No. 25-887

IN THE

Supreme Court of the United States

SAUER WEST, LLC, et al.,

Petitioners,

v.

UNITED STATES,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

CARTER G. PHILLIPS
Counsel of Record
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

THOMAS S. STEWART
REED W. RIPLEY
STEWART WALD
& SMITH, LLC
3515 W. 75TH Street,
Suite 201
Prairie Village, KS 66208

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES (cont.)

CASES Page

OTHER AUTHORITIES

In their petition, Petitioners argued that the Federal Circuit's use of a fact-intensive "causation" standard failed to consider that the NITU's authorization is a *per se* physical taking exactly like the California regulation at issue in this Court's ruling in *Cedar Point Nursery v. Hassid,* 594 U.S. 139 (2021).

On May 1, 2026, the United States urged this Court to ignore the Federal Circuit's improper consideration of irrelevant facts in the face of an authorized *per se* physical taking and significantly downplayed the broader constitutional concerns embodied in the Federal Circuit's promulgated causation standard. The United States' Opposition rests on two fundamentally flawed—and indeed, unconstitutional—bases.

First, the United States argues for deference to the Federal Circuit's factual analysis regarding the railroad's intent to abandon, but if that intent is being considered, then the analysis has already passed the threshold of unconstitutionality. Because the NITU itself authorizes an additional burden—recreational trail use—upon a landowner's fee interest, the NITU itself causes a *per se* physical taking, and the railroad's intent simply does not matter. *See* Section I *infra*.

Second, the United States argues that the Federal Circuit's decision simply does not merit this Court's consideration because it does not conflict with a decision of this Court and rather applies a standard wholly contained within the Circuit's own precedent. That position ignores that the NITU is exactly like the type of direct, authorized, physical

appropriation that this Court identified in *Cedar Point Nursery*, which traced its roots to basic tenets of takings law. Where a federal action authorizes physical appropriation of private property, that authorization inherently causes a taking for which the government is responsible. That is exactly what the NITU does, which the Federal Circuit's causation standard ignores, contrary to this Court's established jurisprudence. *See* Section II *infra*.

1. The United States argues (Opp. 10-15) that the Federal Circuit correctly applied the facts of this case to an established, valid causation standard, but that argument presupposes the standard's constitutionality.

Until the recent line of Federal Circuit decisions that ultimately led to this Petition, the NITU served as a bright line for the United States' liability in Trails Act cases. This was true whether the taking was permanent or ultimately became temporary, for a very simple reason. The NITU was the singular government action that authorized recreational trail use, which created an additional burden on a landowner's fee interest and therefore constituted a physical, not regulatory, taking of land. This simple proposition traces to this Court's decision in *Preseault* v. *ICC*, 494 U.S. 1 (1990) ("*Preseault I*"), in which this Court repeatedly stated, without exception, that Trails Act takings are physical, not regulatory, takings because the authorization to convert a railroad easement to a recreational trail easement changes the nature of the owner's state law property interest. *See Preseault I*, 494 U.S. at 8, 11, 13, 19, 22-24.

Shortly after *Preseault I*, in *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) ("*Preseault II*"), the Federal Circuit followed this Court's guidance and clearly emphasized the physical nature of a NITU's authorization. In fact, the Federal Circuit specifically rejected the government's attempts to apply a more fact-intensive framework to Trails Act takings beyond the mere issuance of a NITU, such as the analysis that routinely occurs in regulatory takings. *See Preseault II*, 100 F.3d at 1540 ("[T]he Government's attempt to read the concept of 'reasonable expectations' as used in regulatory takings law into the analysis of a physical occupation case would undermine, if not eviscerate, long-recognized understandings regarding protection of property rights; it is rejected categorically").

For decades following *Preseault I* and *Preseault II*, the Federal Circuit faithfully and consistently applied a bright-line rule in Trails Act cases, despite the repeated efforts to deemphasize the NITU's specific authorization. In *Caldwell v. United States*, 391 F.3d 1229 (Fed. Cir. 2004), the Federal Circuit concluded that a categorical physical taking occurs upon the NITU's issuance because that is the precise moment that a landowner is deprived of property rights, even if negotiations for permanent trail use ultimately fail and the taking becomes temporary. *See Caldwell*, 391 F.3d at 1234-35.

