirley M. Thomas Revocable Living Trust; Zapp Family Revocable Living Trust; Paul D. Ancheta; David William Bruneau Trust; Kim Kristina Bruneau Trust (Daniel Stokes & Judith Stokes); Mark & Maryann Escriva; Eileen George; James Harper; Georgia Gettman; Zhiming Mei; Oregon Writers Colony, Inc.; Rockaway Sandwood LTD; Fred Wale; Ruffo Family Revocable Living Trust; Won Wha Kim; Jeong Ho Kim; Mascott, LLC; Terry S. McCamman; Cheryl A. McCamman; Cheryl D. Runnels Trust; William & Jacqueline Appleton; Gary L. & Mary E. Dowen; Scott Ford; Franklin Byrnes; Alice Yetka; James & Sally McDonald; Ardyce K. Osborn Revocable Living Trust; Van's Camp, LLC

Bellisario Plaintiffs: Carole J. Bellisario; Martha Bush; George W. DeGeer and Tracy J. Keegan; David L. Hubbell; Gregory K. Hulbert Trust; Jamieson Land and Timber, LLC; Gail M. Kessinger; James A. and Susan M. Kliewer; Little Family Trust; James C. Miller; Diane Foeller Miller, Daniel Mathias Foeller; and Thomas Charles Foeller; Thomas J. Rinck and Sandra Gift Trust; Switzer Family Trust; Steven Michael and Linda Ann Van Doren and Willa Worley;

Richard John Vidler, Jr.; Arlene Frances Wolever Trust

Appellee United States of America.

CORPORATE DISCLOSURE STATEMENT

None of the Petitioner entities in this proceeding has a parent corporation or publicly held company that owns 10% or more of its stock.

LIST OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Albright v. United States*, Nos. 19-2078, 19-2080, 19-2090, 19-2316 (Fed. Cir.) (judgment entered Dec. 1, 2020)
- *Albright v. United States*, Nos. 16-912L, 16-1565L, 18-375L (Fed. Cl.) (judgment entered April 29, 2019)

There are no other proceedings in state or federal court or this Court known to be directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Federal Circuit's opinion (Pet. App. 1a–19a) is published at 838 Fed. App'x 512 (2020). The Federal Circuit's denial of rehearing is at Pet. App. 397a–399a. The Court of Federal Claims' initial decision (Pet. App. 198a–396a) is published at 139 Fed. Cl. 122 (2018), and its decision granting partial reconsideration (Pet. App. 22a–197a) is published at 2019 WL 495578.

JURISDICTION

The Federal Circuit entered judgment on December 1, 2020. The Federal Circuit denied rehearing on February 18, 2021. Pet. App. 397a. On March 19, 2020, the Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The effect of that order was to extend the deadline for filing a petition for a writ of certiorari in this case to and including July 19, 2021 (the Monday following Sunday, July 18, 2021). This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides "No person shall * * * be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The National Trails System Act Amendments of 1983, Pub. L. 98-11, 16 U.S.C. § 1241, *et seq*., provide that the United States may establish public recreational trails across otherwise abandoned railroad rights-of-way. Relevant excerpts are at Pet. App. 400a–404a.

The Tucker Act, 28 U.S.C. § 1491, grants the Court of Federal Claims jurisdiction to, *inter alia*, award damages against the United States for claims arising under the Constitution, including the Fifth Amendment Takings Clause. The statutory language is at Pet. App. 405a–408a.

INTRODUCTION

Cooperative judicial federalism directs federal courts confronting an unsettled question of state law to refer that question to the state's highest court for an authoritative answer.

Having state courts decide questions of state law promotes federalism because, when a federal court chooses to decide "a novel state [law question] not yet reviewed by the State's highest court," it "risks friction-generating error." *Arizonans for Off. English* v. *Arizona*, 520 U.S. 43, 79 (1997). "Speculation by a federal court" over how the state court would rule "is particularly gratuitous when … the state courts stand willing to address questions of state law on certification from a federal court." *Id.*; *accord McKesson v. Doe*, 141 S. Ct. 48, 51 (2020) (per curiam). Certification is "particularly appropriate" in cases where the federal court would otherwise need to resolve an unsettled question of a *distant* state's laws, as "'outsiders,' lacking the common exposure to local law which comes from sitting in the jurisdiction." *Lehman Bros.* v. *Schein*, 416 U.S. 386, 390–91 (1974). And it is particularly appropriate when the question of state law turns in part on public policy or local value judgments. *McKesson*, 141 S. Ct. at 51.

This case embraces each of these elements favoring certification. In this Rails-to-Trails case, the Federal Circuit opted to decide a question arising under a distant state's laws that the state's courts are particularly well-suited to resolve and that implicates public policy—whether deeds allowing the railroad to operate over narrow strips of land cutting across

Petitioners' properties created easements or transferred fee simple title under Oregon law.

Rather than certify this question to the Oregon Supreme Court consistent with this Court's guidance, the Federal Circuit speculated that the Oregon Supreme Court would rule that the deeds conveyed fee simple title, rather than easements, precluding Petitioners' Fifth Amendment taking claims based on the federal government's conversion of the strips of land to recreational trails.

Eschewing cooperative judicial federalism, the Federal Circuit needlessly generated extraordinary friction with Oregon courts and property law. The decision rejected multiple controlling Oregon precedents dating back 125 years, ignored Oregon rules of deed construction, and rejected an Oregon public policy that seeks to prevent the existence of innumerable strips and gores of land across properties. The decision has therefore injected confusion and uncertainty into an area of Oregon law—property title and rights—that demands maximum predictability. *See Leo Sheep Co.* v. *United States*, 440 U.S. 668, 687–88 (1979) (noting the "special need for certainty and predictability where land titles are concerned," and advising that courts should not "upset settled expectations" in this area).

