No. 19-386

IN THE

Supreme Court of the United States

MONROE COUNTY COMMISSION,
Petitioner,

v.

A.A. NETTLES, SR. PROPERTIES LIMITED AND EULA LAMBERT BOYLES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents are the owners of a parcel of land in Monroe County, Alabama. The Alabama Railroad Company formerly held an easement for railroad use to a right-of-way across the parcel, but it failed to operate a railroad for decades or to repair a necessary trestle that burned down years ago. Alabama Railroad Company sold via quitclaim deed whatever remaining easement rights it held to petitioner Monroe County Commission. And Monroe County Commission, thereafter, asserted it obtained the right-of-way in fee simple. Respondents then brought a quiet title action to determine the rights to the property under Alabama law.

The questions presented are:

1. Whether the National Trails System Act, 16 U.S.C. § 1241 *et seq.*, precludes Alabama state courts from resolving, for purposes of Alabama state property law, competing claims to property rights.

2. Whether Congress intended to create a massive rails-to-trails takings scheme when it enacted the National Trails System Act.

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STATEMENT OF THE CASE

1. Respondents own a parcel of land in Monroe County, Alabama.[1] They use their property to grow trees and for hunting. The property has been in respondents' families since at least 1953. *See* SR449 (Trial Tr. 11, Dec. 20, 2017).[2]

Alabama Railroad Company (Railroad) previously had a limited easement for "operation of the railroad" on a right-of-way crossing respondents' property. SR11. The Railroad in 1997 sold respondents the land on which the right-of-way passes, reserving for itself in the deed:

> rights of way, railroad tracks, track fixtures, tunnel structure, wire lines, signal lines, pipelines, wires, cables, apparatus, and other appliances presently existing for the operation of the railroad.

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[1] Respondent Eula Lambert Boyles took ownership of the property after her husband Charles W. Boyles's death and leases tracts to respondent A.A. Nettles, Sr. Properties Ltd. Pet. App. 4a-5a.

[2] References to the record before the Supreme Court of Alabama are marked according to their pagination in the state record, *Monroe Cty. Comm'n v. AA Nettles, Sr. Props. Ltd. et al.*, No. 1170738 (Ala. 2018), and designated "SR." References to the state trial transcript, which appears at the end of the state record and bears its own pagination, include parallel citations to transcript pages.

Pet. App. 4a n.3; SR11-12. Otherwise, respondents received all other rights associated with the property in fee simple. SR11.

2. The Railroad stopped operating a line through the property many years ago. Pet. App. 5a, 18a. That line was not maintained and fell into disrepair. Pet. App. 18a-19a. For example, a trestle 300 feet long that had been seriously damaged in 2007 was never restored. Pet. App. 19a.[3]

In March 2013, the Railroad notified the U.S. Surface Transportation Board (Board) that it sought to formally abandon the line. Pet. App. 5a. The Board has exclusive jurisdiction to determine whether a rail line can formally be abandoned under federal law. *See* 49 U.S.C. § 10501(b). Rather than deem the line abandoned, the Board may also facilitate the line's conversion to a recreational trail, subject to future reversion for railroad use. Congress provided that such interim trail use "shall not be treated" as abandonment of the rail line. *See* 16 U.S.C. § 1247(d). The National Trails System Act and its amendments (Trails Act), Pub. L. No. 90-543, 82 Stat. 919 (codified as amended at 16

[3] Amicus Rails-to-Trails Conservancy inaccurately suggests respondents "set fire to the bridge." Brief for Amici Curiae Rails to Trails Conservancy Et Al. at 7 n.3, *Monroe Cty. Comm'n v. A.A. Nettles Sr. Props. Ltd. et al.* (2019) (No. 19-386). That suggestion is entirely unfounded. The trestle damage occurred around the time of a prescribed burn on property nearby, and also at a time when trespass over the former rail path was frequent. The area surrounding the trestle had also long been littered with discarded flammable cross ties. It is not clear whether the trestle fire damage was caused by the acts of trespassers, flammable scraps, or otherwise.

U.S.C. § 1241 *et seq.*), thereby empower the Board, and the Interstate Commerce Commission before it, to facilitate "railbanking" as an alternative to abandonment. *See id.*; Pet. App. 2a-3a.

