No. 23-1360

In the Supreme Court of the United States

VERNON FIEHLER, PETITIONER

v.

CATHERINE MECKLENBURG, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—continued:

Constitution:

Miscellaneous:

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REPLY BRIEF FOR THE PETITIONER

This case presents an important question concerning the ability of a court to second-guess the location of a water boundary identified in a federal land survey. In the decision below, the Alaska Supreme Court set aside a federal surveyor's statement that he had placed a physical monument "at the line of mean high tide" of the property at issue, in favor of subsequently developed extrinsic evidence that the mean high tide line had been located seaward of the monument. That decision conflicts with decisions of the Louisiana and Michigan Supreme Courts and is in significant tension with decisions of other lower courts. It is also erroneous: as this Court has long explained, federal surveys are "unassailable by the courts" and can be challenged only through a direct proceeding before the executive branch. *Cragin* v. *Powell*, 128 U.S.

691, 699 (1888). The Alaska Supreme Court was not permitted to correct the federal survey at issue here by disregarding the surveyor's statement that he placed the monument at the mean high tide line.

Respondents attempt to evade review by characterizing the dispute between the parties as concerning whether a meander *line*—an artificial platted line used to approximate the shape of a body of water—can supersede the actual mean high tide line as the location of a water boundary. But that is not the issue here. Petitioner never attempted to show the original location of the entire shoreline, as represented by a meander line; instead, he merely sought to show the location of a single point, marked by a permanent federal monument, where the relevant property line intersected the shoreline. The issue here is whether a court, in contravention of *Cragin*'s rule, can second-guess a monument placed by a federal surveyor at that point.

"[G]reat confusion and litigation" threatens to follow if the Alaska Supreme Court's decision stands and courts are allowed to "interfere and overthrow * * * public surveys on no other ground than an opinion that they could have the work in the field better done." *Cragin*, 128 U.S. at 699 (citation omitted). While respondents claim that the question presented has arisen infrequently, the relative absence of cases deciding disputes over water boundaries in federal surveys proves only that the system was working before the Alaska Supreme Court's decision unsettled it.

Because of the clear conflict among state courts of last resort and the enormous practical significance of the question presented, the petition for a writ of certiorari should be granted. At a minimum, given the significant federal interests at stake in this case, the Court may wish to call for the views of the Solicitor General.

A. The Decision Below Creates A Conflict Among The Lower Courts On The Question Presented

As petitioner has explained (Pet. 13-17), the decision below conflicts with decisions of the Louisiana and Michigan Supreme Courts and is in significant tension with decisions of the Tenth Circuit and nine other state courts of last resort. Respondents' efforts to diminish the conflict are unpersuasive.

1. The Louisiana and Michigan Supreme Courts have held that, when locating a historical water boundary, evidence of where the original federal government survey located that boundary is controlling. See *State* v. *Aucoin*, 20 So. 2d 136, 154-155 (La. 1944); *Brown* v. *Parker*, 86 N.W. 989, 990 (Mich. 1901). Respondents contend that that those cases merely represent an "exception" for "swamplands" to the "general rule" that "the property boundary where a parcel meets a body of water is the mean high tide line, not the meander line" (the meander line being the platted survey line that "defin[es] the sinuosities of the banks" of a body of water, *Hardin* v. *Jordan*, 140 U.S. 371, 381 (1891)). Mecklenburg Br. in Opp. 21, 24; see Alaska Br. in Opp. 12-15. Because "this case doesn't involve swampland," respondents conclude that the decisions cited by petitioner are distinguishable. Mecklenburg Br. in Opp. 25.

The problem for respondents is that neither of the relevant decisions purported to hold that the survey lines at issue were governing simply because they demarcated swamplands. Instead, in *Aucoin*, *supra*, the Louisiana Supreme Court applied *Cragin*'s general rule that, "[w]hen lands have been disposed of by the government according to a line appearing on an official plat[,] * * * the location of the line shown on the official plat is controlling." 20 So. 2d at 154. Although the Louisiana Supreme Court did note that swampland was at issue, the court's

refusal to second-guess the federal surveyor's line was based on the "lack of jurisdiction in the courts to correct errors in government surveys." *Id.* at 155.