The Federal Circuit's decision not to certify, where certification was plainly warranted, evinces a broader confusion among the federal courts as to when certification is appropriate. The federal Courts of Appeals have adopted disparate standards since this Court decided *Arizonans*, which has led to inconsistent, unpredictable, and often erroneous

results, effectively discouraging certification and eroding the foundations of cooperative judicial federalism that this Court has strived to build over the past eighty years since establishing *Pullman* abstention. *See Railroad Comm'n of Tex.* v. *Pullman Co.*, 312 U.S. 496 (1941).

This case is an ideal vehicle for the Court to reaffirm the importance of certification—especially as to novel or unsettled, important questions arising under a distant state's laws that the state courts are better equipped to answer—and to clarify when courts should resort to certification. The Court should grant certiorari and review this case because (a) the Federal Circuit disregarded this Court's guidance by not certifying to the Oregon Supreme Court; (b) the Federal Circuit's erroneous *Erie* guess is a case study in the type of needless friction that declining to properly certify can generate with state courts and law; and (c) the disparate approaches to certification taken by the federal Courts of Appeals, leading to inconsistent results, evinces an urgent need for this Court's intervention to restore cooperative judicial federalism.

Accordingly, and for the reasons stated below, the Court should grant certiorari.

STATEMENT OF THE CASE

This is a Trails Act takings case in which more than one-hundred Petitioners (hereafter, the "Oregon Landowners") contend that the federal government effected a Fifth Amendment taking of narrow strips of land across their properties without compensation, by

converting the strips from abandoned railroad rights-of-way to recreational trails.

In the early 1900s, the Oregon Landowners (or their predecessors-in-interest) granted interests in the strips of land under twenty-six deeds to the Pacific Railway and Navigation Company and the Southern Pacific Company, so that the companies could operate a railroad.[1] The deeds provided interests in the narrow strips of land across an 81.07-mile-long portion of the railroad line located between milepost 775.01 near Banks, Oregon, and milepost 856.08 near Tillamook, Oregon.

All of the deeds included indicia demonstrating, under Oregon law, that they provided easements allowing the railroad companies to use the strips of land only to operate a railroad. The Oregon Landowners therefore retained ownership in the strips of land, which converted to unencumbered fee simple title upon abandonment of the strips of land by the railroad.

For example, eleven of the deeds expressly stated that they conveyed an interest in the strips of land for use as a railroad or a right of way, evincing an easement only for that purpose, and five of the deeds were expressly titled "Railway Deed." Nearly every deed was in exchange for nominal consideration, consistent with an easement, and the majority of the deeds were in exchange for $1. All of the deeds indicated that they conveyed only an interest in a

[1] One hundred and thirty-two deeds were initially at issue in the Court of Federal Claims, but only twenty-six deeds were at issue on appeal and in this petition.

narrow "strip of land," which had no other utility at the time but to run a railroad, further evincing easements. The railroad companies also surveyed and located the strips of land prior to executing the deeds, which under Oregon law effected takings in the form of easements, since that was the smallest estate required to be condemned for the purpose of creating the railroad.

In May 2016, the Port of Tillamook Bay Railroad (POTB), which had obtained the deeded interests in the relevant portion of the railroad line, decided to abandon the segment of the railroad line at issue in the twenty-six deeds. POTB initiated abandonment procedures established by the National Trail System Act Amendments of 1983 (the "Trails Act"), 16 U.S.C. § 1247(d), and regulations promulgated thereunder.

Under the Trails Act, and regulations promulgated by the United States Surface Transportation Board (STB), a railroad can abandon or discontinue a railroad line by filing an application for abandonment or discontinuance with the STB under 49 U.S.C. § 10903, or a notice of exemption under 49 U.S.C. § 10502 and 49 C.F.R. §§ 1152.1–1152.60. A "qualified trail provider" (*i.e.*, "a state, political subdivision, or qualified private organization") that is interested in acquiring the corridor for interim trail use and railbanking, and who is willing to assume financial and legal responsibility for the land, can then request that the STB issue a Certificate of Interim Trail Use or a Notice of Interim Trail Use, 16 U.S.C. § 1247(d); 49 C.F.R. § 1152.29(c)–(d), which will issue if the railroad is willing to negotiate an agreement. If the railroad

company and the trail sponsor reach an agreement, the STB suspends the abandonment proceedings, and the trail sponsor may then assume management of the former railroad corridor, subject only to the right of a railroad to reassert control of the property for the restoration of rail service.

POTB filed a Notice of Intent to Partially Terminate (Abandon) Service for the railroad segment at issue here with the STB on May 26, 2016. On June 17, 2016, a trail sponsor, the Salmonberry Trail Intergovernmental Agency, filed with the STB a Statement of Willingness to Assume Financial Responsibility regarding the relevant railroad segment. On July 1, 2016, POTB filed a response and expressed its willingness to negotiate with the Salmonberry Trail regarding the acquisition of the relevant railroad segment. On July 26, 2016, the STB issued a Notice of Interim Trail Use for the relevant railroad segment, and, on October 27, 2017, the POTB and the Salmonberry Trail notified the STB that they had entered into a trail use/rail banking agreement regarding the relevant railroad segment, completing the conversion process under the Trails Act.

