

No. 16-1077

---

---

In The  
**Supreme Court of the United States**

—◆—  
BAY POINT PROPERTIES, INC.  
f/k/a BP Properties, Inc.,

*Petitioner,*

v.

MISSISSIPPI TRANSPORTATION COMMISSION and  
MISSISSIPPI DEPARTMENT OF TRANSPORTATION,

*Respondents.*

—◆—  
**On Petition For Writ Of Certiorari  
To The Supreme Court Of Mississippi**

—◆—  
**BRIEF IN OPPOSITION**  
—◆—

CHRISTOPHER M. HOWDESHELL  
*Counsel of Record*  
chris@pittmanlawfirm.net

JACK H. PITTMAN  
ALEXANDRA PARKER SHOEMAKER  
PITTMAN LAW FIRM  
Post Office Drawer 17138  
140 Mayfair Road, Suite 700  
Hattiesburg, MS 39404-7138  
(601) 264-3314

*Counsel for Respondents*

## **RESTATEMENT OF QUESTIONS PRESENTED**

Should this Court grant Certiorari where:

1. The Mississippi Supreme Court Did Not Consider a Constitutional Challenge to Mississippi Code Annotated § 65-1-123;
2. The Mississippi Supreme Court Did Not Decide an Important Federal Question Which Was in Sharp Conflict with the Decisions of this Court;
3. Statutory Abandonment Is Relevant to the Amount of Compensation Because It Determines the Property Interest Acquired;
4. Respondents Never Abandoned the Easement on Its Minutes, and Therefore, the Rails to Trails Cases Cited by Petitioner Are Inapplicable; and
5. This Case Is Not a Good Case to Address the Requirement of Just Compensation.

TABLE OF CONTENTS

	Page
RESTATEMENT OF QUESTIONS PRESENTED ....	i
TABLE OF AUTHORITIES .....	iv
INTRODUCTION .....	1
COUNTER STATEMENT OF THE CASE .....	2
A. Background.....	2
B. Factual Misstatements In The Petition.....	2
REASONS FOR DENYING THE PETITION.....	4
I. THE STATE COURT DID NOT CONSIDER A CONSTITUTIONAL CHALLENGE TO MISSISSIPPI CODE ANNOTATED § 65-1- 123 (AMENDED 2003) .....	4
II. THE STATE COURT DID NOT DECIDE AN IMPORTANT FEDERAL QUESTION WHICH WAS IN SHARP CONFLICT WITH THE DECISIONS OF THIS COURT .....	6
A. Mississippi Code Annotated § 65-1-123 Did Not Extinguish Any Part Of Just Compensation By Prospective Conjec- tural Advantage.....	6
III. STATUTORY ABANDONMENT IS RELE- VANT TO THE AMOUNT OF COMPENSA- TION BECAUSE IT DETERMINES THE PROPERTY INTEREST ACQUIRED .....	11
A. The <i>Preseault</i> Cases Are Factually And Legally Distinguished From The Pre- sent Case.....	11

TABLE OF CONTENTS – Continued

	Page
B. Statutory Abandonment Is Relevant To Property Interests Acquired Under State Law, Which, In Turn, Determines The Amount Of Compensation.....	15
C. Mississippi Code Annotated § 65-1-23 Does Not Insulate Respondents From Paying Just Compensation.....	17
IV. BECAUSE RESPONDENTS NEVER ABANDONED THE EASEMENT ON ITS MINUTES, THE RAILS TO TRAILS CASES CITED BY PETITIONER ARE INAPPLICABLE.....	18
V. THIS CASE IS NOT A GOOD CASE TO ADDRESS THE REQUIREMENT OF JUST COMPENSATION.....	22
A. Just Compensation Law Is Inextricably Tied To State Title Law .....	22
B. This Case Is Far From Ideal To Address The Boundaries Of Just Compensation.....	22
CONCLUSION.....	23

INDEX TO APPENDIX

Mississippi Code Annotated § 65-1-123 (amended 2003) .....	App. 1
Mississippi Code Annotated § 65-1-51 (amended 2000) .....	App. 7

## TABLE OF AUTHORITIES

Page

## CASES

<i>Anna F. Nordhus Family Trust v. United States</i> , 106 Fed. Cl. 289 (2012).....	20
<i>Bay Point Properties v. Mississippi Transportation Comm’n</i> , 201 So.3d 1046 (Miss. 2016).....	<i>passim</i>
<i>Bivens v. Mobley</i> , 724 So.2d 458 (Miss. 1998).....	13
<i>Boston Chamber of Commerce v. Boston</i> , 217 U.S. 189 (1910).....	10
<i>First English Evangelical Lutheran Church of Glendale v. County of Los Angeles</i> , 482 U.S. 304 (1987).....	9, 10
<i>Ford Motor Co. v. United States</i> , 134 S. Ct. 510 (2013).....	5
<i>Geneva Rock Prods., Inc. v. United States</i> , 107 Fed. Cl. 166 (2012).....	15, 16
<i>Howard v. United States</i> , 106 Fed. Cl. 343 (2012).....	17
<i>Howell v. Mississippi</i> , 543 U.S. 440 (2005).....	5
<i>Ingram v. United States</i> , 105 Fed. Cl. 518 (2012).....	19, 20
<i>Isom v. Mississippi Cent. R.R.</i> , 36 Miss. 300 (Miss. 1858).....	8, 9, 15
<i>Jacobs v. United States</i> , 290 U.S. 13 (1933).....	9, 10
<i>James v. United States</i> , Nos. 14-6L, 14-38L, Slip Op. at 23-24 (Fed. Cl. Feb. 28, 2017).....	15, 16, 17
<i>Lucas v. South Carolina Coastal Council</i> , 505 U.S. 103 (1992).....	13

