No. 22-282

IN THE
Supreme Court of the United States

RANDALL PAVLOCK, KIMBERLEY PAVLOCK, AND RAYMOND CAHNMAN,
Petitioners,

v.

ERIC J. HOLCOMB, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF INDIANA, ET AL.,
Respondents.

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

Brief *Amicus Curiae* of the FOUNDATION FOR MORAL LAW In Support of Petitioners

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Foundation for Moral Law ("the Foundation"), is a national public-interest organization based in Montgomery, Alabama, dedicated to the strict interpretation of the Constitution as written and intended by its Framers. The Foundation has an interest in this case because the Framers strongly believed in property rights and intended the Takings Clause of the Fifth Amendment to prohibit taking property without just compensation. Likewise, they believed the judiciary was the "least dangerous" branch of government and would have found the ruling of the Seventh Circuit below that the judiciary is exempt from the Takings Clause utterly bizarre.

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[1] Pursuant to Rule 37.2, counsel of record for all parties received notice of intent to file this brief at least ten days before the due date. Pursuant to Rule 37.3, all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

For decades, the Pavlocks owned a lakefront home. They lived on it, made improvements on it, and enjoyed it because this was their home. Or so they thought.

In 2018, the Indiana Supreme Court held that all lakefront property below the ordinary high-water mark belonged to the State.

The Pavlocks were devastated. The house was still theirs, but the lakefront they had enjoyed was now public property, to be used equally by others.

This is precisely what the Framers thought they had made impossible by the Takings Clause of the Fifth Amendment.

Petitioners have presented an excellent and compelling argument that their property has been taken, that this taking constitutes an injury, and that the laws afford them a remedy. Rather than repeat Petitioners' arguments, *amicus* will demonstrate that the State's position is contrary to the meaning of the Fifth Amendment as intended by its Framers. *Amicus* will examine the sources of the Framers' views of property and eminent domain, citing the formative influences on their thought: The Bible and judicial philosophers. We will demonstrate that each of these places a high view on property rights and a low view of eminent domain, even citing a case of eminent domain in the Old Testament.

ARGUMENT

I. The Law Favors Deciding Cases on Their Merits.

At least since *Marbury v. Madison*, 5 U.S. 137 (1803), American courts have recognized the general principle that for every right there is a remedy. As Chief Justice Marshall said on page 163, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury." He cited Blackstone's *Commentaries*, page 23, as saying that "it is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded."

Although procedure is important, it is not an end in itself. The purpose of procedural due process is to protect what has been termed substantive due process. The purpose of procedural rules is to ensure a just result, a result in accord with the law and the facts. For this reason, the law favors deciding cases on their merits.

Moore's Federal Practice § 55.02 states, "there is a strong desire to decide cases on the merits rather than on procedural violations. For this reason, most courts traditionally disfavor the entry of a default judgment. This is a reflection of the oft-stated preference for resolving disputes on the merits."[2]

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[2] Moore, James et al., *Moore's Federal Practice* § 55.02 (3rd

Therefore, the position of the Seventh Circuit that even if there has been an injury, Petitioners have no right of redress for it is a highly disfavored anomaly in the law, to be avoided whenever possible.

And as we will establish below, clearly there has been an injury.

II. The State of Indiana and/or its subdivisions has taken Petitioners' property in violation of the Fifth Amendment.

The Fifth Amendment to the United States Constitution provides in part, "nor shall private property be taken for public use, without just compensation." This Court applied the "Takings Clause" to the states in *Chicago Burlington and Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897).

The courts have recognized two basic types of "takings": "classical" or "confiscatory takings," in which the state actually seizes title to, or possession of, the property, and "regulatory takings," in which the property owner retains ownership and possession but is substantially restricted in his use of the property. Regulatory takings are often difficult to establish, because the state must have deprived the owner of substantially all economically viable use of his property, *Lucas v. South Carolina Coastal Council*,

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ed. 2012).

505 U.S. 1003 (1992).

However, in this case, the taking is clearly confiscatory because the property was clearly marked on the Pavlocks' deed and the Pavlocks paid taxes on the property for decades. But, the Indiana Supreme Court declared in *Gunderson v. State*, 90 N.E.3d 1171, 1173 (Ind. 2018), that Indiana owns exclusive title to all shoreline property below the ordinary high-water mark. Although the Pavlocks still own their home because it is above the ordinary high-water mark, the land between their home and the shoreline now belongs to the State, and the public can use it freely. In other words, shoreline property that for decades indisputably belonged to the Pavlocks, has now become the property of the State. This is a classic confiscatory taking.