In 2016 and 2018, the Oregon Landowners collectively filed three lawsuits against Respondent the United States in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(a)(1), which grants the Court of Federal Claims jurisdiction to hear claims founded upon the Constitution.[2]

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[2] The three cases were captioned *Loveridge, et al. v. United States*, No. 1:16-cv-00912 (Aug. 1, 2016), *Albright et al. v. United*

The Oregon Landowners alleged that the STB's Notice of Interim Trail Use effected a taking of the strips of land on their properties without compensation, in violation of the Fifth Amendment, and sought compensation for the unconstitutional takings. In *Preseault v. Interstate Commerce Commission,* 494 U.S. 1 (1990), this Court held that the Trails Act often effects takings of property for which the Fifth Amendment requires the federal government to compensate landowners because "many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests … [and] frequently the easements provide that the property reverts to the abutting landowner upon abandonment of rail operations." 494 U.S. at 8.[3]

The Court rejected the notion that Congress can redefine existing property interests without violating the Fifth Amendment's obligation to justly compensate the owner. *See also Cedar Point Nursery v. Hassid*, Slip Op. at 5, 8, 141 S. Ct. 2063 (2021)

States, No. 1:16-cv-01565 (Nov. 23, 2016), and *Aeder, et al. v. United States*, No. 1:18-cv-00375 (Mar. 9, 2018).

[3] More recently, in *Marvin M. Brandt Revocable Tr.* v. *United States*, 572 U.S. 93, 105 (2014), this Court explained that railroad right-of-way easements are common-law easements governed by settled principles of property law. The Court explained: "Unlike most possessory estates, easements … may be unilaterally terminated by abandonment, leaving the servient owner with a possessory estate unencumbered by the servitude. In other words, if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land." *Id.* (internal citation omitted).

("When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation. … The same is true when the government physically takes possession of property without acquiring title to it. … We similarly held that the appropriation of an easement effected a taking …." (citations omitted)).

To prevail under Federal Circuit precedent, the Oregon Landowners had to establish that: (1) the railroad companies acquired only an easement under the deeds, not fee simple title, such that the Oregon Landowners still held title to the strips of land at the time of the conversion; (2) the terms of the easement limited the land use to railroad purposes, and not for recreational trail use; and (3) if the easement allowed for recreational trails, the easement had terminated prior to the conversion, disallowing that use. *See, e.g.*, *Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009).

The parties filed cross-motions for summary judgment as to the first element. The Oregon Landowners contended that, under Oregon law, the twenty-six deeds conveyed only easements, and the Oregon Landowners retained title to the narrow strips of land following POTB's abandonment of the strips. In contrast, the United States argued that the Oregon Landowners conveyed fee simple title in the narrow strips of land to the railroad companies, precluding their recovery.

On August 13, 2018, the Court of Federal Claims entered summary judgment in favor of the United States on this element, denying the Oregon

Landowners' claims for compensation. *See Loveridge v. United States*, 139 Fed. Cl. 122 (2018) (Pet. App. 198a–396a). The Court of Federal Claims ventured an *Erie* guess that the Oregon Supreme Court would hold that the twenty-six deeds at issue conveyed fee simple title to the strips of land to the railroad companies—not easements—such that the Oregon Landowners retained no title to the strips of land that could have been converted by the federal government. The Oregon Landowners filed timely notices of appeal on June 27, 2019, June 28, 2019, and August 26, 2019.

On appeal, in an unpublished opinion dated December 1, 2020, the Federal Circuit summarily affirmed the judgment of the Court of Federal Claims. *See Albright v. United States*, 838 Fed. App'x 512 (Fed. Cir. 2020) (Pet. App. 1a–19a).[4] The Federal Circuit also ventured an *Erie* guess, speculating that the Oregon Supreme Court would hold that all twenty-six deeds conveyed fee simple title to the railroad companies.

The Federal Circuit's decision, however, plainly conflicted with Oregon law. The decision disregarded or misapplied five central tenets of Oregon law—each of which separately compelled the conclusion that the deeds conveyed easements—and charted its own path in interpreting the intent of the deeds. The Federal Circuit rejected multiple controlling Oregon precedents dating back 125 years, ignored Oregon rules of deed construction, and rejected an Oregon public policy that seeks to prevent the existence of

[4] *See* 28 U.S.C. § 1295(a)(3) (granting the Federal Circuit exclusive jurisdiction over an appeal "from a final decision of the United States Court of Federal Claims").

innumerable strips and gores of land across properties. As a result, the Federal Circuit's decision needlessly injected confusion and uncertainty into an area of Oregon law, property title and rights, that demands maximum predictability. *See Leo Sheep*, 440 U.S. at 687–88 (noting the "special need for certainty and predictability where land titles are concerned," and advising that courts should not "upset settled expectations" in this area).

The Federal Circuit could have avoided creating this friction with Oregon courts and property law—and promoted cooperative judicial federalism—simply by certifying the question to the Oregon Supreme Court. Oregon law, like that of 47 other states, provides a mechanism for federal courts to certify questions of state law to the Oregon Supreme Court. *See* O.R.S. § 28.200–205. The Oregon Supreme Court permits certification so long as the question of state law "may be determinative of the cause then pending." *Id.* § 28.200. But the Federal Circuit declined to do so.

The Oregon Landowners timely petitioned for rehearing by the panel and en banc, asking the Federal Circuit to rehear the case so that it could either correct the panel's errors or certify the question of Oregon law to the Oregon Supreme Court for an authoritative answer. The Federal Circuit denied rehearing on February 18, 2021. Pet. App. 397a–399a.

The Oregon Landowners timely filed the instant petition for a writ of certiorari, so that this Court can vacate the erroneous judgment of the Federal Circuit, and remand with directions that the Federal Circuit certify to the Oregon Supreme Court the question of

whether the twenty-six deeds at issue conveyed easements or fee simple title to the railroad companies. Through this case, the Court can reaffirm and clarify whether and when federal courts should certify novel and unsettled questions of state law to a state's highest courts, and promote the cooperative judicial federalism that the federal Courts of Appeals have come to discourage.

REASONS FOR GRANTING CERTIORARI

This case is an ideal vehicle for the Court to reaffirm the importance of certification and clarify when federal courts should certify novel or unsettled state law questions to a state's highest court, for at least three reasons.