## TABLE OF AUTHORITIES – Continued

	Page
<i>Macy Elevator Inc. v. United States</i> , 104 Fed. Cl. 195 (2012).....	20
<i>Marvin M. Brandt Rev. Tr. v. United States</i> , 134 S. Ct. 1257 (2014).....	11, 12
<i>Mississippi State Highway Comm’n v. Tomlinson</i> , 78 So.2d 797 (Miss. 1995).....	14
<i>Monongahela Navigation Co. v. United States</i> , 148 U.S. 312 (1892) .....	7, 8, 9, 15
<i>Preseault v. Interstate Commerce Comm’n</i> , 494 U.S. 1 (1990) ( <i>Preseault I</i> ).....	11, 12, 15
<i>Preseault v. United States</i> , 100 F.3d 1525 (Fed. Cir. 1996) ( <i>Preseault II</i> ) .....	11, 12, 13, 15
<i>Presley v. Mississippi State Highway Comm’n</i> , 608 So.2d 1288 (1992).....	21
<i>Schmitt v. United States</i> , 2003 WL 21057368 (S.D. Ind. 2003).....	17
<i>State by Washington Wildlife Preservation, Inc. v. State</i> , 329 N.W. 2d 543 (Minn. 1983).....	23
<i>U.S. v. Chandler-Dunbar Water Power Co.</i> , 229 U.S. 53 (1913) .....	10
<i>United States v. Ortes</i> , 422 U.S. 891 (1975).....	5
<i>Whispell Foreign Cars, Inc. v. United States</i> , 106 Fed. Cl. 635 (2012).....	20
<i>Wildlife Preservation, Inc. v. Minnesota Dep’t of Natural Resources</i> , 463 U.S. 1209 (1983) .....	23
<i>Ybanez v. United States</i> , 102 Fed. Cl. 82 (2011).....	20

## TABLE OF AUTHORITIES – Continued

Page

## CONSTITUTION AND STATUTES

U.S. Constitution Amend. V.....	8, 10, 13, 22
28 U.S.C. § 1257 (Amended 1988) .....	4, 6
Mississippi Code Annotated § 65-1-3 (amended 1992) .....	4
Mississippi Code Annotated § 65-1-51 (amended 2000) .....	14
Mississippi Code Annotated § 65-1-123 (amended 2003) .....	<i>passim</i>

## RULES

Sup. Ct. R. 15 .....	2, 19
----------------------	-------

## OTHER AUTHORITIES

<i>Cambridge Idioms Dictionary</i> , 2nd ed. (2006).....	23
--	----

## INTRODUCTION

This case involves an inverse condemnation claim by Bay Point Properties, Inc. (hereinafter Petitioner) against the Mississippi Transportation Commission and the Mississippi Department of Transportation (hereinafter Respondents) for compensation related to the relocation of a bridge landing on U.S. Highway 90 in Harrison County, Mississippi. A portion of the highway easement used for the bridge landing was converted to a park and parking lot. Petitioner claims that it should be compensated for the value of its property used as a park and parking lot as if unencumbered by the highway easement. Mississippi Code Annotated § 65-1-123 (amended 2003) states that highway easements can only be abandoned on the minutes of Respondents, which did not occur. The Petition for Writ of Certiorari should be denied because 1) the majority of the Mississippi Supreme Court did not address the constitutional issues raised in the Petition, and, therefore, this case is not properly presented to this Court; 2) the decision of the Mississippi Supreme Court is not in conflict with other State Court decisions or with any federal appellate court decision; 3) statutory provisions regarding abandonment determine the property interest acquired; 4) this case is factually and legally distinguishable from the rails to trails cases which Petitioner most frequently cites as authority for its arguments; and 5) this case presents factual and legal issues which preclude it from being an ideal case to address the requirement of just compensation.





## COUNTER STATEMENT OF THE CASE

### A. Background

On July 21, 2016, the Mississippi Supreme Court (hereinafter State Court) affirmed the verdict of the Circuit Court of Harrison County, Mississippi, awarding Petitioner just compensation in the amount of \$500.00. *Bay Point Properties v. Mississippi Transportation Comm'n*, 201 So.3d 1046, 1059 (Miss. 2016) (hereinafter the “State Court decision”). Seven justices voted in favor of affirmance, and two dissented. Petitioner’s Motion for Re-Hearing was denied on November 3, 2016, and the Mandate remanding this matter back to trial court was dated November 10, 2016. This Petition for Writ of Certiorari followed.

### B. Factual Misstatements In The Petition

Under this Court’s Rules, counsel for Respondents have an obligation to note perceived misstatements of fact or law contained in the petition. *See* Sup. Ct. R. 15. In order that the Court may fully comprehend this Brief in Opposition, omissions of important facts are also included.

1. Petitioner asserts that they own a 14.34 acre parcel in Harrison County, Mississippi. (Pet.4). Respondents would assert that the parcel of property, which later became subject to the easement in favor of Respondents, included 11.26 acres “exclusive of present street and highway right of way,” and 7.9 acres of this 11.26 was

eventually dedicated for a park and parking lot adjacent to the new bridge.

