NO. 19-_____

In the Supreme Court of the United States

CLINTON L. SIDES and KIMBRA D. SIDES,

Petitioners,

v.

CENTRAL KANSAS CONSERVANCY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case concerns the extent to which federal law permitting the rail-banking of unused railroad right-of-way so that it is not abandoned restricts the ability of the servient owner to establish a right to use the property pending reactivation for railroad purposes. The question presented is:

Does federal law preclude the application of state adverse possession/prescriptive easement doctrines to trail-use easements created under the National Trail System Act, 16 U.S.C. § 1247(d), such that the owner of the servient estate cannot establish a right to use the property pending its reactivation for railroad purposes?

PARTIES TO THE PROCEEDINGS

Petitioners, Defendants/Counterclaimants and Appellants Below

Clinton L. Sides and Kimbra D. Sides

Respondent, Plaintiff and Appellee below

Central Kansas Conservancy, Inc.

LIST OF PROCEEDINGS

District Court of McPherson County, Kansas

2015-CV-67

Central Kansas Conservancy, Inc. v. Clinton L. Sides, et al.

Date of entry of judgment: June 1, 2018

Court of Appeals of the State of Kansas

No. 119,605

Central Kansas Conservancy, Inc. v. Clinton L. Sides and Kimbra D. Sides

Date of entry of judgment: May 17, 2019

Supreme Court of the State of Kansas

No. 119,605

Central Kansas Conservancy, Inc. v. Clinton L. Sides and Kimbra D. Sides

Date Petition for Review denied: December 19, 2019

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PETITION FOR A WRIT OF CERTIORARI

Clinton L. Sides and Kimbra D. Sides petition for a writ of certiorari to review the judgment of the Kansas Court of Appeals and the Kansas Supreme Court in this case.

OPINIONS BELOW

The decision of the trial court on the parties' motions for summary judgment (App.93a) was entered on October 12, 2016 and was not reported. The final order at the trial court level (App.55a) was entered on June 1, 2018 and was not reported. The decision of the Court of Appeals of the State of Kansas (App.4a) is reported at 56 Kan. App. 2d 1099, 443 P.3d 337 (2019). The denial of the petition for review by the Supreme Court of the State of Kansas (App.1a), December 19, 2019, is not reported.

JURISDICTION

This petition seeks review of the decision of the Court of Appeals of the State of Kansas dated May 17, 2019, following the denial of a petition for review from the Supreme Court of the State of Kansas, on December 19, 2019. This Court has jurisdiction to review that decision on a petition for a writ of certiorari pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

16 U.S.C. § 1247(a)

> The Secretary of the Interior is directed to encourage States to consider, in their comprehensive statewide outdoor recreation plans and proposals for financial assistance for State and local projects submitted pursuant to chapter 2003 of title 54, needs and opportunities for establishing park, forest, and other recreation and historic trails on lands owned or administered by States, and recreation and historic trails on lands in or near urban areas. The Secretary is also directed to encourage States to consider, in their comprehensive statewide historic preservation plans and proposals for financial assistance for State, local, and private projects submitted pursuant to division A of subtitle III of title 54, needs and opportunities for establishing historic trails. He is further directed, in accordance with the authority contained in chapter 2003 of title 54 to encourage States, political subdivisions, and private interests, including nonprofit organizations, to establish such trails.

16 U.S.C. § 1247(d)

> The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. 801 et seq.], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such

programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim 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. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then 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 of such use.

49 U.S.C. § 10501(b)

The jurisdiction of the Board over—

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

K.S.A. § 60-503

> No action shall be maintained against any person for the recovery of real property who has been in open, exclusive and continuous possession of such real property, either under a claim knowingly adverse or under a belief of ownership, for a period of fifteen (15) years. This section shall not apply to any action commenced within one (1) year after the effective date of this act.

K.S.A. § 60-509

> Nothing contained in any statutes of limitations shall be applicable to any real property given, granted, sequestered or appropriated to any public use, or to any lands belonging to this state.

