No.

In the Supreme Court of the United States

VERNON FIEHLER, PETITIONER

v.

T. ANTHONY MECKLENBURG, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

TODD F. GAZIANO
MICHAEL E. ROSMAN
CALEB KRUCKENBERG
CENTER FOR INDIVIDUAL RIGHTS
1100 Connecticut Avenue, N.W., Suite 625
Washington, DC 20036

KANNON K. SHANMUGAM
Counsel of Record
BRIAN M. LIPSHUTZ
ANITA Y. LIU
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

QUESTION PRESENTED

Whether a court has the power to disregard evidence of the location of a water boundary from a federal survey based on subsequent evidence of the body of water's location.

PARTIES TO THE PROCEEDING

Petitioner is Vernon Fiehler. Respondents are T. Anthony Mecklenburg; Catherine Mecklenburg; the State of Alaska; the City and Borough of Juneau; and Wells Fargo Bank, N.A.

RELATED PROCEEDINGS

Superior Court for the State of Alaska (First Judicial District at Juneau):

Mecklenburg, et al. v. *State of Alaska, et al.*, No. 1JU-19-495CI (Sept. 5, 2021)

Supreme Court of the State of Alaska:

Fiehler v. *Mecklenburg, et al.*, No. S-18208 (Nov. 17, 2023)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—continued:

Constitution and statutes:

In the Supreme Court of the United States

No.

VERNON FIEHLER, PETITIONER

v.

T. ANTHONY MECKLENBURG, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

Vernon Fiehler respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alaska in this case.

OPINIONS BELOW

The opinion of the Alaska Supreme Court (App., *infra*, 1a-33a) is reported at 538 P.3d 706. The opinions of the Alaska Superior Court (App., *infra*, 34a-35a, 36a-41a, and 42a-57a) are unreported.

JURISDICTION

The judgment of the Supreme Court of Alaska was entered on November 17, 2023. A petition for rehearing was denied on January 29, 2024 (App., *infra*, 58a-59a). On April 18, 2024, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including June 27, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

CONSTITUTIONAL PROVISION INVOLVED

Article IV, Section 3, of the United States Constitution provides in relevant part:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

STATEMENT

This case presents a foundational constitutional question that has divided state courts of last resort. Congress has disposed of approximately 1.3 billion acres of public land through its power under the Property Clause of Article IV, Section 3, of the United States Constitution. See Bureau of Land Management, *Public Land Statistics 2022*, tbl. 1-2 (June 2023) <tinyurl.com/2022-PublicLand-Statistics>. As part of that process, Congress provided for federal surveys to assist with measuring, dividing, and marking the boundaries of parcels of that land. This Court has long held that federal surveys are "unassailable by the courts, except by a direct proceeding" initiated in the Bureau of Land Management (or its predecessor, the Land Office). *Cragin* v. *Powell*, 128 U.S. 691, 699 (1888). The question presented here is whether a state court has

impermissibly "corrected" a federal survey by crediting extrinsic evidence of the location of a historical water boundary over evidence from the original federal survey.

This particular case concerns the ownership of land along a harbor beach in Alaska. Petitioner owns a home in the area, and the beach provides the only practical means of access to the home. Respondents are petitioner's neighbors. The parties agree that the respective property boundaries turn on the intersection of their shared property line with the location of the mean high tide line at the time of the 1938 federal survey, together with a fair allocation of land subsequently exposed on the beach. The surveyor placed a brass cap monument between the two properties "at the line of mean high tide" and memorialized it in his notes. Following a trial at which respondents presented evidence, including a later photograph of the shore and subsequent non-federal surveys, that the 1938 mean high tide line was seaward of the brass cap monument, the trial court entered judgment in favor of respondents. According to the trial court, the 1938 surveyor was "effectively mistaken" when he placed the monument. The Alaska Supreme Court affirmed, holding that the trial court did not exceed its jurisdiction because it merely resolved a "question of fact" about the location of the 1938 mean high tide line.

The Alaska Supreme Court's decision created a conflict with other state courts of last resort on an important question of federal law. Both the Louisiana and Michigan Supreme Courts have squarely held, when faced with the same question, that a state court does not have jurisdiction to correct where a federal surveyor located a waterline boundary. And the Alaska Supreme Court's decision is in significant tension with the decisions of the Tenth

Circuit and nine other state courts of last resort prohibiting courts from second-guessing the physical marks set by federal surveyors in similar cases.

The Alaska Supreme Court's decision was also erroneous. Under *Cragin* and other precedents applying the Property Clause, a court lacks the power to correct a federal survey of public lands. A court thus may not override where a federal surveyor located a water boundary, even based on subsequent, extrinsic evidence about the location of that waterline.

The conflict created by the Alaska Supreme Court will sow confusion and instability for property owners in enormous areas of the United States. Because this case comes to the Court after the question was presented and decided below, it is an optimal vehicle for this Court to resolve the conflict on that discrete question of federal law. The petition for a writ of certiorari should be granted.

A. Background

1. The Property Clause of Article IV of the United States Constitution provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, cl. 2. When "state laws conflict with * * * legislation passed pursuant to the Property Clause, the law is clear: the state laws must recede." *Kleppe* v. *New Mexico*, 426 U.S. 529, 543 (1976). "A different rule would place the public domain of the United States completely at the mercy of state legislation." *Ibid.* (citation omitted).