2. Petitioner states that its predecessor-in-interest granted a highway purpose easement to Respondents for Toll Project No. 1. (Pet.5). Respondents would respectfully submit that Petitioner's predecessor-in-interest conveyed to Respondents an easement as part of Toll Project No. 1.
3. Petitioner asserts that discontinuance of Respondents' use of the land for Toll Project No. 1 should have resulted in Petitioner's having exclusive, unencumbered use of its property as the fee owner. (Pet.7-8). Respondents would respectfully suggest that, assuming Mississippi Code Annotated § 65-1-123 (hereinafter the "statute") should not have been applied, Respondents would be required to prove abandonment under Mississippi common law principles. It is acknowledged that the jury found that Respondents' use of the easement was not a highway purpose. The continued use of the easement by Respondents for a public purpose does not equate to abandonment.
4. Petitioner failed to point out in its Petition that two appraisers were allowed to testify as to the encumbered value of Petitioner's property (as if the easement were still in effect) without objection.
5. Petitioner states that the majority of the State Court rejected the argument that

calculation of just compensation is for the judiciary, and not the legislature or an executive agency. (Pet.10). Respondents would respectfully suggest that the majority of the State Court acknowledged that counsel for Petitioner did not challenge the constitutionality of Mississippi Code Annotated § 65-1-123 at the trial court level, and therefore the majority of the State Court refused to consider same.

6. Petitioner refers to Respondents as “an executive branch agency.” (Pet.13). The Respondents, Mississippi Transportation Commission, is an elected body of three Commissioners, representing different areas of the State. Mississippi Code Annotated § 65-1-3 (amended 1992).



## REASONS FOR DENYING THE PETITION

### I. THE STATE COURT DID NOT CONSIDER A CONSTITUTIONAL CHALLENGE TO MISSISSIPPI CODE ANNOTATED § 65-1-123 (AMENDED 2003).

The Petition should be denied under 28 U.S.C. § 1257 (amended 1988) because the validity of the statute was never “drawn in question” by the majority of the State Court. The two dissenting Justices in the State Court decision opined that the statute thwarted Petitioner’s right to just compensation under the United States Constitution and the Mississippi Constitution. *Bay Point Properties v. Mississippi Transportation Comm’n*, 201 So.3d at 1059. The majority of the

State Court correctly pointed out in its decision that the constitutional analysis raised in the dissent was not presented to the trial court, stating as follows:

. . . [W]e do not consider arguments raised for the first time on appeal (citations omitted). We do not hold trial courts in error on issues not presented to them for consideration (citations omitted). Furthermore, Bay Point did not object to the instructions based on the arguments introduced anew by the author of the dissent. If a proper contemporaneous objection is not made, the error is waived (citations omitted).

*Id.* at 1055.

Therefore, the State Court properly refused to consider the constitutional arguments on appeal.

This Court has acknowledged that it has “almost unfailingly refused to consider any federal law challenge to a State Court decision unless the federal claim ‘was either addressed by or properly presented to the State Court that rendered the decision we have been asked to review.’” *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (citing *Adams v. Robertson*, 520 U.S. 83, 86 (1997); and *Illinois v. Gates*, 462 U.S. 213, 218 (1983)). Thus, if certiorari was granted in this matter, this Court would be considering constitutional issues in this case not properly presented to the State Court. This Court has repeatedly admonished that it is a Court of “final review, not of first view.” See *Ford Motor Co. v. United States*, 134 S. Ct. 510 (2013); *United States v. Ortes*, 422 U.S. 891, 898 (1975).

Petitioner attempts to circumvent the requirements of 28 U.S.C. § 1257 by stating that the State Court rejected the argument that calculation of just compensation is for the judiciary, not the legislature or an executive agency. (Pet.10). The State Court did not consider this argument and its decision contains no such holding. Because the constitutional challenge to the statute was never properly presented below, the Petition should be denied.

## **II. THE STATE COURT DID NOT DECIDE AN IMPORTANT FEDERAL QUESTION WHICH WAS IN SHARP CONFLICT WITH THE DECISIONS OF THIS COURT.**

### **A. Mississippi Code Annotated § 65-1-123 Did Not Extinguish Any Part Of Just Compensation By Prospective Conjectural Advantage.**

Alternatively, and assuming arguendo this Court does not deny the Petition under the grounds stated above, the Petition should be denied because the cases cited by Petitioner are legally and factually distinguishable from this case, and therefore do not create a conflict with any United States court of appeals decision.

The statute in question is located in Title 65, Chapter 1, Article 1 of the Mississippi Code of 1972 Annotated. Title 65 is titled “Highways, Bridges, and Ferries”; Chapter 1 is titled “Transportation Department”; and Article 1 is titled “In General.” The heading for the

statute is “Sale or Disposal of Unnecessary Property.” The pertinent parts of the statute, a full copy of which is included in the Appendix, state as follows:

(5) All easements for highway purposes shall be released when they are determined on the minutes of the commission as no longer needed for such purposes, and when released, they shall be filed by the department in the office of the chancery clerk in the county where the property is located.

(6) In no instance shall any part of property acquired by the commission, or any interest acquired in such property, including, but not limited to, easements, be construed as abandoned for nonuse, nor shall any encroachment on such property for any length of time constitute estoppel or adverse possession against the state’s interest.

Mississippi Code Annotated § 65-1-123 (amended 2003).