First, the Federal Circuit disregarded this Court's guidance by not certifying the question, since the question was novel and unsettled, important, turned on state property law in a distant state with which the Federal Circuit had little expertise, and implicated local public policy within the ken of the Oregon courts. This Court should therefore correct the Federal Circuit's error, and prevent it from recurring.

Second, this case presents a case study in *why* federal courts should more carefully consider certifying questions in the interest of cooperative judicial federalism. The Federal Circuit's *Erie* guess is plainly wrong, and has generated precisely the type of friction that this Court has cautioned federal courts to avoid, by unsettling Oregon law on the important subject of property title and rights.

Third, the disparate certification standards and criteria adopted by the federal Courts of Appeals,

which has led to inconsistent and often erroneous results, evinces an urgent need for this Court to provide additional guidance as to when certification to a state's highest court is appropriate. While this Court has trumpeted the importance of promoting cooperative judicial federalism through certification, it has provided limited guidance as to when certification is appropriate, effectively discouraging certification. This case presents an opportunity for the Court to promptly fill that void, align the federal courts on this subject, and strengthen the federal courts' commitment to cooperative judicial federalism through certification.

Accordingly, for the reasons stated below, the Court should grant certiorari.

I. This case is an ideal vehicle for the Court to reaffirm the importance of certification to a state's highest court and clarify when certification is appropriate.

A. The Federal Circuit disregarded this Court's guidance by declining to certify a novel or unsettled, important question arising under a distant state's laws to the state's highest court.

This Court has long emphasized the importance of certifying unsettled questions of state law to a state's highest court in order to promote cooperative judicial federalism. This principle applies with particular force where, as here, the question is important, the question arises under a distant state's

laws, the state court is well-suited to answer the question, and the question implicates the state's public policy. This Court should review this case to correct the Federal Circuit's error in disregarding these principles.

Long before certification became widely available, the Court held that principles of federalism require federal courts to abstain from deciding unsettled questions of state law when a definitive state court determination would allow the federal courts to avoid adjudicating a federal constitutional issue. *See Pullman*, 312 U.S. at 500; *Clay* v. *Sun Ins. Off. Ltd.*, 363 U.S. 207 (1960).

In *Pullman*, the Court required a federal court to abstain from deciding an issue of Texas law because the proper resolution of that issue would avoid "an unnecessary ruling of a federal court." 312 U.S. at 500. The Court explained that, "no matter how seasoned the judgment of the district court may be [on matters of state law], it cannot escape being a forecast rather than a determination." *Id.* at 499.

In the decades since *Pullman*, almost all states, now numbering forty-eight, adopted procedures allowing federal courts to certify unsettled questions of state law directly to the state's highest court for resolution. *See McKesson*, 141 S. Ct. at 50 ("Fortunately, the Rules of the Louisiana Supreme Court, like the rules of 47 other States, provide an opportunity to obtain such guidance."); *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). This Court has urged federal courts to use certification to

resolve unsettled questions of state law. *See Lehman Bros.*, 416 U.S. at 390–91 (reversing a lower federal court's failure to certify an unsettled question of state law).

In *Arizonans* this Court admonished a lower federal court for deciding the constitutionality of a novel Arizona constitutional amendment (requiring that the state act only in English) without first certifying the meaning of the Arizona law to the Arizona Supreme Court. "Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law," the Court explained, because "the federal tribunal risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Arizonans*, 520 U.S. at 79.

The *Arizonans* Court stressed that the advantages of certification over abstention only strengthen the case for using certification to avoid a federal constitutional issue:

> *Pullman* abstention proved protracted and expensive in practice, for it entailed a full round of litigation in the state court system before any resumption of proceedings in federal court. … Certification procedure, in contrast, allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response.

Id. at 76.

The *Arizonans* Court concluded that the lower federal courts should not have decided the constitutionality of the Arizona amendment because the case had become moot when the plaintiff left her employment with the state. *Id.* at 72. Nonetheless, the Court went out of its way to provide much-needed guidance for lower federal courts as to certification. Both the district court and the Ninth Circuit refused to certify the question of the amendment's meaning to the Arizona Supreme Court because they thought the meaning was "plain." *Id.* at 76. This Court directed, however, that "[a] more cautious approach was in order." *Id.* at 77. "Given the novelty of the question and its potential importance to the conduct of Arizona's business, … the certification requests merited more respectful consideration than they received in the proceedings below." *Id.* at 78.

With the development of certification procedures, the *Pullman* "abstention" doctrine has become a *Pullman* "certification" doctrine because certification is substantially less time consuming and disruptive than traditional abstention. *See Arizonans*, 520 U.S. at 75–76.

Just this past term, the Court reinforced the need for federal courts to certify unsettled questions of state law to the state's highest court. In *McKesson v. Doe*, the Fifth Circuit resolved a novel issue of Louisiana law by holding that a police officer could bring a negligence claim against the planner of a protest after an unidentified protester assaulted the officer. 141 S. Ct. at 49. The Court granted certiorari to determine whether the First Amendment

precluded the claim, but did not reach that issue, holding instead that the Fifth Circuit should have certified the antecedent question of state law to the Louisiana Supreme Court.