STATEMENT OF THE CASE

The defendants are landowners whose land is burdened by a railroad right-of-way easement. The land is no longer in use as an active railroad right of way, but is railbanked under 16 U.S.C. § 1247(d). The

ICC issued a Notice of Interim Trail Use and the plaintiff entity was permitted to negotiate with the railroad for a quit claim deed to the easement from the railroad, which the plaintiff obtained in 1997. Therefore under federal law the railroad right-of-way was "railbanked," preventing its abandonment and creating a new trail-use easement in addition to the original railroad right-of-way easement burdening the defendants' property. *See Biery v. United States*, 99 Fed. Cl. 565, 575-76 (2011); *Toews v. United States*, 376 F.3d 1371, 1377 (Fed. Cir. 2004) (recreational trail use allowed under the Trail Act "constitutes a new easement."); *Preseault v. United States*, 100 F.3d 1525, 1550 (Fed. Cir. 1996) ("the taking of possession of the lands owned by the [plaintiffs] for use as a public trail was in effect a taking of a new easement for that new use. . . . ").

The plaintiff posted no trespassing signs and failed to make any use of the trail-use easement for in excess of the 15-year limitations period of state adverse possession/prescriptive easement law, K.S.A. § 60-503. During that time the defendants used the easement area to the exclusion of the plaintiff and the public was not permitted on the property. The plaintiff sought to quiet title and sought injunctive relief to remove the defendants from the land. The defendants contended that by virtue of adverse possession and/or prescriptive easement they were entitled to continue to use the easement area until it was needed for reactivation for railroad use. In the district court the plaintiff argued on summary judgment that under federal law a trail-use easement—even when not used by anyone or accessible to the public—is real estate given, granted, sequestered or appropriated to a public use and is

therefore exempt by virtue of K.S.A. § 60-509 from the statute of limitations with respect to adverse possession/ prescriptive easements. (Plaintiff's Motion for Summary Judgment at 15.) (*See also* App.8a). In addition, the plaintiff argued that federal law preempts any application of the state law doctrines of adverse possession and prescriptive easement to the trail-use easement. (Plaintiff's Motion for Summary Judgment at 8-9.) The defendants countered both of these arguments. (Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at 16-18; Defendants' Motion for Summary Judgment at 23-25.) (*See also* App.101a-103a and App.7a). The trial court ruled in favor of the plaintiff on the plaintiff's motion for summary judgment. Specifically, the trial court ruled:

> The United States Supreme Court, in its decision in *Preseault* [494 U.S. 1], stated that:
>
> > Congress apparently believed that every line is a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable, Given the long tradition of congressional regulation of railroad abandonments, (citation omitted), that is a judgment that Congress is entitled to make." *Preseault*, at 19.
>
> The Court finds, on the basis of the two *Preseault* decisions, that the land remained in a public use and/or appropriated for a public use when the easement converted from a railroad easement to a trail easement.

(District Court's Journal Entry Concerning Parties' Motions for Summary Judgment filed October 12, 2016, at p. 8.) (App.102a).

On appeal to the Court of Appeals of the State of Kansas the defendants/appellants argued in their opening brief that under federal law there is no requirement on an entity in the position of the plaintiff to make any use whatsoever, much less any public use, of a trail-use easement created pursuant to 16 U.S.C. § 1247(d) and that the trail-use easement therefore is not land appropriated to public use:

> The district court rejected the adverse possession and prescriptive easement theories based on its conclusion that the railroad right-of-way was a public use against which the statute of limitations could not run. In doing so the district court erred. The Sides were not asserting adverse possession against the dormant railroad right-of-way interest; so whether or not that interest is real property appropriated to public use is irrelevant.
>
> * * *
>
> The actual governing question, though, is whether the separate trail-use easement recognized in *Biery* is real estate appropriated for public use for the purposes of K.S.A. 60-509. CKC is a private entity holding property rights that it had no obligation to put to public use, and, for more than a decade and a half, made no attempt to put to any public use.
>
> * * *

CKC is not a public body. It is a private corporation. It has no inherent obligation to permit the general public to use or access the easement and, in fact, CKC has established a policy statement that the general public does not have the inherent right to use the easement, but that only those people whom CKC selects may occupy the easement. Its policy statement says "The owner/manager/responsible party has the right to exclusive possession of the Railbanked Right of Way Easement under Kansas law." (R. Vol. II, pp. 115-116, 122-123.)

* * *

CKC could not have been more clear that it was asserting private, not public, use rights to the Subject Property. And for the nearly 20 years in which CKC has had its quit claim deed, the Subject Property has not been put to any public purpose, but has served only Clinton and Kimbra's private purposes.