And this taking has caused injury to the Pavlocks. Shoreline property of which they for decades had exclusive right to use, including the right to exclude others, they now must share with the general public. The general public may walk, swim, party, picnic, and do whatever they want, right in front of the Pavlocks' home and on what the Pavlocks understood until 2018 was their exclusive property.

And the value of their property has undoubtedly been diminished. No one would pay as much for property he has to share with the general public, as for property over which he has exclusive use. No one would pay as much for property that does not

extend to the shoreline, as for property that does extend to the shoreline.

The State's taking of the Pavlocks' property has caused them serious economic injury and has also deprived them of the full use of their beloved home.

III. The Framers of our Constitution placed a high value on property rights.

Although the common law recognized a limited power of eminent domain, that power was limited by the common law's recognition of property rights. The Framers held a high view of property rights, and consequently they intended that the power of eminent domain be strictly limited. Their respect for property rights was based upon the following:

A. The Bible

On October 4, 1982, Congress passed Public Law 97-280, declaring 1983 the "Year of the Bible." The President signed the bill into law. The opening sentence of the bill read:

> Whereas Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States; whereas this nation now faces great challenges that will test this Nation as it has never been tested before; and whereas that renewing our knowledge of and faith in God through Holy Scripture can strengthen us as a nation and

a people.

Dr. Eran Shalev, in his book *American Zion: The Old Testament as a Political Text from the Revolution to the Civil War*,[3] extensively documents the use of the Bible as a basis for concepts of law and government in early America.

It is therefore appropriate to look to the Bible as one source of the Framers' understanding of takings and property rights.

Central to the Biblical understanding of property rights is the commandment "thou shalt not steal" from Exodus 20:15 and Deuteronomy 5:19. This commandment clearly protects private property, as it must be read in tandem with the commandment of Exodus 20:17, "thou shalt not covet thy neighbor's house, thou shalt not cover thy neighbor's wife, nor his man-servant, nor his maid-servant, nor his ox, nor his ass, nor any thing that is thy neighbor's."

Numerous Bible passages address issues of property rights, purchase and sale of property, liability for misuse of property, penalties for theft of property, among them Genesis 21:25; 23:17-18; Genesis 26:18-22; Genesis 34:10; Deuteronomy 2:1-3 Numbers 27:1-11; Leviticus 27:28; Deuteronomy 19:14; 22:1-3; 23:25; Exodus 21:28-36; Exodus 22:9-

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[3] Eran Shalev, *American Zion: The Old Testament as a Political Text from the Revolution to the Civil War* (Yale University Press, 2013).

15; Leviticus 6:3-4; Leviticus 25:29-30;25:46; 27:16-25; Jeremiah 32:7; Ecclesiastes 2:21; Luke 16:1; Matthew 25:14; Micah 2:2; and Proverbs 19:14.

But the passage that deals most directly with eminent domain is I Kings 21:1-19, in which King Ahab wanted a vineyard that belonged to a commoner named Naboth. King Ahab offered to buy the vineyard, but Naboth refused to sell. Ahab was unhappy about this, but even as an apostate king knew enough Hebrew law to know that the vineyard belonged to Naboth and Naboth had the right to refuse to sell it to anyone, including the king. But King Ahab's wife, Queen Jezebel, was a Phoenician princess who was used to a different system of law. She had Naboth convicted of false charges and executed, and the vineyard was forfeited to King Ahab.

But the Lord spoke through the prophet Elijah:

> Arise, go down to meet Ahab king of Israel, who is in Samaria: behold, he is in the vineyard of Naboth, whither he is gone down to possess it. And thou shalt speak to him, saying, Thus saith the Lord, Hast thou killed, and also taken possession? And thou shalt speak to him, saying, Thus saith the Lord, In the place where dogs licked the blood of Naboth shall dogs lick thy blood, even thine.

(I Kings 21:17-19). The Lord's prophecy and sentence upon King Ahab was fulfilled in I

Kings 22:37-38, clearly revealing the Lord's disapproval of Ahab's attempt at eminent domain.

B. Legal and judicial philosophers

Those who influenced the Framers of our Constitution included John Locke and Sir William Blackstone. Locke's political philosophy centered around man's God-given natural rights of life, liberty, and property. As he said in his 1823 *Two Treatises on Government,* "[e]very man has a 'property' in his own 'person.' This nobody has any right to but himself. The 'labour' of his body and the 'work' of his hands, way may say, are properly his."[4] Locke then applied that principle to physical property: "Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property."[5] In Locke's view, property was an extension of the person and therefore a right of the highest priority.

