No. 23-1360

IN THE

Supreme Court of the United States

VERNON FIEHLER,
Petitioner,
v.
T. ANTHONY MECKLENBURG, ET AL.,
Respondents.

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

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONER

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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.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute assists executive and legislative branch policymakers by providing ideas, research, and data to enable lawmakers' effectiveness in advocating free-market public policy solutions. The Buckeye Institute also files and joins amicus briefs that are consistent with its mission and goals. The Buckeye Institute is a non-partisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3).

The Buckeye Institute is dedicated to protecting individual liberties, and especially those liberties guaranteed by the Constitution of the United States, against government interference. The Buckeye Institute is a leading advocate of protecting private property and promoting policies that utilize fair processes and fair laws to produce just outcomes.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae* made any monetary contribution toward the preparation or submission of this brief. Counsel provided the notice required by Rule 37.2.

SUMMARY OF ARGUMENT

This case asks whether a court can change a boundary set by a federal surveyor and on which the landowners have relied for decades.

Reliance on unwavering and enforceable property boundaries is a cornerstone of western civilization. The ancient Romans believed boundary markers to be so important that they consecrated them in a celebration to the god Terminus, who they believed resided in these markers. Since there was no division between the Roman pantheon and the state, the Terminalia was not merely a symbolic observance, but an acknowledgement that it was the state's power to enforce boundaries that gave monetary value to real property.

The Founding generation was well acquainted with the classical world and viewed land as the greatest repository of both wealth and liberty. They understood, like the Romans, that the trace of ink on a surveyor's map holds no intrinsic value whatsoever. Thus, one of the first priorities of the Confederation Congress and the Constitution's Framers was to standardize and protect rights in, and the transferability of, real property. In so doing, the Founding generation monetized the western lands for the payment of war debts and spurred economic growth and development of the frontier. In essence, the states setting definite property boundaries enabled those lands to be sold, traded, and used to finance economic development. Certainty and predictability turned a wilderness into one of history's greatest economic catalysts. This commodification of land further promoted the Jeffersonian belief that a

nation of free-holding yeoman farmers was the best foundation for a free and stable republic.

The Alaska Supreme Court's decision calls into question the certainty of federally drawn boundaries, and, in so doing, undermines the value of that real property. Without the certainty of enforceable boundaries, real property is nothing more than rocks and dirt or ink on paper. Just like in ancient Rome and at the Founding of our nation, the value of real property lies in the promise that the government will recognize and enforce the boundaries that it has drawn. This Court should grant the petition to clarify that federally drawn boundaries are inviolable.

ARGUMENT

I. All Hail Terminus, God of Boundary Markers

Most modern Americans give little thought to property boundaries or survey lines. They do not typically ascribe religious significance to these invisible lines or pay them much attention except when a conflict arises.

But the ancient Romans saw things differently. Every February 22 (or 23 depending on your source), they publicly celebrated the Terminalia—a feast in praise of Terminus, the Roman god of property boundaries. Terminus was initially and predominantly a household god ensuring proper boundaries between landowners and probably pre-dated the "importation of major Greek deities" to Roman society. Kenneth D. Madsen, *Terminus Unleashed, Divine Antecedents of Contemporary Borders*, 38 J. Borderlands Studies 1, 39 (2023) (citing

Edith Hamilton, *Mythology: Timeless Tales of Gods and Heroes* 44 (1953)).

The Roman poet Ovid, commemorating the major holidays of his time describes the festivities and the reasons for honoring Terminus, which resonate still today:

> *Conveniunt celebrantque dapes vicinia s implex*
>
> *et cantant laudes, Termine sancte, tuas*
>
> *Tu populos urbesque et regna ingentia fi nis:*
>
> *Omnis erit sine te litigiosus ager.*

2 Ovid, *Fasti* (8).[2] One does not need to be a Latin scholar to guess what the phrase "erit . . . litigiosus" implies. The rest of the passage in translation paints the festival of Terminus as part pagan ritual, part neighborhood block party:

> Neighbours gather sincerely, and hold a feast,
>
> And sing your praises, sacred Terminus:
>
> You set bounds to peoples, cities, great kingdoms:
>
> *Without you every field would be disputed*.

Ovid: Fasti, Poetry in Translation[3] (emphasis added).