The STB has addressed the question of whether the complete failure to actually develop a public trail is a problem under the federal law. It has held that so long as the railroad's right to reactivate the right-of-way at some future time remains, the lack of any public use of the supposed trail is of no federal concern because, it has said, "the Trails Act does not require that a trail be developed in any particular way." *E.g.*, *Victor Wheeler, et al. — Petition for Declaratory Order — Rail Line in Erie*

Cty., Pa Bessemer & Lake Erie R.R. Co. — Abandonment Exemption — in Erie Cty., Pa, 1FN1OFN, 2008 WL 3971090, at *8 (Aug. 26, 2008). From the STB's perspective the public interest is the preservation of the railroad right-of-way and there is no requirement on CKC that any public trail actually be built. Nor did CKC's agreement with Union Pacific impose any requirement that any trail across the property actually be opened to the public. In the absence of such a requirement on CKC, it cannot be said for the purposes of K.S.A. 60-509 that CKC's trail easement rights were "given, granted, sequestered or appropriated to any public use." It is when a property right "is given in order that the obligations to the United States . . . might be performed" that adverse possession cannot operate because its operation would have the effect of "overthrowing an act of Congress." *Northern Pacific Railroad Co. v. Townsend*, 190 U.S. 267, 272, 23 S.Ct. 671, 47 L.Ed. 1044 (1903). Whether an adverse possession statute can operate against a property interest granted by federal law is answered by looking at "the nature of the duties imposed by Congress." *Id.* at 273. CKC owes the United States no duty that CKC cannot perform if the Sides have acquired rights with respect to the trail easement by adverse possession or prescriptive easement: with respect to interim trail use, all the federal statutes require is that the

> railroad right-of-way remain available for potential reactivation, not that a trail be developed or opened. Because the Sides are not claiming an interest or easement as against the potential reactivation of the railroad right-of-way to active service, the question of whether the preservation of the railroad right-of-way is a sufficient public purpose to avoid the operation of the statute of limitations is immaterial. That right to reactivate the rail line is not impacted by Clinton and Kimbra's adverse possession and statute of limitations claims and defenses directed, in this case, only at the trail-use easement. The district court erred in denying the Sides' motion for summary judgment on their adverse possession claim and in entering judgment in favor of CKC. The uncontroverted facts established the Sides' adverse possession sufficient to extinguish the trail-use easement.

(Appellants' Brief at 28-33.) (*See also* App.26a-27a).

In the appellee's brief, the plaintiff asserted that the application of the doctrines adverse possession and prescriptive easement was pre-empted by federal law. (Appellee's Brief at 27-30 and 34-36.) The defendants responded in a timely reply brief as follows, in relevant part:

> A claim to have acquired, by virtue of adverse possession, exclusive and perpetual control over a railroad right-of-way as against an entity possessing the right to reactivate the right-of-way for rail service would be pre-

empted by 49 U.S.C. 10501(b) which provides: "the remedies provided under [49 U.S.C. 10101-11908] with respect to regulation of rail transportation are exclusive and pre-empt the remedies provided under Federal or State Law." *See 14500 Ltd. LLC – Petition for Declaratory Order*, FD 35788, 2014 WL 2608812, at *1 (June 4, 2014) (adverse possession claim seeking to exclude railroad use is preempted by 49 U.S.C. 10501(b)). The key term in 49 U.S.C. 10501(b) is "with respect to regulation of rail transportation." The Sides' argument has no effect on the regulation of rail transportation. Their claim is to have obtained rights, during the interim-use period, that are not at odds with the later use of the property for rail transportation, but rather that are at odds only with the right of a non-railroad, CKC, to use the property for a non-railroad use until a railroad needs it again.

The Sides' position is supported by the STB, which has held that if adverse possession law were to operate against the right to reactivate rail service, that would unreasonably interfere with railroad transportation and thus be preempted. *See* Decision, *Jie Ao and Xin Zhou*, EB 41977 (STB June 6, 2012). However, where the right claimed is not exclusive of the right to reactivate rail service, preemption does not operate. *Id.* "A state law property interest permitting access to portions of a railroad ROW, unless exclusive, does not typically unreasonably interfere with the pre-

sent or future use of the property for activities that are part of railroad transportation." *Id.* at 3. There is no preemption of state law when the state law would not have the effect of preventing or unreasonably interfering with rail transportation. *See Franks Inv. Co. v. Union Pac. R.R.*, 593 F.3d 404, 414 (5th Cir. 2010) *en banc*. Thus state law claims of a private right to use a railroad right of way that do not create unusual interference with railroad use are not preempted. *Id.* at 416.

