No. 17-712

In The
Supreme Court of the United States

KEVIN BROTT, et al.,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, REASON FOUNDATION, AND AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Can the federal government take private property and deny the owner the ability to vindicate his constitutional right to be justly compensated in an Article III court with trial by jury?

Table of Contents

Table of Authorities iv

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION 2

REASONS FOR GRANTING THE PETITION 4

I. The issues at stake in this litigation affect the procedural rights and the property rights of thousands of property owners across the country 4

II. This Court has yet to Grapple Directly with the Vital and Unresolved Question of Whether "Suits at Common Law" Extends to Inverse Condemnation Claims Against the Federal Government 7

III. This Court Should Determine Whether the Widespread Practice of Resolving Federal Takings Claims Outside the Presence of a Jury Comports with the Right to a Jury "Preserved" by the Seventh Amendment 11

A. The American Colonies Prior to Independence Consistently Relied on Juries in Condemnation Proceedings 12

B. English Practice Confirms a Robust Jury Right in Condemnation Proceedings 13

C. Actions for Unlawful Takings Also Qualified for Juries in English Practice 16

D. This Court Has Never Fully Addressed How the Historical Right to a Jury in Takings Cases Bears on the Modern Practice of Adjudicating Takings Claims Without a Jury 17

CONCLUSION 19

Table of Authorities

Cases

Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n,
430 U.S. 442 (1977) 10, 14, 17

Bauman v. Ross, 167 U.S. 548 (1897) 19

Brandt v. United States, 134 S. Ct. 1257 (2014)..... 1

Brott v. United States,
858 F.3d 425 (6th Cir. 2017) 6, 8

City of Monterey v. Del Monte Dunes.
526 U.S. 687 (1999). 7, 8, 11

First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty.,
482 U.S. 304 (1987) 16

Horne v. Dep't of Agric., 135 S. Ct. 2419 (2015)..... 1

Hurley v. Kincaid, 285 U.S. 95 (1932)..... 10

Kohl v. United States, 91 U.S. 367 (1875)..... 10

Koontz v. St. Johns River Mgmt. Dist.,
133 S. Ct. 2586 (2013) 1

Lehman v. Nakshian, 453 U.S. 156 (1981) 8

Patton v. United States, 281 U.S. 276 (1930)..... 10

Pernell v. Southall Realty, 416 U.S. 363 (1974) 10

Preseault v. I.C.C., 494 U.S. 1 (1990)..... 5

United States v. 811.92 Acres of Land,
404 F.2d 303 (6th Cir. 1968) 18

United States v. Reynolds.
397 U.S. 14 (1970) 18, 19

Williams v. Florida, 399 U.S. 78 (1970) 11

Federal Statutes

16 U.S.C. §§ 1241-51 5

28 U.S.C. § 1491 5

Judiciary Act of 1789, Ch. 20, § 9, 1 Stat. 73 11

Rules

Fed. R. of Civ. P. 71.1(h) 18

Sup. Ct. R. 37.2(a) 1

Sup. Ct. R. 37.6 1

Other Authorities

1 Holdsworth, William, *A History of English Law* (3d ed. 1922) 14

1 Orgel, Lewis, *Valuation Under the Law of Eminent Domain* (2d ed. 1953) 14

1 Reid, John P., *Constitutional History of the American Revolution: The Authority of Rights* (1986) 13

5 Moore, J., *Federal Practice* (2d ed. 1969) 19

8 *The Writings of Thomas Jefferson* (Memorial Edition, Andrew A. Lipscomb, ed. 1903) 9

Attorney-General v. De Keyser's Royal Hotel, Ltd. [1920] A.C. 508 (H.L.) (appeal taken from Eng.) 15

Cripps on Compulsory Acquisition of Land (Harold Parrish ed., 11th ed. 1962) 14

Davies, Keith, *The Jury in Eminent Domain*, SF 54 ALI-ABA 145 (2001) 16, 17

Davies, Keith, *The Law of Compulsory Purchase and Compensation* (4th ed. 1984) 14