According to Ovid, families gathered dressed in

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[2] https://tinyurl.com/Ovid-Fasti (last visited July 26, 2024).
[3] https://tinyurl.com/Fasti-Translation (last visited July 25, 2024).

white, the adjoining landowners crowned the stone embodiment of Terminus with garlands, and presented cakes to the stone marker. The participation of both landowners assured the god's impartiality. Madsen, *supra*, at 38. The entire family took part, with boys throwing grain into a ceremonial fire and girls offering honeycombs to the slabs of rock. The celebrants also sprinkled the stone markers with lamb's blood. And Ovid notes that Terminus would not look askance at a suckling pig offered to him. *Id.*

And, while compared to other more familiar members of the Roman pantheon—Terminus was a B-list deity—he held a special place in Roman society. In fact, when the Temple of Jupiter Optimus Maximus was built on the Capitoline Hill, smaller shrines and temples of lesser gods were cleared. But the builders took care to retain the shrine to Terminus, who would not be moved within the temple of Jupiter. In other words, even the king of the gods had to yield to Terminus. Indeed, the motto associated with Terminus and often chiseled into his monuments reminds passersby of the primacy of established boundaries: "*Concedo Nulli*"—or "I yield to no one." *Id.* at 43.

For good or bad, contemporary American property owners do not place garlands or sprinkle lamb's blood on stone markers. Instead, they hire title insurance companies and file documents with county recorders' offices. But the goal is exactly the same—to invoke the power of the state to protect their intangible right of exclusive possession of some designated parcel of land. The Romans recognized that without the state's protection, "every field would be contested." And

unlike the lines on a map or the spirit of Terminus dwelling in the rocks, the economic consequences of that uncertainty would be palpable.

This need to re-affirm and honor property boundaries, and the state's role in preserving and enforcing them, is buried in our cultural consciousness. Echoes of Terminalia surface obliquely in both our high art and popular culture today. See, *e.g.*, Robert Frost, *Mending Wall*, *reprinted in* Alice Corbin Henderson & Harriet Monroe, The New Poetry: An Anthology 110 (1917) ("And on a day we meet to walk the line, And set the wall between us once again"); The Marshall Tucker Band, *Property Line*, on Long Hard Ride (Capricorn Records) (1976) ("My idea of a good time is walkin' my property line, And knowin' the mud on my boots is mine."). But more importantly, for modern Americans, the spirit of Terminus who prevents disputes and concedes to no one, animates the constitutional provision at issue here. It is this covenant between the state and property owners that creates transferable financial value out of dirt and rock and ink and paper.

Without Terminus and his connection to both supernatural and state power, the stone in a field was just a stone. At the nation's founding, standardization and enforcement of property boundaries was a purely secular matter, but no less important to giving value to real property.

II. The Need for Certainty in Land Transactions from The Northwest Ordinance and the Land Ordinance of 1785 to Title Insurance

Most of the Founders were well-schooled in

classical civilization and would likely have had at least a passing acquaintance with Ovid and the Roman veneration of boundaries. Their lived experience, however, reinforced the importance of real property as a source of wealth, status, and perhaps most importantly, liberty. See Paul Larkin, *The Framers' Understanding of "Property"*, Heritage Found (July 6, 2020)[4]; see also *Thomas Jefferson to James Madison* (1785), *reprinted in* 1 The Papers of Thomas Jefferson 681–82 (1950).

In colonial times, land was the main repository of wealth, and the new continent had a lot of wealth to offer. But "[d]isputes surrounding these new property titles plagued colonial governments, making surveying a salient political issue." Kerry Goettlich, *The Colonial Origins of Modern Territoriality: Property Surveying in the Thirteen Colonies. Colonies*, 116 Am. Pol. Sci. Rev. 911, 915 (2021). Many colonies responded "by instituting surveys to solidify the legitimacy of existing property titles and limit property disputes," thus avoiding the clogged colonial courts. *Id*. The continued standardization and sale of property in the early republic was thus crucial to turning land into money and a top priority for the Confederation Congress.