So too in *Brown*, *supra*. There, the Michigan Supreme Court held that the federal government's "determination" of the boundary of a lake "should be considered final and authoritative"—not because swampland was involved, but rather because that determination could not be challenged in the courts as erroneous. 86 N.W. at 990. Although the case did involve swampland, the court rested its holding on decisions of this Court applying *Cragin*'s general rule. See *ibid.* (citing *Dominguez de Guyer* v. *Banning*, 167 U.S. 723 (1897); *Russell* v. *Maxwell Land-Grant Co.*, 158 U.S. 253 (1895); and *Stoneroad* v. *Stoneroad*, 158 U.S. 240 (1895)).

Hilt v. *Weber*, 233 N.W. 159 (Mich. 1930), is not to the contrary. There, the Michigan Supreme Court held that a riparian landowner, and not the State, holds title to any land between a platted meander line and the actual water's edge. See *id.* at 162, 168. In reaching that holding, the court described *Brown* as a "swamp land case[]." *Id.* at 167. But it did so only in the course of rejecting the argument that a meander line represents an absolute limit on a riparian landowner's property in the event of subsequent "reliction," *ibid.*—that is, "lands once covered by water that become dry when the water recedes," *Stop the Beach Renourishment, Inc.* v. *Florida Department of Environmental Protection*, 560 U.S. 702, 708 (2010). The question of how to apportion any land relicted *after* the original federal survey bears no relation to the question of where the original survey boundary was (whether demarcated by a meander line, as in *Brown*, or a meander corner, as here).

2. As petitioner has also explained (Pet. 15-17), the Alaska Supreme Court's decision is in serious tension with

cases holding that an artificial survey monument controls over other sources of evidence. Respondents attempt to distinguish those cases on the ground that they involved the placement of a monument "on the land boundary between two parcels," Mecklenburg Br. in Opp. 27, rather than on a corner at "a point where a boundary line [between two parcels] intersects a meanderable body of water," *Udall* v. *Oelschlaeger*, 389 F.2d 974, 976 (D.C. Cir.), cert. denied, 392 U.S. 909 (1968). That distinction does not withstand scrutiny.

In making that argument, respondents appear to assume that, because such a corner forms a point on a meander line, "the monument does not reflect the true boundary" of the mean high tide line when placed. Mecklenburg Br. in Opp. 26; cf. *Thunder Lake Lumber Co.* v. *Carpenter*, 200 N.W. 302, 303 (Wis. 1924). But even if that could be true in other cases, but see pp. 7-8, *infra*, the federal surveyor here affirmatively stated that he had placed the monument at the mean high tide line. See Pet. App. 3a-4a.

The Tenth Circuit, the South Dakota Supreme Court, and the Utah Supreme Court have specifically recognized that "the corner established by [a federal] government survey," marked by a monument, is the "first search" in any boundary dispute, with no further inquiry if the corner is identified. *Arneson* v. *Spawn*, 49 N.W. 1066, 1067-1068 (S.D. 1891); see *United States* v. *Doyle*, 468 F.2d 633, 637 (10th Cir. 1972); *Henrie* v. *Hyer*, 70 P.2d 154, 157-158 (Utah 1937). State courts of last resort have also recognized that a federal surveyor's monument prevails over other evidence of a property corner or boundary. See Pet. 16-17 (collecting cases). The Alaska Supreme Court's decision to second-guess the monument that marked the corner here cannot be reconciled with those cases.

