No. 22-956

In the United States Court of Appeals for the Second Circuit

David P. Demarest,

Plaintiff-Appellant,

-v-

Town of Underhill, a municipality and charter town,
Daniel Steinabauer, as an individual and in official capacity as Selectboard Chair, Bob Stone, as an individual and in official capacity, Peter Duvall, in official capacity, Dick Albertini, as an individual and in official capacity, Judy Bond, in official capacity, Peter Brooks, in official capacity, Seth Friedman, in official capacity, Marcy Gibson, as an individual and in official capacity, Barbara Greene, in official capacity, Carolyn Gregson, in official capacity, Stan Hamlet, as an individual and in official capacity, Rick Heh, as an individual and in official capacity, Brad Holden, as an individual and in official capacity, Faith Ingulsrud, in official capacity, Kurt Johnson, in official capacity, Karen McKnight, as an individual and in official capacity, Nancy McRae, as an individual and in official capacity, Michael Oman, in official capacity, Steve Owens, as an individual and in official capacity, Mary Pacifici, in official capacity, Clifford Peterson, as an individual and in official capacity, Patricia Sabalis, as an individual and in official capacity, Cynthia Seybolt, as an individual and in official capacity, Trevor Squirrell, as an individual and in official capacity, Rita St. Germain, as an individual and in official capacity, Daphne Tanis, as an individual and in official capacity, Walter Ted Tedford, as an individual and in official capacity, Steve Walkerman, as an individual and in official capacity, Mike Weisel, as an individual and in official capacity, Barbara Yerrick, in official capacity, Anton Kelsey, in official capacity,

Defendants-Appellees,

{ DEFENDANTS CONTINUED ON THE INSIDE COVER }

On Appeal from the United States District Court for the
District of Vermont (Burlington), No. 21-cv-167

Plaintiff-Appellant's Brief

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Front Porch Forum, as a Public Benefit 15 Corporation fairly treated as acting under color of law due to past and present 16 factual considerations while serving the traditional governmental role of providing 17 “Essential Civic Infrastructure” ranging from the di, Jericho Underhill Land Trust, as NonProfit 21 Corporation fairly treated as acting under color of law due to past and present 22 factual considerations and a special relationship willfully participating in and 23 actively directing acquisition of municipal property by the Town of Und,

Defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Other Authorities

JURISDICTIONAL STATEMENT

This appeal is from the final Order of March 29, 2022 (A-226), by Judge William J. Sessions III from the U.S. District Court for the District of Vermont, granting Municipal Defendant-Appellees' motion to dismiss (A-111) under Fed.R.Civ.P. Rule 12(b)(6) which dismissed all of Plaintiff-Appellant's § 1983 causes of action under the First, Fifth, Ninth and Fourteenth Amendments of the U.S. Constitution and *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).

The district court jurisdiction is based upon 28 U.S.C. § 1331 and 28 U.S.C. § 1343. Plaintiff filed a timely notice of appeal on April 27, 2022 (A-259) involving claims against Defendant Town of Underhill and the town officials named in the Notice of Appeal ("Municipal Defendants"). This Court has appellate jurisdiction court under 28 U.S.C. § 1291 to review the final decision the district court made dismissing Counts 1-6 and 11-12, which included all Takings and Due Process Claims against Municipal Defendants, with prejudice and without leave to amend on March 29, 2021.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does Rooker-Feldman preclude District Court jurisdiction on independent Causes of Action alleging injuries *caused by Defendant decisions* if a State court has ratified narrowly defined Defendant decisions under a deferential standard of review, akin to a *writ of certiorari*?
2. Does Rooker-Feldman preclude District Court jurisdiction over a challenge to an unconstitutionally vague State statute?
3. Does *res judicata* or the statute of limitations preclude Plaintiff from standing to bring present 42 U.S.C. § 1983 takings and due process Causes of Action against Municipal Defendants which were never litigated and did not accrue until *Knick v. Township of Scott* wisely overturned *Williamson County*?