The Northwest Ordinance of 1787 is well known for creating the constitutional blueprint for the states to be carved out of the Northwest Territory. It famously included the prohibition of slavery in the territory, the advancement of public education as a goal for the state governments that would emerge,

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[4] https://www.heritage.org/economic-and-property-rights/report/the-framers-understanding-property.

and protected religious freedom and private property. It also statutorily introduced the concept of fee-simple ownership of property in the Northwest Territory. These guidelines gave land purchasers—sometimes settlers, often speculators—a promise from the fledgling government that their investments in these properties had some degree of protection.

Less familiar is the Land Ordinance of 1785, which "provided the mechanism for actually disposing of the public lands by specifying that presurveyed contiguous parcels would be sold at auction." Douglass C. North & Andrew R. Rutten, *The Northwest Ordinance in Historical Perspective* (1987). Perhaps unsurprisingly, Thomas Jefferson, the Founding generation's greatest champion of westward expansion and the democratic value of land ownership, authored the 1785 Land Ordinance. The Land Ordinance standardized rules for surveying and platting the western lands. The integrity of these surveys, and the ability of purchasers to believe that the government would recognize those borders was crucial for both speculators, settlers, and the federal government itself. Indeed, the new government was relying significantly on the sale of these western lands to generate cash to retire the Revolutionary War debt. See Gregory Ablavsky, *The Rise of Federal Title*, 106 Cal. L. Rev. 631, 671 (2018) ("Public lands played a particularly important role in Gallatin's financial vision. The leading Jeffersonian thinker on political economy, Gallatin embraced public land sales as indispensable for both settling the West with smallholders and for eliminating the public debt,

which he viewed as a great evil.").

Further, property ownership was consistent with the 18th-century view of land rights as a guarantor of liberty, making their preservation one of the government's most important objectives. This view is perhaps best summarized by John Adams' famous aphorism—"[p]roperty must be secured, or liberty cannot exist." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021) (quoting *Discourses on Davila*, *reprinted in* 6 Works of John Adams 280 (C. Adams ed. 1851)). Adams' understanding that property and liberty went hand-in-hand was hardly unique at the Founding or in the years that followed. See, *e.g.*, James Madison, Address to the Virginia Convention (Dec. 2, 1829) ("Persons and Property, are the two great subjects on which Governments are to act; and that the rights of persons, and the rights of property are the objects for the protection of which Government was instituted. These rights cannot well be separated."). The emerging Jeffersonian-Republican vision of a republic of free, self-sufficient farmers that held sway as the nation expanded, amplified this connection between land, status, and liberty. See John Ragosta, *Thomas Jefferson, Land, and Liberty*, Univ. of Virginia (June 8, 2020).[5]

Plainly, investors would be hesitant to enter into these transactions without understanding exactly what they were buying and being able to rely on the government to enforce their purchases against other claimants. As modern economist Samuel Bray explains, if ownership of real property is uncertain,

[5] https://engagement.virginia.edu/learn/2020/06/08/thomas-jefferson-land-and-liberty.

there is little incentive to invest in purchasing or improving it:

> Without certainty, their incentives to invest in the property are reduced. Any significant investment would be unlikely because the expected return must be discounted for the possibility of non-ownership. This disincentive to invest would thus prevent the property from being put to its most efficient use. And without certainty, the benefit from developing and disseminating information about the property is also reduced.

Samuel Bray, *Preventive Adjudication*, 77 U. Chi. L. Rev. 1275, 1311–313 (2010) (internal citations omitted). And the certainty of the title to the property itself is critical.

> Modern commerce and the advantages which flow from it depend on the ability to exchange and pledge legal titles. Assets not represented by legal documents are not legal property and are, in Adam Smith's terminology, 'dead capital'. A functioning property system with proper records is vital . . . .

Ken Moon, *The Information Society and the Property Philosophy of Hernando De Soto*, 5 IBA Convergence 36, 36 (2009). Indeed, the certainty of land titles is one of the things that elevates the wealth in Western societies from the comparative poverty in other countries. "In the West, by contrast, every parcel of

land, every building, every piece of equipment, or store of inventories is represented in a property document that is the visible sign of a vast hidden process that connects all these assets to the rest of the economy." Hernando De Soto, *The Mystery of Capital, Why Capitalism Triumphs in the West and Fails Everywhere Else* 6 (2000).[6]

III. Title Insurance and the Need for Certainty

Unlike many countries, the United States has given certainty to land titles by developing a system for insuring real estate title, including the property description. "Real property has historically been one of the largest contributors to the nation's GDP. Therefore, a strong housing market is an indication of a strong economy. Title insurance plays a key role in supporting this critical market." Tom Hayden & Jordan Kelner, *The Value of Title Insurance*, 15 J. Bus. & Tech. L. 305, 311–12 (2020).