Petitioner states that the right to compensation is self-executing and cannot be impaired by the statute. (Pet.12). Petitioner uses this broad statement to argue that the statute’s delegation of authority as to the manner of abandonment allowed Respondents to control how Petitioner’s property was valued. (Pet.12). In support, Petitioner cites *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1892), in which Congress passed a statute approving a project to acquire and approve the locks and dams along the Monongahela River. Importantly, Congress, in the same

legislation which approved the project, also stated that the ability of the Monongahela Navigation Company to collect tolls along the river should not be considered in determining just compensation. *Id.* at 312. Further, this statute altered Pennsylvania State law. *Id.* at 329. Petitioner also cites *Isom v. Mississippi Cent. R.R.*, 36 Miss. 300 (Miss. 1858). Consistent with *Monongahela Navigation Co.*, the charter of the Mississippi Central Railroad Company approved by the Mississippi Legislature stated that the jury must consider the benefits to the landowner of the railroad passing through his land as an offset to just compensation. *Isom*, 36 Miss. at 313. As in *Monongahela Navigation Co.*, this restraint on compensation was included in the same legislation that approved the railroad charter. *Id.* at 313. Importantly, both of these statutes were described as limiting just compensation by prospective conjectural advantage. *Isom*, 36 Miss. at 313; *Monongahela Navigation Co.*, 148 U.S. at 327.

Petitioner cites these cases for the broad statement that just compensation is self-executing and cannot be impaired by statute. Certainly, very broadly speaking, the requirement of just compensation by the Fifth Amendment to the United States Constitution as applied through the Fourteenth Amendment is self-executing in character. Further, Respondents agree that any part of compensation cannot be limited by the prospective conjectural advantage of a statute. However, that is not what occurred here.

Obviously, the statute in question here was passed to supersede Mississippi common law tenets regarding

abandonment of easements. However, as indicated by the statute heading, the statute was not passed as part of legislation for Toll Project No. 1 or any highway project. It was separate and distinct from any right the Respondents may have regarding eminent domain and does not mention or refer to just compensation in any manner. Therefore, the prospective conjectural advantage that was repugnant to this Court in *Monongahela Navigation Co.* and to the State Court in *Isom* is absent here. This significant distinction places this case outside consideration as an impairment or a limitation on just compensation.

Petitioner continues by citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) and *Jacobs v. United States*, 290 U.S. 13 (1933) for the proposition that the State Court should have reversed the trial court decision and allowed valuation of the Petitioner's property as if it were unencumbered by the easement. As the Court is aware, *First English* is a regulatory takings case that involved the issue of whether the affected landowners were required to challenge an ordinance through declaratory relief or writ of mandamus under California law prior to initiating inverse condemnation court proceedings. *First English*, 482 U.S. at 308. *Jacobs* involved a claim to monetary interest on an eminent domain award that was not specifically allowed by the statute authorizing the project. *Jacobs*, 290 U.S. at 16. Clearly, these cases have nothing to contribute to Petitioner's plea. The statute in



question here does not require pre-condemnation proceedings as presented in *First English*; nor does it involve the awarding of monetary interest on an award of just compensation as dealt with in *Jacobs*. Thus, Petitioner has failed to establish a conflict between the State Court decision and these cases.

This Court has held that damages under the takings clause must be assessed according to the condition of the title. See *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 193 (1910); *U.S. v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 71 (1913). The title to the easement remained in Respondents, while the remaining property interests were owned by Petitioner. The owner of the property in 1952 was paid just compensation for the taking of the easement, and title to the remaining property interests was conveyed to Petitioner. To simply ignore the easement for purposes of valuation, as Petitioner suggests, would result in Petitioner's receiving a windfall, not the constitutional requirement of just compensation.

A straightforward analysis of the cases cited by Petitioner herein indicates that a legislature, by prospective conjectural advantage, cannot limit the right of just compensation under the Fifth Amendment, as applied through the Fourteenth Amendment. However, the statute at issue does not fall into this category, despite Petitioners repeated attempts to pound that square peg into a round hole. The application of the statute to Petitioner's property creates no conflict justifying review by this Court. Petitioner's claims to the

contrary are without merit, and the Petition should be denied.

### **III. STATUTORY ABANDONMENT IS RELEVANT TO THE AMOUNT OF COMPENSATION BECAUSE IT DETERMINES THE PROPERTY INTEREST ACQUIRED.**

#### **A. The *Preseault* Cases Are Factually And Legally Distinguished From The Present Case.**

Petitioner attempts to draw a legal and factual parallel between the present case and *Marvin M. Brandt Rev. Tr. v. United States*, 134 S. Ct. 1257 (2014); *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990) (*Preseault I*), and *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (*Preseault II*), arguing that the right to compensation does not “turn” upon a statute and abandoned easements converted to public parks “trigger” the right to compensation. (Pet.16). In so doing, Petitioner’s argument paints too broad a stroke, and a discerning analysis of these cases indicates that they are inapplicable to the present case. First, Petitioner herein cites *Brandt* for the proposition that “the Court thwarted an attempt to rewrite the rules to avoid the right to compensation, and emphatically reaffirmed the principle that using an easement in a way different than the use granted triggers that right.” (Pet.17). However, the issue in the *Brandt* case was to determine whether the United States conveyed an easement or fee simple title pursuant to the General Railroad Right-of-Way Act of 1875, 43 U.S.C.

§§ 934-939. *Marvin M. Brandt*, 134 S. Ct. at 1264. There was no attempt by the government in that case to “rewrite the rules.” Further, there is nothing in the case to suggest that this Court reaffirmed the principle that using a highway easement as a public park triggers the right to compensation. Importantly, the case plainly states that the easement owner notified the proper authorities of its intent to abandon the right of way, a determinative fact which is glaringly absent in this case. *Marvin M. Brandt*, 134 S. Ct. at 1262.

This matter also presents very different issues than those addressed by the *Preseault* cases. The main issue in *Preseault I* was whether the government could avoid compensation under the National Trails System Act Amendments of 1983, which “authorized the ICC to preserve for possible future railroad use rights-of-way not currently in service and to allow interim use of the land as recreational trails.” *Preseault I*, 494 U.S. at 5. In that case, this Court merely held that the Tucker Act is available for claimants seeking relief for claims arising pursuant to federal statute. *Id.* at 13. This case does not involve the right to sue Respondents for inverse condemnation under federal law, and is therefore properly distinguishable.