The Monroe County Commission (Commission) filed a request for a Notice of Interim Trail Use (NITU), seeking to convert the former rail line to a recreational trail. Pet. App. 5a. The Railroad agreed to negotiate with the Commission for sale of its remaining property rights in the railroad easement passing through respondents' property. *Id.* The Board issued a NITU on April 29, 2013. *See id.*; Pet. App. 40a. The Board granted the parties 180 days to negotiate an agreement, though it later extended this deadline. Pet. App. 42a; SR517 (Trial Tr. 79, Dec. 20, 2017). The Board further ordered that, if an agreement was reached within the negotiation period, "interim trail use may be implemented." Pet. App. 46a.

The Railroad and Commission reached an agreement for sale of the Railroad's remaining railroad easement. Pet. App. 5a. The roughly 7.4 mile right-of-way from Tunnel Springs, Alabama, to Beatrice, Alabama, was valued at $142,000. SR15. The Commission paid the Railroad $89,000 for its rights in the path in August 2015. SR16. The sale was executed through a quitclaim deed. Pet. App. 5a.

3. After the Commission asserted a right in fee simple to the property previously covered by the limited easement, Pet. App. 15a, SR7, respondents filed an action in Monroe County Circuit Court on August 25, 2017, seeking to quiet title. SR6-9. Under Ala-

bama law, "[t]he purpose of the [quiet-title] proceeding is not to invest the court with jurisdiction to sell or dispose of the title to the land, but merely to determine and settle the same as between the complainant and the defendants." Pet. App. 16a (quoting *Dake v. Inglis*, 239 Ala. 241, 243 (1940)).

The Monroe County Circuit Court entered an order quieting title in respondents' favor after a bench trial. Pet. App. 6a. The Commission unsuccessfully moved for reconsideration or a new trial, then appealed directly to the Supreme Court of Alabama. *See* SR315, 397, 4.

The Supreme Court of Alabama began its analysis by addressing the issue of federal preemption. It expressly recognized the Board's "undisputed," "exclusive" jurisdiction over abandonment and interim trail use proceedings. Pet. App. 6a-7a. It went on to make the uncontroversial point that "even in a regime of federal preemption, determining the ownership of real property requires a review of state law." Pet. App. 10a. And respondents' suit, the Court explained, concerned disputed ownership of real property under state law—not abandonment: "Here, neither the plaintiffs nor the Commission sought a judgment concerning whether the right-of-way had been abandoned. Rather, the plaintiffs merely filed a statutory action seeking to quiet title to the right-of-way because the Commission had represented, in conjunction with the trails projects, that it held fee title to the right-of-way." Pet. App. 15a.

The Court held that, as a matter of Alabama law, the Commission could not have a fee title to the right-

of-way. Pet. App. 15a. The Railroad itself did not have such an interest to transfer: Trail use was "not envisioned by the reservation of rights in the initial instrument conveying the right-of-way," which provided only for use in operation of a rail line. Pet. App. 9a. Nor was the Railroad's easement effective as a matter of state law: The Supreme Court of Alabama found no reason to disturb the Circuit Court's findings that the Railroad had not used or maintained the line; as a matter of property law, the easement had accordingly lapsed. Pet. App. 12a. Because the Railroad did not own a blanket right-of-way across respondents' land, it could not quitclaim such an interest to the Commission. As a result, the Commission could not have obtained a valid fee title to the right-of-way from the Railroad under Alabama law. Pet. App. 13a.

Chief Justice Parker and Justice Shaw, joined by Justice Stewart, filed dissents. Pet. App. 21a, 29a. Chief Justice Parker's dissent expressed concern, however, that the Commission's position would violate the "fundamental rights of contract and property" of landowners. Pet. App. 22a. Chief Justice Parker explained that the Railroad had "negotiated for the right to use the easement for railroad operations. The railroad did not negotiate for a public recreational trail." Pet. App. 22a.

REASONS FOR DENYING CERTIORARI

Since the filing of the petition, the Commission has made clear that it does not plan to move forward with its rails-to-trails program. The issues raised in the petition therefore present no real-world consequences. In any event, it is well established that

state law defines the state-law property rights affected by the rails-to-trails program. The Supreme Court of Alabama in the decision below exercised the traditional authority of state courts to resolve state law. The Court assessed two competing claims to a property right under Alabama law, and it properly determined that the Commission does not hold a fee simple. The Commission's purchase gave it nothing more than what the Railroad owned, which was a limited easement to run a railroad. Exercise of eminent domain over the former rail path for a hiker-biker trail would accordingly effect a taking of property. Indeed, it is uncontroversial that respondents would be owed just compensation for the taking of their property rights and that those property rights are defined by state law. The petition should be denied because the Supreme Court of Alabama's decision does not conflict with a federal rails-to-trails regime; it simply evaluates its state-law consequences.

