No. 00-31

In the Supreme Court of the United States

CHEVY CHASE LAND COMPANY OF MONTGOMERY COUNTY, MARYLAND, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in light of a determination by the Maryland Court of Appeals that, as a matter of state law, petitioner's reversionary interest in a right-of-way remains subject to a valid easement that covers the respondent County's current use of the land, the court of appeals correctly rejected petitioner's claim under the Just Compensation Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is unreported. The court of appeals' order certifying three questions of state law to the Court of Appeals of Maryland (Pet. App. 105- 109) is reported at 158 F.3d 574. The opinion of the Court of Appeals of Maryland answering the certified questions (Pet. App. 8-104) is reported at 733 A.2d 1055. The decision of the Court of Federal Claims (Pet. App. 110-222) is reported at 37 Fed. Cl. 545.

JURISDICTION

The court of appeals entered its judgment on December 17, 1999 (Pet. App. 1). The opinion was modified on rehearing on March 27, 2000 (Pet. App. 223-224). The petition for a writ of certiorari was filed on July 3, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). For the reasons stated at pp. 7-8, *infra*, there is a question whether the petition for a writ of certiorari was timely filed, and therefore whether this Court has jurisdiction of the case.

STATEMENT

1. Under federal law, railroads may not abandon or discontinue service over a line without first obtaining permission from the Interstate Commerce Commission (ICC). See 49 U.S.C. 10903(a) (1982); *Preseault* v. *ICC*, 494 U.S. 1, 8 (1990) (noting ICC's "'exclusive and plenary' jurisdiction to regulate abandonments") (quoting *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 321 (1981)); *Powell* v. *United States*, 300 U.S. 276, 287 (1937).[1] "[B]ecause of the importance of uninterrupted rail transportation service in the nation's economy, Congress has expressed a clear intent, even to the point of criminal sanctions, that abandonments without prior ICC approval are not tolerated. *See* 49 U.S.C. § 1(20) (1970)." *ICC* v. *Baltimore & Annapolis R.R.*, 398 F. Supp. 454, 464 (D. Md. 1975), aff'd, 537 F.2d 77 (4th Cir.), cert. denied, 429 U.S. 859 (1976).

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, abolished the ICC and transferred many of its responsibilities, including its authority over rail abandonments, to the Surface Transportation Board. We cite to the federal railroad statutes and regulations in effect in 1988, which was the time of the operative ICC orders in this case.

Section 208 of the National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 48 (Trails Act), directs the ICC "to preserve established railroad rights-of-way for future reactivation of rail service" and not to permit abandonment where a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of the "interim use" of the property as a trail. 16 U.S.C. 1247(d) (1982 & Supp. V 1987). The Act further provides that such "interim use shall not be treated, for [any] purposes * * *[,] as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. 1247(d) (1982 & Supp. V 1987).

Under the Trails Act, the railroad's right-of-way is transferred to the third-party sponsor for interim trail use. The right-of-way is "railbanked," and the railroad "retains the right to reassert control over the easement at some point in the future if it decides to revive rail service." *Birt* v. *Surface Transp. Bd.*, 90 F.3d 580, 583 (D.C. Cir. 1996). See also *Preseault*, 494 U.S. at 6-9; *Nebraska Trails Council* v. *Surface Transp. Bd.*, 120 F.3d 901, 903-904 (8th Cir. 1997).[2]

2. In 1891, petitioner entered into an agreement with the Metropolitan Southern Railroad providing, among other things, that petitioner would grant the

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[2] In several instances, the agency has approved the re-activation of rail service over railroad corridors that had been railbanked pursuant to the Trails Act. See *Norfolk & W. Ry.—Abandonment Between St. Mary's & Minster in Auglaize County, Ohio*, 9 I.C.C.2d 1015, 1017 (1993); *Missouri Pacific R.R.—Abandonment Exemption—in St. Louis County, Mo. (Carondelet Branch)*, Dkt. No. AB-3 (Sub-No. 98X) (Surface Trans. Bd. Apr. 18, 1997); *Iowa Power, Inc.—Constr. Exemption—Council Bluffs, Iowa*, 8 I.C.C.2d 858 (1990).

railroad a 100-foot-wide right-of-way across its lands, upon which a portion of a rail line would be constructed. See Pet. App. 120-122. In 1910, the railroad completed the line, known as the Georgetown Branch, which ran from Silver Spring, Maryland, to Georgetown in the District of Columbia, and commenced providing rail service. *Id.* at 122. In 1911, petitioner executed a deed conveying to the railroad and its "successors and assigns," a "free and perpetual right of way" approximately one mile long. *Id.* at 12-13, 123.