The *McKesson* Court concluded that "the Fifth Circuit's interpretation of state law is too uncertain a premise on which to address" whether the First Amendment precluded the officer's claim. *Id.* at 50. The Court added that, while "[c]ertification is by no means 'obligatory' merely because state law is unsettled," it can be "advisable," including where "the dispute presents novel issues of state law peculiarly calling for the exercise of judgment by the state courts." *Id.* at 51. The Fifth Circuit's "[s]peculation" as to the question of Louisiana law in the case was "particularly gratuitous when the state courts stand willing to address questions of state law on certification," the Court added. *Id.*

Importantly, this Court has emphasized that certification is "particularly appropriate" in cases where, as here, the federal court would otherwise need to resolve an unsettled question of a *distant* state's laws. *Lehman Bros.*, 416 U.S. at 391. In *Lehman Brothers v. Schein*, the Second Circuit decided an unsettled and novel question of Florida corporate fiduciary law in a shareholder derivative suit, rather than certifying the question to the Florida Supreme Court. This Court vacated the Second Circuit's decision and remanded for consideration whether to certify the question. The Court concluded that while certification was not obligatory, "resort to it would seem particularly appropriate in view of the novelty of the question and the great unsettlement of

Florida law, Florida being a distant State." *Id.* The Court explained that federal judges from a distant jurisdiction act as "'outsiders,' lacking the common exposure to local law which comes from sitting in the jurisdiction," further warranting certification. *Id.*; *see also Pullman*, 312 U.S. at 499 (observing that this Court itself reads distant state laws "as outsiders without special competence" and "would have little confidence in [its] independent judgment regarding the application of that law to [a novel] situation").

In this case, the Federal Circuit disregarded these principles by opting to decide a novel and unsettled question of Oregon law, outside its expertise and squarely within the expertise of the Oregon Supreme Court, rather than certifying it to the Oregon Supreme Court. *See* O.R.S. § 28.200 (permitting certification where the question "may be determinative of the cause then pending"); *see, e.g.*, *Klamath Irrigation Dist. v. United States*, 532 F.3d 1376, 1377 (Fed. Cir. 2008) (certifying question to the Oregon Supreme Court).

The question of whether deeds providing interests in narrows strips of land for use by the railroad companies transferred fee simple title rather than providing easements is paradigmatic of the type of question that this Court has held warrants certification. The question was novel and unsettled—if not altogether settled in the Oregon Landowners' favor. *See infra* Part I.B.

The question is also highly important. This Court has emphasized the "special need for certainty and predictability" in the area of title and ownership, and for federal courts to take care not "to upset" such

certainty and predictability. *Leo Sheep*, 440 U.S. at 687–88. The Federal Circuit's erroneous decision unsettles this important area of Oregon law.

The question is also one that "peculiarly call[ed] for the exercise of judgment by the state courts." *McKesson*, 141 S. Ct. at 51. Property ownership and rights have long been the domain of state courts, which have developed substantial expertise in resolving issues such as the one presented here. *See, e.g.*, *Cedar Point*, Slip Op. at 13 ("As a general matter, it is true that the property rights protected by the Takings Clause are creatures of state law."); *Clark v. Graham*, 19 U.S. 577, 579 (1821) ("It is perfectly clear, that no title to lands can be acquired or passed, unless according to the laws of the State in which they are situate."); *see also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (noting the "basic axiom that [p]roperty interests" are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law" (internal quotation marks omitted)).

Certification was "particularly appropriate" in this case, moreover, because the Federal Circuit was confronted with a novel and unsettled state law question from "a distant State," thousands of miles from where the Federal Circuit sits. *Lehman*, 416 U.S. at 391. Like in *Lehman*, the panel of the Federal Circuit here resolved the novel and unsettled question of Oregon law as "'outsiders,' lacking the common exposure to local law which comes from sitting in the jurisdiction." *Id.* Thus, certification was even more appropriate here than if, for example, the Ninth

Circuit had decided the question based on its institutional experience in deciding questions of Oregon law.

In addition, like in *McKesson*, the question presented here implicated important public policy and value judgments under Oregon law, which are outside the expertise of the Federal Circuit. Indeed, the Oregon Supreme Court has recognized "the highest public policy" in Oregon of "prevent[ing] the existence innumerable strips and gores of land" across properties, which is precisely what the Federal Circuit's decision would create. *Cross v. Talbot*, 254 P. 827, 828 (Or. 1927) (internal quotation marks omitted).

In these circumstances, the Federal Circuit should have certified the question to the Oregon Supreme Court, and it abused its discretion by declining to do so. Absent this Court's review in this case, the Federal Circuit is likely to repeat its mistakes, since it is the only federal appellate court that hears appeals in takings cases asserted against the United States. This Court should therefore review this case and correct the Federal Circuit's errors.

B. This case exemplifies the friction generated by an improper *Erie* guess, as the Federal Circuit needlessly unsettled 125 years of Oregon property law.

This case exemplifies why this Court has advised federal courts to certify unsettled or novel questions of state law to the highest court of a state, especially when the issue "peculiarly call[s] for the exercise of

judgment by the state courts," *McKesson*, 141 S. Ct. at 51, and involves resolution of the laws of a "distant State," *Lehman*, 416 U.S. at 391, involving local public policy or value judgments, *McKesson*, 141 S. Ct. at 51.

In ruling that the twenty-six deeds conveyed fee simple title to the railroad companies rather than easements, the panel disregarded or misapplied five central tenets of Oregon law—each of which independently compelled the conclusion that the deeds conveyed easements. As a result, the Federal Circuit's erroneous *Erie* guess has unsettled a critically important area of Oregon law developed over the past 125 years.

First, the panel disregarded the Oregon rule that a deed that indicates a particular use conveys an easement even if the deed otherwise appears to convey fee simple—a factor the Oregon Supreme Court has held is "controlling." *Wason v. Pilz*, 48 P. 701, 702 (Or. 1897). In *Wason v. Pilz*, the Oregon Supreme Court held that a deed conveying "a parcel of land for road purposes" was "indicative of an easement only." *Id.* The court adopted the reasoning of the Vermont Supreme Court in *Robinson v.* [*Missiquoi*] *Railroad Co.*, 10 A. 522 (Vt. 1887), which held that a deed conveying "a strip of land … across [the grantor's] land … for the use of a plank road" conveyed an easement and not fee simple. The *Wason* court found persuasive *Robinson*'s holding that "[t]he words 'for the use of a plank road' seem to have been *decisive* of the estate carved out, *although the deed otherwise purported to be an absolute grant*." *Wason*, 48 P. at 702 (emphasis added). "[T]he words 'a parcel

of land for road purposes,'" the court observed, was not only "indicative of an easement only," but was "controlling as the measure of the estate granted." *Id.*