In *Barclay v. United States*, 443 F.3d 1368 (Fed. Cir. 2006), *cert. denied*, 549 U.S. 1209 (2007), the Federal Circuit quickly revisited the issue and affirmed its decision in *Caldwell*, holding specifically that "the issuance of the NITU is the only event that

must occur to entitle the Plaintiff to institute an action." *See Barclay*, 443 F.3d at 1373. Another Federal Circuit Trails Act decision soon followed—*Illig v. United States*, 274 F. Appx. 883 (Fed. Cir. 2008), *cert. denied*, 557 U.S. 935 (2009)—which again confirmed the NITU's status as a bright-line, physical appropriation of land. *See Illig*, 274 F. Appx. at 883-84.

The *Illig* landowners even petitioned this Court for a writ of certiorari. The United States, through now-Justice Kagan, opposed for exactly the opposite reason for which the United States now purportedly opposes certiorari in this case, and indeed the same basis for Petitioners' position. The United States argued that the NITU directly and immediately causes a physical taking, even if the physical invasion and interference "may later prove to have been temporary." *See* Brief of the United States in Opposition to Petition for Writ of Certiorari in *Illig v. United States*, S. Ct. No. 08-852, at 9, citing *John R. Sand & Gravel Co. v. United States,* 457 F.3d 1345, 1355-56 (Fed. Cir. 2006), *aff'd*, 552 U.S. 130 (2008).

Following the original *Caldwell-Barclay-Illig* line of cases, in *Ladd v. United States*, 630 F.3d 1015 (Fed. Cir. 2010), the government attempted to shift the causation focus away from the NITU, despite the government having itself worked diligently in *Caldwell*, *Barclay*, and *Illig* to establish the NITU as a bright-line rule. The Federal Circuit rejected that attempt, and specifically "the government's present suggestion that the NITU is nothing more than a temporary regulatory hold on the railroad's authority to abandon its railway." *See Ladd*, 630

F.3d at 1025. Importantly, the Federal Circuit dismissed the relevancy of any factual inquiry following the NITU's issuance, stating that because a takings claim accrues on the date that a NITU issues, "events arising after that date—including entering into a trail use agreement and converting the railway into a recreational tail—cannot be necessary elements of the claim." *See id.* at 1024.

This line of cases expressly stands for a bright-line proposition—the NITU itself satisfies causation in Trails Act cases because the NITU authorizes a physical appropriation of land upon its issuance, notwithstanding any subsequent events that ultimately limit the appropriation's duration—which traces directly back to this Court's decision in *Preseault I*. The Federal Circuit's causation standard in Trails Act [1] takings cases, first introduced in *Caquelin v. United States*, 959 F.3d 1360 (Fed. Cir. 2020) (*"Caquelin II*") and now continued through to this case, directly contradicts the reasoning behind the *Caldwell-Barclay-Illig-Ladd* cases and, in turn, directly contradicts the constitutional standards that this Court dictated in *Preseault I*. The standard, and the government's arguments to uphold the standard, are merely another example of an attempt to separate the date of accrual from the date of the taking, which this Court has long rejected across myriad forms of takings litigation. *See, e.g.*, *United States v. Dow,* 357 U.S. 17, 20-23 (1958).

Fundamentally, that is the basis upon which Petitioners have requested that this Court grant

[1] *See* National Trails System Act Amendments of 1983, 16 U.S.C. § 1247.

certiorari—not because the Federal Circuit's factual findings regarding post-NITU evidence should have produced a different outcome, but because the Federal Circuit's decision to evaluate post-NITU evidence alone contradicted this Court's longstanding precedent regarding physical appropriation of property, including specifically a NITU's issuance.