Grant, Eric, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 N.W. U. L. Rev. 144 (1996) 9, 11, 12, 13

Hamburger, Philip, *Is Administrative Law Unlawful?* (2014) 3, 9, 12, 13

Kanner, Gideon, *Shattering the Myth of Eminent Domain*, The Connecticut Law Tribune (March 31, 2003) *available at* http://www.ctlawtribune.com/id=900005383472/Shattering-the-Myth-of-Eminent-Domain. 17

McNulty, William D., *The Power of "Compulsory Purchase" Under the Law of England*, 21 Yale L. J. 639 (1912) 16

Rossiter, Clinton, *Seedtime of the Republic: The Origin of the American Tradition of Political Liberty* (1953) 12

Scott, Austin, *Holmes vs. Walton: The New Jersey Precedent*, 4 Am. Historical Rev. 456 (1899) 3, 20

The Declaration of Independence (U.S. 1776) 12

U.S. Court of Federal Claims, Statistical Report for the Fiscal Year October 1, 2015-September 30, 2016, *available at* http://www.uscfc.uscourts.gov/sites/default/files/Statistical%20Report%20for%20FY2016.pdf. 6

U.S. Dept. of the Interior, Bureau of Land Management, Public Land Statistics, 2010, http://www.blm.gov/public_land_statistics/pls10/pls10.pdf..... 5

Wayne D. Moore, *Written and Unwritten Constitutional Law in the Founding Period: The Early New Jersey Cases*, 7 Const. Comment. 341 (1990)..... 3

Wolfram, Charles W., *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639 (1973)..... 12

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF), Reason Foundation, and the American Civil Rights Union respectfully file this amicus curiae brief in support of Appellants Kevin Brott, et al.[1]

Founded in 1973, PLF is the nation's most experienced public interest legal organization defending Americans' property rights. PLF attorneys have often participated as lead counsel or amicus curiae in takings cases at all levels of the federal court system. *See, e.g.*, *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015); *Brandt v. United States*, 134 S. Ct. 1257 (2014); *Koontz v. St. Johns River Mgmt. Dist.*, 133 S. Ct. 2586 (2013). PLF's familiarity with takings law will assist the Court in considering this petition.

Reason Foundation is a nonpartisan public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing *Reason* magazine, online commentary, and policy research reports. To further Reason's commitment to "Free

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Minds and Free Markets," Reason files briefs on significant constitutional issues.

American Civil Rights Union (ACRU) is a 501(c)(3) legal policy organization dedicated to educating the public on constitutional government and supporting litigation that will advance and restore principles enshrined in the U.S. Constitution. The policy board of the ACRU includes such constitutional conservative leaders as former United States Attorney General Edwin Meese III, former Assistant Attorney General Charles J. Cooper, former Assistant Attorney General William Bradford Reynolds, and former Ambassador J. Kenneth Blackwell. The ACRU is participating as amicus here to advance an originalist understanding of the Fifth and Seventh Amendments to the U.S. Constitution.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

Kevin Brott petitions this Court to reverse the Sixth Circuit decision below and affirm his right to have a jury assess just compensation in a federal inverse condemnation action. His case raises an issue of national importance. Untold numbers of property owners like him will face future legal disputes with the federal government in eminent domain or inverse condemnation proceedings. The question of whether they can call upon the venerable right to a jury is one of lasting national significance.

Kevin Brott's plea joins a rich history. Indeed, the birth of judicial review in the American colonies involved the right to a jury in a property case regarding the wartime seizure of commercial goods.

After the battle of Monmouth in 1778, the British occupied much of New Jersey. *See* Philip Hamburger, *Is Administrative Law Unlawful?* 152 (2014); Austin Scott, *Holmes vs. Walton: The New Jersey Precedent*, 4 Am. Historical Rev. 456, 456 (1899). With Tory sympathies and revolutionary fervor churning at a frenzied pitch, the state faced looming crisis. Hamburger, *supra* at 152.