If the Court were to take the case, it should also review whether Congress intended to authorize the taking of property where the property rights held by a railroad do not permit use of the rail path for a trail, as here. The rails-to-trails program, which Congress never thought was going to require extensive taking of property, has transmogrified into a nationwide takings regime with a price tag in the hundreds of millions of dollars. It requires taking the property of thousands of landowners without express Congressional approval and should be rejected by this Court.

I. The Alabama Supreme Court's Ruling Does Not Warrant This Court's Review.

A. The Commission has now made clear the trail project is defunct.

With or without this Court's intervention, the trail at the center of this dispute will likely never be built. The right-of-way running through respondents' property is only a small fraction of a wide-ranging trail project the Commission originally envisioned—but rejected at a recent vote.

On November 12, 2019, the Monroe County Commission voted to halt its rails-to-trails conversion plans. *See* Opp'n App. 3a-4a; Mike Qualls, *Trail Lawsuit Appeal Gets Extension*, The Monroe Journal, Nov. 21, 2019, at 1A, 8A. The trail use agreement at issue here covered a 7.4 mile portion of line running from Tunnel Springs, Alabama, to Beatrice, Alabama. Pet. App. 40a. The Commission had also requested a Notice of Interim Trail Use for abandoned line running roughly 47 miles between Tunnel Springs and Flomaton, Alabama. *See* Opp'n App. 3a. As the Commission discovered, public interest in the project was low. *See* Qualls, *supra*, at 8A. Commissioners present at the Monroe County Commission's November 12 meeting unanimously voted to discontinue that rails-to-trails project by not renewing the NITU. *See id.*; Opp'n App. 4a. Though the Commission's vote addressed a portion of its trail project not at issue in this dispute, that vote made clear the project as a whole will not move forward.

In light of these recent developments, the trail previously contemplated appears unlikely to ever be completed, no matter how this Court rules. Given the Commission's decision to discontinue its broader trail project, there is no real-world controversy surrounding the abbreviated right-of-way here that merits this Court's intervention.

B. Federal courts of appeals and state courts universally accept the central premise of the Alabama Supreme Court's ruling: Property rights are defined by state law.

At the center of the decision below was a question over the state-law property rights in a former rail path running through respondents' property. The Railroad held a limited easement that allowed use to run a railroad along the path. After more than a decade of nonuse and allowing the path to fall into disrepair, the Railroad sold whatever remaining easement rights it had to the Commission. The Commission then claimed it held a fee title to the right-of-way from its purchase of the limited easement. Thereafter, respondents brought this quiet title action, to determine, as a matter of Alabama state law, what property rights, if any, were procured by the Commission. *See* Pet. App. 15a. The Alabama Court evaluated the competing claims to state property rights to the rail path as a matter of state law. Pet. App. 10a-13a.

Contrary to the sky-is-falling narrative of the petition, there is nothing remarkable about the Supreme Court of Alabama's conclusion that "even in a

regime of federal preemption, determining the ownership of real property requires a review of state law." Pet. App. 10a. This Court has long been "mindful of the basic axiom that '[p]roperty interests … are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (alterations in *Ruckelshaus*)). *Cf. Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93, 104-05 (2014) ("The essential features of easements—including, most important here, what happens when they cease to be used—are well settled as a matter of property law.").

This Court recognized the role of state law in the rails-to-trails scheme in *Preseault v. ICC* (*Preseault I*), 494 U.S. 1, 8, 15-16 (1990). Justice O'Connor, joined by Justices Scalia and Kennedy, emphasized in her concurrence that "state law determines what property interest petitioners possess." *Id.* at 20 (O'Connor, J., concurring). The Board's actions under the National Trails System Act to implement a trail "do not displace state law as the traditional source of the real property interests. … Any other conclusion would convert the [Board's] power to pre-empt conflicting regulation of interstate commerce into the power to preempt the rights guaranteed by state property law, a result incompatible with the Fifth Amendment." *Id.* at 22.