The United States' assertion (Opp. 12) that "Petitioners no longer dispute the factual finding that Great Western would not have abandoned the line even if the Board had never issued a NITU" is flatly incorrect. Petitioners posit that such factual findings are entirely irrelevant because any causation inquiry stops upon the NITU's issuance, which is established by *Preseault I*, *Preseault II*, *Caldwell*, *Barclay*, *Illig*, and *Ladd*.

Of course, Petitioners maintain that the Federal Circuit's factual findings regarding the railroad's intent are erroneous, too, but to the government's point, such factual findings generally do not warrant this Court's review, no matter how erroneous. *See* U.S. Opp. Br. at 12 (citing *United States v. Johnston*, 268 U.S. 220, 227 (1925). Considering that extreme deference to a Circuit Court's evidentiary review, it is entirely unsurprising that the United States' Opposition focuses almost exclusively on the Federal Circuit's factual findings. However, Petitioners simply have not offered those factual findings for this Court's review because they are entirely irrelevant to the pertinent question—does the NITU cause a physical taking upon its issuance?

Pursuant to this Court's decision in *Preseault I*, and additionally the Federal Circuit's previously sound reasoning as enunciated in *Caldwell*, *Barclay*, *Illig*, and *Ladd*, Petitioners submit that the answer is yes.[2]

2. The United States additionally argues (Opp. 15) that Petitioners have identified "no decision of this Court or any other court that conflicts with the decision below," but that ignores the Petition's entire premise and the clear, fundamental principles of takings law that this Court espoused in *Cedar Point Nursery*. As discussed in Section I *supra*, the focus of this Court's review must be the NITU's issuance and authorization and not any factual inquiry regarding the railroad's intent to abandon post-NITU because the NITU's authorization constitutes a per se physical taking. That authorization is the same type of authorization that this Court discussed at length in *Cedar Point Nursery*.

If allowed to stand, the Federal Circuit's decision would deny just compensation to Petitioners for the exact type of physical taking that this Court has held is an unconstitutional deprivation of property rights. The California regulation at issue in *Cedar Point Nursery* allowed labor organizations to gain access to an agricultural employer's property for extended periods, and this Court concluded that

---

[2] In these cases, the Federal Circuit also cited extensively to other important *per se* takings decisions from this Court. *See, e.g.*, *Caldwell*, 391 F.3d at 1235 (citing *Dow,* 357 U.S. at 23); *Ladd*, 630 F.3d at 1025 (citing *Nollan v. California Coastal Comm.,* 483 U.S. 825, 831 (1991)).

"[t]he access regulation appropriate[d] a right to invade the grower's property and therefore constitute[d] a *per se* physical taking." *See Cedar Point Nursery*, 594 U.S. at 149. This Court held that a *per se* categorical physical taking resulted when the government's regulation authorized a physical appropriation of property, which violated the landowner's right to exclude.

The focus of the United States' Opposition, and indeed the focus of the Federal Circuit's factual inquiry post-NITU, concerns the railroad's intent to abandon its rail line. So the Federal Circuit held, and as the United States parroted, if the railroad never would have abandoned its line during the NITU's pendency, then the landowners would never have gotten their land back, and therefore no state law property interests were actually taken. However, this reasoning simply ignores what the NITU actually does—**authorize a physical appropriation of land** in the form of recreational trail use. Indeed, it is literally called a "**Notice of Interim Trail Use**."

It is important to contextualize the NITU's authorization within the STB proceedings through which it is issued. Before a NITU is ever issued, a railroad—in this case, Great Western—must affirmatively indicate an intent to abandon its rail line through filings with the STB, including an identification of a specific, proposed date of abandonment. That happened in this case on April 16, 2008. On July 28, 2008, expressly in lieu of this proposed abandonment, the STB issued the NITU, which halted the abandonment process. Without the NITU, every public statement indicated the

railroad's firm intent to abandon its line on a specific date, including Great Western's own admissions that the rail line had been inactive since the 1970s.

Pursuant to state law, as the CFC actually found in this case, the railroad abandoned its easement long before Great Western petitioned the STB to consummate federal abandonment. Had Great Western proceeded to abandon its line, with no remaining impediments, Petitioners would have received full, exclusive access to their land. Instead, the NITU issued, which blocked Petitioners' reversionary interests specifically to authorize recreational trail use.