PRELIMINARY STATEMENT

This appeal involves the Municipal Defendants individually stated on the Notice of Appeal; dismissal of other Defendants is not at issue due to the *Ashcroft v. Iqbal* plausibility pleading standard.

Present 42 U.S.C. § 1983 takings and due process causes of action against Municipal Defendants were not and never could have been raised during Vermont state court review of municipal decisions involving the Town Highway 26 (TH26) corridor under the Vt.R.Civ.P. Rule 75 deferential standard of administrative review, akin to a *writ of certiorari*.

Despite 19 V.S.A. § 740 (AD-1) clearly stating:

> When a person owning or interested in lands through which a highway is laid out, altered, or resurveyed by selectboard members, objects to the necessity of taking the land, or is dissatisfied with the laying out, altering or resurveying of the highway, or with the compensation for damages, he or she may appeal, in accordance with [Vt.R.Civ.P.]Rule 74 of the Vermont Rules of Civil Procedure, to the superior court…

The 19 V.S.A. § 701(2) (AD-1) definition of "altered" as interpreted by *Ketchum v. Town of Dorset , No. 10–165.,* 22 A.3d 500, 2011 VT 49, (¶12-14 of the Order) limited Vermont courts' review of Municipal Defendants' action to a deferential Vt.R.Civ.R. Rule 75 review of a

municipal decision, instead of the ability to apply the proper non-deferential Vt.R.Civ.P. Rule 74 standard of review to Municipal Defendant decisions to make significant alterations to TH26.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

On June 21, 2021, David Demarest brought this action, pursuant to 42 U.S.C. § 1983 against Municipal Defendant Town of Underhill and individual town officials alleging:

> In violation of the Fifth Amendment, Defendants the Town of Underhill and a clique of Defendant individual town officials, acting both individually and in collusion under color of law, have recently succeeded in their long-term goal of maliciously rescinding all prior implicit and explicit promises made by The Town of Underhill to Plaintiff for reasonable access to and use of his domicile and over 50 acres of surrounding private property.
>
> …
>
> [Municipal Defendants] have also acted under color of law to discriminate against Plaintiff in multiple ways including: censoring and misrepresenting protected speech (including preventing factual evidence from ever being incorporated into the legal record in prior state litigation), intentionally and relentlessly retaliating against protected speech, obstructing the right to petition multiple times, *willfully*

> acting with *deliberate indifference* to necessary structural and procedural due process legal protections, and violating Plaintiff's substantive due process rights in *flagrant* violation of the First, Ninth, and Fourteenth Amendments.

Presently at issue, and properly alleged in both the Original and First-Amended Complaint (A-32 ¶60-67), is Defendants' conduct (not a state court's *ratification* of the Defendants' conduct):

> Approximately 12 years of preceding Vermont state court proceedings document Defendant Town of Underhill, and Defendant town officials sued in their individual capacity, decision to willfully deceive the Vermont state courts by misrepresenting or censoring relevant facts and creating frivolous debates of clearly known facts or interjecting immaterial facts."

Table 1 of Amended Complaint (A-39) partially quantifies the dramatic financial differences between parcels abutting TH26, the proximate cause of which being Municipal Defendant decisions.

B. COURSE OF PROCEEDINGS AND DISPOSITION

Plaintiff commenced this litigation by filing a *pro se*[1] Complaint on June 21, 2021. Proceedings relevant in present appeal are:

On August 2, 2021, in accordance with Fed.R.Civ.P. 15 (a)(1)(B), Plaintiff filed an amended complaint as a matter of course (A-14). On August 23, 2021, Municipal Defendants filed a Motion to Dismiss the Complaint under Fed.R.Civ.P. Rule 12(b)(6) (A-111); on September 17, 2021, Plaintiff filed Response Memorandum in Opposition together with an index to describe attachments, and eight exhibits (A-151 to A-214); on October 1, 2021, Municipal Defendants filed Reply to Response (A-216). On January 25, 2022, the Stipulated Motion to Stay Filing a Discovery Schedule was both filed and granted (D-61 and D-62 from The District Docket Report).