No federal court, state court, or agency has doubted the sound conclusion that state law defines

the threshold property rights underlying the rails-to-trails program. Federal courts universally apply state property law in analyzing the property interests implicated in a rails-to-trails conversion. *See Rogers v. United States*, 814 F.3d 1299, 1305 (Fed. Cir. 2015) ("We analyze the property rights of the parties in a rails-to-trails case under relevant state law."); *see also, e.g.*, *Preseault v. United States* (*Preseault III*), 100 F.3d 1525, 1534 (Fed. Cir. 1996) (en banc) (discussing the importance of state law in ascertaining the parties' property interests); *Hornish v. King Cty.*, 899 F.3d 680, 692-96 (9th Cir. 2018) (applying Washington state law to ascertain parties' property rights); *Nat'l Wildlife Fed'n v. ICC*, 850 F.2d 694, 703 (D.C. Cir. 1988) ("Many … [railroad] rights-of-way are creatures of state law."). The Board itself has recognized the significant role state law plays in assessing property rights in the context of rail regulation. *See Allegheny Valley R.R. Co.*, S.T.B. Dkt. No. FD 35388, at 3 (Apr. 25, 2011) (determining 49 U.S.C. § 10501(b) did not preempt plaintiff's claims because "the size and extent of a railroad easement is a matter of state property law and best addressed by state courts"); *see also Ingredion Inc.*, S.T.B. Dkt. No. FD 36014, at 3 (Sept. 30, 2016) (declining to exercise jurisdiction over "a claim that an easement agreement was violated" because it "primarily involves the application of state property law" and "the state court is able to address any preemption arguments"). Given this wealth of consistent authority, petitioner cannot claim that federal courts or agencies have exclusive jurisdiction to define state property interests implicated by the rails-to-trails program.

Far from ignoring the federal rails-to-trails scheme and its preemptive effects, the Supreme Court of Alabama heeded the "undisputed" proposition that Congress vested the Board with broad jurisdiction over railroad transportation. Pet. App. 6a. The Court accepted all the features of the Board's authority the petition claims it ignored. The Supreme Court of Alabama recognized the Board's jurisdiction over "abandonment" of railroad lines is "exclusive," 49 U.S.C. §§ 10501(b)(2), 10903(a), and it noted that § 8(d) of the Trails Act provided interim trail use of a railroad line would "not be treated … as an abandonment," 16 U.S.C. § 1247(d). Pet. App. 2a-10a. And in its analysis of the case, the Court was careful to explain it was not offering "a judgment concerning whether the right-of-way had been abandoned." Pet. App. 15a.

Rather than encroach on the Board's authority regarding national rail lines and their abandonment, the Supreme Court of Alabama's decision turned on a traditional analysis of state law and represented a proper exercise of the state court's power to determine state property rights. The Commission traced its ownership of the right-of-way to its purchase, by quitclaim deed, of land from the Railroad. Under the law of Alabama (as almost all states), the Railroad could only transfer by quitclaim deed the property rights it actually possessed at the time of execution. Pet. App. 10a, 12a. Accordingly, the Alabama Supreme Court properly evaluated the state property interests the Railroad held when it purported to transfer them. The Court reached two conclusions.

First, the Court explained that, "under Alabama property law," the Railroad's specific-purpose easement had been extinguished. Pet. App. 12a. The Railroad's deed was unmistakably limited to rail-purpose use: It provided a limited easement for "operation of the railroad." SR11. Under Alabama law, when the "purpose" for a limited purpose easement "ceases to exist" or "is rendered impossible of accomplishment," the easement "terminates." *Tatum v. Green*, 535 So.2d 87, 88 (Ala. 1988) (cited at Pet. App. 13a). Not only had the line passing through respondents' property been in disuse for decades, but the Railroad had also let it fall into disrepair. Notably, the trial court found that after a trestle necessary to the line's operation burned down in 2007, the Railroad made no effort to repair it. Pet. App. 37a-38a. The Supreme Court of Alabama found no basis to disturb the findings of fact regarding the nonuse and disrepair of the property. Pet. App. 18a-19a.

In reaching its state-law conclusion about the limited easement, contrary to petitioner's suggestion, the Alabama Supreme Court made clear that it was not "treat[ing] the conversion of a railroad right-of-way to a trail-use right-of-way as an abandonment" under federal law. Pet. 11. Instead, the Court held that as a matter of Alabama property law, the Railroad's easement had been extinguished by operation of law long before any trail conversion or rail abandonment proceedings were even contemplated. Pet. App. 13a.