One way that Congress exercises its power under the Property Clause is by disposing of federally owned land. See, *e.g.*, *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U.S. 10, 17 (1935); *Stoneroad* v. *Stoneroad*, 158 U.S. 240, 248 (1895). Under the Alaska Homestead Act of 1918,

Congress created a mechanism for homesteaders to make claims to parcels of federal lands in Alaska. See Pub. L. No. 65-180, 40 Stat. 632 (1918).

In Alaska, as elsewhere, the federal government's system of public surveys is integral to the disposition of land. In general, an Alaska homesteader was required to obtain a public survey before making a claim. See Pub. L. No. 65-180, § 2, 40 Stat. 633 (Alaska Homestead Act of 1918). If the land had not previously been surveyed, the surveyor was instructed to "follow the general system of public-land surveys," and the claimant was instructed to "conform his boundaries thereto." *Ibid.*; see Pub. L. No. 73-260, 48 Stat. 809 (Alaska Homestead Act of 1934); 43 U.S.C. 751a (extending the system of public land surveys to Alaska).

2. In general, a federal public land surveyor marks "proper corners" and "boundary lines" to establish the corners and boundaries of sections of public land. 43 U.S.C. 752; see 43 U.S.C. 751. If a section of public land is bounded by a body of water, the "waters themselves constitute the real boundary." *Hardin* v. *Jordan*, 140 U.S. 371, 380 (1891); see 43 U.S.C. 752. To describe those sections of land, surveyors run lines called "meander lines" that "defin[e] the sinuosities of the banks" of a body of water. *Hardin*, 140 U.S. at 381 (citation omitted). Meander lines permit the surveyor to "ascertain[] the quantity of the land in the fraction subject to sale" and to "represent[]" in the official survey plat "the border line" of the body of water. *Ibid.*

A surveyor who draws a meander line may also designate a "meander corner," which is "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). "For tidal

waters, the meander corner is established at the intersection of the [boundary] line with the line of [mean high tide]." U.S. Department of the Interior, Bureau of Land Management, *Manual of Surveying Instruction* § 3-173, at 83 (2009).

To determine where the boundaries and corners described in a survey lie in the present day, a court must adopt "[s]ome general rule of construction." *Newsom* v. *Pryor's Lessee*, 20 U.S. (7 Wheat.) 7, 10 (1822). The controlling rule is that "the most material and most certain calls," which are definite descriptions of the property, should "control those which are less material, and less certain." *Ibid.* Accordingly, "[a] call for a natural object, as a river, a known stream, a spring, or even a marked tree, shall control both course and distance." *Ibid.* Applying that rule, "courts have generally agreed upon" an "order of precedence": (1) "natural monuments or objects"; (2) "artificial marks, stakes, or other objects, made or placed by the hand of man"; (3) "maps and plats"; (4) "courses and distances"; and (5) "recitals of quantity." National Oceanic & Atmospheric Administration, 2 *Shore and Sea Boundaries* pt. 3, ch. 3, at 470 (1964) <tinyurl.com/ShoreAndSeaBoundaries>. In other words, priority is given to fixed, definite, permanent objects that can be ascertained. See, *e.g.*, *Thompson* v. *Darr*, 298 S.W. 1, 3 (Ark. 1927); *Barringer* v. *Davis*, 120 N.W. 65, 70 (Iowa 1909); *Brown* v. *Milliman*, 78 N.W. 785, 788 (Mich. 1899); *Arneson* v. *Spawn*, 49 N.W. 1066, 1069 (S.D. 1891).

3. Because federal surveys are conducted pursuant to Congress's power under the Property Clause, federal and state courts lack "the power to make and correct surveys of the public lands." *Cragin*, 128 U.S. at 698. Federal surveys "are unassailable by the courts, except by a direct proceeding" (*e.g.*, before the Bureau of Land Management), and courts "have no concurrent or original power

to make similar correction" of those surveys. *Id.* at 699. This Court has long recognized that the lack of judicial authority to "correct" federal surveys is "settled by such a mass of decisions of this [C]ourt that its mere statement is sufficient." *Id.* at 698-699.