On March 29, 2022, The Vermont District Court issued Opinion and Order dismissing the Complaint (A-226).

Plaintiff timely filed the Notice of Appeal on April 27, 2022. (A-259).

[1] Plaintiff and co-parties had counsel in prior state court proceedings.

CHRONOLOGICAL STATEMENT OF FACTS

In 2001, Municipal Defendant-Appellee Town of Underhill ordered a central segment of TH26 to be reclassified from a Class III/Class IV town highway to a "Legal Trail" classification, but the Selectboard Reclassification Order was not filed in the town land records.

The Underhill Selectboard also adopted a Trail Ordinance (AD-3) which *inter alia*, stated:

> Permits shall be issued only to persons who, in the judgment of the Selectboard, have a legitimate need to operate a vehicle on the Crane Brook Trail. For the purposes of this ordinance, 'legitimate need' shall mean a compelling personal or business purpose.

In 2002, after both meeting with the Underhill Selectboard and hiring an attorney to review the land records, Plaintiff-Appellant David Demarest purchased parcel NR-144, "parcel of land containing 51.64 acres, more or less, located on New Road" and built his domicile under new dwelling permit B02-41.

Prior to any litigation, Defendant Town of Underhill shared general correspondence with Plaintiff, which was dated October 8, 2009 involving "whether a Selectboard grant of access [to Demarest] over the Trail is valid and if there is any way the Town could rescind the access."

Plaintiff and two neighbors retained legal counsel and submitted a Notice of Insufficiency to the Selectboard on February 17, 2010 because New Road was legally still a Class III/Class IV town highway connecting Pleasant Valley Road and Irish Settlement Road.

The 2010 Vermont Agency of Transportation Map depicted New Road as Town Highway 26 (TH26) and the Town of Underhill received Vermont AOT funding to maintain the Class III segment of TH26 located between the Town Highway Department garage and Plaintiff's parcel.

In June of 2010, a segment of TH26 heading northerly from New Road was discontinued and reclassified by the Town as a legal trail to a point where it meets what is now known as Fuller Road. That segment of legal trail is now known as the Crane Brook Trail.

Plaintiff was not a party to the Vermont Supreme Court precedent *Ketchum v. Town of Dorset* which determined, in relation to reclassification of a town highway:

> 14. Therefore, because the statute in this case was "silent on the mode of review" and did not affirmatively indicate that the selectboard's decision is final, review by certiorari through [Vt.R.Civ.P. Rule 75] provided the proper procedure for appeal to the superior court. Hunt, 159 Vt. at 440, 620 A.2d at 1266. In this posture, the court's jurisdiction is usually confined to

> reviewing questions of law and consideration of evidentiary questions is limited to determining "whether there is any competent evidence to justify the adjudication." Id. at 441, 620 A.2d at 1267 (quotation omitted). [(¶14 of the decision not in the record)]

On May 5, 2016, the Town of Underhill Selectboard denied Demarest's preliminary access permit application to a proposed 9-lot subdivision of his property with access from the current and former Town Highway 26 (TH26) corridor.

On December 1, 2016, the Vermont Agency of Natural Resources (ANR) granted Demarest's application for a wastewater systems and potable water supply permit for the subdivision plan.

Prior State Court Administrative Review of Municipal Action Pursuant to Vt.R.Civ.P. Rule 75 did not involve Causes of Action alleging § 1983 Takings or Due Process violations (or any direct Vermont constitutional analogues).

Plaintiff presented the 2020 Petition on Public Accountability to the Underhill Town Clerk with sufficient voter signatures to place advisory articles on the next ballot; the Underhill Selectboard declined to place the advisory articles on the ballot.

Prior State Court Review of Municipal Action Pursuant to Vt.R.Civ.P. Rule 75 did not involve causes of action alleging § 1983 First Amendment violations (alleging censorship, retaliation for protected speech, and violation of the right to petition), or any direct Vermont constitutional analogues.