Following the conveyance, the railroad and its successors provided rail service over the right-of-way. In 1983, the railroad posted a notice indicating that it intended to file an application with the ICC for permission to abandon rail service over the line. Pet. App. 13, 127-128. In 1985, service was discontinued when a rail bridge was seriously damaged. *Id.* at 13. The next year, the railroad filed its application to abandon rail service with the ICC. *Id.* at 13. Montgomery County promptly informed the ICC of its interest, pursuant to the Trails Act, in constructing a light-rail transit way and recreational trail on the 6.4-mile Maryland portion of the line. C.A. App. 246, 252-253. In February 1988, the ICC authorized the railroad to abandon rail service over the line, but conditioned its approval on the railroad's continued maintenance of the right-of-way pending negotiations over the possible acquisition of the right-of-way for continued rail service. Pet. App. 13-14. In December 1988, after negotiations over further rail use failed, the railroad conveyed its interest in the 6.4-mile Maryland portion of the Georgetown Branch, including the approximately one-mile long portion of the right-of-way in dispute here, to the County by quitclaim deed for interim use under the Trails Act. See *id.* at 14; C.A. App. 257-263. In

exchange, Montgomery County paid the railroad $10 million. Pet. App. 14.

3. Petitioner filed suit in the Court of Federal Claims alleging that the 1911 deed had conveyed to the railroad only an easement; that the easement was limited to freight railroad purposes; and that it had been abandoned before the December 1988 conveyance to the County. Petitioner accordingly claimed that the County's use of the property pursuant to the Trails Act worked an uncompensated taking of petitioner's "reversionary" interest in the right-of-way. Pet. App. 112-166. The Columbia Country Club, whose golf course is bisected by the right-of-way, intervened as a plaintiff, alleging a taking on different grounds. See *id.* at 195-222.[3] Montgomery County intervened as a defendant. *Id.* at 111.

The Court of Federal Claims granted summary judgment for the United States and the County (Pet. App. 110-222), holding that the 1911 deed had conveyed the property "in fee simple absolute," so that the petitioner had retained no property interest and had suffered no taking, *id.* at 166.

4. On appeal, the Court of Appeals for the Federal Circuit concluded that the case turned on "complicated issues of Maryland property law upon which this court discerns an absence of applicable and dispositive Maryland law," and certified three questions of state law to the Court of Appeals of Maryland: (1) whether the 1911 deed conveyed to the railroad a fee simple interest or an easement; (2) whether, if an easement were conveyed, that easement was subject to use limitations;

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[3] The Country Club has not sought this Court's review of the Federal Circuit's decision and thus stands as a respondent before this Court.

and (3) whether the easement had ever been abandoned and, if so, when. Pet. App. 107-108.

Based on stipulated facts, the Court of Appeals of Maryland ruled on the certified questions. Pet. App. 8-104. Noting that it was "concerned only with the state law property issues and not with the takings claim itself," *id.* at 15, the Maryland court concluded that (a) the 1911 deed from the petitioner to the railroad conveyed an easement rather than a fee simple interest, *id.* at 10, 16-37, 85; (b) the use of the right-of-way as a recreational trail fell within the scope of the easement, which was a general right of passage that "may be used for recreational as well as transportation purposes," and such use imposed no greater or unreasonable burden on the underlying fee estate than freight rail use, *id.* at 10-11, 38-55, 85; and (c) the easement had not been abandoned, *id.* at 11, 55-85, 86.[4]

"[A]ccept[ing]" the Maryland Court of Appeals' analysis of the underlying state-law questions (Pet. App. 6), the Federal Circuit unanimously affirmed the Court of Federal Claims' entry of judgment for the United States and the County (*id.* at 1-7). The court of appeals explained that, because "the terms of the easement when first granted are broad enough under then-existing state law to encompass trail use, the servient estate holder would not be in a position to complain about the use of the easement for a permitted purpose." *Id.* at 5 (quoting *Preseault* v. *United States*, 100 F.3d 1525, 1552 (Fed. Cir. 1996)). Accordingly, because "the current recreational trail use of the easement is a permissible use, no acts of abandonment of that use being shown," *id.* at 6, the Federal Circuit

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[4] One justice dissented from the six-justice majority's opinion on the abandonment issue. Pet. App. 88-104.

