

No. 25-64

In the Supreme Court of the United States

IRON BAR HOLDINGS, LLC, PETITIONER,

v.

BRADLEY CAPE, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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This case presents a recurring federalism question at the heart of “a 150-year conflict touching on the core of property law and, simultaneously, defining the American West.” Pet. App. 4a. The question is whether the Unlawful Inclosures Act of 1885 (UIA) implicitly preempts private landowners’ state-law property right to exclude. The answer “affects property rights in 150 million acres of land in the Western United States.” *Leo Sheep Co. v. United States*, 440 U.S. 668, 678 (1979). The Tenth Circuit’s decision contravenes *Leo Sheep*, tramples state trespass law, and grants easements across thousands of checkerboard properties—without paying a dime of compensation.

Respondents cannot defend that holding. Instead, they rewrite both the UIA and the decision below, recasting the statute as a roving license for the public to cross private property whenever public land lies beyond. To respondents, landowners who exercise their right to exclude are “nuisances” to be abated. That’s backward: The UIA creates no easements or servitudes, and the public thus has no affirmative right to access landlocked public parcels that would otherwise require trespassing.

When a landowner enforces his right to exclude, he is not “eliminating” a public right of access; no such right exists.

Yet the Tenth Circuit’s interpretation “functionally” granted respondents—and millions of others—a perpetual easement across private land, Pet. App. 40a, precisely the right this Court in *Leo Sheep* held Congress had not reserved. Indeed, the panel acknowledged the “doctrinal inconsistencies at play” and invited this Court to “reconsider the scope of *Leo Sheep* as it applies to this case.” Pet. App. 40a, 47a. Rarely does a court of appeals wave the flag for certiorari so plainly.

The constitutional stakes are immense. By reading the UIA to “appropriate[] a right to invade [checkerboard] property,” *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021), the decision effects a taking affecting millions of acres. The Court should grant review to restore fidelity to *Leo Sheep*, safeguard state property law, and prevent a nineteenth-century anti-fence statute from becoming a twenty-first-century license to trespass.

I. THE DECISION BELOW DIRECTLY CONTRAVENES THIS COURT’S PRECEDENT

The Tenth Circuit’s decision contravenes *Leo Sheep*, departs from the UIA’s text, and grants easements without compensation.

A. *Leo Sheep* answered the question that should have foreclosed the Tenth Circuit’s theory: Whether the United States “reserved a right of access” to enclosed, public land in the checkerboard. Brief for the United States, *Leo Sheep*, 440 U.S. 668 (No. 77-1686), 1978 WL 223187, at *1. “[U]nwilling to imply rights-of-way” across private checkerboard land, the Court held that Congress reserved no such right of access. 440 U.S. at 681-682. There, that principle meant the government could not clear a dirt road across a corner. Here, the facts

vary, but the principle applies the same: Because Congress reserved *no* right of access, respondents may not corner cross through Iron Bar’s property.

Unable to contest that syllogism, respondents reinvent *Leo Sheep*. Respondents argue *Leo Sheep* was about whether the government could “*increase* access to public land,” not whether a landowner can “*eliminate* access.” Opp. 23; *id.* at 2 (similar); *id.* at 24 (similar). Here’s what this Court actually said: It was “physically impossible” to reach the reservoir “without some minimum physical *intrusion* upon private land.” 440 U.S. at 678 (emphasis added); see *Leo Sheep Co. v. United States*, 570 F.2d 881, 884 (10th Cir. 1977) (road was needed “to provide the public access”). The question was not about convenience; no matter *how* the public accessed the reservoir, it required some trespass. Moreover, respondents’ reinterpretation makes no sense given that the government argued for easement by necessity, which requires *necessity*. The government would have had no claim if it sought merely to improve access. 440 U.S. at 679 (“easement by necessity” may arise when passage “is necessary to reach the retained property”).

Respondents further seek (at 23) to distinguish *Leo Sheep* because it supposedly “did not concern the actions of a private landowner.” That, too, contradicts what the Court actually said. In discussing why the UIA did not apply, the Court cited *only* the private landowner’s actions: “[W]e cannot see how the Leo Sheep Co.’s unwillingness to entertain a public road without compensation can be a violation of [the UIA].” 440 U.S. at 685.¹ The Court’s ruling that the UIA is inapplicable where a landowner properly refuses to permit a trespass across a

¹ Unlike the recreating public in *Leo Sheep*, who petitioned the government, see 440 U.S. at 678, respondents here took matters into their own hands, choosing trespass over negotiation.

checkerboard corner was not “*sub silentio*,” Opp. 23—it was loud and clear.