Second, the Court held that, in any event, there was no basis under state law for the Commission's claim to fee simple ownership in the rail-trail. In de-

ciding which state-law rights passed from the Railroad to the Commission, the Court examined the limited language of the Railroad's deed and determined the original limited easement held by the Railroad did not include the right to recreational trail use. Pet. App. 12a. The Court explained that, under Alabama law, those limited easement rights could not be expanded unilaterally by the easement holder. *See* Pet. App. 12a-13a (discussing key Alabama cases).

The Court ultimately held that because the Railroad did not, as a matter of state law, have a property interest to a right-of-way across respondents' land for recreational trail purposes, it could not convey such property via quitclaim deed. Its conclusion comports with basic principles of property law and common sense, as well as with the laws of other states. *See, e.g.*, *Toews v. United States*, 376 F.3d 1371, 1375-77 (Fed. Cir. 2004) (California law); *Preseault III*, 100 F.3d at 1550-51 (Vermont law); *Lawson v. State*, 730 P.2d 1308, 1311-12 (Wash. 1986). *Cf. Lawson*, 730 P.2d at 1316 ("We note that, insofar as the present record reveals, the County has only acquired, through a quitclaim deed, whatever interest Burlington Northern held. There is a strong argument to be made that Burlington Northern had no interest to convey to the County: upon abandonment of the right-of-way the land automatically reverted to the reversionary interest holders."); *Toews*, 376 F.3d at 1376 (concluding rail use easement did not include recreational hiking or biking because it is "beyond cavil that use of

these easements for a recreational trail … is not the same use made by a railroad").[4]

This determination of state property rights does not prevent the Board from exercising its exclusive jurisdiction over abandonment of rail lines in interstate commerce. The Board's authority under that Act does not, however, empower it to redefine state property rights. *See, e.g.*, *Dana R. Hodges Trust v. United States*, 111 Fed. Cl. 452, 456-57 (2013) (holding the "Trails Act has not 'destroyed' or 'eliminated' [adjacent landowners'] pre-existing [property] crossing rights," and rejecting the "argument that the Trails Act precludes all state law property law claims"). And, as discussed further below, the Alabama Supreme Court's exercise of its authority to define those state-law property rights is not inconsistent with the National Trails System Act.

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[4] The Alabama Supreme Court's conclusion does not undermine the viability of a national rail network, contrary to amicus Association of American Railroads' assertion. Extinguishment of an easement is not the same as abandonment of a rail line under federal law. The Court's state law holding does not, and could not, remove a rail line from the national rail network. Nor is there any suggestion that respondents sought to force the railroad to abandon its line, as there was in *Cedarapids, Inc. v. Chicago, Central & Pacific R.R. Co.*, 265 F. Supp. 2d 1005, 1014 (N.D. Iowa 2003). Moreover, nothing prevents petitioner from now seeking to exercise its eminent domain powers to establish a trail.

C. The Supreme Court of Alabama's decision establishes the necessary predicate for evaluating the consequences of rails-to-trails conversions under the Takings Clause.

There can be no dispute that rails-to-trails conversions often effect takings of private property and that such takings require just compensation. *See Preseault I*, 494 U.S. at 16. As the Federal Circuit explained: "It is elementary that if the Government uses (or authorizes the use of …) an existing railroad easement for purposes and in a manner not allowed by the terms of the grant of the easement, the Government has taken the landowner's property for the new use. The consent of the railroad to the new use does not change the equation—the railroad cannot give what it does not have." *Toews*, 376 F.3d at 1376. For that reason, the "defining issue" in rails-to-trails takings cases is what property interest the railroad actually had. *Id.* As Justice O'Connor explained, "[d]etermining what interest petitioners would have enjoyed under [state] law, in the absence of the [Board's] recent actions, will establish whether petitioners possess the predicate property interest that must underlie any takings claim." *Preseault I*, 494 U.S. at 21 (O'Connor, J., concurring).