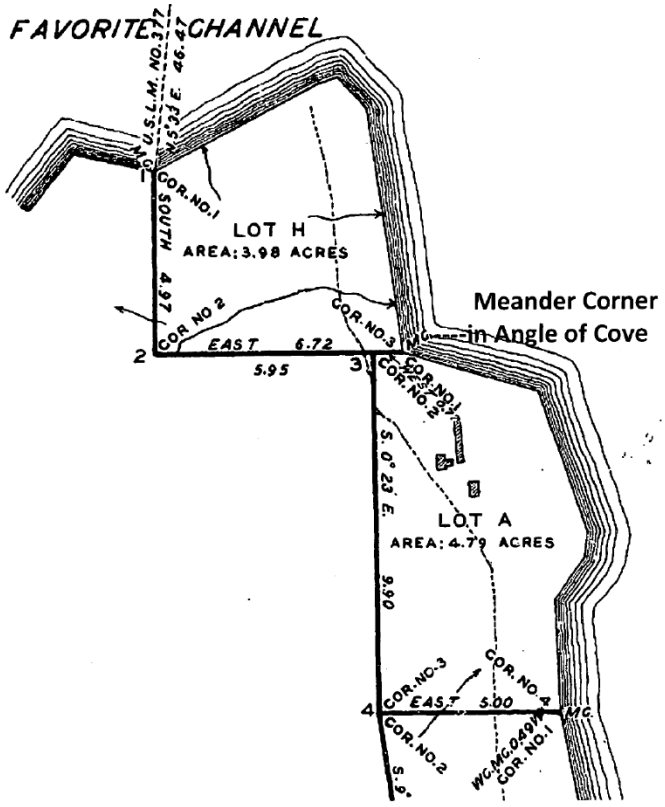
That rule serves the purposes of stability and predictability. This Court has recognized that "great confusion and litigation would ensue if the judicial tribunals were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done and divisions more equitably made than the department of public lands could do." *Cragin*, 128 U.S. at 699 (citation omitted). The rule avoids imposing on property owners and the federal government the "great hardship" of "mak[ing] new surveys and grants." *Mitchell* v. *Smale*, 140 U.S. 406, 412 (1891).

B. Facts and Procedural History

1. Petitioner Vernon Fiehler owns a family home on a parcel of land in Tee Harbor, Alaska. It is adjacent to a parcel owned by respondents Anthony and Catherine Mecklenburg. Both parcels of land were initially homesteads claimed from federally owned lands. App., *infra*, 2a-3a, 43a.

Tee Harbor is a small coastal inlet northwest of Juneau, Alaska. The harbor leads into Favorite Channel and then the Gulf of Alaska. Near the mouth of Tee Harbor, protected from the worst of Alaska's rough coastal waters, lies a tiny, unnamed cove and a narrow gravel beach. That beach is the only suitable place to land a boat for miles in each direction. The rest of petitioner's shoreline consists of large boulders and outcroppings that are, for much of the year, not suitable for accessing inland property from the water. App., *infra*, 4a, 43a; Alaska S. Ct. Pet. Br. 13, 20-22.

In 1938, the parcels were surveyed pursuant to federal law. App., *infra*, 2a. The surveyor stated in his field notes that he set a "brass cap" monument, "flush in cement in a boulder," "at the line of mean high tide" where it would intersect with the boundary line between the two parcels. *Id.* at 3a-4a. On the survey map, depicted below, the surveyor labeled the corner "MC" (short for "meander corner"). Pet. Alaska S. Ct. Br. 8.



2. In 2019, respondents sued petitioner in Alaska state court to quiet title to disputed land that lies on the harbor beach. The parties agreed that the division of the disputed land turned on the original division of ownership between their parcels in 1938, which in turn was dictated by where their shared boundary line intersected the mean

high tide line in 1938. They agreed that any additional land that did not exist in 1938 but had been added to the beach since (*i.e.*, as the mean high tide line moved after 1938) should be equitably apportioned between them. In other words, the disputed land would be apportioned between the parties based on the original division of ownership in 1938. The trouble was that the parties disagreed about how to determine where the mean high tide line was in 1938. As the parties agreed, that waterline had shifted seaward since 1938 because of glacial uplift and beach accretion, so the modern waterline was not the same. App., *infra*, 4a-5a.

Petitioner has relied on the brass cap monument placed by the 1938 surveyor as marking that historical waterline. He thus believed that he owned the part of the disputed land he used to access his property, which served as the only practical means of access and consisted of the narrow path from the limited boat access on the beach that was not covered by rocky cliffs. Respondents sought to quiet title to that land; if they succeed, respondents will own land blocking the limited path petitioner has been able to use to access his property from the harbor. As a result, petitioner will lose his mode of access to his property. App., *infra*, 4a-5a; Pet. Alaska S. Ct. Br. 20.

At trial, the parties presented experts who testified about where the mean high tide line was in 1938. Respondents' expert testified, based in part on what 1998 and 1999 non-federal surveys of the land had concluded, that "the actual 1938 [mean high tide line] was considerably seaward" from the 1938 brass cap monument, although the expert could not say exactly how many feet seaward. He also testified that the 1938 surveyor sometimes marked so-called "witness corners" as rough approximations of the waterline where it was impracticable

to mark the actual intersection of the property boundary with the waterline. App., *infra*, 5a-6a, 33a, 47a-50a.

By contrast, petitioner's expert testified that the 1938 monument was the best available evidence of the 1938 mean high tide line and was accurately placed. According to petitioner's expert, if the surveyor had intended to place a "witness corner" instead of marking the actual mean high tide line, he would have labeled it as such—not as a "meander corner." Indeed, the surveyor did mark witness corners elsewhere on the 1938 survey. App., *infra*, 6a, 51a.

After weighing the experts' testimony, the trial court agreed with respondents. App., *infra*, 42a-57a. The court reasoned that the 1938 surveyor was "effectively mistaken" when he labeled his monument as "at the line of mean high tide"; instead, he meant to label it as "a witness corner." *Id.* at 55a. Because respondents had not yet presented a calculation of the "exact[]," "true" location of the 1938 mean high tide line, the court ordered the parties to submit their calculations of where the 1938 line was located. *Id.* at 55a-56a. After respondents submitted corrected findings of law based on a survey conducted by their own expert that placed the 1938 mean high tide line roughly 100 feet east of the brass monument, the trial court entered judgment in favor of respondents. *Id.* at 2a, 33a.

