No. 22-282

In the

Supreme Court of the United States

RANDALL PAVLOCK, ET AL.,
Petitioners,

v.

ERIC J. HOLCOMB, GOVERNOR OF INDIANA, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the individual right to own and use private property. The Center has participated in a number of cases before this Court raising these issues including *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021); *Knick v. Township of Scott*, 139 S.Ct. 2162 (2019); *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017) *Horne v. Dept. of Agriculture*, 576 U.S. 350 (2015); *Koontz v. St. John's River Management Dist.*, 570 U.S. 595 (2013); and *Stop the Beach Renourishment v. Florida Dept. of Environmental Protection*, 560 U.S. 702 (2010), to name a few.

SUMMARY OF ARGUMENT

This Court should grant review to settle the confusion resulting from its fractured decision in *Stop the Beach Renourishment, Inc., supra*. In that decision, four members of this Court opined that a state could be liable for compensation when a state court declares that an established right to private property no longer exists. *Stop the Beach*, 560 U.S. at 715 (plurality). Two concurring justices rejected the conclusion that the state would owe compensation in such a situation and instead argued that the appropriate remedy is to

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[1] All parties received timely notice of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

void the state court decision as a violation of the Due Process Clause. *Id.*, at 735 (Kennedy, J., concurring in part and concurring in the judgment). This despite prior, apparently settled, rulings of this Court that compensation is the only remedy for a Taking of private property. *See First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 318 (1987) (The Fifth Amendment requires compensation, not mere invalidation). The question of whether a state is liable for compensation when a judicial decision alters established property rights remains open today. This case is an appropriate vehicle to resolve the question.

The court below dismissed the case because the property owners sued state executives (who would enforce the judicial taking) rather than the state supreme court (who caused the taking but has no enforcement authority outside the context of litigation between disputing property owners). The Seventh Circuit creates a "Catch 22" situation where owners can sue neither the executive officials who will enforce the order but who did not cause it nor the judicial agency that caused the Taking but that does not independently enforce the order for the Taking. While federal courts are bound by the limitations on their authority under Article III, at the end of the day they are required to enforce the limits of the constitution on government officials to protect the individual liberties of citizens. This is especially true for the pre-existing natural rights protected in the Bill of Rights like the right to own and use private property.

The Takings Clause recognizes that ownership and use of private property is a key foundation to the

American concept of liberty. It places into the Constitution a pre-existing right to be free from confiscation of property (whether by regulation or physical taking) and requires the payment of compensation when property is taken. It does not matter which state actor takes the property. If there is a taking, the Constitution demands the payment of compensation. The Court should grant review to hold the constitutional protection to ownership and use of private property cannot be cancelled by the fiat of a state court.

REASONS FOR GRANTING THE WRIT

I. The Fifth Amendment Protects a Preexisting Natural Right to Own and Use Private Property.

The Fifth Amendment was adopted to protect the right of the individual to own and use private property. Its purpose is not to protect government power to confiscate property. The focus should not be on the government's power to take, but rather the individual's right to keep. As this Court noted in *Murr*, the Constitution protects "the individual's right to retain the [property] interests and exercise the freedoms at the core of private property ownership." 137 S. Ct. at 1943. It is appropriate, therefor, to refer to the individual right at issue. Referring to the Fifth Amendment's "Keepings Clause" is one way to capture the purpose of the protection at issue. Donald J. Kochan, *The [Takings] Keepings Clause: An Analysis of Framing Effects from Labeling Constitutional Rights*, 45 Florida State Univ. L. Rev. 1021, 1023 (2018).

This Court has so often characterized the individual rights in property as "fundamental" that it is difficult to catalogue each instance. The Court has noted

that these rights are among the "sacred rights" secured against "oppressive legislation." *Bartemeyer v. State of Iowa*, 85 U.S. 129, 136 (1873). These rights are the "essence of constitutional liberty." *Johnson v. United States*, 333 U.S. 10, 17 n.8 (1948). In a word, they are "fundamental." *In re Kemmler*, 136 U.S. 436, 448 (1890). Justice Washington noted that rights that are "fundamental" are those that belong "to the citizens of all free governments." *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823). He listed individual rights in property as one of the primary categories of fundamental rights. *Id*.

This Court has followed Justice Washington's view, noting that constitutionally protected rights in property cannot be viewed as a "poor relation" with other rights secured by the Bill of Rights. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994); *see Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (citing to John Locke, Blackstone, and John Adams, the Court noted that "rights in property are basic civil rights").

Moreover, the individual right in property is not in mere ownership. Instead, this Court has noted that the right in property is the right to use that property. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987); *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). This also includes the right to exclusive use – the right to exclude others. *Dolan*, 512 U.S. at 384; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). This Court did not invent the idea of the ownership and use of private property as a fundamental right. The individual rights in private property are

a cornerstone of the liberties enshrined in the Constitution.

Although there was little mention of a fear of federal confiscation of property during the ratification debates, James Madison included the Keepings Clause in the proposed Bill of Rights based on the protections included in the Northwest Ordinance. *See* THE BILL OF RIGHTS, ORIGINAL MEANING AND CURRENT UNDERSTANDING, (Eugene W. Hickcok, Jr., ed.) (Univ. Press of Virginia 1991) at 233. The Northwest Ordinance of 1787 included the first analog of the Bill of Rights and it expressly protected property from government confiscation. Robert Rutland, THE BIRTH OF THE BILL OF RIGHTS (Northeastern Univ. Press 1991) at 102. The drafters of the individual rights provisions of the Northwest Ordinance took their cue from the 1780 Massachusetts Constitution. *Id*. at 104.