One of these crises was trade with the enemy. *See* Scott, *supra* at 461. To deal with this vexing problem, New Jersey authorized the seizure of goods crossing British lines. Scott, *supra* at 461. Because of the dire circumstances, New Jersey limited seizure disputes to summary proceedings with a six-man jury, instead of the usual 12. Hamburger, *supra* at 152. Soon after, the privateer and vigilante Elisha Walton seized a massive stock of silk and other goods owned by John Holmes and Solomon Ketcham. Scott, *supra* at 457.

Holmes challenged the constitutionality of the six-man jury under the New Jersey Constitution. *Id.* at 457-58. In this first recorded instance of judicial review in American history, the New Jersey Supreme Court agreed with Holmes. *Id.* at 468; *see also* Wayne D. Moore, *Written and Unwritten Constitutional Law in the Founding Period: The Early New Jersey Cases*, 7 Const. Comment. 341, 341 (1990). Despite the desperate circumstances and the gravity of the allegations, the Court held that only a twelve-man jury could satisfy the right to a civil jury trial. Hamburger, *supra* at 152; Scott, *supra* at 463.

This seminal case inaugurated a tradition of judicial review that has shaped our nation. Senator Gouverneur Morris said of the case: "Such power in judges is dangerous; but unless it somewhere exists,

the time employed in framing a bill of rights and form of government was merely thrown away." Scott, *supra* at 464.

Over two centuries later, however, the right to a jury trial does not enjoy the same degree of veneration. Administrative agencies and legislative courts often adjudicate civil cases without juries. *See* Hamburger, *supra* at 242-48.

Such is the case with Kevin Brott. Like John Holmes, Kevin Brott wants to litigate his wrongful takings claim in front of a jury. But the right to a jury trial in 2017 has traveled far from the right that inaugurated judicial review in 1780. That right, preserved by the Seventh Amendment, involved a strong tradition of juries in takings cases, including inverse condemnation. This Court should grant this petition to address the unresolved role of the Seventh Amendment in federal takings disputes.

REASONS FOR GRANTING THE PETITION

I. The issues at stake in this litigation affect the procedural rights and the property rights of thousands of property owners across the country

This petition raises issues of national importance. The Sixth Circuit's holding curtails fundamental rights enshrined in the Takings Clause and the Seventh Amendment. And the scope of such a holding is vast—most landowners nationwide impacted by federal regulation and condemnation of land must seek to enforce their Fifth Amendment rights outside the shelter of Article III courts and in the absence of a jury. This widespread administrative practice hinges

on pressing and unresolved questions of law that this Court should address.

The Court of Federal Claims enjoys exclusive jurisdiction over condemnation proceedings and takings claims where more than $10,000 is at stake. *See* 28 U.S.C. § 1491. This means that thousands of property owners impacted by federal regulation of land cannot seek redress in the federal court system.

This reality has special force in the context of the rails-to-trails program at issue here. The Trail Act promises an untold number of takings cases for many years to come. *See* 16 U.S.C. §§ 1241-51. At the zenith of railroad development, 272,000 miles of track existed. *Preseault v. I.C.C.*, 494 U.S. 1, 5 (1990). Huge swaths of these corridors have been and continue to be relinquished to government entities for trail conversion. *Id.* Between 1781 and 2010, the United States conveyed approximately 816 million acres of public lands into private ownership (individuals, railroads, etc.).[2] Thus, throngs of property owners adjacent to railway corridors may yet come seeking redress for uncompensated takings. Whether the Seventh Amendment has any bearing on these future takings claims is a clear question of law of great importance for thousands of property owners across the United States.

And rails-to-trails cases only make up a fraction of the overall federal eminent domain proceedings or federal regulations that raise takings issues that may find their way into the Court of Federal Claims.

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[2] U.S. Dept. of the Interior, Bureau of Land Management, Public Land Statistics, 2010, Table 1-2, http://www.blm.gov/public_land_statistics/pls10/pls10.pdf.