The Oregon Supreme Court reaffirmed the *Wason* rule in *Bernards v. Link*, 248 P.2d 341 (Or. 1952), *adhered to on reh'g*, 263 P.2d 794 (Or. 1953). The court in *Bernards* identified eight factors that indicated that the deed at issue conveyed an easement rather than fee simple title, but rested its decision on the *Wason* rule, which the court deemed "determinative." *Id.* at 344. The court explained that *Wason* "experienced no difficulty in reaching the conclusion that the deed granted an easement only" where it indicated a use for the land, and "the *Wason* decision is determinative…." *Id.* The Oregon Supreme Court again reaffirmed this principle in *Bouche v. Wagner*, 293 P.2d 203, 209 (Or. 1956), where it observed that "courts have little difficulty, where a railroad company is grantee, in declaring that the instrument creates only an easement whenever the grant is a use to be made of the property, usually, but not invariably, described as for use as a right of way in the grant." *Id.*

The panel disregarded these controlling precedents here. Eleven of the deeds indicated that the land would be used for either a railroad or a right of way, conclusively establishing that they conveyed easements under *Wason* and its progeny. As the panel acknowledged, "seven deeds … indicate that the right to operate a railroad is conveyed," and "four of the deeds … include the word 'right of way.'" Pet. App 12a. The panel effectively treated this dispositive language from *Wason* as meaningless surplusage, holding that

all eleven of these deeds conveyed fee simple title. Citing no Oregon case law, the panel found that the indication that the land would be used for a railroad "is clearly employed merely to confirm that the conveyance includes that right," even though the right would be implicit if the deed conveyed fee simple title, and "not to limit the interest conveyed to that right." *Id.* This holding defies *Wason*.

Second, the panel overlooked *Cappelli v. Justice*, 496 P.2d 209, 213 (Or. 1972), where the Oregon Supreme Court held that a deed describing a "right of way" provides an easement "[i]n the absence of special circumstances indicating a contrary meaning." *Id.* In so holding, *Cappelli* found that a deed describing "[a] right of way 30 feet in width" provided an easement, notwithstanding that: (1) it was entitled "Warranty Deed;" (2) it lacked language indicating that the strip of land ran "over and across the lands of the grantors;" and (3) it referred to the land as a "[p]arcel." *Id.* at 212. Under Oregon law, the court found, Oregon courts employ a purpose-based interpretation of the deed—rather than a "highly technical" one—and reasoned that the purpose was to provide an easement over "a narrow strip which, standing alone, has little if any utility except to provide a means of access to the highway for neighboring land." *Id.*

The Federal Circuit ignored this case. Here, as in *Cappelli*, all of the deeds conveyed "a narrow strip which, standing alone, ha[d] little if any utility," to the railroad companies except to run a railroad. In addition, none of the deeds involved "special circumstances" signifying a fee simple transfer, the sole exception in *Cappelli*. *Id.* at 213. But although

Cappelli is the Oregon Supreme Court's most recent statement on this subject and is controlling here—and the Oregon Landowners cited it repeatedly in their briefs—the panel entirely overlooked it.

Third, the panel did not fairly apply the eight factors from *Bernards v. Link*, 248 P.2d 341, which provide indicia of an easement under Oregon law, and instead discounted these factors. The factors are whether:

> (1) [The deed] was entitled "Right of Way Deed"; (2) a conveyance of the strip was made "for use as a right of way"; (3) the consideration was only $1; (4) the conveyance was subject to a condition subsequent which revested all title in the grantors in the event the stipulated condition occurred; (5) the grantees were required to construct for the use of the grantors a cattle crossing; (6) the description included the phrase "over and across and out of the land of the grantors"; (7) the phraseology employed repeatedly the term "strip of land"; [and] (8) the grantee was required to "build and keep in repair a good and substantial fence along each side of the strip."

Id. at 343.

The Federal Circuit effectively discounted these factors. All twenty-six deeds contained indicia from *Bernards* indicating that they conveyed easements. Every deed referred to the granted property as a

"strip of land." Every deed described the conveyance as running "through," or "across" the grantor's property (or used a similar locution). Nearly every deed was in exchange for nominal consideration, including fourteen deeds that were in exchange for $1, as in *Bernards*. Five of the deeds were called "Railway Deeds." And four deeds, as noted above, conveyed a strip of land for use as a "right of way."

Rather than weigh the *Bernards* factors, however, the panel found them insignificant. The panel found insignificant that every deed indicated that it conveyed only a "strip of land," declaring that *Bernards* did not "attach great significance to" that factor, and finding that it favored the government. Pet. App. 14a. The panel found insignificant that the deeds referred to the interest as running "through" or "across" the grantor properties, despite that *Bernards* found substantially similar language to be indicative of an easement ("over and across and out of the land of the grantors"). Pet. App. 16a. The panel found insignificant that the deeds were in exchange for nominal consideration, typically $1, finding it "insufficient to overcome the other factors" purportedly indicating a conveyance of fee simple title. *Id.* This finding is particularly untenable in light of the Supreme Court's recent pronouncement of "a simple, *per se* rule: The government must pay for what it takes." *Cedar Point*, Slip Op. at 5. The payment of $1 in nominal consideration can only comply with this rule, if at all, if the payment is for an easement and not full title to the property. And the panel did not address the fact that five of the deeds

were titled "Railway Deeds."[5] A fair assessment of the *Bernards* factors evinced that each deed conveyed an easement.