Petitioner cites *Preseault II* in further support of its argument that converting abandoned easements to public parks triggers compensation. (Pet.18). *Preseault II* involved the issue of whether the interim conversion of a railroad right of way to a public walking trail under the Rails to Trails Act constituted a taking of the

landowner's property. *Preseault II*, 100 F.3d at 1529. First, as noted by the dissent, *Preseault II* has no precedential value. *See id.* at 1555. Thus, the Federal Circuit Court's holding in *Preseault II* could not conflict with the opinion of the State Court, and the dissent's opinion in the State Court's opinion was not founded on established law.

Notwithstanding, *Preseault II* dealt with common law tenets of Vermont law, which holds that an easement may be abandoned if there is a change in use of the easement that is inconsistent with the purpose for which the easement was granted. *Preseault II*, 100 F.3d at 1543. Significantly, the Vermont Railway ceased operation of the railroad and removed the railroad equipment. *Id.* at 1545. Mississippi common law with regard to the abandonment of easements is different, requiring protracted nonuse for an extended period of time which creates a presumption of abandonment. That presumption becomes stronger if an intent to abandon is also demonstrated by the evidence. *Bivens v. Mobley*, 724 So.2d 458, 460 (Miss. 1998). State law creates the property rights to which the Fifth Amendment rights attach, not the Constitution. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 103, 130 (1992). Thus, Petitioner's argument that a different use automatically triggers abandonment is not correct under Mississippi Law. However, even assuming that the statute did not apply, Petitioner herein would have to prove that the easement was abandoned under Mississippi common law. The importance of this distinction cannot be understated. Petitioner's entire argument revolves

around the idea that change in the use of the easement for the Bay of St. Louis Bridge would *ipso facto* create the right to compensation. This is simply not the case. In fact, Mississippi Code Annotated § 65-1-51 (amended 2000) grants the Mississippi Transportation Commission the right to develop publicly owned and controlled rest and recreation areas adjacent to a right of way reasonably necessary to accommodate the traveling public. In interpreting the statute, the State Court, in *Mississippi State Highway Comm'n v. Tomlinson*, 78 So.2d 797 (Miss. 1955) states as follows:

The statute does not contemplate the counties and the highway department, when taking land for highway purposes, should limit the construction of the highway to a particular plan, and when the highway is to be paved, as this one is, to any particular character of paving. In other words, the statute contemplates that the counties and the highway department shall have a free-hand in constructing the character of a highway that most nearly conforms to the public interest and welfare. What satisfies this requirement on one day may fail to do so on the next.

*Tomlinson*, 78 So.2d at 799.

Petitioner failed to introduce any evidence at the trial level that the easement eventually used for a park and parking lot was ever abandoned under Mississippi common law. Quite the contrary, the easement continued to be used for public purposes. *Bay Point*

*Properties*, 201 So.3d at 1051. Further, there is no authority cited for the proposition that the statute was enacted to prevent Mississippi common law from applying for the purpose of providing an interim use of the property as in the *Preseault* cases. The *Preseault* cases are more in line with *Monongahela Navigation Co.* and *Isom* cases because they involved legislation that prospectively limited compensation as part of a particular project (converting old railway easements to walking trails). These significant distinctions from the statute in question here establish that no direct conflict with these cases exists, and the Petition should be denied on these grounds.

**B. Statutory Abandonment Is Relevant To Property Interests Acquired Under State Law, Which, In Turn, Determines The Amount Of Compensation.**

Petitioner next argues that the statute could not be used to prevent payment of the fee simple value of the property as if the property remained encumbered by the easement. (Pet.19). In support of this contention, Petitioner cites *Geneva Rock Prods., Inc. v. United States*, 107 Fed. Cl. 166, 172 (2012), and *James v. United States*, Nos. 14-6L, 14-38L, Slip Op. at 23-24 (Fed. Cl. Feb. 28, 2017). Neither of these cases is inconsistent with the State Court's opinion in this matter and as such are erroneously relied upon by Petitioner. In *Geneva Rock Prods., Inc.*, the Federal Court of Claims simply held that it must analyze the scope of an easement under federal law because the easement

was granted under federal law. *Geneva Rock Prods., Inc.*, 107 Fed. Cl. at 172. Obviously, this case turns upon Mississippi statutory law, not federal law, and so *Geneva Rock Prods., Inc.* is inapplicable. In *James*, the Federal Claims Court had to address the effect of South Carolina Statute § 57-3-220(a) (2010) as it relates to the abandonment under the National Trails System Act, 16 U.S.C. § 1241, *et seq.* (2012) (The Trails Act). *James*, Nos. 14-6L, 14-38L, Slip Op. at 17. The South Carolina statute reads as follows:

A railroad right of way corridor held for railroad right of way preservation may be used for a public purpose compatible with the preservation of the corridor for future transportation use on an interim basis until the corridor is used for rail transport. A railroad corridor held for railroad right of way preservation is not abandoned for the purpose of any law.

Based upon this state statute, the Federal Claims Court rejected Plaintiff's argument that the railroad was abandoned, recognizing that the South Carolina statute controlled state property law. *Id.* at 18. The language Petitioner attempts to use in support of its argument was analyzed under the issue of whether the statute could be used to prevent Plaintiff from receiving compensation for a use outside the scope of the railroad easement, not, as Petitioner argues, to prevent

payment for property based on valuation as if it were unencumbered by the easement. *Id.* at 23.