Nor has Iron Bar ever suggested the UIA “affords the public *no* protection” against a landowner whose actions effect “a purpresture of government lands.” Opp. 23 (citation omitted). The Act bars fencing federal land, *Camfield v. United States*, 167 U.S. 518, 526-527 (1897), and prevents landowners from using “force, threats, [or] intimidation”—or other “*unlawful* means”—to prevent the public from accessing public land, *McKelvey v. United States*, 260 U.S. 353, 356-357 (1922). But the UIA does not grant the public a free-standing right to access public land wherever and however they’d like, much less a license to cross private property. Just as “the prohibitions of [the UIA]” could not “somehow be read to include the Leo Sheep Co.’s refusal to acquiesce in a public road over its property,” 440 U.S. at 684, neither can it be read to encompass Iron Bar’s refusal to allow the public to trespass on its property.

Respondents concede *Leo Sheep* recognized that, per *Camfield*, a landowner can “fence each of his private-land sections individually without running afoul of the UIA.” Opp. 24. That admission eviscerates respondents’ argument. If Iron Bar may individually fence its private squares without “violat[ing] ... the [UIA],” even when doing so would “obstruct[]” “access to [the public] lots,” 440 U.S. at 685, then bringing a trespass action to enforce those same property rights likewise does not violate the UIA. Whatever *Camfield* said about the “purpresture of government lands,” it was unequivocal that a landowner “doubtless” has “the right to” “separately fence[]” his “odd-numbered sections” *even if* “the result” would be to “practically exclude the government from the even-numbered sections.” 167 U.S. at 525, 527-528. *Camfield* thus supports Iron Bar, not respondents. *Contra* Opp. 20-21.

Respondents nevertheless contend that *Camfield* is about intent—an issue on which the circuits are split—

and that Iron Bar’s trespass action “served no purpose other than to keep the public off public land.” Opp. 24; *id.* at 22 n.4. Not true. Iron Bar has reluctantly exercised its right to exclude only when respondents repeatedly refused to stay off *private* property and to avoid the headaches that invariably accompany public trespasses. See Stock Growers Br. 13-14.

Leo Sheep’s footnote discussing *Buford v. Houtz*, 133 U.S. 320 (1890), does not help respondents. *Contra* Opp. 20, 24. In *Buford*, cattlemen sought to enjoin sheep ranchers from moving their herds across private checkerboard lots to graze on public lands. 133 U.S. at 321-324. As *Leo Sheep* explained, *Buford* denied relief because “it was contrary to a century-old grazing custom.” 440 U.S. at 687 n.24. *Leo Sheep*’s passing reference to the ranchers’ “lack of any alternative” acknowledged that sheep herders, if enjoined, could not have grazed *anywhere*, contrary to the open-range grazing custom. That custom ended long ago.

Finally, it is irrelevant that this Court denied a cert petition in *Bergen* decades ago. That case concerned whether the UIA prohibited a 28-mile fence that prevented “Wyoming pronghorn antelope” from accessing winter grazing areas. *U.S. ex rel. Bergen v. Lawrence*, 848 F.2d 1502, 1504 (10th Cir. 1988). The parties stipulated that the case did not involve human access to checkerboard land, focusing instead on “the access of antelope to public lands.” Pet. 7, 10, *Lawrence v. United States*, No. 88-437 (filed Sept. 12, 1988).

B. The UIA does not clearly and manifestly preempt checkerboard landowners’ state-law right to exclude. The Act bans “inclosures” of public land, 43 U.S.C. § 1061—physical barriers including but not limited to fences—along with other “unlawful means” of obstructing pre-existing access to public land, such as “force, threats, [or] intimidation,” § 1063. The Act says nothing about preempting state law. Iron Bar neither erected a fence-

like barrier “inclosing” public land nor used an unlawful means to obstruct access, so the UIA lacks “any significance in this controversy.” *Leo Sheep*, 440 U.S. at 683.

Respondents assert (at 18) that Iron Bar’s trespass action is an “inclosure” under the UIA because, by “prevent[ing] corner crossing,” Iron Bar “fully eliminate[s] access to ... checkerboarded public lands.” Not so. It is not Iron Bar’s trespass action that prevents corner crossing—it is state-law property rights, coupled with the natural configuration of the land and Congress’s failure to reserve an access easement for itself 140 years ago. Consider island-like parcels of public land entirely surrounded by private land, which constitute roughly 7.5 million acres throughout the West, as in the image below. See onX, *The Corner-Locked Report* (Mar. 2025), <https://perma.cc/G27P-QW6K>.