CHRONOLOGICAL REVIEW OF MUNICIPAL ACTIONS

On February 17, 2010 counsel for Petitioner Demarest and two co-petitioners submitted a Notice of Insufficiency (A-178) to the Town of Underhill pursuant to 19 V.S.A. § 971 which petitioned:

> the Town simply acknowledge its statutory obligations and begin maintaining the entire length of TH26 as a Class 3 and Class 4 town highway — i.e., in the manner that it should have been maintained over the last several years, consistent with 19 V.S.A. § 302(a)(3)(B) and the Map on file with VTrans. (A-180).

Defendant Town of Underhill responded to the petitioners' Notice of Insufficiency within the 72 hours required by 19 V.S.A. § 302(a)(3)(B)) (A-182).

After receiving this Notice of Insufficiency, the Town of Underhill initiated the 2010 New Road Reclassification to administratively change the classification of a central segment of TH26 from

a Class 3/Class 4 town highway to a 49.5 foot wide "Legal Trail" after the requisite site visit and public hearing.

Legal counsel for Demarest and one co-party timely appealed the Municipal Defendants' June 2010 New Road Reclassification order after both the order and survey were filed in the land records.

On May 31, 2011, the Vermont Superior Court Ruling Seeking Review of Notice of Insufficiency (A-183) issued order:

> The court concludes that the Town's 2001 attempt to reclassify TH26 was not valid because the Town did not comply with the requirement that the Selectboard's order be recorded in the Town's land records. However, given the pendency of *Demarest v. Town of Underhill, No. S0937-10 CnC*, which addresses whether the Town has more recently reclassified the road properly, the court will stay any further action in this case pending resolution of that matter.

On June 26, 2012, in reference to the Municipal Defendant reclassification decision, a Superior Court decision (A-197) stated:

> This is a direct appeal to the Superior Court of the most recent reclassification decision. This case does not require referral to the Road Commissioners. It is an on the record review pursuant to [Vt.R.Civ.P. Rule 75] See Ketchum • Town of Dorset, 2011 VT 49 (mem). The court's role is to determine if there is adequate evidence to support the selectboard's decision. The court reviews only the record below without new

> evidence. There is no fact-finding. It is an appellate-style review of an administrative decision. With the [Vt.R.Civ.P. Rule 75] standard in mind, it is clear that there is no longer any reason to postpone consideration of the reclassification decision. There is no legal requirement that the road be brought back to its condition in 2001 before the court considers the issue of reclassification. This was the plan previously, but with the Ketchum decision in hand, it becomes clear that the only evidence to be considered by the court is the record of the selectboard decision making which is already complete.
>
> …
>
> Although there is no Statement of Undisputed Facts, the Town has provided a detailed account of the evidence it believes was before the selectboard when it voted for reclassification. The plaintiffs should have an opportunity to provide any supplemental information or to dispute whether the materials described were placed before the selectboard and formed a basis for its decision.
>
> (A-200 middle of page to A-201)

On September 11, 2012, the Vermont Superior Court ratified the municipal defendant's 2010 New Road reclassification under Vt.R.Civ.P. Rule 75; counsel for Demarest and one co-party timely appealed the case to the Vermont Supreme Court.

On June 26, 2013, County Road Commissioners issued Decision, (A-202) "Repairs are to consist of those repairs recommended by petitioners…" (A-207)

On September 27, 2013, the Vermont Supreme Court ratified the 2010 New Road Reclassification in accordance with the limitations of the Vermont statutory definition of "altered" given by 19 V.S.A. § 701(2) stating:

> ¶ 9. Also while petitioners' appeal was pending, this Court issued *Ketchum v. Town of Dorset,* 2011 VT 49, 190 Vt. 507, 22 A.3d 500 (mem.). In *Ketchum*, we rejected the argument that reclassification constitutes an "alteration" under *19 V.S.A. § 740*, and consequently, rejected the argument that an appeal of a reclassification decision requires the appointment of a panel of commissioners to review a town's reclassification decision. We held that "review by certiorari through [Vt.R.Civ.P. Rule 75] provided the proper procedure for appeal to the superior court." In such cases, the superior court conducts an on-the-record review to determine if there was adequate evidence to support the town's decision. (noting that in [Vt.R.Civ.P. Rule 75] appeals "jurisdiction is usually confined to reviewing questions of law, and consideration of evidentiary questions is limited to determining whether there is any competent evidence to justify the adjudication"

On May 1, 2015, the February 2010 Notice of Insufficiency involving Class 3 and Class 4 segments of TH26 converted into a "Legal Trail" was dismissed as moot:

> we note that a town has wide discretion in determining the extent to which to maintain a Class 4[2] road, 19 V.S.A. § 310(b). We reject the notion that petitioners acquired some type of right to an undefined level of maintenance by filing a lawsuit, and that they should consequently be allowed to avoid basic subject matter jurisdiction requirements, including the requirement that a controversy remain "live" throughout the course of a legal proceeding. This segment has been deemed a trail, and there is no legal basis on which to order the Town to maintain a trail. (SA-76)

On January 15, 2016, the Vermont Supreme Court ratified Defendant Town of Underhill's discretion in relation to the second Notice of Insufficiency submitted by Demarest and two co-petitioners involving the segment of TH26 which had retained a Class IV town highway classification after the 2010 New Road Reclassification, stating:

> Although the Town's road policy establishes less

[2] The first-filed Notice of Insufficiency involved segments of TH26 which were Class 3 and Class 4 prior to Municipal Defendant's 2010 New Road Reclassification. A second Notice involved the still unmaintained Class 4 segment remaining after the reclassification.

> town responsibility for Class 4 highway repair and maintenance than appellees desire, or even than the Commissioners recommend, it is fully consistent with the discretion accorded by § 310(b). Both appellees and the Commissioners are bound to respect the Town's discretion, and cannot "trump the selectboard's decision through their own view of what the public requires." Id. at 622, 795 A.2d at 1269. [(from decision not in the record)]

On May 26, 2016, Demarest appealed the Underhill Selectboard's May 5, 2016 denial of a preliminary access permit to the Vermont Superior court under Vt.R.Civ.P. Rule 75.

On April 10, 2019, the Vermont Superior Court declined to issue a declaratory judgment that Demarest has a 19 V.S.A. § 717(c) right of access to his property on the former TH26 segment which Municipal Defendants had ordered reclassified as a Legal Trail in 2010, and granted the Defendant Motion for Partial Summary Judgement based upon *res judicata*:

> The trial court's ruling on Demarest's [Vt.R.Civ.P. Rule 75] appeal regarding reclassification was a final judgment on the merits between the same parties, and the claim for declaratory relief regarding Demarest's right of access to what is now Crane Brook Trail could have been fully litigated in that proceeding.

On April 30, 2020, Demarest's Appellant brief to the Vermont Supreme Court, still under the Vt.R.Civ.P. Rule 75 standard of review, did not argue any Takings or Due Process claims.

On February 26, 2021, the Vermont Supreme Court decision affirmed the lower court's application of *res judicata* to the last Vt.R.Civ.P. Rule 75 Appeal of a Municipal Decision, due to the wording of the Underhill Trail Ordinance:

> As explained above, the Selectboard did not reach the question of whether to grant plaintiff an access permit to a town highway under [19 V.S.A. § 1111]. The Selectboard denied plaintiff's request to allow vehicular access across Crane Brook Trail pursuant to its discretion under the Town ordinance. [(¶33 of decision not in the record)]

SUMMARY OF THE ARGUMENT

> Deferential: showing or expressing respect and high regard due a superior or an elder: showing or expressing deference
>
> ["Deferential." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/deferential. Accessed 26 Jun. 2022]