The STB has held that property claims with respect to railway easements resulting from the claimant's extended period of possession which do not seek the exclusion of railroad uses are best addressed by state courts applying state law. *See, e.g.*, *Allegheny Valley R.R. – Petition for Declaratory Order – William Fiore*, FD 35388 (STB served April 25, 2011).

In addition, the Trails Act expressly preempts state-law extinguishment of the use of rights of way for railroad purposes, not the application of state law to the use for trail purposes. The relevant language in 16 U.S.C. 1247(d) is "such interim 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." (Emphasis added.)

Even if it were true that adverse possession claims are impossible because the mere existence of a NITU is a "use" as to which the Sides' use was not adverse notwithstanding that CKC needed access to perform its duties under the KRTA, (CKC Brief at 27-28) this

> has no bearing on prescriptive easement claims. The Sides can (and did) acquire rights to use of the right-of-way easement in opposition to trail uses of CKC even if they did extinguish by adverse possession the full trail-use rights of CKC.
>
> Kansas adverse possession and prescriptive easement law does not interfere in any significant way with any federal purpose of creating opportunities for the development of recreational trails: All CKC would have needed to do to preserve whatever opportunity it had to develop a trail would have been to file this action within the first 15 years in which the Sides were in open possession of the trail-use easement, excluding CKC from the Subject Property.

(Reply brief at 9-11.)

The Court of Appeals of the State of Kansas affirmed the district court's decision granting the plaintiff summary judgment on the defendants' adverse possession/prescriptive easement claims, relying on federal law. In determining that the trail easement was a "public use" the Kansas Court of Appeals specifically quoted from and cited to 16 U.S.C. § 1247(d) and 16 U.S.C. § 1241(a). (Kansas Court of Appeals opinion at pp. 22-23.) (App.29a-31a). Further, in support of the conclusion that trail-use easements constitute land appropriated to public use, the Court of Appeals of the State of Kansas quoted from this Court's decision in *Preseault v. United States*, 494 U.S. 1, 110 S.Ct. 914 (1990). (Kansas Court of Appeals decision at P. 23.) (App.1a). The state court of appeals also concluded "Congress established that trails, and thus the ease-

ments necessary to create those trails, exist for public use in its Trail Act statement of purpose." (Kansas Court of Appeals opinion at 25.) (App.33a). Finally the Kansas Court of Appeals concluded federal preemption supported its holding that adverse possession could not apply, writing:

> Last, we are guided in this inquiry by the Surface Transportations Board's (STB) decision in *Ao and Zhou*, No. FD 35539, 2012 WL 2047726 (June 6, 2012). The STB determined that landowners could use Washington's adverse possession laws to obtain rights over a railbanked corridor on their land because invocation of the adverse possession laws would unreasonably interfere with railroad transportation, even if the railroad corridor was not currently being used for transportation, In reaching this decision, the STB noted that the party who maintained the railroad corridor under the Trails Act would not be able to maintain the corridor if the landowners adversely possessed it, The STB further noted the inability to conduct rail-related construction in the case of reactivation. As a result the STB held that the landowners' adverse possession claim was preempted by 49 U.S.C. (Sec) 10501(b)—the statute giving the STB authority to regulate rail carrier transportation. 2012 WL 2047726, at *6-8. Therefore, the trial court correctly denied the Sides' motion for summary judgment while granting the Conservancy's motion for summary judgment.

(Kansas Court of Appeals opinion at 25) (App.33a-34a).

The defendants filed a timely petition for review with the Kansas Supreme Court on June 14, 2019, again identifying the federal question:

> The Court of Appeals writes "Congress established that trails, and thus the easements necessary to create those trails, exist for public use in its Trails Act statement of purpose. Thus, K.S.A. 60-509 precludes the Sides from obtaining rights over the Conservancy's trail use easement. . . . " This reads too much into Congress's statement of purpose. A purpose of enabling public access to, travel within or appreciation of "open-air outdoor areas" does not necessarily turn an undeveloped trail-use easement which the private owner has no duty under federal law to make open to the public (and in fact actively posts no-trespassing signs saying that the public is not welcome to use) into real property appropriated to a public use for the purposes of K.S.A. 60-509. The Court of Appeals assumes that a federal policy interest in creating an opportunity for the development of a trail is sufficient to cause a trail-use easement as to which there is no federal obligation to develop and open any trail, or if a trail is developed to make it publicly accessible, to be real property held for public use. That assumption is worthy of review.
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> * * *
>
> The Court of Appeals also relies on the inapposite STB decision in *Ao and Zhou*, No. FD 35539, 2012 WL 2047726 (June 6, 2012); a case in which, unlike ours, parties were seek-

ing to obtain rights superior to the railroad's (the defendants are seeking only to establish rights as against CKC's trail-use easement and recognize that the rail-banked right-of-way easement will remain in place, unaffected). In addition, the Court of Appeals opinion recites from a discussion regarding an area (Parcel D) as to which, if the railroad-use easement were lost by adverse possession, there would be an interference with future rail reactivation and with ongoing rail activities. Ours is not such a case. As to Parcel E, where a prescriptive easement over the railroad easement was sought, the STB found that a prescriptive easement could be available.

The STB wrote:

> Unlike an adverse possession claim, a prescriptive easement does not take railroad property outright, and it is often possible for an easement that crosses over, under, or across a right-of-way, to co-exist with active rail operations without necessarily interfering with the latter. *See Eastern Ala.* Because such easements do not affect the rail network in the same way as carving out property that is part of a railroad, and because a prescriptive easement may still allow the railroad to access the property, the Board has previously found that property disputes involving prescriptive easements are generally best addressed by state courts applying state law.

So the STB decision recognizes the defendants' point: they are not precluded from obtaining

a prescriptive easement by the existence of a railroad right-of-way easement.

The Kansas Supreme Court denied review on December 19, 2019 (App.1a).

REASONS FOR GRANTING THE PETITION

The Court of Appeals of the State of Kansas has determined that a trail easement created under the National Trails System Act, 16 U.S.C. § 1247(d) cannot be adversely possessed or subject to prescriptive easement relying in part on the conclusion that state adverse possession claims are preempted by 49 U.S.C. § 10501(b). It bases this conclusion on precatory language in 16 U.S.C. § 1247(a), and ignores that the Trails Act expressly preempts state-law extinguishment of the use of rights of way for railroad purposes, not the application of state law to the use for trail purposes. The relevant language in 16 U.S.C. § 1247(d) is "such interim 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." (Emphasis added.) By finding preemption with respect to purposes beyond railroad purposes, the Kansas court ignored the recent admonition that "it is our duty to respect not only what Congress wrote but, as importantly, what it didn't write." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900, 204 L. Ed. 2d 377 (2019). The Kansas court substituted a statement of federal interest in promoting trails for specific text displacing or conflicting with state law, contrary to the declarations that "[i]nvoking some brooding federal interest

or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law." *Id.*, 139 S. Ct. at 1901. In addition, by looking to the general provisions of 49 U.S.C. § 10501 (b) to assess the preemption question rather than the specific provision of 16 U.S.C. § 1247(d), the state court has decided the preemption question in a way that ignores the canon that a specific statute controls over a general one even when they exist side-by-side, *see, e.g., RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645, 132 S. Ct. 2065, 2071, 182 L. Ed. 2d 967 (2012), and that conflicts with *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995) in which the Court has held that the scope of preemption expressed by Congress "supports an inference" of the intended limit to the preemption.

In addition, the Kansas decision is contrary to this Court's direction in *Northern Pacific Railroad Co. v. Townsend*, 190 U.S. 267, 272, 23 S.Ct. 671, 47 L.Ed. 1044 (1903) which determined that the question of whether state-law adverse possession claims are pre-empted as to property interests bestowed by Congress is determined by looking at "the nature of the duties imposed by Congress." *Id.* at 273. When the duties imposed by Congress on the recipient of the property interest cannot be performed if adverse possession law were to apply, adverse possession of a congressionally granted property interest is pre-empted. As to trail-use easements, Congress has imposed no duties. "[T]he statute and the NITU do not make trail use mandatory. . . . " *Barclay v. United States*, 443 F.3d 1368, 1378