Federal regulations that could give rise to takings claims or condemnation proceedings are diverse and abundant. Of the 1,501 cases pending in the Court of Federal Claims in 2016, 235 were takings cases. U.S. Court of Federal Claims, Statistical Report for the Fiscal Year October 1, 2015-September 30, 2016.[3] And of the 634 claims filed that year, 57 involved takings. *Id.* Many of these cases involve multiple property owners, like Kevin Brott and his twenty-two fellow petitioners. *Brott v. United States*, 858 F.3d 425 (6th Cir. 2017). Thus, hundreds of cases bearing on a fundamental constitutional right are adjudicated and disposed of without a jury.

The fundamental right to a jury trial protects the underlying right at issue, such as the right to just compensation. Government agencies and appraisers have developed a reputation for lowballing compensation. In fact, former law professor Gideon Kanner maintains a "lowball watch" that compiles reports of abuse. Gideon Kanner, *Lowball Watch*, Gideon's Trumpet.[4] Many of the examples that Professor Kanner cites demonstrate that juries often award much higher compensation than government offers. *See id.* For instance, in 2016, a San Diego hospital began a condemnation proceeding and deposited $4.7 million, but—after trial—the jury awarded $16.8 million. *Id.* A few months earlier, a Pennsylvania jury awarded $1.25 million compared to the condemnor's offer of $60,000. *Id.* Juries can thus serve as a vital check on self-interested government actors when assessing compensation.

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[3] *Available at* http://www.uscfc.uscourts.gov/sites/default/files/Statistical%20Report%20for%20FY2016.pdf.

[4] http://gideonstrumpet.info/category/lowball-watch/.

Given the scope of the many property owners affected by the legal question in this case and the fundamental rights at stake, this petition merits review.

II. This Court has yet to Grapple Directly with the Vital and Unresolved Question of Whether "Suits at Common Law" Extends to Inverse Condemnation Claims Against the Federal Government

This Court has never directly resolved the role of the Seventh Amendment in inverse condemnation cases. That silence has a broad impact on the many property owners who must pursue their constitutional claims in the Court of Federal Claims without a jury. This Court should grant Brott's petition and fill this jurisprudential gap.

This Court last addressed the right to a jury trial in the takings context in *City of Monterey v. Del Monte Dunes*. 526 U.S. 687 (1999). There, the Court held that a Section 1983 action against the City of Monterey for an alleged taking was an action at law that fit within the "Suits at common law" to which the Seventh Amendment applies. *Id.* at 710-11. The Court made clear, however, that it was not addressing whether Seventh Amendment rights apply to takings actions brought outside the Section 1983 context. *Id.* at 721. That issue, left open in *Del Monte Dunes*, remains open today. As a result, an uncertain question of law persists regarding the constitutionality of a widespread federal practice affecting the fundamental rights of property owners across the country.

In arguing that the jury question here has indeed been resolved by this Court, the Sixth Circuit and the

government relied on inapposite and non-binding dictum. *See Brott v. United States*, 858 F.3d at 436; Response Brief for the United States, 2016 WL 4582611 *56. Ironically, that dictum comes from *Del Monte Dunes* itself, where the Court made an unrelated statement about the right to a jury in proceedings against the federal government: "Most of our regulatory takings decisions have reviewed suits against the United States. . . . It is settled law that the Seventh Amendment does not apply in these contexts." *Del Monte Dunes*, 526 U.S. at 719. (Citations omitted.) This non-binding statement, however, does not put the issue to rest. After all, the takings claim in *Del Monte Dunes* was not against the United States. *Id.* Moreover, *Del Monte Dunes* expressly said that it was *not* deciding whether the Seventh Amendment applied to inverse condemnation claims outside the Section 1983 context. *Id.* at 721.

In turn, the dictum from *Del Monte Dunes* relied on precedent from a far-flung context involving statutory rather than constitutional claims: *Lehman v. Nakshian*, 453 U.S. 156, 158 (1981). *See Del Monte Dunes*, 526 U.S. at 719. In *Lehman*, a federal employee sued the Navy under the Age Discrimination Act. *Lehman*, 453 U.S. at 158. This Court said the employee lacked a right to a jury trial because "[i]t has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government." *Id.* at 160. This limit on the Seventh Amendment, the Court said, derived from sovereign immunity. *Id. Lehman*, however, did not deal with the Fifth Amendment or constitutional claims of any kind.