Plaintiff-Appellant was not and could not have been a party to the Vermont Supreme Court's *Ketchum* interpretation of "altered" (¶12 of decision not in the record) and presently has standing to challenge the

Constitutional validity of 19 V.S.A. §701(2) as Vermont court *stare decis* has caused this statute to be applied. In matters which *may* implicate a town's eminent domain powers, such as whether or not the town "altered" TH26 (according to the §701(2) definition, as opposed *any* other definition of the word), the Vt.R.Civ.P. Rule 74 appeal process would provide structural due process, but a deferential Vt.R.Civ. P. Rule 75 appeal process merely forced Vermont courts to ratify Municipal Defendants' record and municipal "discretion."

This Court's decision in *Cho ex rel. Situated v. City of N.Y.*, Docket No. 18-337-cv (910 F.3d 639) perfectly describes the error of applying Rooker-Feldman Doctrine to present Causes of Action:

> On appeal here, plaintiffs allege, inter alia, that the state courts merely ratified rather than produced their injuries, and that therefore, the district court erred when it dismissed their suit for lack of jurisdiction. We thus begin by analyzing Rooker-Feldman's "core" substantive requirement: are the injuries of which plaintiffs complain produced by the state-court judgments at question or merely ratified by such judgments? We conclude that they are merely ratified…

Res judicata does not preclude present Causes of Action which are timely filed after the legal ambiguities built into an otherwise unenforced Trail Ordinance were finally decided, and exactly two years after *Knick v. Township of Scott* corrected the error of *Williamson County* precedent.

ARGUMENT

A. STANDARD OF REVIEW FOR Fed.R.Civ.P. Rule 12(b)(6)

This Court reviews the granting of a motion to dismiss on the pleadings *de novo*. *See Karedes v. Ackerley Group, Inc.*, 423 F.3d 107, 113 (2d Cir. 2005) ("We apply a *de novo* standard of review to the grant of a motion to dismiss on the pleadings, accepting as true the complaint's factual allegations and drawing all inferences in the plaintiff's favor.")

B. PRIOR DEFERENTIAL STANDARD OF REVIEW DOES NOT APPLY TO § 1983 CAUSES OF ACTION

Vermont statute constrained all prior Vermont Supreme Court appeals in which Plaintiff (and former co-parties) challenged municipal decisions to *fully deferential* Vt.R.Civ.P. Rule 75 *ratification* of a Municipal Defendant record, akin to a *writ of certiorari.*

Present claims require a non-deferential standard of review after discovery which conforms to Federal evidentiary standards.

The Opinion and Order under appeal correctly states:

> To allege a violation pursuant to § 1983, a plaintiff must plausibly plead "(1) actions taken under color of [state] law; (2) deprivation of a constitutional or statutory right; (3) causation; [and] (4) damages." *Roe v. City of Waterbury*, 542 F.3d 31, 36 (2d Cir. 2008).

The Opinion and Order under appeal also correctly states:

> The accrual date of a § 1983 cause of action, however, is a "question of federal law that is not resolved by reference to state law." *Wallace*, 549 U.S. at 388; see also *Spak v. Phillips*, 857 F.3d 458, 462–63 (2d Cir. 2017). Under federal law, accrual occurs "when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief[.]" *Wallace*, 549 U.S. at 388

C. STATUTE OF LIMITATIONS AND ACCRUAL DATE

The Statute of Limitations for a § 1983 Takings claim in Vermont is six years (12 V.S.A. § 511) and the earliest potential takings and due process accrual date occurred on June 21, 2019, when *Knick v. Township of Scott* corrected the legal error of *Williamson Country.* Vermont statutory changes delayed the ability to raise claims of a taking of a reversionary property right because "*reclassifications"* no longer meet the vague statutory definition of "*altered*."

For the purposes of deciding a Fed.R.Civ.P. Rule 12(b)(6) motion if the Court does not presently "accept as true all of the allegations contained in a complaint," Plaintiff should be granted leave to correct the unartfully pleaded portions of the complaint involving Municipal Defendants named in the Notice of Appeal after a limited discovery period to reach the higher "plausibility standard" created by *Ashcroft v. Iqbal, 556 U.S. 662, 678.* (2009).