concluded that petitioner could not "show a property interest that has been impermissibly taken," *ibid.*

ARGUMENT

1. There is a question concerning whether the petition for a writ of certiorari was timely filed. Pursuant to 28 U.S.C. 2101(c), a petition for a writ of certiorari in a civil case must be filed within 90 days after entry of the court of appeals' judgment. This time limitation is "mandatory and jurisdictional." *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990). The court of appeals entered its judgment on December 17, 1999. Petitioner filed a petition for rehearing en banc, which the Federal Circuit also treated as a petition for rehearing. Pet. App. 224; see also the Advisory Comm. Notes to the 1998 amendments to Fed. R. App. P. 35(b) (change of terminology made by 1998 amendments reflects Committees' intent to treat similarly a petition for panel rehearing and a petition for rehering en banc, regardless of how a party denominates its papers). On March 27, 2000, the court of appeals granted the petition for rehearing only for the limited purpose of making a clerical correction to the opinion. *Ibid.* The order otherwise apparently denied the petition for rehearing, because, although it stated that the "petition for rehearing en banc is still pending," it did not state that the petition, insofar is it was treated as a petition for rehearing addressed to the panel, remained pending. *Ibid*; see also C.A. Docket Sheet Entry No. 46. In a separate order issued on April 6, 2000, the court of appeals denied "the petition for rehearing en banc." *Id.* at 226; see also C.A. Docket Sheet Entry No. 42 (only action taken on Apr. 6, 2000, is "EN BANC: DENIED").

Rule 13.3 of the Rules of the Court provides that, if a "petition for rehearing" is timely filed in a lower court, the time for filing a petition for a writ of certiorari runs from the date of the "denial of the petition for rehearing." The petition for a writ of certiorari in this case was filed on July 3, 2000, which was more than 90 days after the panel's March 27 order denying panel rehearing, but less than 90 days after the en banc court's order of April 6, 2000 denying en banc review. The jurisdictional issue raised by the unusual procedural history of this case—in which the panel first denied rehearing and the full court only later denied rehearing en banc—is whether the panel's order of March 27, 2000, constitutes the operative "denial of the petition for rehearing" for purposes of Rule 13.3. There is no occasion to resolve that issue here, however, because the case does not in any event warrant review by this Court.

2. Petitioner does not contend that the court of appeals' unpublished decision conflicts with the decision of any other court of appeals.[5] Nor does petitioner

[5] Petitioner suggests (Pet. 7-11) that the decision below is inconsistent with the Federal Circuit's en banc decision in *Preseault* v. *United States*, 100 F.3d 1525. An intra-circuit conflict, however, generally does not merit this Court's review. In any event, no such conflict exists. In *Preseault*, as here (Pet. App. 5-6), the Federal Circuit, like this Court before it, recognized that the Trails Act does not work a taking where the easement in question would not have terminated even as a matter of state law upon interim trail use. 100 F.3d at 1550, 1552; see also *Preseault*, 494 U.S. at 16 & n.9; *id.* at 20-21 (O'Connor, J., concurring). That the *result* of that state-law inquiry here differs from the *result* in *Preseault* reflects not a conflict in legal doctrine, but simply differences in the applicable facts and state law. For example, while the easement in *Preseault* was, under Vermont law, limited to rail purposes, 100 F.3d at 1534, 1541-1542, the Maryland court deter-

argue that the Federal Circuit applied the wrong constitutional standard to evaluate its Just Compensation Clause claim. In fact, the court of appeals hewed to this Court's teaching in *Preseault* v. *ICC*, 494 U.S. 1 (1990), that, even if the Trails Act may work a taking in some circumstances, no taking occurs when interim trail use is within the scope of an easement that remains effective as "a matter of state law." *Id.* at 16; accord *id.* at 20-21 (O'Connor, J., concurring). Furthermore, because the takings question before it fundamentally turned on issues of state property law, Pet. App. 107-108, the court of appeals properly sought guidance from Maryland's highest court, and petitioner does not contend that the Federal Circuit erred in so doing.[6]

Instead, petitioner contends (Pet. 15) that the construction of state property law by the Court of Appeals of Maryland was a "*post hoc* transformation of state property law in order to defeat a takings claim." Petitioner thus seeks this Court's review to hold that the Maryland court misapplied its own state-law standards governing the scope and abandonment of easements. See Pet. 15-16. That claim lacks merit.

