

No. 25-64

In the
Supreme Court of the United States

IRON BAR HOLDINGS, LLC,
Petitioner,

v.

BRADLEY H. CAPE, *et al.*
Respondents.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals for the Tenth Circuit

**BRIEF OF *AMICUS CURIAE*
THE CLAREMONT INSTITUTE'S CENTER FOR
CONSTITUTIONAL JURISPRUDENCE
IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE.....	1
SUMMARY OF ARGUMENT	2
REASONS FOR GRANTING THE WRIT.....	2
I. Review Should Be Granted to Protect the Natural Right to Own and Use Property Which Is a Foundation of Individual Liberty..	2
II. The Court Should Grant Review to Clarify that the fundamental property right to exclude others cannot be confiscated without just compensation, even to correct the self- inflicted lack of access to public lands.	6
A. The Tenth Circuit’s Decision Effectively Commandeers an Easement Over Petitioner’s Private Land, Contrary to Prior Decisions of this Court.....	6
B. Congress Created the Patchwork Mess; It Can Fix It As Well.	8
CONCLUSION	11

TABLE OF AUTHORITIES

Cases

<i>Arkansas Game and Fish Com’n v. U.S.</i> , 68 U.S. 23 (2012).....	1
<i>Bartemeyer v. State of Iowa</i> , 85 U.S. 129 (1873).....	2
<i>Camfield v. U. S.</i> , 167 U.S. 518 (1897).....	7, 8
<i>Cedar Point Nursery v. Hassid</i> , 594 U.S. 139 (2021).....	1, 3
<i>Chicago, B. & Q.R. Co. v. City of Chicago</i> , 166 U.S. 226 (1897).....	10
<i>Corfield v. Coryell</i> , 6 F. Cas. 546 (C.C.E.D. Pa. 1823).....	3
<i>Dolan v. City of Tigard</i> , 512 U.S. 374 (1994)	3
<i>Horne v. Department of Agriculture</i> , 569 U.S. 513 (2013).....	1
<i>In re Kemmler</i> , 136 U.S. 436 (1890).....	3
<i>Johnson v. United States</i> , 333 U.S. 10 (1948).....	3
<i>Kaiser Aetna v. United States</i> , 444 U.S. 164 (1979).....	3
<i>Kelo v. City of New London, Conn.</i> , 545 U.S. 469 (2005).....	1
<i>Koontz v. St. Johns River Management Dist.</i> , 570 U.S. 595 (2013).....	1

<i>Leo Sheep Co. v. United States</i> , 440 U.S. 668 (1979).....	7, 8
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982).....	3
<i>Lucas v. South Carolina Coastal Council</i> , 505 U.S. 1003 (1992).....	3
<i>Lynch v. Household Fin. Corp.</i> , 405 U.S. 538 (1972)	3
<i>Miller v. United States</i> , 357 U.S. 301 (1958)	5
<i>Murr v. Wisconsin</i> , 582 U.S. 383 (2017).....	1
<i>Nollan v. California Coastal Comm’n</i> , 483 U.S. 825 (1987).....	3
<i>Palazzolo v. Rhode Island</i> , 533 U.S. 606 (2001).....	10
<i>Penn Cent. Transp. Co. v. City of New York</i> , 438 U.S. 104 (1978).....	10
<i>Pennsylvania Coal Co. v. Mahon</i> , 260 U.S., 393 (1922).....	10

Statutes and Constitutional Provisions

Declaration of Independence, 1 Stat. 1.....	4
U.S. Const. amend. V (Takings Clause)	2, 4, 7, 10
U.S. Const. Art. I, § 8, cl. 1	9
Unlawful Inclosures Act of 1885 (UIA), 43 U.S.C. §§ 1061-1066.....	7, 8
Wyo. Stat. § 23-3-305(b)	10