Fourth, the Federal Circuit rejected a rule of law that the Federal Circuit, sitting en banc, had already found applied in Oregon, and that demonstrated that each deed conveyed an easement. This Court had previously held, under Vermont law, in *Preseault II*, that "the survey and location" by the grantee "is what constitutes the taking of the land," not the execution of the deed, and "when a railroad for its purposes acquires an estate in land for laying track and operating railroad equipment thereon, the estate acquired is no more than that needed for the purpose, and that typically means an easement, not a fee simple estate." *Preseault v. United States* (*Preseault II*), 100 F.3d 1525, 1535 (Fed. Cir. 1996). Immediately following this statement of Vermont law, the Federal Circuit indicated in a footnote that this rule was in "accord" with Oregon law, citing *Bernards* for the proposition that "a deed purporting to convey a strip of land for use as a railroad right-of-way conveyed an easement, not a fee." *Id.* at 1535 n.10 (citing *Bernards*, 248 P.2d at 341).

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[5] The panel also attached undue weight to a single *Bernards* factor it found absent from the deeds—reasoning that the absence of an express reverter in the deeds, paired with the use of the word "forever," weighed heavily in favor of finding that the deeds conveyed fee simple title. Pet. App. 13a, 18a–19a. Adding its thumb to the scale, the panel also found highly significant that the deeds granted "appurtenances, tenements and hereditaments," even though it cited no Oregon law that attached significance to this language. Pet. App. 13a.

Importantly, *Preseault II*'s statement of Oregon law is consistent with *Egaas v. Columbia County*, 673 P.2d 1372 (Or. Ct. App. 1983), where the Oregon Court of Appeals stated: "The general rule regarding the interest taken in a right-of-way condemnation proceeding by a railroad is that, unless otherwise expressly provided by statute or in the instrument of taking, only an easement is acquired." *Id.* at 1375.[6]

The Federal Circuit ignored this holding. As the panel acknowledged, all twenty-six deeds "specifically state[] that the railroad had already surveyed and located a railway across the grantor's land prior to executing the deed." Pet. App. 17a. Under *Preseault II* and *Egaas*, all of the deeds conveyed easements, not fee simple title, because the railroads had already effected a condemnation and taking by entering and surveying the land well before executing the deeds.

Nevertheless, the panel declined to apply this rule. The panel reasoned that *Preseault II* applied "Vermont law, not Oregon law," and failed to address *Preseault II*'s statement that Oregon law accords with Vermont law on this point, let alone *Egaas*'s confirmation of that fact.[7]

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[6] *See also* James W. Ely, Jr., *Railroads & Am. Law* (Univ. of Kansas Press, 2001) (noting the prevailing rule that "absent statutory provisions expressly authorizing the taking of a fee simple, railroads should receive just an easement in land condemned for their use," because "a railway company … in taking lands, could acquire no absolute fee-simple, but only the right to use the land for their purposes").

[7] In addition, in rejecting this rule, the panel relied on the fact that one of the deeds held to convey fee simple title in *Bouche* happened to indicate that the railroad had already been "located

Fifth, the panel disregarded "the highest public policy" in Oregon of "prevent[ing] the existence of innumerable strips and gores of land" across properties. *Cross*, 254 P. at 828 (internal quotation marks omitted). The panel reasoned that either this is no longer the policy of Oregon, or that *Bernards* and *Bouche* silently subsumed this policy in their analyses. Pet. App. 15a. But the Oregon Supreme Court has not disavowed this policy, and neither *Bernards* nor *Bouche* required deference to public policy because the deeds were clear in those cases. Indeed, in *Bernards*, the deed involved a straightforward application of the *Wason* rule, apart from the eight other factors indicating that the deed conveyed an easement. 248 P.2d at 343. And, unlike here, the deed in *Bouche* involved *none* of the *Bernards* factors. 293 P.2d at 209. Given that the panel found indicia of *both* an easement and a fee simple conveyance, it should have defaulted to Oregon public policy, rather than disavow it. This is precisely the type of public policy and value judgment that the Oregon Supreme Court is fit to make, but about which the Federal Circuit sitting across the country should not speculate, especially when it essentially held that the public policy is no longer extant. *See McKesson*, 141 S. Ct. at 51.

In sum, the Federal Circuit's rejection or disregard of landmark decisions under Oregon law—

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and established" on the strip of land. Pet. App. 18a. But there is no indication that any party raised this point in *Bouche*, let alone that the Oregon Supreme Court evaluated its relevance. Thus, *Bouche* cannot be read to reject the Vermont rule on this basis, especially when a later pronouncement of Oregon law adopted it. *See Egaas*, 673 P.2d at 1375.

and the consequent confusion and uncertainty the decision sows in the important area of title and property rights—illustrates why this Court has emphasized the need for certification in a case like this one. This case presents a paradigmatic example of why certification "merit[s] more respectful consideration" in cases like this one, rather than "gratuitous" *Erie* guesses. *Arizonans*, 520 U.S. at 78–79.

C. The disparate standards adopted by the federal Courts of Appeals effectively discourage certification and evince an urgent need for further guidance from this Court as to when certification is appropriate.

The Federal Circuit's decision, and the disparate standards adopted by the federal Courts of Appeals, has led to inconsistent and often-incorrect results, has effectively discouraged certification, and warrants this Court's urgent intervention to clarify when certification is appropriate. Review of this case will provide the Court with that opportunity, and the opportunity to restore cooperative judicial federalism.