B. The Decision Below Is Incorrect

In the decision below, the Alaska Supreme Court disregarded "an elementary principle of our land law": that, consistent with the Property Clause of Article IV of the Constitution, "the power to make and correct surveys of public lands belongs to the political department of the government." *Cragin*, 128 U.S. at 698-699. Once land has been federally surveyed, the accuracy of the survey is "not open to challenge by any collateral attack in the courts." *Russell*, 158 U.S. at 256. Despite that settled law, the Alaska Supreme Court disregarded the statement in the federal survey here that the surveyor placed a monument "at the line of mean high tide" at the corner of the two adjacent lots at issue. Pet. App. 3a-4a. Instead, the court relied on extrinsic evidence to hold that the mean high tide line at the time of the survey was located seaward of the monument. See *id.* at 31a-33a. That decision was erroneous.

Respondents argue that the Alaska Supreme Court correctly treated the monument as "not inherently mark-[ing] the boundary" because it was placed "on the meander line." Mecklenburg Br. in Opp. 18. That argument conflates meander lines and meander corners. Meander lines are drawn because it is "not practicable * * * to follow and reproduce all the minute windings of the high-water line" of a body of water. Department of Interior, *Manual of Instructions for the Survey of Public Lands of the United States* 218 (1930) (Survey Manual). According to the governing federal survey manual at the time of the survey here, a meander line is designed only to be in "approximate agreement with the minute sinuosities of mean of high-water elevation." *Id.* at 219.

A meander corner, by contrast, is a single point that marks the intersection of an ordinary boundary line and a meanderable body of water. See p. 5, *supra*. As such, it

does not present the same practical difficulties as a meander line. The governing federal survey manual instructed surveyors to place meander corners at the mean high tide line, see Survey Manual 218, and respondents acknowledge that "[t]he federal government told surveyors" to do so, Mecklenburg Br. in Opp. 26. And where a surveyor is unable to place a corner at the mean high tide line, the manual directs the placement of a witness corner, rather than a meander corner. See Survey Manual 218.

The foregoing distinction disposes of respondents' defense of the Alaska Supreme Court's decision. The question in this case is where the *historical* water boundary was at the time of the survey. Here, the federal surveyor placed a meander corner, not a witness corner, despite placing witness corners at several other points in the same survey. See Pet. App. 49a. A monument marking a meander corner is supposed to be placed at the mean high tide line, and the federal surveyor here expressly indicated that he was following that guidance. Under *Cragin*, that monument was the only legally permissible evidence of the location of the boundary at the time the survey was completed.

This Court's decision in *Railroad Co.* v. *Schurmeir*, 74 U.S. (7 Wall.) 272 (1869), is not to the contrary. Respondents argue that *Schurmeir* demonstrates that, "where the location of the meander corner monuments and the location of the shoreline differ, the shore controls." Mecklenburg Br. in Opp. 21; see Alaska Br. in Opp. 18-19. In that case, however, the corners at issue were properly set at the bank of the river in question, but a subsequent infill of a channel in the river caused accretion that connected previously unsurveyed islands to the river's bank. 74 U.S. at 277. As with reliction, see p. 4, *supra*, the corners did not control the property boundary for the simple reason that "a riparian property owner can lay claim to accreted lands

beyond the meander line." Alaska Br. in Opp. 12. The decision in *Schurmeir* does not stand for the extraordinary proposition that evidence outside a survey can be used to determine the shoreline's position *at the time of the survey*.

Respondents are also incorrect to suggest (Alaska Br. in Opp. 22; Mecklenburg Br. in Opp. 12-13, 15-17, 19) that petitioner's expert agreed that the corner here was not placed at the mean high tide line. As the Alaska Supreme Court recognized, petitioner's expert "opined that the monument was the best evidence of the mean high tide in 1938." Pet. App. 6a. By contrast, Mecklenburg's expert could not testify with certainty where he believed the waterline was located. See *id.* at 49a-50a. In any event, regardless of the state of the expert testimony, the surveyor's monument must control. The Alaska Supreme Court erred by crediting subsequently developed extrinsic evidence of the location of the historical water boundary over the still-standing monument.

C. The Question Presented Is Important And Warrants The Court's Review In This Case

The question presented is of significant legal and practical importance, and this case, which cleanly presents the question, is an optimal vehicle for the Court's review. See Pet. 22-25. At a minimum, given the significant federal interests at stake in this case, the Court may wish to call for the views of the Solicitor General.