Because *James* recognizes that statutes altering common law abandonment of public property may be applied without offense to the Constitution, and because the jury assessed the value of the underlying fee interest based on a change of use, there is no conflict between the opinion of the State Court and the Courts of Federal Claims. For these reasons, the Petition should be denied.

**C. Mississippi Code Annotated § 65-1-23  
Does Not Insulate Respondents From  
Paying Just Compensation.**

Petitioner next attempts to argue that it is entitled to just compensation because the use of the easement as a park and parking area, rather than for highway travel, was outside of the scope of the easement. (Pet.25). In support of this proposition, Petitioner cites *Howard v. United States*, 106 Fed. Cl. 343 (2012) and *Schmitt v. United States*, 2003 WL 21057368 (S.D. Ind. 2003). This argument does little to provide a reason for this Court to grant the Petition. As noted in the State Court decision, jury instruction D-7A presented the jury with three alternate of findings: One of which is stated as follows:

Alternatively, if you find (1) that MTC's easement has not been abandoned, but (2) that the use being made of the property in this case is not a highway purpose, then your verdict shall



be in favor of Bay Point and you may award it a sum of money, but said sum may not exceed a nominal sum that has been evidenced by the proof in this case.

*Bay Point Properties*, 201 So.3d at 1054.

Thus, what Petitioner appears to be arguing should have happened, actually did happen at the trial court level. The amount of compensation determined for the use of the easement outside of a highway purpose was determined by the jury to be \$500.00. This amount was consistent with testimony admitted without objection by Petitioner's trial counsel, and Petitioner's trial counsel never presented any evidence of a higher value.

Because the jury considered compensation for the continued public use of the easement outside a highway purpose, no constitutional infringement could have occurred, and the Petition should be denied.

#### **IV. BECAUSE RESPONDENTS NEVER ABANDONED THE EASEMENT ON ITS MINUTES, THE RAILS TO TRAILS CASES CITED BY PETITIONER ARE INAPPLICABLE.**

Petitioner argues that the State Court decision conflicts with other lower courts on the issue of property valuation, citing a number of rails to trails cases to support its argument. Specifically, Petitioner attempts to use these cases to support its claim that "[The] government made the same argument as Respondents here, asserting compensation must be

calculated as if the land continued to be encumbered by an *abandoned* easement.” (Pet.27). “Petitioner continues by attempting to argue that [L]and formerly subject to rail easements which are converted to recreational trails must be valued in their unencumbered state.” (Pet.27). Even if the State Court decision conflicts with other lower court rulings, this is not a proper consideration to grant certiorari. *See* Sup. Ct. R. 15.

However, assuming that a conflict with another lower court decision can be considered, Respondents do not take issue with Petitioner’s interpretation of the law here; however, Respondents disagree with Petitioner’s clear misstatement of its position. Respondents’ position is, and always has been, that because the easement was not released on Respondents’ minutes, it was never abandoned. Because the rails to trails cases exclusively concern easements that were definitively abandoned under state law, or would have been abandoned but for The Trails Act, these cases are not applicable to the case at hand.

For example, in *Ingram v. United States*, 105 Fed. Cl. 518, 522 (2012), the South Carolina State Ports Authority, the owner of several railroad easements, quit-claimed its interest in a rail line to the Beaufort-Jasper Water and Sewer Authority for conversion to walking trails. While it is unclear why the Court in *Ingram* did not consider South Carolina Statute § 57-3-220(a) (2010), the Court held that under South Carolina law, the railroad easements were abandoned. *Id.* at 537. Because the easement had been abandoned, the Plaintiff was entitled to compensation for value of the property,

unencumbered by the easement. *Id.* at 542. The significant distinctions between the rails to trails cases and the present case are thoroughly discussed herein. For the purposes of this argument, the critical distinction is that the easement in *Ingram* was determined to be abandoned prior to the taking. In contrast, Respondents' easement could be abandoned solely through its minutes, according to Mississippi law, and was not determined to be abandoned. Because Respondents never abandoned the easement pursuant to the statute, the easement continued to encumber Petitioner's property, and Petitioner is only entitled to value of the property as encumbered by the easement.

Several of the other rails to trails cases cited by Petitioner provide the same result. In many of these cases, the easement in question was conclusively determined to be abandoned based on applicable state law. *E.g.*, *Ybanez v. United States*, 102 Fed. Cl. 82, 87 (2011); and *Macy Elevator Inc. v. United States*, 104 Fed. Cl. 195, 200 (2012).

In other rails to trails cases cited by Petitioner, the court declined to find an abandonment, but, rather, held that under the Trails Act, the Surface Transportation Board (STB), a federal entity, blocked the Plaintiffs' reversionary interests under state law, entitling Plaintiffs to the fair market value of the unencumbered property. *E.g.*, *Whispell Foreign Cars, Inc. v. United States*, 106 Fed. Cl. 635, 643 (2012); and *Anna F. Nordhus Family Trust v. United States*, 106 Fed. Cl. 289, 293 (2012). In these cases, but for the Trails Act, the plaintiffs' reversionary interests would have

triggered. Such cases are distinguishable from the instant case; unlike the rails to trails cases where a federal law blocked state law reversionary interests, there is no intervening force preventing Petitioner's right of reversion. More simply put, there is only one way to effectuate Petitioner's reversionary interest, which is through Respondents' abandonment of the easement on its minutes, as determined by the state legislature, which holds the power to regulate such matters. See *Presley v. Mississippi State Highway Comm'n*, 608 So.2d 1288, 1296 (1992) ("If the legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute. . . .").