D. ROOKER-FELDMAN & *RES JUDICATA* INAPPLICABLE

Rooker-Feldman Doctrine is purely a jurisdictional bar to District Court *appellate review* of State court decisions between parties in privity, it does not eliminate a District Court jurisdiction on Takings and Due Process causes of action complaining of harm *caused by* municipal defendants' actions and inactions or standing to challenge an unconstitutionally vague statute which granted unbridled discretion to the municipal defendants.

Despite years of knowing Municipal Defendants *intention* to rescind Plaintiff's personal use of a significant portion of TH26, the denial of Plaintiff's *preliminary* access permit on May 5, 2016 was the first instance of his personal access right and reasonable investment backed

returns being irrefutably impacted (despite still requiring exhaustion of potential State remedies under the error of Williamson County's *stare decis*). Municipal Defendants' circular arguments are now undeniable.

Despite a common dictionary definition of "altered" being "Made different in some way,[3]" Municipal Defendant discretion to rescind Plaintiff's 19 V.S.A. § 717(c) (AD-1) self-executing private right of access over a former town highway ***still*** cannot meet the 19 V.S.A. § 701(2) definition of "altered" as precedentially applied.

State court ratification of municipal defendants' discretion during Vt.R.Civ.P. Rule 75 appeals simply cannot be extrapolated into a Rooker-Feldman or *res judicata* preclusion since present Federal Causes of Action had not yet accrued and were never previously litigated. In accordance with the Full Faith and Credit Clause of 28 U.S.C. § 1738, Plaintiff adds emphasis to "Response in Opposition" section III(D) (A-171), which refers to ¶50 A, B and C of the First Amended Complaint

[3] "Altered." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/altered. Accessed 26 Jun. 2022.

listing the very few independent findings of fact made throughout State court review of Municipal Defendant decisions (A-28).

> [T]he ordinary and expected outcome of many a meritorious §1983 suit is to declare unenforceable (whether on its face or as applied) a state statute as currently written. See, e.g., *Cedar Point Nursery v.Hassid*, 594 U. S. ___ (2021). And in turn, the unsurprising effect of such a judgment may be to send state legislators back to the drawing board. See, e.g., *Kolender v. Lawson*, 461 U. S. 352, 358 (1983).
>
> [(As cited in *Nance v. Ward*, No. 21–439 (2022))]

Given both "reclassification" and a history of refusing to maintain the central Class III/Class IV segment did not statutorily quality as "altered" it was impossible for a personal damages element of a takings claim to accrue;

> [A person] raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws…does not state an Article III Case or Controversy. (*Lujan v. Defenders of Wildlife* 504 U.S. 555, 112 S.Ct. 2130 , 119 L.Ed.2d 351 *No. 90-1424*)

E. VAGUE STATUTORY DEFINITION OF "ALTERED"

None of the Municipal Defendants' ongoing decisions involving the segment of TH26 which was *discontinued as a town highway and reclassified by the Town as a legal trail* (or the sustained refusal to

provide *any* maintenance to a portion of the remaining Class IV segment of TH26) met the vague definition of "altered" statutorily stated by 19 V.S.A. § 701(2) as:

> a major physical change in the highway such as a change in width from a single lane to two lanes.

Municipal Defendants irrationally continue to claim:

> Nothing has been taken from Plaintiff that was not already taken from his predecessors in title…."[D]owngrading a road does not involve a taking." *Ketchum v. Town of Dorset, 2011 VT 49, ¶13, 190 Vt. 507, 510.*
>
> The only practical change is that Plaintiff can no longer drive a vehicle over the Southern Access Route… (middle of page A-129)

Plaintiff presently has standing to challenge the unconstitutionally vague statutory definition of "altered" given by 19 V.S.A. § 701(2) as precedentially interpreted in the *Ketchum v. Town of Dorset* because Plaintiff was not a party in privity to the *Ketchum decision*;; Vermont courts no longer have Vt.R.Civ.P. Rule 74 jurisdiction to overrule Selectboard discretion on much beyond widening a town highway from one lane to two because of *Ketchum's stare decis*. The affidavits (A-13 and A-194 to A-196) of former Underhill Road Foremen increase the plausibility of present Causes of Action against Municipal Defendants.