3. The Alaska Supreme Court affirmed. App., *infra*, 1a-33a. The State of Alaska "participat[ed] in limited capacity as an appellee" before that court based on its ownership of the tidelands below the waterline. *Id.* at 11a. The State argued that, despite calling the 1938 surveyor "mistaken," the trial court had not impermissibly "correct[ed] a survey"; instead, the trial court had merely given effect to the surveyor's intent to recognize the mean high tide line at the time of the survey as the property

boundary. *Ibid.* The State further argued that the trial court had jurisdiction to "determin[e] as a factual matter where the mean high tide line existed at the time of conveyance." *Ibid.*

The Alaska Supreme Court agreed with the State. It observed first (and uncontroversially) that, when the survey was originally conducted, the division between petitioner's and respondents' land was based on the location of the "actual waterline." App., *infra*, 18a-19a (citing *Railroad Co.* v. *Schurmeir*, 74 U.S. (7 Wall.) 272, 284 (1868)). Applying that rule, the court explained, a "meander corner" in a survey is not a "legally controlling" boundary—because the waterline is. *Id.* at 13a, 18a. By contrast, when a surveyor sets a "proper corner," he does create a "legally controlling" boundary, because the "proper corner" itself defines a boundary. *Id.* at 13a.

The Alaska Supreme Court then held that *Cragin* does not deprive a court of jurisdiction to look at evidence outside a survey to determine whether the survey correctly described where the "legally controlling" boundary was. According to the Alaska Supreme Court, doing so would not run afoul of *Cragin* because a court would only be "interpret[ing]" "conflicting calls," not correcting the survey. App., *infra*, 28a. In the Alaska Supreme Court's view, the trial court thus properly determined "the actual location of mean high tide" in 1938 by "weigh[ing]" the conflicting evidence of that location. *Id.* at 28a, 33a. And the trial court was not required to credit the surveyor's monument because the surveyor had marked the monument as a "meander corner," which is not legally controlling. *Id.* at 18a-19a.

In this case, the conflicting evidence included, on one hand, the surveyor's monument and notes, which "expressly state[d] that the meander corner monument was placed at the location of mean high tide." App, *infra*, 27a.

On the other hand, respondents' expert testified that "the monument was not actually placed at the mean high tide line." *Id.* at 28a. The Alaska Supreme Court concluded that the trial court did not err by resolving the conflict in favor of respondents' extrinsic evidence because the 1938 waterline should be treated as a "natural monument" that controls over a surveyor's marker and notes. *Id.* at 28a-29a.

REASONS FOR GRANTING THE PETITION

A court lacks authority to disregard evidence of the location of a historical water boundary from a federal government survey based on subsequent evidence of where the waterline used to be. The Alaska Supreme Court departed from the decisions of two other state courts of last resort, which have correctly applied the longstanding principle that a court may not revisit a federal survey. The Alaska Supreme Court's decision is also irreconcilable with the decisions of the Tenth Circuit and at least nine other state courts of last resort, which have all recognized that courts should credit physical marks over less definite evidence.

The Alaska Supreme Court's decision was also incorrect. By concluding that a 1938 water boundary of federally surveyed land was not located where the surveyor had placed a brass cap monument, the Alaska Supreme Court improperly disregarded the survey, crediting extrinsic evidence of the water's location dating from long after 1938 over the still-standing brass cap monument.

The decision below threatens to unsettle important reliance interests and invite burdensome litigation concerning long-settled land boundaries. Those effects could extend to all land that has been federally surveyed, including significant portions of the State of Alaska. Because the question presented here was squarely litigated by the

parties and passed on by the Alaska Supreme Court, this case is an optimal vehicle for resolving the conflict in the lower courts. The petition for a writ of certiorari should be granted.

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

The decision below squarely conflicts with decisions of the Louisiana and Michigan Supreme Courts. Both courts have held that, when locating a historical water boundary, evidence of where the original federal government survey located that water is controlling. The decision below is also in significant tension with the decisions of one federal court of appeals and at least nine state courts of last resort, which have recognized that monuments designated by federal surveyors take precedence over other sources of evidence. The direct conflict among three state courts of last resort, and the broader disarray involving numerous other courts, warrant this Court's review.

