No. 14-439

In the

Supreme Court of the United States

JACK KURTZ, et al.

Petitioners,

v.

VERIZON NEW YORK, Inc., fka NEW YORK TELEPHONE COMPANY, et al.

Respondents.

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

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

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QUESTION PRESENTED

Are property owners who allege a state or local government violated their rights under the Takings Clause forbidden from bringing their federal claim in federal courts?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Center for Constitutional Jurisprudence[1] is a project of the Claremont Institute, a nonprofit organization whose mission is to restore and uphold the principles of the American Founding, including protecting the theory underlying our republic that we are endowed with inalienable rights and the function of government is to protect those rights. The federal courts have the special duty to protect these rights.

In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance touching on individual rights in property, including *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586 (2013); *Sackett v. Environmental Protection Agency*, 132 S.Ct. 1367 (2012); and *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010).

The Center is vitally interested in preserving individual rights in property and preserving a federal forum for the protection of those rights. The

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[1] Pursuant to this Court's Rule 37.2, all parties have granted consent for this brief and the letters evidencing that consent have been lodged with the clerk. Amicus gave notice to all parties of this brief more than 10 days prior to filing.

Pursuant to Rule 37.6, Amicus 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 Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Founding Generation saw the protection of individual rights in property as essential to the protection of all other individual rights. This principle is still true today and amicus seeks to protect that interest in this case.

SUMMARY OF ARGUMENT

In *Williamson County*, this Court ruled that a federal takings claim against a state or local government under the Fifth and Fourteenth Amendments is not ripe until the plaintiff has applied for compensation in state proceedings and been denied. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985). This ripeness requirement imposes a state court exhaustion requirement that does not exist for other section 1983 civil rights claims. Full faith and credit requirements and rules of claim preclusion convert this exhaustion requirement into an effective bar on bringing a claim for violation of a federal constitutional right into federal court. Because of the seriousness of this problem, members of this Court have called for a reconsideration of the ripeness rule of *Williamson County*. This case presents a good vehicle for that reexamination.

Reconsideration of the *Williamson County* ripeness rule is appropriate because of the important role that property rights play in our constitutional scheme of individual liberty. The Fourteenth Amendment arose out of concerns that states would not protect basic civil rights of citizens. Congress had a special concern for protecting individual rights in property. There is no indication that Congress intended these new protections against the state government to be protected only by state courts.

ARGUMENT

I. The *Williamson County* Ripeness Rule Operates to Bar Federal Review of State Violations of the Constitution.

In *Williamson County*, this Court ruled that a taking claim against a state or local government was not ripe, and could not be brought in federal court, until the property owner had sought compensation from the state or local government and had that compensation denied. *Williamson County*, 473 U.S., at 195. In practice, this is not a ripeness requirement at all. Instead it is a bar on federal courts reviewing claims that a state has violated an individual's federal constitutional rights. *See San Remo Hotel LP v. City and County of San Francisco*, 545 U.S. 323, 338 (2005).

Generally, litigants claiming a federal right who are required to litigate the meaning of a state law or action first in state court are entitled to "reserve" their federal claim for later presentation in a federal forum. *See England v. Louisiana Board of Medical Examiners*, 375 U.S. 411, 417-18 (1964). This process for "reservation" of the federal issue preserves the primacy of federal courts for deciding federal issues. *Id.*, at 415-16. Preservation of the federal forum is vital because discretionary review via a petition for writ of certiorari to this Court is an "inadequate substitute" for the initial review by the federal district court. *Id.*, at 416.

In *San Remo*, this Court ruled that property owners arguing a violation of the Takings Clause were not permitted to use the *England* reservation

proceeding to preclude state court review of the federal claim. *San Remo*, 545 U.S., at 338. Instead, individuals seeking to enforce the Fifth and Fourteenth Amendment rights against Takings of private property by a state must present their claim *only* in state court.

Once the Takings claim is committed to state court in the first instance, the preclusion of federal review follows as a matter of course. The claim in state court is that property was taken without payment of just compensation. This is precisely the same claim that would be brought in federal court. Once this claim is litigated in state court, all other remedies based on those facts are extinguished as a matter of claim preclusion. *Rose v. Town of Harwich*, 778 F.2d 77, 78-79 (1st Cir. 1985). The only choice for a property owner is to bring the federal constitutional claim as part of the state court compensation claim. *Edwards v. City of Jonesboro*, 645 F.3d 1014, 1019-20 (8th Cir. 2011); 28 U.S.C. §1738.