The Supreme Court of Alabama's opinion offers precisely that determination. The Court's opinion is

not a collateral attack on the Board's proceedings; instead, it is an evaluation of their consequences under state law.[5]

As the Federal Circuit has explained, the takings analysis itself involves three "determinative issues":

> (1) who owned the strips of land involved, specifically did the Railroad by the [original] transfers acquire only easements, or did it obtain fee simple estates; (2) if the Railroad acquired only easements, were the terms of the easements limited to use for railroad purposes, or did they include future use as public recreational trails; and (3) even if the grants of the Railroad's easements were broad

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[5] *Grantwood Vill. v. Mo. Pac. R.R. Co.*, 95 F.3d 654 (8th Cir. 1996), is not to the contrary. The court there did not purport to address the takings consequences of the conversion; its preemption analysis does not pertain to assessing whether compensation is owed. At any rate, the Eighth Circuit "recogniz[ed] that state law defines the nature of the property interest." *Id.* at 658. Unlike in this case, the railroad in *Grantwood* held a property interest it could convey to under state law. *Id.* at 658. Similarly, in *Hornish v. King County*, the Ninth Circuit concluded adjacent landowners lacked standing to challenge a rails-to-trails conversion spearheaded by King County. 899 F.3d 680. It reasoned the plaintiffs lacked standing because they did not, under Washington state property law, hold a property interest in the land taken by the County. One set of plaintiffs made claims against land that the County—unlike the Monroe County Commission—owned in fee simple. *See id.* at 692-93. The railroad held a specific-purpose easement for a right-of-way on the property of the second set of plaintiffs. The Ninth Circuit recognized that the rails-to-trails conversion would create a "new" easement for recreational use, without considering the consequences. *Id.* at 694-97.

> enough to encompass recreational trails, had these easements terminated prior to the alleged taking so that the property owners at that time held fee simples unencumbered by the easements.

Preseault III, 100 F.3d at 1533.

The Alabama Supreme Court's ruling closely tracks that three-part outline. First, the Court recognized the undisputed fact that the Railroad held only an easement and had no claim to a fee simple interest in the right-of-way. Pet. App. 4a, 10a. Second, it analyzed the breadth of the Railroad's easement, and concluded that under Alabama state property law the railroad-specific purpose of the easement did not extend to recreational trail use. Pet. App. 12a-13a. Third, the Court held the Railroad's easement had been extinguished by operation of law due to the Railroad's failure to use or maintain its easement. *Id.* That analysis not only offers the best statement of Alabama property law; it also accords with that of several other states' similar regimes. *See, e.g.*, *Lawson*, 730 P.2d at 1311-13.

There is nothing inappropriate about the Supreme Court of Alabama's decision to resolve a question of state property law in this context. As discussed, *see supra* I.B, Justice O'Connor's concurrence in *Preseault* emphasized that the "scope of the [Board's] authority to regulate abandonments, thereby delimiting the ambit of federal power, is an issue quite distinct from whether the [Board's] exercise of power over matters within its jurisdiction effected a taking of petitioners' property." *Id.* at 22

(O'Connor, J., concurring). State law defines the respective property interests of a railroad and adjacent landowner at the center of the takings analysis. *Id.*

The Federal Circuit, sitting en banc after this Court's *Preseault* decision, made this precise point clear.[6] *See* 100 F.3d at 1534-35. As Judge Rader had explained in his earlier panel dissent, "[f]ederal law cannot shape or alter the Preseaults' 'bundle of property rights' defined and created by state law." *Preseault v. United States* (*Preseault II*), 66 F.3d 1167, 1189 (Fed. Cir. 1995) (Rader, J., dissenting), *rev'd*, 100 F.3d 1525 (Fed. Cir. 1996) (en banc). The en banc court ratified that view, holding that "[w]hen state-defined property rights are destroyed" in rails-to-trails conversions, "the owner of those rights is due just compensation." *Preseault III*, 100 F.3d at 1552.

Nothing in the National Trails System Act or its amendments suggests federal courts have exclusive jurisdiction to determine the bounds of state property rights.[7] To the contrary, federal courts routinely call on state courts to conduct precisely the analysis the

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[6] Two of the majority judges on the en banc Federal Circuit issued a separate concurrence. The Federal Circuit has since explained that even if the concurrence rendered the lead opinion a "plurality," it would not "weaken its precedential value. Even a cursory reading of the concurrence shows that there was no disagreement on any of the issues, as well as on the result." *Toews*, 376 F.3d at 1380 n.6.