Principled reasons exist for treating constitutional and statutory claims differently when it comes to the reach of the Seventh Amendment. The government here claims that Congress can dispense with a jury because of sovereign immunity.[5] But when a constitutional right is at stake—such as Kevin Brott's right to just compensation—Congress is not the source of the right being litigated. Thus, it would flout constitutional supremacy if Congress could exercise the same degree of control over claims rooted in a law that is supreme to congressional authority. Courts should be wary not to "elevate[] sovereign rights over constitutional rights." Hamburger, *supra* at 247.

Moreover, if *Lehman's* sweeping statement embraced constitutional cases, it would conflict with historical evidence that the founding generation expected to have juries in cases against the government. For instance, the Stamp Act—the poster child of parliamentary oppression—enraged colonists by removing juries from disputes with the Crown. *See* Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 N.W. U. L. Rev. 144, 151 (1996); *infra* Part III. Thomas Jefferson, in a 1789 letter to Thomas Paine, emphasized the need to place government litigants before a jury: "I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), *quoted in* 8 *The Writings of Thomas Jefferson* 408 (Memorial Edition, Andrew A. Lipscomb, ed. 1903). Whatever *Lehman*

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[5] The petitioners address the issue of sovereign immunity at greater length.

might say about adjudicating statutory rights, this Court has not addressed whether Congress can remove this anchor where constitutional rights—such as Kevin Brott's right to just compensation—are the subject of the litigation.

Indeed, this Court's broad interpretations of "Suits at common law" seem contrary to the dictum in *Del Monte Dunes*. Under this Court's precedent, the phrase refers to "cases tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not." *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 449 (1977). The Seventh Amendment, while preserving the traditional jury right, also extends to "actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than an action in equity or admiralty." *Pernell v. Southall Realty*, 416 U.S. 363, 375 (1974). This includes all actions "for the recovery and possession of specific real or personal property." *Id.* at 370. And it certainly embraces eminent domain, which "always was a right at common law." *Kohl v. United States*, 91 U.S. 367, 376 (1875). This Court has similarly concluded that inverse condemnation claims are actions at law. *See Hurley v. Kincaid*, 285 U.S. 95, 104 (1932).

This broad understanding of "Suits at common law" finds support in the Judiciary Act of 1789. This Court has long considered that early act to be "a contemporaneous exposition of the highest authority" in construing the Constitution. *Patton v. United States*, 281 U.S. 276, 301 (1930) (*abrogated on other*

grounds by Williams v. Florida, 399 U.S. 78 (1970)); *see also* Grant, *supra* at 168-73. When defining the role of the jury in federal courts, the Act distinguishes between common law suits on the one hand, and equity and admiralty on the other. It says: "And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury." Judiciary Act of 1789, Ch. 20, § 9, 1 Stat. 73. *See also* § 12. The Seventh Amendment extends to any action at law with the exceptions of equity and admiralty. The breadth of this Court's Seventh Amendment jurisprudence thus conflicts with the dictum in *Del Monte Dunes*—a conflict worthy of resolution.

Despite the *Del Monte Dunes* dictum, this Court has yet to issue a binding, on-point decision regarding the role of the Seventh Amendment in regulatory takings against the federal government. This petition presents an excellent vehicle for addressing that question.

III. This Court Should Determine Whether the Widespread Practice of Resolving Federal Takings Claims Outside the Presence of a Jury Comports with the Right to a Jury "Preserved" by the Seventh Amendment

Our legal history sheds much light on the question presented by this case. Condemnation practices in England and the colonies show that the right to a jury trial—the right memorialized in the Bill of Rights—applied in the takings context. This Court should grant the petition to determine how these early practices inform the modern practice of adjudicating federal takings issues in juryless proceedings.