1. The decision below conflicts with decisions of the Louisiana and Michigan Supreme Courts.

a. In *State* v. *Aucoin*, 20 So. 2d 136 (La. 1944), the defendant owned three sections of land on the south side of Lake Long. See *id.* at 138. In 1857, a federal surveyor had recorded in his field notes a traverse line—a term the court used interchangeably with "meander line"—for the lake. See *ibid.* That survey became the official plat for the township containing the defendant's land. See *ibid.*

By 1936, Lake Long had receded from its 1857 banks. See 20 So. 2d at 138. Louisiana argued that it owned any land between the new banks and the federal surveyor's 1857 traverse line. See *id.* at 139. The defendant maintained that he owned the land, either because it was included in his original deed or because he had acquired any

land accreted or derelicted as the lake receded. See *id.* at 139-140.*

The trial court agreed with Louisiana that the federal surveyor's 1857 traverse line marked the boundary between Louisiana's land and the defendant's, even in the present day. See 20 So. 2d at 140-141. The court ordered Louisiana's surveyor to "locate and retrace" the "original traverse of Lake Long, as surveyed by [the federal government] in 1857." *Id.* at 141. The defendant protested the line that the state surveyor drew. He argued that, even applying the trial court's instruction, the line was inaccurate because "the [federal] meander was a representation of the mean high-water mark" in 1857 and the state surveyor had failed to use the correct methodology to place the 1857 mean high-water mark. See *ibid.* The court rejected that challenge and determined that the state surveyor correctly "retraced" the federal surveyor's 1857 traverse line. See *id.* at 142.

The Louisiana Supreme Court affirmed. As is relevant here, the court held that it lacked jurisdiction to consider a challenge to the federal surveyor's line, which was incorporated in the survey ordered by the trial court. See 20 So. 2d at 154-155. Citing this Court's decision in *Cragin* v. *Powell*, 128 U.S. 691 (1888), the Louisiana Supreme Court explained that it lacked jurisdiction to "correct errors in government surveys" or question the "accuracy and reliability" of the federal surveyor's line. 20 So. 2d at 155. As the court stated, "[w]hen lands have been disposed of by the government according to a line appearing

* Accretion is "the gradual and imperceptible addition of soil or other material by the natural processes of water-borne sedimentation or by the action of currents." Bureau of Land Management, *Glossaries of BLM Surveying and Mapping Terms* 2 (1980). Dereliction is the "gradual and imperceptible recession of the water resulting in an uncovering of land once submerged." *Id.* at 55.

on an official plat of a government survey, approved by the Surveyor General, the location of the line shown on the official plat is controlling." *Id.* at 154.

b. The Michigan Supreme Court recognized the same limitation in *Brown* v. *Parker*, 86 N.W. 989 (1901). There, the plaintiffs and the defendants disputed ownership of "wet and marshy land adjacent to Lake Erie." *Id.* at 989. Before 1850, a federal surveyor had drawn a meander line "designed to show the boundary of Lake Erie." *Id.* at 990. According to that survey, the disputed land belonged to the plaintiffs. See *ibid.* The defendants argued that, at the time of the survey, the disputed land was actually submerged land in the bed of the lake and thus belonged to the State of Michigan. See *ibid.*

The Michigan Supreme Court held that the federal surveyor's meander line drawn by the survey was "conclusive." 86 N.W. at 990. The court recognized the need for the survey to be "final and authoritative," in order to prevent titles to surrounding land from being "subject to attack upon the ground that they were improperly or erroneously surveyed." *Ibid.* Citing this Court's decision in *Cragin*, the Michigan Supreme Court reasoned that the survey must "conclusively establish the boundaries of the lake" based on the "presumption" that "when the meander lines were run they followed the true shore of the lake." *Id.* at 991.

2. The decision below is also irreconcilable with the decisions of one federal court of appeals and at least nine other state courts of last resort, which have recognized that an artificial survey monument controls over other sources of evidence from the survey or the parties' acquiescence. Although the decisions of those courts did not address meander lines that mark the boundary between water and land, they evince a common, broader principle for resolving boundary disputes: "ocular and tangible

proof of authentic boundaries," such as "physical marks[] established and stamped by a government officer," must prevail over other, less verifiable evidence of boundary lines, including evidence in the survey plat and field notes. *Myrick* v. *Peet*, 180 P. 574, 577 (Mont. 1919).

The Tenth Circuit, the South Dakota Supreme Court, and the Utah Supreme Court have all recognized that the "first search" in any boundary dispute involving a federal survey must be "for the corner established by the government survey," which may be marked by the surveyor with such monuments as "mounds, pits, and stake[s]." *Arneson* v. *Spawn*, 49 N.W. 1066, 1067-1068 (S.D. 1891); see also *United States* v. *Doyle*, 468 F.2d 633, 637 (10th Cir. 1972); *Henrie* v. *Hyer*, 70 P.2d 154, 157-158 (Utah 1937). Under the decisions of those courts, if the surveyor's original corner can be identified based on "the marks of the government surveyor," the court conducts no further inquiry into the "mathematical exactness" of that corner. See, *e.g.*, *Arneson*, 49 N.W. at 1069. Only if no evidence of the original corner can be found may a court turn to other evidence. See, *e.g.*, *Doyle*, 468 F.2d at 637.

State courts of last resort have also recognized that, when the monument on which a federal surveyor relied to place a corner can be located, it prevails over other evidence. For example, several courts have stated that a monument marking a corner prevails over the lines described in a survey or plat. See *Sala* v. *Crane*, 221 P. 556, 557, 559 (Idaho 1923) (holding that a stone marking a township corner prevails over a section line in a section plat); *Langle* v. *Brauch*, 185 N.W. 28, 28-29 (Iowa 1921) (stating that the location of a stone monument would control over a straight line described in a government survey); *Hickey* v. *Daniel*, 195 P. 812, 814-815 (Or. 1921) (holding that monuments on the ground control over field notes stating that a line would run straight east and west).