Blackstone, whose *Commentaries* probably sold more copies in America than in England, valued the right of property as "the third absolute right" and described it as consisting "in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the

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[4] John Locke, *Two Treatises of Government,* 1660.
[5] *Id.*

laws of the land."[6] He added that the "laws of England are therefore, in point of honor and justice, extremely watchful in ascertaining and protecting this right."[7] He strictly limited the power of eminent domain and said it may never be exercised without just compensation:

> In vain may it be urged that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man or even any public tribunal, to be the judge of the common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual to an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature

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[6] Blackstone, *Commentaries* I:1:138 (Avalon 134).
[7] *Id.*

> indulges with caution, and which nothing but the legislature can perform.[8]

Baron Montesquieu, in his classic *The Spirit of the Laws,* declared that "the public good consists in everyone's having his property, which was given him by the civil laws, invariably preserved."[9] He further explained:

> Let us, therefore, lay down a certain maxim, that whenever the public good happens to be the matter in question, it is not for the advantage of the public to deprive an individual of his property, or even to retrench the least part of it by a law, or a political regulation. In this case we should follow the rigor of the civil law, which is the palladium of property. Thus when the public has occasion for the estate of an individual, it ought never to act by the rigor of political law; it is here that the civil law ought to triumph, which, with the eyes of a mother, regards every individual as the whole community. If the political magistrate would erect a public edifice, or make a new road, he must indemnify those who are injured by it; the public is in this respect like an individual who treats with an individual. It is fully enough that it can oblige a citizen to sell his

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[8] *Id.* I:1:139 (Avalon 135). Even then, he added, the legislature must pay the individual reasonable compensation.

[9] Montesquieu, Baron Charles, *The Spirit of the Laws*, Book 26, Ch. 15.

> inheritance, and that it can strip him of the great privilege, which he holds from the civil law, of not being forced to alienate his possessions.[10]

Donald S. Lutz surveyed thousands of writings of leading American figures from 1760 to 1805 and concluded that, except for the Bible, leading Americans quoted Montesquieu (8.3%), Blackstone (7.9%), and Locke (2.9%) more frequently than any other persons.[11] We therefore see that those who influenced the Framers of our Constitution believed in property rights and wanted to limit eminent domain.

C. The Framers' views of property

George Washington, a property owner who chaired the Constitutional Convention and served as President when the Bill of Rights was adopted, stated simply, "It is . . . natural for man to wish to be the absolute lord and master of what he holds in occupancy."[12]

James Madison, a leading delegate to the Constitutional Convention and the Congressman who introduced the Bill of Rights on the floor of

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[10] *Id.*

[11] Lutz, Donald S. "The Relative Influence of European Writers on Late Eighteenth Century American Political Thought," *American Political Science Review* 189 (1984).

[12] Fitzpatrick, John, *George Washington Himself* (Indianapolis: Bobbs-Merrill, 1933) (quoting George Washington, *Letter to William Strickland* at 35:500 (1797).

Congress in 1789, wrote concerning property and confiscation of property in 1792,

> This term in its particular application means "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual." In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage*. In the former sense, a man's land, or merchandize, or money is called his property. In the latter sense, a man has a property in his opinions and the free communication of them. He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them. . . . Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own. According to this standard of merit, the praise of affording a just securing to property, should be sparingly bestowed on a government which, however scrupulously guarding the possessions of individuals, does not protect them in the enjoyment and communication of their opinions, in which they have an equal, and in the estimation of some, a more valuable property. . . . A just security to property is

not afforded by that government, under which unequal taxes oppress one species of property and reward another species: where arbitrary taxes invade the domestic sanctuaries of the rich, and excessive taxes grind the faces of the poor; where the keenness and competitions of want are deemed an insufficient spur to labor, and taxes are again applied, by an unfeeling policy, as another spur; in violation of that sacred property, which Heaven, in decreeing man to earn his bread by the sweat of his brow, kindly reserved to him, in the small repose that could be spared from the supply of his necessities. *If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken directly even for public use without indemnification to the owner, and yet directly violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which indirectly violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and soothe their cares, the influence [inference?] will have been anticipated, that such a government is not a pattern for the United States.* If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in

> rights: they will rival the government that most sacredly guards the former; and by repelling its example in violating the latter, will make themselves a pattern to that and all other governments.[13]

Madison thus saw property rights as an aspect of dominion and closely related to a person's opinions, his religious convictions, and other aspects of his person. He would have considered strange the twentieth-century effort to downgrade property rights as somehow inferior to other rights. In his view, there is no distinction between "property rights" and "human rights;" there is simply a human right to own and use property.