(Fed. Cir. 2006) (Newman, dissenting). The STB has clearly said "The Board has no involvement in the negotiations and does not analyze, approve, or set the terms of trail use agreements. The Board is not authorized to regulate activities over the actual trail. In short, the Board's jurisdiction under the Trails Acts is ministerial." *J.K. Line, Inc. – Abandonment Exemption – In Starke & Pulaski Ctys., In Toledo, Peoria & W. Ry.-Discontinuance Exemption – In Starke & Pulaski Ctys.*, AB 847 (SUB 1X), 2003 WL 22231190, at *2 (Sept. 29, 2003). Any requirement for a trail to be developed as part of the existence of the NITU would arise, if at all, from the private agreement between the plaintiff and the railroad. *See Goos v. I.C.C.*, 911 F.2d 1283 (1990) (the trail use itself is entirely a matter of private agreement with the railroad). Nothing in the Line Donation Contract between the plaintiff and Union Pacific imposes an obligation to build a public trail. As far as federal law is concerned, so long as the plaintiff has expressed its willingness to assume the liabilities it is required by statute to express its willingness to assume, and has reached some sort of agreement with the railroad, the plaintiff could perpetually do nothing on the land, as it did from 1997 until the filing of this action—and as the plaintiff still does with respect to many miles of unused railroad right of way across McPherson County and Marion County, Kansas.

The Kansas court's determination that federal law inherently prevents the application of adverse possession law to trail-use easements is also contrary to the decisions of the STB on that subject, which is the very agency whose power the Kansas Court of Appeals has determined results in the pre-emption. *See, e.g.*,

Allegheny Valley R.R. – Petition for Declaratory Order – William Fiore, FD 35388 (STB served April 25, 2011); *Ao and Zhou*, No. FD 35539, 2012 WL 2047726 (June 6, 2012). Thus the Kansas court's argument creates a circumstance in which neither the state nor the federal government have the power to regulate the issue: the federal agency claims that the questions of obtaining prescriptive rights over the trail easement are a matter of state adverse possession law, and the state claims that such laws are preempted. Likewise the state court decision is counter to those federal appellate court decisions that measure preemption under 49 U.S.C. § 10501(b) based solely on the interference of state laws with railroad uses. *See Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001) (limiting the preemption in 49 U.S.C. § 10501(b) only to state laws "with respect to regulation of rail transportation" and therefore not applying to zoning laws); *City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858 (8th Cir. 2005) (finding that a proposed condemnation of 20-foot strip of 100-foot railroad right of way for a bike path was preempted under 49 U.S.C. § 10501(b) as it might interfere with storing of materials moved by rail on remainder of right of way and create safety hazard by reason of close proximity of trail to tracks); *see also Beres v. United States*, 143 Fed. Cl. 27 (2019) (no preemption of adverse possession claims as to the fee interests underlying railroad rights of way if claims do not interfere with railroad operations or reactivation).

In sum, this case falls within U.S. Supreme Court Rule 10(c), meriting review. A state court has decided an important question of federal law that has not been,

but should be, settled by this Court and has done so in a manner that conflicts with previous decisions of this Court. The preemption of state laws represents "a serious intrusion into state sovereignty." *Medtronic, Inc. v. Lohr*, 518 U. S. 470, 488, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). Moreover, the problem of trail sponsors failing to actually take control of unused railroad rights of way, leaving them as a type of no-man's land, subject to dumping, criminal activity and other uncontrolled annoyance is common across the country. *See* Kansas Farm Bureau, *An Adjoining Landowners' Guide to Rails-to-Trails in Kansas*, February 2019 ("many trails remain in an unkempt state while the responsible party (*i.e.,* the trail group) develops a plan and obtains funding to develop the corridor into a trail"); *Colfax-Albion-Pullman Railroad Corridor Community Discussions, Summary Report for 2016*, https://www.wsdot.wa.gov/NR/rdonlyres/79B37102-3D37-4600-A29E-B0A6944428F5/0/CAPCommunityWorkshops2016FinalReport.pdf at v (where there is no trail development on rail-banked rights of way, increased crime and vandalism are a concern). For example, STB Docket No. AB-406 (Sub. No. 7X), *see* 1997 WL 359083, concerns a trail-use easement created by an NITU in 1997 that crosses through three Kansas counties and encompasses 37.4 miles, yet as of January 2020 the development of a trail has not started. STB Docket No. AB-1068 (Sub. No. 3X) involves a 144-mile Missouri trail easement that has been in existence for several years but with no one to maintain it. With no trail activity it has been described as a "basically an overgrown garbage dump that stretches across the state." https://www.kbia.org/post/rock-island-corridor-become-rails-trails#stream/0. Although hard data is scarce, a 1999 GAO report suggested that of 6,397 miles