According to respondents, the UIA would preempt a trespass action to prevent hunters from crossing private land because the lawsuit would “fully eliminate access to” the BLM land. Opp. 18. While these land configurations may frustrate recreationalists, Congress’s peculiar land-grant scheme is to blame, and there are solutions that do

not require abolishing property rights. See *Iron Bar* C.A. Br. 58-60.

Respondents resist the logical end of their argument, claiming (at 26) the decision below does not immunize the trespasser in the example above because the decision permits trespasses only where the trespasser does not “physically touch” the land, Pet. App. 47a. But respondents never explain why physically touching the land makes any difference. The Tenth Circuit held that corner crossing constituted a trespass under state law, Pet. App. 18a-23a; it was only *after* so holding that the panel read the UIA to preempt trespass liability, Pet. App. 44a. If the UIA preempts state law to permit trespassing, the *extent* of the trespass is irrelevant. Respondents offer no contrary limiting principle.

Respondents also argue (at 18) that *Iron Bar*’s “no trespassing” signs constituted an “inclosure.” The signs and chain were irrelevant to the decision below, and are irrelevant here. A foot-long chain between two signposts cannot “inclose” anything. Nor does it “prevent or obstruct ... any person from peaceably entering upon ... any tract of public land,” 43 U.S.C. § 1063, since anyone could just step around it. What prevents the public from doing *that* is what would prevent them from crossing a corner without signage: state trespass law.

Respondents assert (at 19) “the word ‘inclosure’ necessarily covers more than fences” and that the UIA prohibits more than “erecting physical barriers.” *Iron Bar* has never argued otherwise. But the Act distinguishes between “inclosures”—which contemporary dictionaries confirm refers to *physical* barriers, Pet. 21-22—and non-physical barriers like

“force, threats, [or] intimidation,” 43 U.S.C. § 1063.² No reasonable reader—in 1885 or today—would understand “threats” and “intimidation” to be “inclosing” devices.” *Contra* Opp. 19. And not even respondents argue that a trespass action falls into those categories.

Respondents fall back on *Mackay v. Uinta Development Co.*, 219 F. 116 (8th Cir. 1914), a hundred-year-old Eighth Circuit decision they essentially abandoned below by describing it as “not useless,” Cape C.A. Br. 51. In *Mackay*, the court held that a sheep herder had the right to drive his three-quarter-mile-wide flock across private parcels in the checkerboard, and that the herder had no obligation to pay damages for his flock devouring 90% of the private grassland along the way. *Mackay*, 219 F. at 120-121 (Sanborn, J., dissenting). *Mackay* is irrelevant for the same reason *Buford* is: It was decided based on the custom of the open-range. The court stressed that the private land crossed by Mackay’s flock was “uninclosed.” 219 F. at 120; *id.* at 117 (“open and unfenced”); *id.* at 119-20 (similar). Open, unfenced land was central to the majority’s holding because “to leave uncultivated lands uninclosed was an *implied license* to cattle ... to traverse and graze them.” *Buford*, 133 U.S. at 330 (emphasis added). Congress closed the open range shortly after *Mackay*, Pet. 9, so *Mackay* has no relevance to the legality of corner-crossing today. Nor did *Mackay* survive *Leo Sheep*, which expressly rejected the idea that the government (or its licensees) retained a right of access to checkerboard land. See pp. 2-3, *supra*.

What *Mackay* is good for is exposing where respondents’ arguments lead. *Mackay* held there would be no trespass liability even when someone *does*

² Respondents ignore Iron Bar’s argument that “inclosing” clarifies that one could not avoid the UIA by erecting non-fence barriers such as ditches, boulders, or embankments. Pet. 23.

“physically touch” private land, *contra* Pet. App. 47a, and damages private property. *Mackay*’s access-public-land-at-all-costs logic extends to trespasses far more extensive than corner crossing and embodies what respondents actually hope this Court will condone.³

C. The Tenth Circuit’s misreading of the UIA effects an unconstitutional taking. The panel acknowledged that it “functionally” granted the public “a limited easement” through every checkerboard landowner’s property. Pet. App. 40a. When the government takes easements, “it must ... pay just compensation.” *Cedar Point*, 594 U.S. at 151. Yet the decision below decreed that Congress in 1885 granted the public thousands of easements free of charge, abrogating “a cornerstone of the liberties enshrined in the Constitution.” Claremont Br. 3.