A. The American Colonies Prior to Independence Consistently Relied on Juries in Condemnation Proceedings

The jury trial has a long history, dating back before the thirteenth century. Hamburger, *supra* at 148. Those roots nourished a firm commitment to the right to a jury among Americans on the brink of independence. Indeed, John Adams called the jury "the heart and lungs" of liberty. *See* J. Adams, Letter from the Earl of Clarendon to William Pym (Jan. 20, 1766), *quoted in* Clinton Rossiter, *Seedtime of the Republic: The Origin of the American Tradition of Political Liberty* 389 (1953). The Crown's refusal to permit trial by jury stands among the grievances listed in the Declaration of Independence. The Declaration of Independence ¶ 3 (U.S. 1776).

The right to a jury trial dominated among the concerns of the early supporters of a Bill of Rights. *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 745 (1973). Parliamentary attempts to erode this right through laws such as the Stamp Act of 1765 contributed to apprehension regarding the future of the jury. *See* Grant, *supra* at 150-53. The Stamp Act established that vice-admiralty courts—courts with no jury—would adjudicate all disputes regarding customs duties imposed by the Act. *Id.* at 152-53. Indeed, though taxation without representation stood out as the primary grievance against the Stamp Act, this deprivation of the right to a jury trial fomented equal revolutionary ardor. *Id.* As a newspaper at the time put it, "If we are Englishmen . . . Is not our property . . . to be thrown into a prerogative court? a court of admiralty? and there to be adjudged, forfeited

and condemned without a jury?" Hamburger, *supra* at 151. The founding generation held this jury right in veneration: "No civil provision was more highly cherished in the European and American dominions of George III than jury trial." 1 John P. Reid, *Constitutional History of the American Revolution: The Authority of Rights* 4 (1986). And they guarded it jealously.

On the eve of the American Revolution, most of the colonies offered rights to a jury in various condemnation proceedings. Condemnation during that era usually made way for the construction of mills or highways. *See* Grant, *supra* at 178. Thus, colonies' approaches to mill and highway takings reflect the general practices of the time. In mill and highway acts across the colonies, the jury trial was a familiar fixture. *See id.* at 179-87. Ten of the thirteen colonies had highway statutes with condemnation provisions that provided a jury. *See id.* at 179-84. The other three colonies' highway statutes contained no provision for just compensation at all. *See id.* at 182-83. Seven of the thirteen colonies had mill acts. *See id.* at 184-87. Each one provided a right to a jury for aggrieved property owners. *See id.* Thus, each colony that had specific acts requiring compensation offered a jury to assess that compensation. None of the colonies erected condemnation proceedings for highways or mills that did not offer property owners the right to a jury.

B. English Practice Confirms a Robust Jury Right in Condemnation Proceedings

British legal history prior to American independence, on which our founders relied, had an abiding commitment to the jury. Juries regularly assessed compensation for takings. This Court should

address how this history bears on the rights "preserved" by the Seventh Amendment. *See Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 458 (1977) (looking to historical practices in England to determine the meaning of the Seventh Amendment).

First introduced by the Norman kings in the eleventh century, jury practices in England have long involved the valuation of real property. For example, William the Conqueror commissioned a massive survey—the Domesday Book—which assessed the value of lands all across England. 1 William Holdsworth, *A History of English Law* 312-13 (3d ed. 1922). The survey relied entirely on jury verdicts. *Id.* Henry II, in 1188, used juries to assess property values for the Saladin Tithe—a 10% property levy to fund a crusade to oust invaders from Jerusalem. *Id.* London's redevelopment acts in the seventeenth century also used juries to assess increases in land value due to public works. Keith Davies, *The Law of Compulsory Purchase and Compensation* 265 (4th ed. 1984). For much of its history, the jury played a vital role in assessing the value of land.

Juries also determined property values in English eminent domain cases. *See* 1 Lewis Orgel, *Valuation Under the Law of Eminent Domain* 268 (2d ed. 1953); *Cripps on Compulsory Acquisition of Land* 484 (Harold Parrish ed., 11th ed. 1962). While 20th century changes in the law have abrogated this tradition, such changes do not bear on the Seventh Amendment's meaning at the time of ratification. *See* Orgel, *supra* at 268; *Cripps on Compulsory Acquisition of Land* at 484.