as to which trail-use requests were granted by the STB between 1987 and 1999, only 1,758 miles had been turned into open trails. *Issues Related to Preserving Inactive Rail Lines as Trails*, GAO/RCED-00-4 pp. 8-9, October 18, 1999. This suggests that more than seventy percent of railbanked rights of way could be unused by the holders of the trail-use easements and amenable to adverse possession. This is consistent with the best available current data for Kansas showing that only about one-fourth of the trail easement area created through railbanking in the state has become open trails. *See* http://www.kansascyclist.com/.

Consistent with these concerns about unused trail easements creating problems within the communities in which they are located, the STB has recently revised its rules to impose time limits on that portion of the process it controls: the issuance of an NITU. *See* STB Docket No. EP 749 (Sub-No.1) Limiting Extensions of Trail Use Negotiating Periods (Service Date December 4, 2019), 2019 WL 7484082. STB Docket No. AB 565 1 X, illustrates the problem. In that matter, arising in Maryland, the unused rail right of way has been sitting since 2001 with no progress toward trail development. State adverse possession laws provide another tool in addressing the problem of untended, unused railroad rights of way preserved by railbanking. Applying adverse possession laws to trail-use easements would permit and encourage unused railroad rights of way to be dedicated to productive uses pending reactivation for railroad use in those instances in which no public trail is being built. More importantly, the preemption of state adverse possession laws propagates the evils adverse possession laws address and forces upon the states the burden of the perpetual nonuse of property

within their jurisdiction. However, as a result of the Kansas court's decision the application of state adverse possession laws to trail-use easements is prohibited in Kansas and made unsettled more broadly, notwithstanding that the decision conflicts with decisions of this Court.

The question of whether the Trails Act preempts state adverse possession laws is also important because it affects the property rights of those who would otherwise be indefinitely subject to the pernicious effects of untended rail-banked rights of way. The Kansas decision, if not reviewed, virtually assures the loss of private rights by scores of landowners in McPherson and Marion Counties in Kansas who, notwithstanding the absence of rail reactivation, can be charged with criminal trespass and ousted at any time from the unused railroad right of way that has been ignored by the trail operator for decades. More broadly, the Trails Act has wide application over thousands of miles of railroad rights of way across the country. Each trail can impact hundreds of adjoining landowners. *See Scheider v. United States*, 2007 WL 2248050 at *1 (D. Neb. 2000) (class action with respect to unused railroad rights of way held by rail banking in Nebraska involved "approximately 3,500 parcels").

The question posed by this case also bears on the utility of the federal statute to accomplish its purpose: to the extent that Congress intends to incentivize the actual construction of trails, as opposed to the private holding of trail-use easements as vacant untended strips, state adverse possession statutes play an important role in achieving that purpose. As recognized in *Preseault v. I.C.C.*, 494 U.S. 1, 17-18, 110 S. Ct. 914, 925, 108 L. Ed. 2d 1 (1990), one of the purposes of the

Trails Act is to encourage the development of recreational trails—a general purpose, not a specific purpose of developing any one specific trail. The adverse possession/prescriptive easement laws encourage the development of recreational trails generally by putting the trails at risk if trail operators simply do nothing with the trail easement, as the plaintiff did.

It is doubtful that this Court, or perhaps any federal court, will have another opportunity to weigh in on the question presented here. The disputes to be decided as to these matters in the future are likely to involve landowners with only relatively small pieces of property such that pursuing cases to an appellate level is not economically justified. Since the particular facts surrounding the adverse possessor's occupation and use of property are the prevalent aspect of an adverse possession case, such cases are not amendable to class-action treatment. *See* Fed. R. Civ. P. 23(b)(3). The filing of adverse possession actions in the first instance is questionable because of this published decision holding adverse possession is unavailable. This may cause the Kansas decision to carry persuasive weight with no direct offsetting authority indefinitely, resulting in the unmerited loss of important property rights across the country.

The Kansas decision has important implications not only for the parties but also across the state and the nation. It makes a plain statement about congressional intent in an area this Court has not addressed and that is inconsistent with this Court's precedent. Review by this Court, whether to reaffirm or to modify to that precedent, is merited.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari as to the issue identified herein.

Respectfully submitted,

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