Title insurance did not always exist. "In 1876, a group of Philadelphia conveyancers founded the first title insurance company." Am. Land Title Ass'n, *Title Insurance: A Comprehensive Overview* 3 (2005).[7] It was developed in the early 1900s and became more common after World War I. See Stewart E. Sterk, *Title Insurance: Protecting Property at What Price?*, 99 Wash. U.L. Rev. 519 (2021). Unlike other types of insurance that spread risk, title insurance is designed to eliminate risk for owners, investors, and lenders.

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[6] https://tinyurl.com/Mystery-of-Capital.

[7] https://www.alta.org/press/titleinsuranceoverview.pdf.

Id. at 521, 532.

Title insurance has become so integral to real estate transactions that "Freddie Mac and Fannie Mae . . . place strict rules on the loans they are willing to buy, which includes a requirement that the loans are covered by a title insurance policy." Hayden & Kelner, *supra*, at 310. Further, the Federal Housing Administration "is a self-funded United States government agency and the largest mortgage insurer in the world, with an active insurance portfolio of over $1.3 trillion." *Id.* at 311. And naturally, "[t]he FHA requires title insurance for any FHA-backed loan to satisfy its desire to sustain its institutional longevity." *Id.*

But title insurance depends on stable ownership records and stable land records. It is based on searching government records and relying on them. See Am. Land Title Ass'n, *supra*, at 5. Until this case, landowners and title companies could rely on government records for land descriptions—no matter what. If that reliance is upended, the solid foundation for property ownership and title insurance begins to crumble.

Title insurance covers defects in the property as described in the title policy. And consequently, "The legal description of a parcel of land is an important element in a real estate transaction." John C. Peck & Christopher L. Steadham, *Land Description Errors: Recognition, Avoidance, and Consequences*, 78 J. Kan. B. Ass'n 20, 20–21 (2009). And in significantly in this case, "[m]uch of the United States lying west of the original 13 colonies, except Texas, is covered by the U.S. Government Survey." *Id.* And the government

survey, or surveys, set reference or "initial points" which control legal descriptions for all of the "western" properties.

So, it is no surprise that allowing changes retroactively or even "ambiguity in the legal description of the insured land can make title unmarketable." Joyce Palomar, Title Insurance Law § 5:7 (2023). It directly follows that if the legal description, based on government records generated decades—or longer—ago is no longer a reliable description because the government records are not fixed, then the rock-solid foundation of the title insurance industry turns into nothing more than shifting sand.

IV. This Court Should Reaffirm *Cragin*, Which Provides Needed Certainty to Property Owners

In *Cragin v. Powell*, 128 U.S. 691, 698 (1888), the Court stated that "the power to make and correct surveys of the public lands belongs to the political department of the government." The Court articulated this rule balancing reliance on the land description, surveys, and survey monuments against subsequent claims of errors based on "new" evidence or disagreements with the duly appointed government surveyors. Coming down staunchly on the side of the immutability of government surveys, the *Cragin* court reiterated the overriding concern of over a generation prior: "[G]reat 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 [the courts] could have [done] the work in the field better . . . than the department of

public lands [did]." *Id.* at 699 (quoting *Haydel v. Dufresne*, 58 U.S. 23, 30 (1854)).

In the instant dispute, the state court rejected *Cragin* and appointed itself as the ex post facto surveyor. Such proceedings open the door to substantially increased uncertainty of untold property ownership interests. This Court's decisions in *Cragin* and *Haydel* have stood for the proposition that the certainty associated with a clearly enunciated legislative scheme and hierarchy for the assignment of lands, whether to private owners or to specific jurisdictional authorities, should not be subject to judicial finessing on the basis of either expectations or utilitarian balancing. Put simply, as the Romans, the Founders, and today's title companies understand, when it comes to real property, the value of certainty trumps the value of correctness.

CONCLUSION

For all the foregoing reasons, the Petition for Certiorari should be granted.

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