Other Authorities

2 Cong. Globe, House of Representatives, 23rd Cong., 2nd Sess. (Dec. 2, 1834).....	9
29 Annals of Cong., House of Representatives, 14th Cong., 1st Sess. 1252 (1816)	9
30 Annals of Congress	9
31 Annals of Cong., Senate, 15 th Cong., 1st Sess. 18 (Dec. 2, 1817).....	9
Adams, John, <i>Discourses on Davila</i> , THE WORKS OF JOHN ADAMS (Charles Francis Adams ed., 1851).....	6
Blackstone, William, COMMENTARIES ON THE LAWS OF ENGLAND (Univ. of Chicago Press 1979) (1765)	5
Coke, Sir Edward, THIRD INSTITUTE OF THE LAWS OF ENGLAND (1644) (William S. Hein Co. 1986).....	5
Eastman, John C., <i>Restoring the ‘General’ to the General Welfare Clause</i> , 4 CHAP. L. REV. 63 (2001).....	9
Erlar, Edward J., PROPERTY AND THE PURSUIT OF HAPPINESS: LOCKE, THE DECLARATION OF INDEPENDENCE, MADISON, AND THE CHALLENGE OF THE ADMINISTRATIVE STATE (Rowman & Littlefield, 2019)	1
Hamilton, Alexander, <i>The Defense of the Funding System</i> , in THE PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett ed., 1973)	6

Hickcok, Eugene W., ed., THE BILL OF RIGHTS, ORIGINAL MEANING AND CURRENT UNDER- STANDING (Univ. of Virginia Press, 1991)	4
Jaffa, Harry V., THE AMERICAN FOUNDING AS THE BEST REGIME (Claremont Review of Books 2007) ..	1
Rutland, Robert, THE BIRTH OF THE BILL OF RIGHTS (Northeastern Univ. Press 1991).....	4
Webster, Noah, <i>An Examination into the Leading Principles of the Federal Constitution</i> (Oct. 10, 1787).....	6
West, Thomas G., <i>The Founders' Understanding of Property Rights</i> , in THE POLITICAL THEORY OF THE AMERICAN FOUNDING: NATURAL RIGHTS, PUBLIC POLICY, AND THE MORAL CONDITIONS OF FREEDOM (Cambridge University Press, 2017).....	1
 Rules	
Sup. Ct. Rule 10(c).....	8
Sup. Ct. Rule 37.6.....	1

INTEREST OF AMICUS CURIAE¹

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 fundamental property rights at issue in this case. Claremont Institute-affiliated scholars have published extensively about the importance of property rights to the nation's founders, including Edward J. Erler, *Property and the Pursuit of Happiness: Locke, the Declaration of Independence, Madison, and the Challenge of the Administrative State* (Rowman & Littlefield, 2019); Thomas G. West, *The Founders' Understanding of Property Rights*, in *THE POLITICAL THEORY OF THE AMERICAN FOUNDING: NATURAL RIGHTS, PUBLIC POLICY, AND THE MORAL CONDITIONS OF FREEDOM* (Cambridge University Press, 2017); and Harry V. Jaffa, *The American Founding as the Best Regime* (Claremont Review of Books, 2007). The Center has previously appeared before this Court in several cases addressing property rights, including *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021); *Murr v. Wisconsin*, 582 U.S. 383 (2017); *Horne v. Department of Agriculture*, 569 U.S. 513 (2013); *Koontz v. St. Johns River Management Dist.*, 570 U.S. 595 (2013); *Arkansas Game and Fish Com'n v. U.S.*, 568 U.S. 23 (2012); and *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

¹ All parties received timely notice of 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 curiae* made a monetary contribution to fund the preparation and submission of this brief.

SUMMARY OF ARGUMENT

Our nation's founders viewed the right to property as fundamental. It includes the right to exclude others, and it is protected by the Fifth Amendment's Takings Clause, which prohibits the taking of private property for other than public use, and then only upon payment of just compensation.

The decision of the Tenth Circuit below affects a taking of an easement against privately-owned property without compensation, in violation of the mandate of the Takings Clause. It also runs counter to prior decisions of this Court, and does so in a way that impacts millions of acres of privately-owned land. Certiorari is therefore warranted.