The NITU's language, in conjunction with the Trails Act, confirms this. The NITU does not authorize trail use at some indeterminate point in the future—it authorizes it **immediately**, in response to a specific request to do so, and expressly to allow negotiations to implement the already-authorized trail use. State law would normally render any such negotiations moot without the participation and consent of the fee owners—the landowners—because trail use constitutes an additional burden on their fee estate. Indeed, the NITU plainly states that conditions of "public use and **interim trail use/railbanking**" are "**imposed in this decision and notice**," and in fact leaves only two possible outcomes for disposition of the line—either permanent implementation of trail use or abandonment.

The Trails Act is also unequivocal regarding its effects on state property interests. The Act expressly states that "interim [trail] use **shall not be treated, for purposes of any law or rule of law, as an**

abandonment of the use of such rights-of-way for railroad purposes." *See* Trails Act, 16 U.S.C. § 1247(d). By its terms, the NITU imposes interim trail use, thereby forestalling the very abandonment that the Trails Act contemplates.

The Trails Act does not stop there, as it mandates that "the Board **shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive or such use**." *See id.* Again, the Trails Act directs the Board to preempt abandonment through authorization of interim trail use, which the Board directly accomplishes through the NITU.

Therefore, the NITU is exactly like the access regulation in *Cedar Point Nursery*—by its terms, and through the authority of the Trails Act, the NITU immediately authorizes a change in use of private property, which forestalls the landowners' state law property interests for the duration of the NITU's effects. That Great Western ultimately decided to withdraw its petition for abandonment did not retroactively negate the NITU and its effects—the taking occurred, and Petitioners are owed compensation for the taking's duration.

This Court has repeatedly reinforced this principle, including most directly in *Knick v. Township of Scott, Penn.*, 588 U.S. 180 (2019), which *Cedar Point Nursery* went on to confirm. *Knick* held that a subsequent government action that renders what at first appears to be a permanent taking into a temporary one does not cure the constitutional violation where

no just compensation is paid. *See Knick*, 588 U.S. at 191-93 (citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987)).[3]

The basic points of *Cedar Point Nursery* and *Knick* confirm that the former bright-line rule in Trails Act cases—established by *Preseault I*, *Preseault II*, *Caldwell*, *Barclay*, *Illig*, and *Ladd*—was correct. Upon the NITU's issuance, and whether permanent or ultimately temporary, a taking occurs that requires compensation to remedy the constitutional violation, and the Federal Circuit erred in holding otherwise.[4]

---

[3] *See also Knick*, 588 U.S. at 193 ("a later payment of compensation may remedy the constitutional violation that occurred at the time of the taking, but that does not mean the violation never took place. The violation is the only reason compensation was owed in the first place. A bank robber might give the loot back, but he still robbed the bank").

[4] The United States makes one additional argument in its Opposition—that a pending rulemaking petition with the STB regarding NITU procedures would somehow reduce the importance of remedying Petitioners' injuries and correcting the United States' unconstitutional actions. *See* U.S. Opp. Br. at 16-17. Such an argument speaks exactly to why this case is so important for this Court's review. Notwithstanding the uncertainty of the proposed rulemaking, determining the constitutionality of the government's actions in this case matters tremendously, not only to Petitioners who have had their property rights taken away without just compensation, but also to the untold numbers of citizens whose property would be subject to unconstitutional seizure through the same methods used in this case, whether through a NITU or some other form of government authorization. The United States is essentially asking this Court to look the other way while it gets away with taking private property for public use without just

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS
Counsel of Record
SIDLEY AUSTIN LLP
1501 K Street, N.W
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

THOMAS S. STEWART
REED W. RIPLEY
STEWART WALD
& SMITH LLC
3515 W. 75th Street
Suite 201
Prairie Village, KS 66208

Counsel for Petitioners

May 14, 2026

compensation. Instead, the Court should grant this petition to protect Petitioners and others' fundamental property rights.