The House of Lords laid out the history of jury assessments in takings cases in a 1920 military occupation case. *See generally Attorney-General v. De Keyser's Royal Hotel, Ltd.* [1920] A.C. 508 (H.L.) (appeal taken from Eng.). In *De Keyser's Royal Hotel*, the House of Lords considered whether the Crown must compensate a hotel for temporary occupation by the military during wartime. *Id.* at 508-09. Swinfen Eady, who drafted the lead opinion, detailed English history regarding takings compensation, including the role of juries. Speaking of a 1708 statute, he wrote: "It is somewhat significant that in the first statute of all dealing with the acquisition of land, . . . we have a reference to the usual methods that had been taken to prevent extortionate demands, and the usual methods are said to be a valuation by jury." *Id.* at 527. *De Keyser's Royal Hotel* establishes not only that the right to a jury in condemnation cases existed in 1708, but that such a practice had been "the usual method" prior to that time.

This pattern reasserted itself in 1757, when Parliament feared that takings during the Seven Years' War might lead to "extravagant claims." *Id.* Parliament thus provided "a statutory provision for vesting the lands taken in trustees till the price may be paid as fixed by assessment by jury." *Id.* This unflagging history shows that the jury trial right "preserved" by the Seventh Amendment embraced the right to a jury in condemnation proceedings. This Court should grant Kevin Brott's petition to address the vital question as to whether the preservation of that storied right applies to Kevin Brott's inverse condemnation claim.

C. Actions for Unlawful Takings Also Qualified for Juries in English Practice

Inverse condemnation claims operate like eminent domain proceedings for constitutional purposes. *See First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty.*, 482 U.S. 304, 316 (1987). Thus, the historical right to a jury in eminent domain proceedings applies equally to the inverse condemnation context. Moreover, English common law also establishes a clear history of jury practices in claims similar to inverse condemnation. This Court should grant review to address how this tradition informs the modern practice of trying federal inverse condemnation claims without a jury.

Inverse condemnation claims resemble English common law actions that relied on juries. As a general matter, prior to 1791, a plaintiff who suffered a wrongful taking of land could pursue an ejectment action. Keith Davies, *The Jury in Eminent Domain*, SF 54 ALI-ABA 145, 155 (2001). Ejectment and similar trespass torts all went before juries. *Id.* at 155-56. Juries also tried wrongful takings by the Crown. The plaintiff suffering such a wrong would file a "petition of right," an action that always enjoyed trial by jury well before 1791. *Id.* at 157-58.

Inverse condemnation claims also resemble English actions against "promoters." In English eminent domain practice, the condemnors were often private "promoters"—individuals or companies authorized by Parliament to take property for roads other public works. *See* William D. McNulty, *The Power of "Compulsory Purchase" Under the Law of England*, 21 Yale L. J. 639, 645 (1912). If the promoters failed to pay adequate compensation, the

landowner could sue them in tort for a trespass action, much like inverse condemnation. *See* Davies, *supra* at 155-56; Gideon Kanner, *Shattering the Myth of Eminent Domain*, The Connecticut Law Tribune (March 31, 2003).[6] These claims went before juries. Davies, *supra* at 155-56; Kanner, *supra.* The Seventh Amendment promised that similar actions—like Kevin Brott's takings claim—should enjoy this same right, preserved in the same form as it had long existed by 1791.

D. This Court Has Never Fully Addressed How the Historical Right to a Jury in Takings Cases Bears on the Modern Practice of Adjudicating Takings Claims Without a Jury

This Court has never decided how this history informs the practice of trying takings claims without a jury. Erroneous dicta, however, may give the false impression that this question has been resolved. This Court should take up this issue directly so that off-hand statements in past decisions do not dictate the fate of a fundamental right.