Moreover, the odd circumstances that have led to the "lack of access to public lands" problem at the heart of this case was created by Congress itself, and Congress itself can fix the problem by use of its power of eminent domain, as long as it does so in conformity with the requirements of the Takings Clause.

REASONS FOR GRANTING THE WRIT

I. Review Should Be Granted to Protect the Natural Right to Own and Use Property Which Is a Foundation of Individual Liberty.

This Court has so often characterized 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 also 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 one of mere ownership. Instead, this Court has noted that the right to property includes the right to use that property to the *exclusion* of others. *Cedar Point Nursery*, 594 U.S. at 149; *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 833 n.2 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). The right to exclude others is key. *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. *See Cedar Point Nursery*, 594 U.S. at 148 (“The Founders recognized

that the protection of private property is indispensable to the promotion of individual freedom. As John Adams tersely put it, “[p]roperty must be secured, or liberty cannot exist.”).

Although there was little mention of a fear of federal confiscation of property during the ratification debates, James Madison included the Takings Clause in the proposed Bill of Rights based on the protections included in the Northwest Ordinance. *See* Eugene W. Hickok, Jr., ed., *THE BILL OF RIGHTS, ORIGINAL MEANING AND CURRENT UNDERSTANDING* (Univ. Press of Virginia 1991) at 233. The Northwest Ordinance of 1787 included the first federal 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 God-given and 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 (emphasis added). 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 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 597 (Philip B. Kurland and Ralph Lerner, eds., Univ. Chicago Press 1987).

II. The Court Should Grant Review to Clarify that the fundamental property right to exclude others cannot be confiscated without just compensation, even to correct the self-inflicted lack of access to public lands.

A. The Tenth Circuit’s Decision Effectively Commandeers an Easement Over Petitioner’s Private Land, Contrary to Prior Decisions of this Court.

Respondents do not contend that when Congress gifted alternating sections of western land to the railroads as inducement to their construction of the transcontinental railroad, it *expressly* reserved an easement over the lands so conveyed in order to guarantee access to the remaining public lands. Neither do they

contend that an easement was *implicitly* reserved, nor could they, given this Court's clear rejection of such a claim a half century ago in *Leo Sheep Co. v. United States*, 440 U.S. 668, 681-82 (1979). Nor do they contend that the common law rule of necessity applies, nor could they, given that there is no necessity to imply a reserved easement when government can acquire an easement over private lands for public use by use of its power of eminent domain. Neither of the lower courts make any of those contentions, either. This issue in this case thus boils down to whether the government can compel the creation of a *de facto* easement by overriding a property owner's protection, via a trespass action, of his right to exclude others, and can do so without the "just compensation" mandated by the Takings Clause of the Fifth Amendment.

The Tenth Circuit held that the Unlawful Inclosures Act of 1885 (UIA), 43 U.S.C. §§ 1061-1066, precludes civil trespass actions which, in its view, have the same effect of preventing access to the public lands as did fences during the infamous range wars of the latter part of the 19th century. That decision effectively creates an easement through the low-level airspace of a massive amount of private land, not just Petitioner's but many others.

It is also contrary to the *dicta* in this Court's opinion in *Camfield v. U. S.*, 167 U.S. 518, 528 (1897):

So long as the individual proprietor confines his inclosure to his own land, the government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor.

That *dicta* became holding in the *Leo Sheep* case:

Obviously, if odd-numbered lots are individually fenced, the access to even-numbered lots is obstructed. Yet the *Camfield* Court found that this was not a violation of the Unlawful Inclosures Act. In that light we cannot see how the Leo Sheep Co.'s unwillingness to entertain a public road without compensation can be a violation of that Act.

Leo Sheep, 440 U.S. at 685. That the Petitioner here has sought to protect his own property utilization of the laws against trespass instead of a physical fence should be of no moment. Either way, as the property owner, it has a right to exclude others from its property. Because the Tenth Circuit's decision to the contrary obliterates that property right, with a profound effect on millions of acres of privately-owned land and is in tension with this Court's prior decisions in *Camfield* and *Leo Sheep*, certiorari is warranted. S. Ct. Rule 10(c).