[7] The Alabama Supreme Court's ruling below does not itself evaluate a takings claim, so there can be no argument that it encroaches on the exclusive jurisdiction of the Court of Federal Claims under the Tucker Act or Little Tucker Act. *See* 28 U.S.C. § 1491(a); *id.* § 1346(a).

Supreme Court of Alabama employed. In *Preseault III*, for instance, the en banc Federal Circuit lamented that it was without a state court determination: "Ideally, [the nature of the Preseaults' property interest] would be decided by the State of Vermont's courts, utilizing their knowledge of and experience with their state's property law." 100 F.3d at 1534. Federal courts commonly certify just this question to their state counterparts. *See, e.g.*, *Chevy Chase Land Co. v. United States*, 158 F.3d 574 (Fed. Cir. 1998); *Howard v. United States*, 100 Fed. Cl. 230 (2011). That such a ruling was rendered as part of a state-law quiet title action, as opposed to a ruling on a certified question, is of no moment. It cannot be, as petitioner implies, that state courts lack jurisdiction to review questions of traditional state law unless that state-law issue is certified by a federal court or federal agency. Such a dismissive view of state courts, and their role over state-law issues, is wholly inappropriate.

Through adjudication of the quiet title action, the Supreme Court of Alabama has determined, as a matter of state property law, that the limited easement did not permit use as a trail. Moreover, it found as a matter of state law that, by the time the County purported to purchase the easement, the easement had already terminated. If the County or federal government decide to proceed with building a trail (through exercise of eminent domain or otherwise), it is those established state-law rights that will now govern in measuring the just compensation due.

D. Nothing in the Supreme Court of Alabama's holding prevents government from building a trail over the Railroad's former right-of-way.

The Alabama Supreme Court's decision is entirely consistent with the principle that "if the Federal Government wishes to create a national network of public recreational biking and hiking trails, it is within its power to do so." *Preseault III*, 100 F.3d at 1537. The government "could—under Fifth Amendment eminent domain powers—take [landowners'] right to possess the parcels" where railroad lines ran. *Preseault II*, 66 F.3d at 1189 (Rader, J., dissenting). Likewise, the County, if it wishes to do so, can seek to exercise its eminent domain power to take possession of the former easement. *See* Ala. Const. art. I, § 23, art. XII, § 235. The Supreme Court of Alabama's decision simply recognizes that taking a lapsed easement and expanding its prior scope does, in fact, require an exercise of that eminent domain authority.[8]

As noted, *supra* I.A, it appears the Commission's trail project is now defunct. But if it were to proceed, Petitioner does not deny that government must exercise its eminent domain authority to convert a lapsed

[8] The Supreme Court of Alabama did not address the injunction issued by the Circuit Court, so that aspect of the trial court's judgment is not ripe for review. Review of the injunction is also unnecessary: the Court's state-law analysis and its takings implications do not turn on the trial court's remedy. Should this Court determine review of that aspect of the trial court's judgment is appropriate, it should remand to provide the Supreme Court of Alabama the opportunity to consider the injunction's propriety in the first instance.

rail use easement to a recreational trail and provide landowners just compensation. The government "has the legal power" to impose "new uses upon the fee interests held by the adjacent landowners," but "the private property interests taken are not free; the Government must pay the just compensation mandated by the Constitution." *Toews*, 376 F.3d at 1379.

II. If This Court Grants The Petition, It Should Address The Underlying Question Whether Congress Actually Authorized The Surface Transportation Board To Oversee A Broad, Costly Program Of Rails-To-Trails Takings.

Although this Court has held rails-to-trails conversions can give rise to just compensation claims, *Preseault I*, 494 U.S. at 13, the plain language of the Trails Act does not contemplate takings like this one. Congress did not envision the extensive taking of property for the rails-to-trails program.

Notably, Congress did not address at all how takings should proceed or be assessed in the context of rails-to-trails conversions. *See Caldwell v. United States*, 391 F.3d 1226, 1229 (Fed. Cir. 2004) (the Trails Act "does not specify in detail what procedures are to be followed" when the Board's actions effect a taking). The National Trails System Act provides no authority or procedure for the Board to condemn private land burdened by a railroad easement. Similarly, it does not provide any timeframe for seeking just

compensation.[9] The Trails Act's plain language and history strongly suggest that the Board lacks condemnation authority, as the D.C. Circuit has held. *See Nat'l Wildlife Fed'n*, 850 F.2d at 699-702. This Court has noted the Board recognizes that limit to its own power. *See Preseault I*, 494 U.S. at 15 n.8.