This Court has only addressed the question presented in this petition in dicta. This dictum appeared, for example, in *Atlas Roofing Company*: "Condemnation was a suit at commonlaw but constitutionally could be tried without a jury." 430 U.S. at 458. But *Atlas Roofing* was not a condemnation case—it addressed whether OSHA could conduct enforcement proceedings outside the presence of a jury. *Id.* at 444. It merely cited

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[6] *Available at* http://www.ctlawtribune.com/id=900005383472/Shattering-the-Myth-of-Eminent-Domain.

condemnation cases as a supposed example of a deviation from civil jury practices.

Atlas Roofing, in turn, relied on other dicta. Specifically, it cited *United States v. Reynolds*. 397 U.S. 14, 14 (1970). In *Reynolds*, plaintiffs argued that 78 acres of a 250-acre condemnation were not part of the original scope of the government's project, so increased property values due to the improvements planned for the condemned property should be included in compensation. *Reynolds*, 397 U.S. at 14. The Court held that the question of the original scope of the project should not have been presented to the jury. *Id.* at 20. In an off-hand remark, the Court also said: "[I]t has long been settled that there is no constitutional right to a jury in eminent domain proceedings." *Id.*

That statement, however, is neither binding nor correct. Although the Court mentioned the Seventh Amendment, *Reynolds* is not a Seventh Amendment case. The parties in *Reynolds* did not raise any Seventh Amendment issue in the briefing. Instead, the parties focused only on the proper scope of Federal Rule of Civil Procedure 71.1(h), which allows a jury to assess compensation. *See generally* Brief for the Respondent, *United States v. Reynolds*, 397 U.S. 14 (1970) (No. 88) 1969 WL 119877; Brief for the Petitioner, *United States v. Reynolds*, 397 U.S. 14 (1970) (No. 88) 1969 WL 119876. Nor did the court of appeals address the Seventh Amendment in the proceedings below. *See generally United States v. 811.92 Acres of Land*, 404 F.2d 303 (6th Cir. 1968). Indeed, Reynolds did not even present an alternative argument that if Rule 71.1(h) did not allow the jury to consider the scope of the project, the Seventh

Amendment still demanded it. *See generally* Brief for the Respondent 1969 WL 119877. The Court, in fact, expressly recognized that the parties had not raised a Seventh Amendment issue: "There is no claim that the issue is of constitutional dimension." 397 U.S. at 18. Thus, the Court's statement that juries do not belong in condemnation proceedings is not binding because—as the Court admitted and the case history demonstrates—the Seventh Amendment was never at issue. This dictum should not remain as this Court's only word on a key constitutional question.

Allowing *Reynolds* to stand as this Court's position on such an important issue is also problematic because *Reynolds* relied on an inaccurate secondary source. *Reynolds* quoted from Moore's Federal Practice, which concluded that eminent domain practices in England and the colonies prior to 1791 did not include juries. *Id.*; 5 J. Moore, *Federal Practice* 239 (2d ed. 1969). Moore cites nothing to clothe this naked proposition, and the numerous sources cited in Part III of this brief refute it. *Reynolds* also cites to *Bauman v. Ross*, a takings case that considered whether the same jury should review damages and off-setting benefits. *See generally Bauman v. Ross*, 167 U.S. 548 (1897). It did not, however, address the broader Seventh Amendment at issue here. This Court should take the opportunity to directly address this question; otherwise dicta based on an inaccurate view of history may continue to control the scope of the fundamental right to a jury trial.

CONCLUSION

Much has changed since a court first introduced judicial review by upholding John Holmes's right to a

jury trial in 1780. As Gouverneur Morris said, that power is dangerous but essential, and "unless it somewhere exists, the time employed in framing a bill of rights and form of government was merely thrown away." Scott, *supra* at 464. That Bill of Rights promises that the right to a jury trial does not change, but "shall be preserved." English common law and condemnation statutes and colonial practice before 1791 all testify with the same voice: the usual method of determining just compensation for a taking occurred through a jury. The Seventh Amendment preserves that practice for Kevin Brott and any others seeking just compensation. The time has come for this Court to address the growing divide between modern administrative practices and the robust right that inaugurated our tradition of judicial review. The petition should be granted.

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Respectfully submitted,

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