Respondents argue that the question presented is not worthy of the Court's review because it "rarely arises." Mecklenburg Br. in Opp. 29; see Alaska Br. in Opp. 21. But as the State of Alaska admits, "a significant number of survey monuments exist in the United States," Alaska Br. in Opp. 21, and the question is particularly significant

in Alaska, given the enormous amount of formerly federally owned lands with water boundaries, see Pet. 23. To the extent the case law forming the conflict over the question presented is dated, that is simply because, before the decision below, the law was settled that a court could not second-guess the accuracy of a water boundary in a federal survey. It is no answer to cite the rule that "the waterbody, and not the meander line, is the true boundary." Alaska Br. in Opp. 20. The question here is not whether the mean high tide line formed the actual boundary; instead, it is whether the federal survey provides controlling evidence of where that boundary was.

Respondents also contend that the question presented is too fact-bound to warrant the Court's intervention. But the decision below tees up a clean legal question: namely, whether a court has the power to second-guess evidence of the location of a water boundary from a federal survey based on subsequent evidence of the body of water's location. To the extent that the question in this case arises in a particular factual context, it is the generalizable context of survey monuments used to mark corners of water boundaries. Any rule adopted by the Court in this case would be applicable at least to other such cases, and it would likely provide guidance on the ability of courts to second-guess the accuracy of other aspects of federal surveys.

The State argues that this case is a poor vehicle for the Court's review because, if petitioner were to prevail, a question would remain on remand of how to "divide [the] accreted lands" between petitioner and Mecklenburg. Br. in Opp. 21. But this Court routinely decides important questions of federal law in cases where the Court's resolution requires a remand for further proceedings on other issues. See, *e.g.*, *Smith* v. *Arizona*, 602 U.S. 779, 801 (2024); *Jack Daniel's Properties, Inc.* v. *VIP Products*

LLC, 599 U.S. 140, 161 (2023); *Brownback* v. *King*, 592 U.S. 209, 215 n.4 (2021). And as the Alaska Supreme Court explained, the location of the shoreline is "key" to deciding the critical issue in the case, which is "access to the cove" and not the precise division of accreted lands. Pet. App. 2a.

For her part, respondent Mecklenburg argues that resolution of the question presented may not resolve this case for a different reason: that is, because the Alaska Supreme Court "reserved the question whether state law or federal law governs the boundary at issue." Br. in Opp. 30. But the Alaska Supreme Court assumed that federal law applied, see Pet. App. 12a n.11, and this Court has the power to decide any federal issue actually passed upon by the court below, even if the court could have decided the case on state-law grounds, see, *e.g.*, *Oregon* v. *Guzek*, 546 U.S. 517, 523 (2006). In any event, there is no genuine question whether federal law governs the question whether the location of the monument placed by the federal surveyor is controlling. The potential question of state law identified by the Alaska Supreme Court concerns the separate issue of the division of any accreted lands. See Pet. App. 12a n.11 (citing *Honsinger* v. *State*, 642 P.2d 1352, 1353 (Alaska 1982)). And unlike in *Borax Consolidated, Limited* v. *City of Los Angeles*, 296 U.S. 10 (1935), *Cragin*'s rule unambiguously applies here because the survey at issue was performed before Alaska became a State, see *id.* at 16-18—making the land "Territory * * * belonging to the United States" that is subject to the Property Clause. See U.S. Const. Art. IV, § 3, cl. 2.

Finally, respondents resist a call for the views of the Solicitor General, arguing that the federal government has "already endorsed the controlling rule." Mecklenburg Br. in Opp. 32-33. But the statements respondents

cite demonstrate only that the government has said that the mean high tide line is the actual boundary line. See *ibid.* That is a distinct question from whether a court may second-guess a monument identified in a survey as being placed at the mean high tide line. At a minimum, the Solicitor General should have an opportunity to weigh in on that question before the Court acts on the petition.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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