B. Congress Created the Patchwork Mess; It Can Fix It As Well.

As this Court recognized in both *Camfield* and *Leo Sheep*, the exercise of private property rights in the patchwork quilt allotment of land throughout much of the western United States might obstruct access or otherwise be a detriment to the alternating sections of public lands. *Leo Sheep*, 440 U.S. at 685; *Camfield*, 167 U.S. at 528. But that problem is of Congress's own making. It—and it alone—created the checkerboard pattern of land grants that has resulted in the access problems at issue in this case. It did so to get around the constitutional prohibition on federal spending for local, internal improvements, as the Spending Clause only authorizes spending for “the

common defense and the *general* welfare.” U.S. Const. Art. I, § 8, cl. 1 (emphasis added). Numerous efforts by prior Congress’s to make expenditures for local internal improvements had fallen to a succession of presidential vetoes. *See, e.g.*, 30 Annals of Congress, 14th Cong., 2nd Sess. 211-13 (March 3, 1817, President Madison’s veto); 31 Annals of Cong., Senate, 15th Cong., 1st Sess. 18 (Dec. 2, 1817) (President Monroe’s annual message asserting no constitutional power to fund internal improvements); 2 Cong. Globe, House of Representatives, 23rd Cong., 2nd Sess. (Dec. 2, 1834) (President Jackson message to Congress discussing his vetoes of various internal improvement bills). But prior historical precedent, such as the reservation of the Section 16 school lands in the land grants made to the Ohio Company that was deemed permissible because it increased the sale value of the remaining lands, induced Congress to believe that its reservation of lands in a checkerboard pattern would yield a higher price, and therefore be constitutional because it would be of benefit to the entire nation and not just locally.²

Nevertheless, whatever Congress’s motivation, it is clear that it did not retain easements across the adjoining checkerboard squares when it conveyed them

² Congress’s concerns were misplaced. Even under the strict interpretation of the Spending Power reflected by the vetoes by Presidents Madison, Monroe, and Jackson—a view that Claremont Institute scholars have argued is correct, *see, e.g.*, John C. Eastman, *Restoring the ‘General’ to the General Welfare Clause*, 4 Chap. L. Rev. 63 (2001)—funding for a trans-continental railroad would have been permissible, just as funding of the road across the Cumberland Gap as a way to connect the Ohio River valley to the seaboard states was permissible. *See* 29 Annals of Cong., House of Representatives, 14th Cong., 1st Sess. 1252 (1816).

in fee simple to the Union Pacific Railroad. If Congress now wishes to obtain such easements or their equivalent, or if the State of Wyoming wishes to do so by altering its trespass laws with retroactive application,³ they can certainly do so, either by outright purchase or, if the private landowners are unwilling to sell, using their power of eminent domain. What they cannot do is take an easement without paying the private property owner the just compensation mandated by the Takings Clause of the Fifth Amendment. As Justice Holmes held, for the Court, more than a century ago, “a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S., 393, 416 (1922); *see also Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 152 (1978) (Rehnquist, J., dissenting).

The use of eminent domain upon payment of a just compensation would fix the access problem. It is a fix compelled by the Takings Clause and protective of property rights, but it will only happen if the Tenth Circuit decision is overruled by this Court.

³ As the District Court noted, the Wyoming legislature amended its trespass statute in 2023 to limit a trespass action to those trespasses that involved “physically touching or driving on the surface of the private property.” Wyo. Stat. § 23-3-305(b). But the State of Wyoming can no more take a private property right without just compensation than can the federal government. *See Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 236 (1897). Moreover, this would be true even if the property is sold to a new owner. *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001).

CONCLUSION

The Court should grant review in this case because the right to exclude others is a core aspect of the individual's rights in property protected by the Constitution. The decision below not only fails to protect that constitutionally-guaranteed right, but it does so at distinct odds with prior decisions of this Court.

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