Ultimately, the lower court rails to trails cases cited by Petitioner are wholly distinguishable from the instant case. First, Respondents' easement across the property was never abandoned, because, according to state statute, the easement could only be abandoned through Respondents' minutes. And last, the situation between Petitioner and Respondents is not one where federal law is interfering with state law reversionary interests. Rather, any state law reversionary interest that Petitioner may own is defined by the state statute requiring abandonment of the easement to occur only through Respondents' minutes. Since Respondents never abandoned the easement on its minutes, which is the only way to vest Petitioner's reversionary interest in the property, Petitioner is only entitled to receive the value of the property as encumbered by the easement, and which the jury awarded. *Bay Point Properties*, 201 So.3d at 1056.

**V. THIS CASE IS NOT A GOOD CASE TO ADDRESS THE REQUIREMENT OF JUST COMPENSATION.**

**A. Just Compensation Law Is Inextricably Tied To State Title Law.**

Petitioner argues that this Court should grant its Petition to “emphasize the constraints the Fifth Amendment places on the power of a state to limit just compensation when it takes property.” (Pet.33). Respondents have established that the statute does not limit just compensation because it was not passed with the requisite prospective conjectural advantage. Further, Respondents have shown that the statute was not passed to create an interim use inconsistent with state laws relating to abandonment. It has been established that the owner is entitled to just compensation based upon the value of the property interests owned, a determination which is made through local property laws, and which vary from state to state. Does the Takings Clause go so far as to require landowners to be paid for more than the fair market value of what they may own? Though illogical, this is the exact argument Petitioner is making here.

**B. This Case Is Far From Ideal To Address The Boundaries Of Just Compensation.**

Petitioner asserts that this case is an ideal case to address the definition of just compensation. Respondents would show otherwise. The just compensation issue was not properly presented to the State Court for review, and this Court would be reviewing this issue

for the first time. Also, trial counsel for Petitioner did not object to Respondents' experts testifying as to a value of the property encumbered by the easement. Thus, this Court would need to address the doctrines of waiver and estoppel, which would be governed by Mississippi law. Finally, this case involves a limited and unusual set of facts. Counsel for Respondents have been unable to find a case from another jurisdiction which challenges a change in public use of a highway easement and would therefore have to assume that such a controversy is rare. For these reasons, this case is far from ideal to address the requirement of just compensation. Petitioner's erroneous claim to the contrary is unsupported by the record or the law.



## CONCLUSION

You can't make a silk purse out of a sow's ear. (n.d.) *Cambridge Idioms Dictionary*, 2nd ed. (2006). The Petition is without basis in fact or law. Petitioner's claims were not properly presented below and therefore not properly before this Court. Alternatively, and without waiving the applicable bar, Petitioner presents nothing of merit to support its claims.

In *State by Washington Wildlife Preservation, Inc. v. State*, 329 N.W. 2d 543, 547 (Minn. 1983), the Minnesota Supreme Court declined to find that a railroad converted to a walking and hiking trail constituted an abandonment under state law. This Court refused to grant Certiorari in that matter. *Wildlife Preservation*,

*Inc. v. Minnesota Dep't of Natural Resources*, 463 U.S. 1209 (1983). Likewise, the State Court's interpretation of State law in this case warrants a similar result. For this reason, and the reasons heretofore stated, Respondents submit that the Petition should be denied.

Respectfully submitted,

CHRISTOPHER M. HOWDESHELL

*Counsel of Record*

chris@pittmanlawfirm.net

JACK H. PITTMAN

ALEXANDRA PARKER SHOEMAKER

PITTMAN LAW FIRM

Post Office Drawer 17138

140 Mayfair Road, Suite 700

Hattiesburg, MS 39404-7138

(601) 264-3314

*Counsel for Respondents*

May, 2017

**Miss. Code Ann. § 65-1-123**

**§ 65-1-123. Sale or disposal of unnecessary property**

- (1) Except as otherwise provided in subsection (10) of this section, whenever any personal property has been acquired in any manner by the Mississippi Transportation Commission for public use and in the opinion of the commission, all or any part of the property becomes unnecessary for public use, the commission is authorized to dispose of such property for a fair and reasonable cash market price. Any such sale shall be a sale upon the receipt of sealed bids after reasonable advertisement for bids in such manner and at such time and place as the commission may deem proper and advisable, except that the commission may sell at private sale any such personal property not necessary for public purposes the cash market value of which is less than Five Hundred Dollars (\$ 500.00); however, if the personal property is timber, the commission may sell at private sale any such timber not necessary for public purposes the cash market value of which is less than Five Thousand Dollars (\$ 5,000.00), except that whenever persons, groups or agencies are permitted to remove a quantity of timber from highway rights-of-way, and the cash market value of the timber is estimated by the commission to be less than One Thousand Dollars (\$ 1,000.00), it shall not be necessary to have the timber cruised or appraised and the commission may sell the timber at private sale.



The commission shall have the right to reject any and all bids in its discretion and to sell the property theretofore advertised at private sale for not less than the highest of the rejected bids, or to readvertise.