Thomas Jefferson likewise strongly believed in property rights. He wrote in 1793, "[t]he persons and property of our citizens are entitled to the protection of our government in all places where they may lawfully go."[14] He also stated, "[a] right to property is founded in our natural wants, in the means with which we are endowed to satisfy those wants, and the right to what we acquire by those means without violating the similar rights of other sensible beings."[15]

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[13] Madison, James, "Property" 1792, https://billofrights institute.org/activities/handout-b-james-madison-property-1792 (emphasis added).

[14] Bergh, Albert Ellery, *The Writings of Thomas Jefferson* (1907) (quoting Jefferson, Thomas, *1816*).

[15] *Id.*

Why, then, did Jefferson use the phrase "pursuit of happiness" instead of "property" in the Declaration of Independence? The answer is that, although he believed in property rights, he used "pursuit of happiness" as a broader concept that included property but other things as well. He may have derived it from John Locke who wrote in his 1690 *Essay Concerning Human Understanding*, "[t]he necessity of pursuing happiness [is] the foundation of liberty."[16]

IV. The Fifth Amendment protects citizens against judicial takings as well as legislative and executive takings.

In the Indiana Supreme Court case below, the Court held that the State of Indiana holds exclusive title to the Lake Michigan shoreline below the ordinary high-water mark. And the Seventh Circuit below ruled that the Takings Clause of the Fifth Amendment does not apply to judicial takings, only to legislative and executive takings.

A plurality of this Court has recognized judicial takings. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010), a four-Justice plurality of this Court in a very well-reasoned opinion by Justice

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[16] Hamilton, Carol, "Why Did Jefferson Change 'Property' to the 'Pursuit of Happiness'?", History News Network (January 27, 2008) https://historynewsnetwork.org/article/46460 (quoting Locke, John, *Essay Concerning Human Understanding*).

Scalia recognized a judicial taking. *Stop the Beach* was similar to the present case because the Florida Supreme Court had overruled previous decisions to effect the taking of beach property. As Justice Scalia stated at page 715, "[i]n sum, the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking." He noted further that the Due Process Clause without the Takings Clause does not provide sufficient protection to property owners, because the Court in the twentieth century downplayed economic liberties. Chief Justice Roberts, Justice Thomas, and Justice Alito joined the plurality opinion. Other Justices joined in different portions of the opinion, and Justices Breyer and Ginsburg filed a separate opinion concurring the judgment. Justice Stevens recused. There were no dissents.

Petitioners have established at great length that there is ample judicial precedent for the doctrine of judicial takings. *Amicus* will only add to this discussion that, if the judiciary is exempt from the restrictions of the Takings Clause, then the judiciary has power that far exceeds that of the other branches. That was not the intent of the Framers. As Alexander Hamilton wrote in *Federalist No. 78*:

> Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the

> least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

(Emphasis in original). Thomas Jefferson often disagreed with Hamilton, but he strongly opposed excessive judicial power. He wrote:

> At the establishment of our constitutions, the judiciary bodies were supposed to be the most helpless and harmless members of the government. Experience, however, soon showed in what way they were to become the most dangerous; that the insufficiency of the means provided for their removal gave them a freehold and irresponsibility in office, that their decisions, seeming to concern individual suitors only, pass silent and unheeded by the public at large; that these decisions nevertheless become law by

> precedent, sapping by little and little the foundations of the constitution, and working its change by construction, before anyone has perceived that that invisible and helpless worm has been busily employed in substance. In truth, man is not made to be trusted for life if secured against all liability to account.[17]

As noted earlier, Blackstone held that eminent domain could be exercised only by the legislative branch, and only with just compensation.[18] By contrast, the Seventh Circuit below held that the judiciary can exercise eminent domain without compensation.

The possibility that often-unelected judges could confiscate property without compensation when neither the legislative branch nor the executive branch could do so would have seemed bizarre to the Framers of the Constitution.

CONCLUSION

The facts are clear. The Pavlocks and their fellow Petitioners are good faith purchasers, owners, occupiers, and taxpayers of property that they believed in good faith belonged to them and that has been taken from them by judicial fiat in violation of the Fifth and Fourteenth Amendments.

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[17] Bergh, Albert Ellery, The Writings of Thomas Jefferson (1907) (quoting Jefferson, Thomas, 1816).
[18] Blackstone, *Commentaries*, I:1:139 (Avalon 135).

This Court has a unique opportunity to reaffirm its *Stop the Beach* plurality opinion and clear up the confusion in the lower courts that has led them to be hesitant in affirming the property rights of people across the nation.

We urge this Court to grant this Petition for Certiorari.

Respectfully submitted,

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