The requirement that property owners exhaust state remedies, thus precluding any federal review of the constitutional claim, is unique to constitutional claims based on the Takings Clause. This Court in *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982), ruled that exhaustion of state administrative remedies cannot be required as a prerequisite to filing a section 1983 civil rights claim in federal court. *See also*, *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974).

Four members of this Court urged reconsideration the *Williamson County* ripeness rule in *San Remo Hotel*. Chief Justice Rehnquist, joined by Justices O'Connor, Kennedy, and Thomas, argued that

the Court had failed to explain "why we should hand authority over federal takings claims to state courts." *San Remo*, 545 U.S., at 350 (Rehnquist, C.J., concurring in the judgment); *see England*, 375 U.S., at 415-16 (recognizing primacy of federal courts in deciding federal constitutional claims). In this separate opinion, Chief Justice Rehnquist agreed that state courts were competent to adjudicate federal claims. But that "does not explain why federal takings claims in particular should be singled out to be confined to state court, in the absence of any asserted justification or congressional directive." *San Remo*, 545 U.S., at 351 (Rehnquist, C.J., concurring in the judgment). Here, the four-member concurring opinion circles back to the rationale of *Patsy* and *England*.

Exhaustion of state remedies can only be required if Congress intended to impose an exhaustion requirement. *Patsy*, 457 U.S., at 516 In *Patsy*, this Court looked to the congressional debates in the 1871 Congress to see if there was any indication that Congress intended to vest state administrative agencies with initial review of federal civil rights claims. *Id.*, at 502. The Court noted that this Reconstruction Era legislation was meant to establish the federal government as the guarantor of federal civil rights. *Id.*, at 503. Any requirement that federal civil rights claimants appeal first to state agencies was plainly inconsistent with this purpose. *Id.*, at 504-07.

The Fourteenth Amendment's protection of property rights against state encroachment is similarly a Reconstruction Era enactment. There is nothing in either the Founding Era or Reconstruction Era that consigns property rights to a lesser sta-

tus. Instead, property rights were considered critical to other basic civil rights.

II. The Fifth and Fourteenth Amendments Secure Fundamental Liberties

A. The Founders considered individual rights in private property the foundation of liberty.

One of the core principles of the American Founding is that individual rights are not granted by majorities or governments, but are inalienable. 1 Stat. 1 (Declaration of Independence ¶2). 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 the individual right in property that is protected in this clause is evident in the writings on which the Founders based the notion of liberty that is enshrined in the Constitution.

Of course, 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 (1644) (William S. Hein Co. 1986)) to William Pitts' argument that the "poorest man" in the mean-

est 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 the founding generation brought with them to America.

The founding generation also relied on the writings of John Locke, who noted that private property was natural, inseparable from liberty in general and actually preceded the state's political authority. John Locke, SECOND TREATISE OF GOVERNMENT, (Indianapolis: Hackett Publishing Company, 1980) 111; James W. Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 17 (Oxford Univ. Press, 2nd Ed. 1998). Locke argued that government was formed to protect "life, liberty, and estates" and Thomas Jefferson merely substituted 'estates' with 'pursuit of happiness' in the Declaration. Willi Paul Adams, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 193 (Univ. North Carolina Press 1980).

Alexander Hamilton, building on these concepts, noted the central role of property rights in 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 that 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.

This Court has recognized the fundamental nature of these property rights. 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 (CCED PA 1823). The *Corfield* court listed individual rights in property as one of the primary categories of fundamental rights. *Id*. This Court has not retreated from this 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 Locke, Blackstone, and John Adams,

the Court noted that "rights in property are basic civil rights.")

The federal protection against taking of property without just compensation first appears in the Northwest Ordinance of 1787. 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. Although there was little mention of a fear of federal confiscation of property during the ratification debates, Madison included this protection 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. Hitchcock, ed.) (Univ. Press of Virginia 1991) at 233. Since the provision applied only to the national government, however, there was little authority on when compensation might be due in the event of a taking. One early state case examining the language of the Northwest Ordinance opined that compensation would likely be due once the scope of the public works project had been determined, identifying the particular property to be taken. *See Renthorp v. Bourg*, 4 Mart. 97, 132-33 (1816). There was no suggestion, however, that the territory could comply with this protection by merely providing a cause of action rather than paying compensation at the time of the taking.