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mined that, under Maryland law, the easement here was of far broader scope, Pet. App. 38-55. The evidence favoring abandonment was very weak here, *id.* at 55-85, in contrast to *Preseault*, see 100 F.3d at 1550. It also bears noting that two members of the Federal Circuit panel here voted with the majority in *Preseault*, and no Federal Circuit judge voted to hear this case en banc.

[6] This Court has urged the federal courts to avail themselves of certification procedures because of the state courts' ability to answer questions of state law "authoritatively" and "definitively." See, *e.g.*, *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 75-79 (1997); *Salve Regina College* v. *Russell*, 499 U.S. 225, 237 n.4 (1991); *Clay* v. *Sun Ins. Office Ltd.*, 363 U.S. 207, 212 (1960).

First, it is a principle "so obvious that it has rarely been thought to warrant statement" that state supreme courts are the most authoritative interpreters of state law. *Herb* v. *Pitcairn*, 324 U.S. 117, 125 (1945). "[T]he highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law[.]" *West* v. *American Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940). See also *Stringer* v. *Black*, 503 U.S. 222, 234 (1992); *Wainwright* v. *Goode*, 464 U.S. 78, 84 (1983); *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967); *Herb*, 324 U.S. at 125; *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938); *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 634-635 (1874).

Second, the "innovations" in state law that petitioner perceives (Pet. 14) are illusory. While some Members of this Court have suggested that a "sudden change" in state common law, "unpredictable in terms of the relevant precedents," could support a federal takings claim,[7] this case presents no occasion to address that question. The Maryland court's opinion applied long-established principles of state property law, as articulated by Maryland's highest court, to conclude that petitioner never held the property right it now claims was taken—a reversionary interest that would automatically vest once the easement ceased being used solely for railroad purposes. Thus, contrary to petitioner's suggestion (Pet. 7-10), the Federal Circuit's decision is fully consistent with *Preseault* v. *ICC*, *supra*; *Lucas* v. *South Carolina Coastal Council*, 505

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[7] *Hughes* v. *Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring); see also *Stevens* v. *City of Cannon Beach*, 510 U.S. 1207, 1212-1213 (1994) (Scalia, J., joined by O'Connor, J., dissenting from denial of certiorari).

U.S. 1003, 1027, 1028-1029 (1992) (no taking where inquiry into state law demonstrates that "the proscribed use interests were not part of his title to begin with"; "we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title"); and *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980). Accordingly, no further review is warranted.

a. In determining that the deed granted the railroad a right-of-way unrestricted in its potential uses, the Court of Appeals of Maryland applied the well-settled principle that "the primary consideration in construing the scope of an express easement is the language of the grant," Pet. App. 39, and reasonably concluded that the grant of a "*free* and perpetual" right-of-way to the railroad and any of its "successors and assigns" meant that the easement was not restricted to use as a freight railroad line, *id.* at 13, 41 (emphasis added); see also *id.* at 43-46 (applying turn-of-the-century cases to confirm the breadth of the easement granted).[8] Petitioner utterly fails to explain how the state court's reliance on the words of a deed and judicial precedent contemporaneous to that deed "reshap[ed] the contours of Maryland property law" (Pet. 14).[9]

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[8] Indeed, the language of the deed and its context were so unrestricted that the Court of Federal Claims ruled that petitioner had conveyed a fee simple interest to the railroad. Pet. App. 157, 166. Tellingly, other deeds drafted by petitioner around the time of the 1911 deed contained express language restricting them to rail or other particular purposes. See *id.* at 156-157.

[9] Nor does petitioner contend that the state court radically departed from precedent when it drew (Pet. App. 41-42) upon the established rule that ambiguities in easement grants must be "resolved in favor of the grantee." *Reid* v. *Washington Gas Light Co.*, 194 A.2d 636, 638 (Md. 1963).