- (2) Except as otherwise provided in subsections (3) and (4) of this section, whenever real property, with the exception of easements for highway purposes, has been acquired by the Mississippi Transportation Commission, in any manner, for public use and in the opinion of the commission all or any part thereof becomes unnecessary for public use, the same shall be declared on the minutes of the commission as excess property and shall be sold at private sale at market value. If the excess property was a total take from the original owner, then the commission shall offer to such owner, in writing, the first right of refusal to purchase such excess property; however, if after due diligence the original owner cannot be located, then the commission shall offer the first right of refusal to purchase the property to the adjoining property owner or owners. If the excess property was a partial take from the current owner of the parcel of real property from which the excess property was originally taken, then the commission shall be required to offer in writing the first right of refusal to purchase such excess property to such owner. If within forty-five (45) days any owner to whom the commission has offered the first right of refusal under the provisions of this subsection fails to accept the offer to purchase, the property shall then be offered to

the adjoining property owner or owners. If within forty-five (45) days an adjoining property owner fails to accept the offer to purchase, then the excess property shall be sold to the highest bidder upon the receipt by the commission of sealed bids after reasonable advertisement for bids in such manner and at such time and place as the commission deems proper and advisable; however, the commission shall have the right to reject any and all bids in its discretion and to sell the property theretofore advertised at private sale for not less than the highest of the rejected bids, or to readvertise. Upon payment of the purchase price, the executive director of the department, upon due authorization by the commission entered on its minutes, may execute a quitclaim deed conveying such property to the purchaser.

- (3) Whenever the commission acquires by fee simple interest any property determined to be an uneconomic remnant outside the right-of-way, then the commission may sell the property to the adjoining property owner or owners for an amount not less than the market value established by the county tax assessor or a state licensed or certified appraiser.
- (4) Whenever the commission desires to sell any real property used as maintenance lots, the property shall be sold to the highest bidder upon the receipt by the commission of sealed bids and after reasonable advertisement for bids in such manner and at such time and place as the commission deems proper and

advisable; however, the commission, in its discretion, may reject any and all bids and sell the property advertised at private sale for not less than the highest of the rejected bids, or may readvertise. Upon payment of the purchase price, the executive director of the department, upon authorization by the commission entered on its minutes, may execute a quitclaim deed conveying the property to the purchaser.

- (5) All easements for highway purposes shall be released when they are determined on the minutes of the commission as no longer needed for such purposes, and when released, they shall be filed by the department in the office of the chancery clerk in the county where the property is located.
- (6) In no instance shall any part of any property acquired by the commission, or any interest acquired in such property, including, but not limited to, easements, be construed as abandoned by nonuse, nor shall any encroachment on such property for any length of time constitute estoppel or adverse possession against the state's interests.
- (7) It is the intent of the Legislature that the Transportation Commission shall declare property it has acquired and which is no longer needed for public purposes as excess and to sell and/or dispose of such excess property in accordance with the provisions of this section as soon as practicable after such property becomes excess in fact. Unnecessary or

excess property or property interests shall be disposed of only upon order of the Transportation Commission on its minutes as provided in this section.

- (8) Whenever any real property has been acquired by the Transportation Commission and in the opinion of the commission all or any part of the property will not be utilized in the near future, the property shall be so declared by the Transportation Commission on its minutes and the commission may lease or rent the property for its market value.
- (9) This section shall not apply to any sale, donation, exchange or other conveyance of real property when the Legislature otherwise expressly authorizes or directs the commission to sell, donate, exchange or otherwise convey specifically described real property.
- (10)(a) As an alternative to the sale of timber under subsection (1) of this section, the Mississippi Transportation Commission may enter into an agreement with the State Forestry Commission for the general supervision and management of timber on selected portions of the rights-of-way of the interstate highway system and those completed segments of four-lane highways in the state. Such an agreement may prescribe the details of, and authority and control over, the full range of forestry management practices. Seventy-five percent (75%) of any money collected from the sale of timber on rights-of-way, less any expenses associated therewith, shall be deposited into the

App. 6

Education Enhancement Fund created in Section 37-61-33, and the remainder shall be deposited into the State Highway Fund to be expended solely for the repair, maintenance, construction or reconstruction of highways.

- (b)** Subject to the provisions of paragraph (a) of this subsection, the Mississippi Transportation Commission may, after consultation with the State Forestry Commission, adopt such rules and regulations with regard to the management, sale or disposal of timber on highway rights-of-way as it considers appropriate; provided, however, such rules and regulations shall be uniform throughout the state and shall be designed to maximize the value of such timber or minimize the cost of removing such timber.
-

**Miss. Code Ann. § 65-1-51**

**§ 65-1-51. Land adjacent to highway rights of way; wetlands**

The Mississippi Transportation Commission may acquire by gift, purchase or otherwise, and may have the Mississippi Department of Transportation improve and maintain strips of land necessary for the restoration, preservation and enhancement of scenic beauty adjacent to the state highway rights-of-way. The commission may acquire and have the Transportation Department develop publicly owned and controlled rest and recreation areas and sanitary and other facilities within or adjacent to the highway right-of-way reasonably necessary to accommodate the traveling public.

The Mississippi Transportation Commission, in its discretion, may acquire by gift, purchase or otherwise, including the exercise of eminent domain, public or privately owned wetlands and other lands suitable for creation as wetlands for the purpose of mitigating wetland losses and replacing those wetlands purchased and damaged or eliminated by development and use, on a basis not to exceed that required by the Federal Highway Administration as a condition for receiving federal aid funds, provided that some governmental agency or approved organization agrees, without compensation, to accept title to the lands acquired and maintain such lands as wetlands in perpetuity. However, the commission shall replace those coastal wetlands purchased and damaged or eliminated by development and use on the basis required by

the “Coastal Wetlands Protection Law” and regulations promulgated thereunder by the Mississippi Commission on Marine Resources.

The Mississippi Transportation Commission, in its discretion, may acquire by gift, purchase or otherwise, wetlands credits from an approved organization with a plan establishing a wetland mitigation bank. The commission shall, if possible, acquire credits on wetlands within the State of Mississippi before acquiring credits on wetlands located outside the State of Mississippi.

---