B. Congress and the states intended the Fourteenth Amendment to secure this fundamental right for all citizens.

The Fourteenth Amendment extended the constitutional protection of individual rights in property to actions taken by state and local government. Although the scope of the constitutional protection expanded, the fundamental nature of the right remained the same. There is no doubt that the Congress that proposed the Fourteenth Amendment had the protection of property rights in mind. The text of the Fourteenth Amendment expressly protects rights to property in the Due Process Clause, and securing individual rights in property for newly freed slaves was a motivating force behind the Amendment.

Before resorting to constitutional amendment, Congress attempted to extend rights to newly freed slaves by statute in the Civil Rights Act of 1866. Senator Trumball, author of the measure, stated that the bill would do more than simply end the discriminatory Black Codes. The bill would also secure "the great fundamental rights." Prominent among those "fundamental rights" were individual rights in property. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 432 (1968).

Not satisfied with leaving the protection of these rights to statutory law, Congress proposed the Fourteenth Amendment. The purpose of the Fourteenth Amendment was not only to erase any doubts about the constitutionality of the protections secured by the Civil Rights Act of 1866, but also to ensure that those fundamental rights were inscribed in the organic law of the nation. *Hurd v. Hodge*, 334 U.S. 24,

32-33 (1948). This Court noted that the Civil Rights Act of 1866 and Fourteenth Amendment did not deal with "the social rights of men" but rather the "fundamental rights of property." *Buchanan v. Warley*, 245 U.S. 60, 78-79 (1917). These individual rights in property are "the essence of civil freedom." *Civil Rights Cases*, 109 U.S. 3, 35 (1883).

In an early examination of the reach of the Fourteenth Amendment, this Court considered what rights were protected by its Privileges or Immunities Clause.[2] The Court confirmed the ruling in *Corfield v. Coryell* that these rights are those which are "fundamental." *Slaughter-House Cases*, 83 U.S. 36, 76 (1872). Individual rights in private property are foremost among those individual rights "which have at all times been enjoyed by citizens of the several States." *Id.*

According to this Court, the stress here is on individual rights. "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights." *Lynch*, 405 U.S., at 552. In *Lynch*, this Court noted the long recognition of these rights as "basic civil rights" from the writings of Locke through the adoption of the Fourteenth Amendment and the Civil Rights Acts. *Id.*

The fundamental nature of individual rights in property has been noted in other cases as well. When this Court has wanted to express the funda-

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[2] This Court has apparently since settled on the Due Process Clause rather than the Privileges or Immunities Clause as the protector of these rights. *See McDonald v. City of Chicago*, 561 U.S. 742, 758 (2010)(plurality). That decision, however, does not affect the analysis.

mental nature of a civil right under the Fourteenth Amendment it has used rights in property as an example. In *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), for example, this Court noted the rights to "life, liberty, *and property*" were among the rights so fundamental that they "may not be submitted to a vote." *Id*. at 638; *see*, *e.g.*, *Palmer v. Thompson*, 403 U.S. 217, 234-35 (1971); *Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 736 (1964).

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 (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).

These decisions make clear that the Fourteenth Amendment and various Civil Rights Acts were intended to create *federal* rights enforceable against *states*. There is no indication that Congress intended to vest exclusive jurisdiction to hear these federal disputes in state courts. Indeed, this Court ruled that Congress did not intend to require exhaustion of state remedies before a claimant could pursue a 42 U.S.C. §1983 claim in federal court. *Patsy*, 457 U.S., at 516. There is no indication that the Congress of the same era intended enforcement of federal constitutional rights to be vested exclusively in the state courts. The time has come for this Court to reconsider its ruling in *Williamson County* and to allow the

federal courts to hear claims that state and local governments have violated federal constitutional rights.

CONCLUSION

Amicus urges the Court to grant the petition for writ of certiorari to reexamine the prudential ripeness rule of *Williamson County*.

DATED: November, 2014.

Respectfully submitted,

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