Other state courts of last resort have held that a monument marking a corner controls over descriptions of distance, area, or courses and bounds in a survey. See *Thompson* v. *Darr*, 298 S.W. 1, 3 (Ark. 1927) (holding that trees marking a corner and surveyor's iron stake control over an incorrect distance in field notes); *Kurth* v. *Le Jeune*, 269 P. 408, 411 (Mont. 1928) (holding that a stone marker prevails over a defendant's expectations about land area); *Davies* v. *Craig*, 201 P. 56, 57-59 (Colo. 1921) (holding that monuments prevail over field notes that inaccurately placed a lake in wrong place); *Myrick*, 180 P. at 577, 579 (holding that monuments control over courses and distances in field notes).

Finally, two state courts of last resort have held that a monument marking a corner controls over private parties' acquiescence to a different border. See *Myrick*, 180 P. at 579; *Beardsley* v. *Crane*, 54 N.W. 740, 741, 743 (Minn. 1893).

* * * * *

In sum, there is a square conflict between the decision below and the decisions of two other state courts of last resort. There is also significant tension between the decision below and decisions of the Tenth Circuit and nine other state courts of last resort. This Court's review is thus warranted.

B. The Decision Below Is Incorrect

The Alaska Supreme Court held that, even when a federal government surveyor has placed a monument to mark a water boundary at the time of the survey, a state court may consider extrinsic evidence of the location of the boundary—and even credit that evidence over the still-standing monument. That decision was incorrect.

As this Court has explained in "a mass of decisions," it is "an elementary principle of our land law" that "the power to make and correct surveys of the public lands belongs to the political department of the government" and those surveys are "unassailable by the courts," which have no "power to make * * * correction" of a survey. *Cragin*, 128 U.S. at 698-699; see *Russell* v. *Maxwell Land-Grant Co.*, 158 U.S. 253, 256 (1895); *Johnson* v. *Towsley*, 80 U.S. (13 Wall.) 72, 87 (1871). Federal law must govern any question about the boundary between adjoining lands that were federally surveyed. *Borax Consolidated* v. *Los Angeles*, 296 U.S. 10, 22 (1935). And a court has no jurisdiction to "correct" a survey, because "[t]he accuracy of the survey" is "no longer open to inquiry" once it is completed. *Russell*, 158 U.S. at 256; *Cragin*, 128 U.S. at 698-699. Otherwise, "great confusion and litigation would ensue if the judicial tribunals were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done and divisions more equitably made than the department of public lands could do." *Cragin*, 128 U.S. at 699 (citation omitted).

1. The Alaska Supreme Court acknowledged the *Cragin* rule and its applicability, see App., *infra*, 16a-17a, but proceeded to limit its reach. When a federal survey unequivocally states where a water boundary was located, a court has no power to question or correct that location.

Contrary to the Alaska Supreme Court's reasoning, the trial court was obligated to treat the surveyor's monument as controlling. The 1938 survey contained no "conflicting calls" for the court to resolve. App., *infra*, 27a. The surveyor stated in no uncertain terms that he located a brass monument "at the line of mean high tide"—that is, at the actual water boundary. *Id.* at 4a; see *id.* at 53a. And

he explicitly labeled the brass monument a meander corner, which marks the intersection of a "boundary line" with a "meanderable body of water." *Udall* v. *Oelschlaeger*, 389 F.2d 974, 976 (D.C. Cir.), cert. denied, 392 U.S. 909 (1968).

A court may not ignore the monument in favor of "extrinsic evidence" based on its finding that the survey supposedly showed a "clear intent" to mark the boundary at the waterline. App., *infra*, 28a, 30a. That purported exception would swallow the rule. To credit "extrinsic evidence" over boundaries that were explicitly identified and marked in the original survey is to "correct" a federal survey. Indeed, in *Cragin*, a subsequent surveyor had concluded that the original survey was "incorrect" and "especially erroneous in the length of its lines." 128 U.S. at 697. According to the surveyor, the original survey must have intended to form a township "six miles square," as required by federal law. 43 U.S.C. 751; see 128 U.S. at 693-694. But the township "lacked half a mile of being six miles square." 128 U.S. at 693-694. Under the Alaska Supreme Court's reasoning, the "extrinsic evidence" that the township in *Cragin* was smaller than "intended" would signify that the original surveyor meant to place the boundary elsewhere. A court would have the ability to resolve that "question of fact" about where the boundary was supposed to be—exactly what this Court held was impermissible in *Cragin*.

This Court's decision in *Railroad Co.* v. *Schurmeir*, 74 U.S. (7 Wall.) 272 (1868), is not to the contrary. See App., *infra*, 19a. There, the Court held only that the meander line is not the boundary of a tract; the actual water boundary is. See 74 U.S. at 284, 286-287. Critically, however, the survey there "did not extend to the river, but * * * stopped at the meander-posts and the described trees on the bank of the river." *Id.* at 284. Here, by contrast, the

surveyor wrote that he placed a brass cap monument "at," not "short of," the mean high tide line.