While Madison may have used the language of the Massachusetts Constitution in crafting protections for individual rights in property, those protections, were firmly grounded in the Founders' theory of individual liberty and government's obligation to protect that liberty. This is the theory of government that animates our Constitution.

One of the core principles of the American Founding is that individual rights are not granted by majorities or governments but are inalienable. Declaration of Independence ¶2, 1 Stat. 1. The Fifth Amendment seeks to capture a part of this principle in its announcement that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V.

The importance of individual rights in property predated the Declaration of Independence and the American Constitution. Blackstone noted that property is an "absolute right, inherent in every Englishman … which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND Bk. 1, Ch. 1 at 135 (Univ. of Chicago Press 1979) (1765). From the pronouncement that "a man's house is his castle" (Sir Edward Coke, THIRD INSTITUTE OF THE LAWS OF ENGLAND at 162 (William S. Hein Co. 1986) (1644)) to William Pitts' argument that the "poorest man" in the meanest hovel can deny entry to the King (*Miller v. United States*, 357 U.S. 301, 307 (1958)), the common law recognized the individual right in the ownership and use of private property. Blackstone captures the essence of this right when he notes that the right of property is the "sole and despotic dominion … over external things of the world, in total exclusion of the right of any other person in the universe." Blackstone, COMMENTARIES, *supra*, Bk. 2, Ch. 1 at 2. The individual rights in private property are part of the common law heritage that our Founders brought with them to America.

Alexander Hamilton argued that the central role of property rights is the protection of all of our liberties. If property rights are eliminated, he argued, the people are stripped of their "security of liberty. Nothing is then safe—all our favorite notions of national and constitutional rights vanish." Alexander Hamilton, *The Defense of the Funding System*, in 19 THE PAPERS OF ALEXANDER HAMILTON 47 (Harold C.

Syrett ed., 1973). This idea was also endorsed by John Adams: "Property must be secured, or liberty cannot exist." John Adams, *Discourses on Davila*, in 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851). Our nation's Founders believed that all which liberty encompassed was described and protected by their property rights. Noah Webster explained in 1787: "Let the people have property and they will have power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other privileges." Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* (Oct. 10, 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION (Philip B. Kurland and Ralph Lerner, eds., Univ. Chicago Press 1987) 597.

II. The Takings Clause Requires Compensation When Settled Property Rights Are Suddenly Altered by the Legislature or the Courts.

There is no basis in the text of the Fifth Amendment for an argument that it does not apply to courts. *Stop the Beach*, 560 U.S. at 714 (plurality opinion) ("Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary."). The text provides, "… Private property (shall not) be taken for public use, without just compensation." U.S. Const., Amend. V. Unlike the proscriptions of the First Amendment ("Congress shall make no law …"), it is not addressed to a particular branch of government. Many provisions of the Bill of Rights, though silent on the branch of government addressed, are in fact targeted at the Judicial Branch.

The Fifth Amendment's guaranty of Due Process, the Seventh Amendment's guaranty of a jury trial, and the Eighth Amendment's protection against excessive bail, excessive fines, and cruel and unusual punishment are some examples. There is no reason to exclude the courts from the restrictions on government power found in the Fifth Amendment and other provisions of the Bill of Rights. *See Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 162 (1980). This is especially true where it is alleged that the state courts – not the executive or the legislature – upset settled expectations of property law resulting in a taking of private property.

In this case, Indiana decided to expand the public beach along the shores of inland waters – but it did so at the expense of shoreline property rights. Petitioners in this case were not parties to the Indiana Supreme Court that made this change, and thus could not have appealed that decision. This action is their only opportunity to seek a remedy for the claimed violation of their property rights. *Cf. Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001) (landowner may not pursue a taking claim before the government agency involved as decided the reach of the challenged rule).

The Indiana court did not base its decision on prior Indiana state law or legislation. Instead, it discovered the state ownership of the disputed property in the Equal Footing Doctrine and the Public Trust Doctrine. Pet. App. at 4a-5a. But this Court had previously noted that transfer of property to a state does not deprive an owner of "absolute ownership and right of private property" regardless of whether the property "borders on a navigable stream." *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 182 (1871);

see also Summa Corp. v. California, 466 U.S. 198, 209 (1984) (sovereignty claims to tidelands not raised in federal patent proceedings are barred). Thus, Indiana must look to existing state law to define property interests in the state. *See Stop the Beach*, 560 U.S. at 707.

There is no doubt that "ownership in the *beds and waters of navigable*" rivers and lakes "is subject to the exercise of public rights of navigation." *United States v. Cress*, 243 U.S. 316, 320-21 (1917) (emphasis added); *see also St. Anthony Falls Water-Power Co. v. Bd. Of Water Comm'rs of City of St. Paul, Minn.*, 168 U.S. 349, 359 (1897) (At the conclusion of the American Revolution, the people of the states became the sovereigns and held absolute right to navigable waters and the soils under them.). But this case concerns neither navigable waters nor the beds underlying those waters. The question here is where the navigable water ends and where private property begins.

There may well be an answer to this question in Indiana state law. But the answer does not lie in the Equal Footing Doctrine that was relied on by the Indiana court. Transfer of property from the federal government to the new states did not alter the established rights of property owners bordering navigable waters. *See Pumpelly*, 80 U.S. at 182. Indiana cannot rely on the Equal Footing Doctrine as providing authority for the confiscation of long-standing property interests. Petitioners should be allowed to present their claim that the Indiana court's ruling resulted in a taking of their private property.

CONCLUSION

The decision in *Stop the Beach* was fractured on the important question of whether the Fifth Amendment's requirement of compensation for the taking of private property applies to judicial decisions that cause the taking. The Court should grant review in this case to resolve that question.

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