Respondents argue (at 30-31) that no taking occurred here because the government-authorized “invasion” is consistent with “longstanding background restrictions” on checkerboard owners. That premise ignores that public officials uniformly understood corner crossing to be illegal for decades. See Pet. 18-19. Nor do respondents dispute that multiple courts post-*Cedar Point* have applied the same “longstanding background restrictions” exception invoked by the court below to deny takings claims. Pet. 29. This case thus provides an important chance to clarify that limitation and ensure the exception doesn’t swallow the rule.

Respondents’ arguments (at 30-31) disputing the viability of a takings claim miss the point. This Court’s

³ Respondents contend (at 28) that Iron Bar belatedly “invoke[d] the presumption [against preemption]” in its reply brief. That is incorrect. The district court did not rule on preemption grounds, so Iron Bar had no reason to address it until respondents raised it below. Regardless, the Tenth Circuit ruled on preemption, see Pet. App. 44a, so this Court can review the issue, *United States v. Williams*, 504 U.S. 36, 41 (1992).

“settled policy” under the canon of constitutional avoidance is “to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question.” *Gomez v. United States*, 490 U.S. 858, 864 (1989). The Tenth Circuit’s interpretation of the UIA triggers that canon, raising serious questions—questions Judge Tymkovich acknowledged—about whether “functionally” granting thousands of easements violates the Takings Clause. The question presented “fairly include[s]” this takings issue. Sup. Ct. R. 14.1(a); cf. *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 56 (2006).

II. THE QUESTION PRESENTED HAS PROFOUND LEGAL AND PRACTICAL IMPORTANCE

Respondents identify no vehicle problems. And the federalism question presented is undeniably important. Trespass rules are the archetype of state authority. If a 140-year-old fence statute can be read to extinguish them, then no realm of traditional state property law is secure. The decision below also sows uncertainty for millions of landowners, recreationalists, and law enforcement officials across millions of acres of land. Pet. 28-33. “Landowners across the West” have raised “concern[] about the[ir] potential liability” to would-be trespassers if they are in fact “licensee[s].” Stock Growers Br. 15. They warn that unrestrained public access “while cattle or sheep are in the vicinity” “can cause great stress to livestock.” *Id.* at 12. Even the court below recognized it had raised pressing new “questions for landowners and the public” about liability and their “duty of care.” Pet. App. 47a.

1. Respondents’ efforts to downplay the importance depend on recharacterizing what the Tenth Circuit actually held. They claim the decision addressed only corner crossing, ignoring that its logic permits other

trespasses equally. See pp. 6-7, *supra*. They claim the decision raises no takings concerns, ignoring the Tenth Circuit’s stated view that the UIA functionally granted easements on which this Court’s modern takings jurisprudence “cast doubt.” Pet. App. 45a-46a. They claim that *Mackay* already read the UIA to prohibit trespass lawsuits; it didn’t. See p. 8, *supra*. In fact, the Tenth Circuit issued a sweeping, precedential decision preempting state trespass laws and affecting property rights across millions of acres of land. That is an “important question of federal law.” *Contra* Opp. 25.

2. The few published decisions addressing “corner crossing ... disputes” (Opp. 27) makes review *more* imperative. The absence of documented disputes after *Leo Sheep* reflects that the illegality of corner crossing was well-settled. Pet. 18-19; Opp. 26 n.6 (statements of federal and state officials).⁴ The Tenth Circuit upended that understanding, inviting more trespass disputes.

Even so, most trespasses won’t end up in court. “[F]ew property owners have concrete proof that an identifiable individual trespassed by corner crossing,” and “even fewer are willing to spend the time and money required to file a trespass lawsuit.” UPOM Br. 8. This Court recognized that dynamic in *Leo Sheep*. Access litigation at the time of *Leo Sheep* had “generally ... been rare,” yet “the special need for certainty and predictability where land titles are concerned” justified certiorari. 440 U.S. at 687.

3. “[S]tate legislatures” cannot “address” the federalism problem. Opp. 27-28. Under the Tenth Circuit’s decision, legislatures can “clarify[]” the law (Opp. 28) in only one direction—*legalizing* corner

⁴ These officials might not “get final say on what the [UIA] means,” Opp. 26 n.6, but their consistent statements that corner crossing is illegal surely deterred would-be trespassers.

crossing. Reversing would give the question back to the political branches: States could permit or forbid corner crossing, and Congress could grant public access using eminent domain. Claremont Br. 8-10.

* * *

The panel below all but asked for this Court's guidance. Pet. App. 47a. This case is the right vehicle to provide it: The preemption question is outcome-determinative; there are no fact disputes; and the interplay among *Leo Sheep*, the UIA, and modern takings doctrine is squarely presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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