2. The difference between a "proper corner" and a "meander corner" is irrelevant to the present case. See App., *infra*, 18a-19a. It is true that a meander corner is not *itself* a legally controlling boundary, because the waterline is. But a surveyor's monument—when it is placed "at" the waterline—is legally controlling *evidence* of that waterline boundary, at least over extrinsic evidence that does not come from the survey itself.

3. The Alaska Supreme Court further attempted to distinguish the decisions of the two other state courts of last resort that faithfully applied this Court's precedent. See App., *infra*, 23a-25a. The Alaska Supreme Court treated *Aucoin* and *Brown* as "exceptions to the general rule that a meander line is not a property boundary" because they involved "swamp lands," App., *infra*, 22a, where there is sometimes no definite boundary between water and land at any point in time, see *Hilt* v. *Weber*, 233 N.W. 159, 163 (Mich. 1930). That distinction misapprehends both cases.

In both *Aucoin* and *Brown*, the meander line drawn by the federal government survey was conclusive not because the meander line was the boundary line, but because the meander line was controlling evidence of where the water boundary was located when the survey was conducted. See *Aucoin*, 20 So. 2d at 154-155; *Brown*, 86 N.W. at 990-991. Here, there is no dispute that the contested corner "should be located at * * * the mean high tide line in 1938." App., *infra*, 5a. In other words, the relevant issue is not whether the contested corner should move as the water boundary itself moves, but rather where the *historical* water boundary was. See *Aucoin*, 20 So. 2d at 149; *Brown*, 86 N.W. at 990-991. Accordingly, the 1938

survey is controlling evidence of the location of 1938 mean high tide line.

4. Finally, the Alaska Supreme Court also invoked the primacy of natural monuments when survey calls conflict. See App., *infra*, 28a-29a. But that does not salvage its decision.

The issue here is not what to do with conflicting survey calls, but instead how to locate a historical waterline that no longer exists. This case is thus distinguishable from *Barringer* v. *Davis*, 120 N.W. 65 (Iowa 1909), which the Alaska Supreme Court treated as "appl[ying] the same rules for resolving inconsistencies between calls for courses and natural monuments." App., *infra*, 29a. There, the lake had a "*permanent* well-defined shore line," so the "definite and permanent monument[]" that still "remain[ed]"—the lake itself—controlled. *Barringer*, 120 N.W. at 70-71 (emphasis added).

By treating the monument as merely a conflicting call, the Alaska Supreme Court placed itself at odds with controlling law. When there are conflicting calls, a court should prioritize a call that is "material" and "certain." *Newsom* v. *Pryor's Lessee*, 20 U.S. (7 Wheat.) 7, 10 (1822). That is why a natural monument controls over evidence that is not capable of "ocular and tangible proof," or "positive identification," such as courses and distances. *Myrick*, 180 P. at 577. Similarly, an original monument established by a surveyor is controlling as long as it can be "definitely determined." *Henrie*, 70 P.2d at 157; see *Doyle*, 468 F.2d at 637.

Here, the Alaska Supreme Court credited less verifiable evidence—disputed expert testimony and surveys conducted decades after the original survey purportedly showing where a historic waterline was 80 years before—over a permanent brass marker, left by the original fed-

eral surveyor, that is certain, definite, permanent, and capable of visual identification. The extrinsic evidence in this case was so uncertain that, at trial, respondents' expert could not testify with certainty where he believed the 1938 waterline was located. See App., *infra*, 49a-50a. The absurdity of crediting that testimony illustrates the Alaska Supreme Court's error in violating the clear rule in *Cragin*.

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

The question presented in this case has significant legal and practical importance. It throws into doubt the boundaries of enormous amounts of land, both in Alaska and outside. Given how much land is subject to the Alaska Supreme Court's new rule, its decision would warrant further review even in the absence of a conflict. And this case, which cleanly presents the question, is an optimal vehicle for the Court's review. 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.

1. This Court has repeatedly recognized the practical importance of consistent rules for property disputes. See, *e.g.*, *Cragin*, 128 U.S. at 699; *Haydel* v. *Dufresne*, 58 U.S. (17 How.) 23, 30 (1854). That is why it is "an elementary principle of [the Court's] land law" that the political branches, not the courts, have "the power to make and correct surveys of the public lands." *Cragin*, 128 U.S. at 698-699. In the absence of a consistent rule, "great confusion and litigation would ensue." *Ibid.* In particular, if forced to reevaluate the boundaries drawn by old surveys, both property owners and the federal government would endure the "great hardship" of "mak[ing] new surveys and grants." *Mitchell* v. *Smale*, 140 U.S. 406, 412 (1891).

State courts of last resort have raised the same concern. The reason a federal surveyor's artificial monuments are given controlling authority is because monuments are "capable of positive identification." *Myrick*, 180 P. at 577. Landowners—including state governments—must be protected from collateral attacks on surveys that are based on less verifiable evidence, such as after-the-fact expert testimony. See *Brown*, 86 N.W. at 990-991; *Brown* v. *Milliman*, 78 N.W. 785, 788 (Mich. 1899). And as a practical matter, in the face of uncertainty and conflicting approaches by courts, property owners' "freedom to develop and sell" property will be "clouded" by the lack of certainty about title. *Hilt*, 233 N.W. at 168.