Without substantial guidance from this Court as to when certification is appropriate, the Federal Circuit has effectively declined to adopt *any* standard as to when it should certify cases to a state's highest court. For example, the Federal Circuit has certified some Fifth Amendment takings cases, while declining to certify others, without meaningful distinction. *Compare Chevy Chase Land Co.* v. *United States*, 158 F.3d 574 (Fed. Cir. 1998) (certifying three questions

of Maryland property law to the Maryland Court of Appeals), *Klamath Irrigation District* v. *United States*, 532 F.3d 1376, 1377 (Fed. Cir. 2008) (certifying "complex issues of Oregon property law" to the Oregon Supreme Court to avoid addressing the underlying Fifth Amendment constitutional issue), *and Rogers* v. *United States*, 814 F.3d 1299, 1305, 1307, 1309 (Fed. Cir. 2015) (noting, in a case presenting the issue "whether the railroad obtained an easement or a fee simple estate," that the court certified to the Florida Supreme Court given the "dearth of Florida case law interpreting the property rights of railroad companies"), *with Romanoff Equities, Inc. v. United States*, 815 F.3d 809 (Fed. Cir. 2016) (declining to certify novel questions of New York property law). The Federal Circuit has provided scant reasoning as to whether and in what circumstances certification is appropriate, leading to these inconsistent results.

With limited guidance from this Court, multiple federal Courts of Appeals have expressly *discouraged* certification, even regarding novel or unsettled state law issues. For example, the Fifth Circuit discourages certification by requiring "compelling" circumstances before it will certify a novel or unsettled question of state law. *Wiltz v. Bayer CropScience, Ltd. P'ship*, 645 F.3d 690, 703 (5th Cir. 2011) ("We are chary about certifying questions of law absent a compelling reason to do so." (internal quotation marks omitted)); *see also In re FEMA Trailer Formaldehyde Prod. Liab. Litig.*, 668 F.3d 281, 290 (5th Cir. 2012) (advising that federal courts should only "sparingly" certify questions to a state's highest court, and only in "exceptional case[s]"). Small wonder, then, that this

Court vacated the Fifth Circuit's *Erie* guess in *McKesson* just last term, after the Fifth Circuit opted to speculate as to whether the Louisiana Supreme Court would recognize a novel theory of negligence and directed the Fifth Circuit to certify the question on remand. 141 S. Ct. at 51.

The Tenth Circuit also discourages certification, holding that federal courts should refrain from doing so—even when confronting a novel or unsettled, difficult question of state law—absent exceptional circumstances. The court has explained:

> Certification is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law. Absent some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, federal courts bear a duty to decide questions of state law … even if difficult or uncertain. Thus, we apply judgment and restraint before certifying, and will not trouble our sister state courts every time an arguably unsettled question of state law comes across our desks.

Colony Ins. Co. v. Burke, 698 F.3d 1222, 1235–36 (10th Cir. 2012) (internal quotation marks omitted). Against this lofty standard, courts in the Tenth Circuit are unlikely to certify even when principles of cooperative judicial federalism require it.

In contrast, the Seventh Circuit has established a more robust standard for deciding whether to certify,

without outright discouraging the practice. The court considers "whether the case concerns a matter of vital public concern, the issue will likely recur in other cases, resolution of the question to be certified is outcome determinative of the case, and whether the state supreme court has yet to have an opportunity to illuminate a clear path on the issue," as well as "whether the supreme court of the state would consider the issue one of importance to the growth of the state's jurisprudence, whether resolution will benefit other future litigants, or whether intermediate courts of the state are in disagreement." *Brown v. Argosy Gaming Co.*, 384 F.3d 413, 416 (7th Cir. 2004). In contrast, the Seventh Circuit has held that "a case is not a good candidate for certification where the case is fact-specific, where there is not much uncertainty regarding the issue in dispute, and where resolution of the question will not dispose of the case." *Id.*

Similarly, the Ninth Circuit has encouraged certification when confronted by novel or unsettled, difficult state law issues, especially where the question implicates state public policy:

> Our task … is to ask ourselves what the Washington Supreme Court would do with this case, using the intermediate appellate decisions as guidance. Simply put, we just do not know what it would do. Hence, this certification order. … Especially in light of this particular case's importance to the citizens of Washington state, we think these questions should be addressed by the

> state Supreme Court, rather than by a federal court sitting in diversity.

McKown v. Simon Prop. Grp. Inc., 689 F.3d 1086, 1093–94 (9th Cir. 2012).[8]

The Second Circuit has held that certification may be appropriate especially where the case presents "undecided issues of state law that are both important and recurring." *Allstate Ins. Co.* v. *Serio*, 261 F.3d 143, 150, 154 (2d Cir. 2001) (stating also that *Pullman* abstention and *Arizonans* certification "can be used by federal courts to avoid (a) premature decisions on questions of federal constitutional law, and (b) erroneous rulings with respect to state law"). The Second Circuit has further interpreted this Court's decision in *Arizonans* to mean that the federal Courts of Appeals "should consider certifying in more instances than had previously been thought appropriate, and do so even when the federal courts might think that the meaning of a state law is 'plain.'" *Tunick v. Safir*, 209 F.3d 67, 73 (2d Cir. 2000).

As these examples show, the dearth of guidance from this Court has effectively discouraged certification, especially in the Fifth and Tenth Circuits, and led to inconsistent results among the federal Courts of Appeals writ large. This Court should review this case so that it can promptly provide guidance to the federal courts as to when

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[8] The Ninth Circuit has further held that certification is "compelled" when necessary to avoid a federal constitutional question. *See Perry* v. *Schwarzenegger*, 628 F.3d 1191, 1195–96 (9th Cir. 2011).

certification is appropriate and restore cooperative judicial federalism in the federal courts.

CONCLUSION

The Federal Circuit ruled contrary to this Court's jurisprudence, and its resulting decision has unsettled more than 125 years of Oregon property law. This Court should vacate the Federal Circuit's judgment, and remand with directions that the Federal Circuit certify the question of whether deeds providing interests in narrow strips of land across private property to railroad companies provide easements or transfer fee simple title. The Court should review this case not only to vindicate the Oregon Landowners' Fifth Amendment rights, but to promote important principles of cooperative judicial federalism across the federal court system.

Respectfully submitted,

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