The "conspicuous absence" in § 8(d) of the National Trails System Act "of any explicit condemnation power," 850 F.2d. at 700, is especially striking by comparison to neighboring sections of the Trails Act, which grant that power for other trail projects. In

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[9] If Congress had intended a takings regime, it would have spelled out the timing and process for seeking the constitutionally mandated just compensation. Absent such specifications by Congress, the Federal Circuit has held the statute of limitations for seeking just compensation under the Tucker Act, 28 U.S.C. § 2501, and Little Tucker Act, 28 U.S.C. § 2401, begins to run at the Board's issuance of a NITU. *See Caldwell*, 391 F.3d at 1235. In *Ladd v. United States*, the Federal Circuit made clear that the date often accrues before plans for the conversion are set. 630 F.3d 1015, 1024 (Fed. Cir. 2010). Those holdings have been widely criticized. *See, e.g.*, S. Mike Gentine, *Riding the Trails To Bad Law: The Inevitably Unjust Results of the National Trails System Act & Current Takings Jurisprudence*, 47 Real Prop. Tr. & Est. L.J. 173, 190 (2012) ("*Caldwell* and *Ladd* created … an unworkable legal scheme in which a plaintiff can (and, when she nears seventy-two months past the NITU, must) file a suit when she knows only the source of her injury, not its extent."). Landowners may lack notice of a NITU and will almost certainly lack information about the extent of damages when the NITU is issued, before their property is actually taken. *Cf. United States v. Dickinson*, 331 U.S. 745, 749 (1947) ("[W]hen the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really 'taken.'").

those other contexts, Congress is not silent when it anticipates creating a takings regime. Instead, Congress expressly empowers the Secretary of the Interior to "utilize condemnation proceedings" for trail acquisition. 16 U.S.C. § 1246(g). And Congress limits the use of those awesome constitutional powers. For example, the Secretary must satisfy several conditions to condemn private property: Condemnation is authorized only where "all reasonable efforts to acquire such lands or interests therein by negotiation have failed"; and the amount of land the Secretary may condemn is limited by a statutorily prescribed ratio. *Id.* Further, where Congress contemplates federal acquisition of private land for trails, it specifically provides a funding mechanism. *See generally* 16 U.S.C. § 1249; *see also, e.g.*, *id.* § 1249(a)(1) (authorizing $5 million in appropriations for the Appalachian National Scenic Trail and $500,000 for the Pacific Crest National Scenic Trail). The lack of such funding to finance a massive taking program for former rail paths is a strong indicator that Congress never contemplated creating such a program in the first place.

Though the Court of Federal Claims has in effect developed an inverse condemnation regime, there is no indication that Congress actually contemplated or authorized it. To be sure, the *Preseault* Court concluded that the availability of just compensation under the Tucker Act meant the Trails Act did not run afoul of the Fifth Amendment. But the availability of damages under the Tucker Act does not mean Congress intended the National Trails System Act to be an extensive takings program, or that Congress wrote the Board a blank check for rails-to-trails conversions. The financial tolls of such takings have been

stark: Estimates of taxpayer liability are in the hundreds of millions, and one single class action recently settled for more than $110 million.[10]

Such a takings program, encroaching on the property rights of landowners throughout the country, cannot be simply assumed. Rather, it should require clear and unambiguous congressional authorization. *Cf. Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2180 (2019) (Thomas, J., concurring) ("This 'sue me' approach to the Takings Clause is untenable.").

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[10] *See* Jenna Greene, *Rails-To-Trails Program Costly to Taxpayers*, Law.com (Sept. 2, 2013, 12:00 AM) (reporting $49 million in government liability for one year and estimating ultimate liability will exceed $500 million), https://tinyurl.com/vfdoyt5; *Haggart v. United States*, 136 Fed. Cl. 70, 81 (2018), *aff'd*, -- F.3d --, 2019 WL 6333708 (Fed. Cir. Nov. 27, 2019) (compensation of $110 million in principal and $49 million in interest). *See also, e.g.*, *Furlong v. United States*, 132 Fed. Cl. 630 (2017) (compensation of roughly $6.5 million in principal and $5.8 million in interest); *Sears v. United States*, 132 Fed. Cl. 6 (2017) (compensation of more than $386,000).

CONCLUSION

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

Respectfully submitted,

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