That concern is particularly acute in disputes between private parties because those individuals' reliance interests are implicated. See *Barringer*, 120 N.W. at 69. The "mischief" that may ensue from permitting such challenges "would be simply incalculable." *Brown*, 78 N.W. at 788 (citation omitted).

2. Permitting challenges to monuments designating the location of a natural boundary will open the door to burdensome litigation. That is particularly true in Alaska, where all of the State's more than 375 million acres began as federally owned lands. See Alaska Department of Natural Resources, *Fact Sheet: Land Ownership in Alaska* (Mar. 2000) <tinyurl.com/LandOwnershipInAlaska>. That land has over 46,000 miles of shoreline. See National Oceanic & Atmospheric Administration, *Alaska ShoreZone: Mapping Over 46,000 Miles of Coastal Habitat* <tinyurl.com/AlaskaShoreZone> (last visited June 27, 2024). Without this Court's review, much of Alaska's land shoreline may be subject to litigation.

The implications of the decision below are not limited to Alaska. Since 1785, the United States has surveyed publicly owned land and disposed of that land throughout

the country. See National Oceanic & Atmospheric Administration, 2 *Shore and Sea Boundaries* pt. 3, ch. 3, at 446 (1964) <tinyurl.com/ShoreAndSeaBoundaries> (*Shore and Sea Boundaries*); Bureau of Land Management, *Public Lands History* <tinyurl.com/PublicLandsHistory> (last visited June 27, 2024). At its largest, the public domain extended to nearly 1.8 billion acres. See *Shore and Sea Boundaries* 442. Since then, approximately 1.3 billion acres of that land has been disposed of in some way, whether to private individuals or state governments. See Bureau of Land Management, *Public Land Statistics 2022*, tbl. 1-2 (June 2023) <tinyurl.com/2022-PublicLandStatistics>. And within the United States, there are 95,471 miles of shoreline (including coasts, sounds, bays, rivers, and creeks). See National Oceanic & Atmospheric Administration, *How Long Is the U.S. Shoreline?* <tinyurl.com/HowLongIsUSShoreline> (last visited June 27, 2024).

Further, as shown by the numerous lower-court decisions involving similar disputes, federal surveyors have often used monument markers such as the one in this case. See, *e.g.*, *Kurth*, 269 P. at 410; *Davies*, 201 P. at 57; *Beardsley*, 54 N.W. at 741; *Brown*, 78 N.W. at 787-788. Throughout the United States, there are hundreds of thousands of permanent survey monuments, in addition to numerous other artificial monuments used in surveys. See National Geodetic Survey, *NGS Commemorative Marks* (Oct. 6, 2022) <tinyurl.com/NGSCommemorativeMarks>; see also *State ex rel. Oregon Department of Transportation* v. *Dietrich*, 544 P.3d 1004, 1009, 1015-1016 (Or. Ct. App. 2024) (discussing a survey boundary described based on a highway right-of-way). Without this Court's intervention, challenges such as respondents' are likely to become increasingly frequent—and increasingly

important—as more time passes between the time of the original survey and the present day.

3. This case presents an ideal vehicle in which to decide the question presented. That question was presented to, and passed upon by, the Alaska Supreme Court. The parties do not dispute that the outcome-determinative question is where the mean high tide line was in 1938. See App., *infra*, 5a. Before the Alaska Supreme Court, the State of Alaska filed a brief presenting the very argument adopted by the Alaska Supreme Court, and petitioner responded to that argument. See State's Alaska S. Ct. Br. 3-5; Pet. Alaska S. Ct. Reply Br. 8-9. And the Alaska Supreme Court directly ruled on whether the trial court had authority to locate the property corner somewhere other than the federal surveyor's monument based on extrinsic evidence of the historical mean high tide line. See App., *infra*, 11a-12a & n.11.

4. At a minimum, in light of the obvious federal interest here, the Court may wish to invite the Solicitor General to file a brief expressing the views of the United States. The United States has routinely participated as an amicus curiae in cases implicating federal land issues, see, *e.g.*, U.S. Br., *Herrera* v. *Wyoming*, No. 17-532, and this Court has previously requested the views of the Solicitor General at the certiorari stage in such cases, see, *e.g.*, *Herrera* v. *Wyoming*, 583 U.S. 1050 (2018).

* * * * *

At least three state courts of last resort have now addressed the question presented with conflicting results, and many more courts have considered the broader question of what types of evidence should control in challenges to federal survey boundary lines. That question, as the Court has recognized, is one of enormous practical im-

portance. Under the decision below, any publicly surveyed land that borders a body of water—or any other natural monument that is subject to change over time—may be subject to challenge. That state of affairs may render permanent, artificial monuments useless, even as the location of natural boundaries becomes more difficult to reconstruct with the passage of time. The question presented here warrants the Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

TODD F. GAZIANO
MICHAEL E. ROSMAN
CALEB KRUCKENBERG
CENTER FOR INDIVIDUAL RIGHTS
1100 Connecticut Avenue, N.W., Suite 625
Washington, DC 20036

KANNON K. SHANMUGAM
BRIAN M. LIPSHUTZ
ANITA Y. LIU
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

JUNE 2024