The Court of Appeals of Maryland also relied on 19th and early 20th century Maryland cases construing easements for public transit purposes to allow for changing modes of transportation. See Pet. App. 44-46 (discussing, *e.g.*, *Baltimore County Water & Elec. Co.* v. *Dubreuil*, 66 A. 439 (Md. 1907), and *Peddicord* v. *Baltimore, Catonsville & Ellicott's Mills Passenger Ry.*, 34 Md. 463 (1871)).[10] Petitioner advances its own, narrower reading of these precedents (Pet. 18-20), but fails to demonstrate why the Maryland court's considered interpretation of its own case law is not reasonable or why it should be transmuted into a federal taking. See Pet. App. 44 (noting that Maryland law has "long considered railroad lines analogous to a public highway").

b. With respect to the question of abandonment, the Court of Appeals of Maryland likewise focused (Pet. App. 57-59) on the railroad's intent to retain or relinquish its property right, as demonstrated by clear and unequivocal conduct—the proper inquiry under Maryland property law for well over a century. See *Vogler* v. *Geiss*, 51 Md. 407 (1879). Indeed, the state court concluded (Pet. App. 78) that a determination of non-abandonment was "*dictated by*" its own decisions, including *Canton Co.* v. *Baltimore & Ohio R.R.*, 57 A. 637 (Md. 1904) (emphasis added).[11]

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[10] Although petitioner (Pet. 16) criticizes the state court for invoking the rule that the parties to the 1911 deed were legally presumed to have contemplated new transportation uses, the rule petitioner criticizes derives from Maryland cases that predate the 1911 deed. See Pet. App. 44-45.

[11] In *Canton*, the court ruled that a rail easement had not been abandoned on facts far more favorable to the fee owner than those presented here. Among other things, the right-of-way in *Canton* had never been used; it had lain dormant for 13 years; the track had been removed, and the easement-holding railroad had entered

Petitioner acknowledges that *Vogler* supplies the correct legal standard (Pet. 24), but asserts that the state court misapplied that standard to the facts here. An alleged misapplication of a settled legal standard to a particular set of facts, however, does not ordinarily merit review by this Court. That rule applies with particular force when, as here, the legal standard in question is one of state law and it was applied by the relevant State's highest court.

Petitioner asserts (Pet. 23-24) that the state court should have declared the easement abandoned because the railroad undisputedly wished to cease providing rail service on the line. But the test under Maryland law is whether the easement-holder clearly manifests an intention to abandon "the right"—that is, the easement—not just a particular *use* of an easement capable of multiple uses. See *Vogler*, 51 Md. at 410; Pet. App. 57. As the state court noted, the fact that the easement here was not limited to rail uses (still less, as petitioner

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into a 999-year lease to ship "all its traffic of every kind" over another line. See Pet. App. 78-79. Despite those facts, the Maryland court found that the railroad had not demonstrated a clear intent to abandon its easement; the court noted in particular that the evidence did not show that the railroad had written the easement off "as being thereafter wholly valueless." *Canton*, 57 A. at 640. As the state court noted, in this case there was "*much less evidence*" of abandonment than the evidence deemed insufficient in *Canton* to satisfy the *Vogler* abandonment standard. Pet. App. 79 (emphasis added). Among other things, here the railroad demonstrated a consistent interest, not in forfeiting its easement, but instead in transferring the line to other parties for value. See *id.* at 74-75, 79. As the Maryland court observed, the railroad's demonstrated intention to retain its property right for possible sale—an intent that was manifest from before the filing of its application with the ICC until the sale to the County—accorded with the railroad's "obvious economic interests." *Id.* at 84.

maintains, freight rail uses) weighed against a finding that the easement was abandoned under state property law, because the railroad was free to convey the easement to another party that could put it to use for an authorized transportation purpose other than railroading. See Pet. App. 55-56. As the court also noted, and contrary to petitioner's claims, there was a "clear intent" on the part of the railroad to exchange its easement for value rather than simply forfeit it. See *id.* at 79.[12] Moreover, even were petitioner correct, it would establish at most an arguably erroneous resolution of the factual question of the railroad's intent. This Court does not grant a writ of certiorari, however, to resolve questions of fact in individual cases.

Petitioner relies (Pet. 25) on the opinion of the single dissenting justice in the Court of Appeals of Maryland to support its position that the state court crafted radically new law. However, as the six-member majority explained, the dissent's view confuses the distinct concepts of "abandonment" of rail service under federal regulations with "abandonment" of an easement under state property law. See Pet. App. 57-67. In any event, an internal disagreement between members of a state's highest court disputing the proper outcome of applying settled property law to the facts of a particular case presents no occasion for an exercise of this Court's certiorari jurisdiction.

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[12] The Maryland court pointed to a wealth of other factors to support its conclusion that the easement was not abandoned, including the implausibility (and the absence of any evidence) that the same railroad that carefully followed ICC procedures for abandoning rail service would intend to risk regulatory sanctions or costly reacquisitions by forfeiting property rights along its rail corridor prior to obtaining federal regulatory approval to abandon service (Pet. App. 71-76).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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