Once the Vermont legislature's grant of unconstitutionally broad discretion to municipal selectboards was set by *Ketchum's stare decis* all the prior Vermont Supreme Court administrative reviews and *mere ratification* of narrowly defined present Municipal Defendant actions involving Plaintiff did little more than demonstrate the vital statewide importance of Plaintiff's present standing to challenge to the constitutional validity of statutorily conferring such a broad level of discretion to town selectboards due to a unconstitutionally vague statute.

F. TRAIL ABUTTERS *MAY* LOSE PRIOR ACCESS RIGHTS

Plaintiff-Appellant's self-executing private right of access for 'compelling personal or business purposes' was recognized on the former TH26 segment by the Underhill Trail Ordinance and plausibly preserved by *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 207, 762 A.2d 1219, 1224-25 (2000) ***until*** the ratification of Municipal Defendants' *ipse dixit* Underhill Trail Ordinance's "discretion" to *rescind* Plaintiff's self-executing rights of access on the former TH26 segment.

Municipal Defendants have gone to extreme taxpayer expense to *rescind* Plaintiff's self-executing common law private

right of access instead of simply discontinuing the segment and allowing Plaintiff and other abutters to privately maintain it.

Vermont Statute 19 V.S.A. § 717(c) states:

> A person whose sole means of access to a parcel of land or portion thereof owned by that person is by way of a town highway or unidentified corridor that is subsequently discontinued shall retain a private right-of-way over the former town highway or unidentified corridor for any necessary access to the parcel of land or portion thereof and maintenance of his or her right-of-way.

Vermont statute 19 V.S.A. § 302(a)(5) states "Legal Trails" are not town highways and the law *at the time TH26 was laid out* unequivocally established abutting property owner's reversionary property rights in the event the town highway was discontinued (Vermont Statutes of 1906, Chapter 107 Sec. 3904). More recent statutory ambiguities delayed accrual of plausible Takings claims in Vermont courts but as already argued:

> Clearly established Federal case law, such as *Caquelin v. United States (2015)*, recognizes converting the use of a Railroad Right of Way (which unlike a town highway generally provides little if any utility or right to vehicular access to an abutting landowner) into use as a Recreational Trail constitutes a categorical taking. (A-159 lines 7-11)

Caquelin v. United States, 2019-1385, 959 F.3d 1360 is demonstrative of many of the constitutional problems with certain types of efforts to develop recreational trails under color of law at the expense of individual private property owners instead of the public as a whole.

Municipal Defendants' deliberate indifference to both the rights of landowners and rights of voters at the polls (as indicated by multiple refusals to present voters with ballots to vote upon duly submitted petition articles) has converted a once publicly maintained and functional segment of TH26 usable by all into an *unmaintained* public trail which *rescinds* self-executing landowner access rights. The Kafkaesque maze of deferential State court Vt.R.Civ.P. Rule 75 administrative review of municipal actions which did not meet the 19 V.S.A. § 701(2) statutory definition of "altered" were diligently pursued in accordance with *Williamson Country.* As of February 2021, there are no longer any ambiguities remaining involving the unenforced Underhill Trail Ordinance impacts on an abutting landowners' 19 V.S.A. § 717(c) access rights.

Plaintiff timely filed present § 1983 Takings and Due Process Causes of Action two years after *Knick v. Township of Scott*.

> The Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960). See also *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304, 318–319, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) ; *Penn Central Transp.* Co. v. New York City, 438 U.S. 104, 123–125, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).
>
> *(as cited in Ark. Game & Fish Comm'n v. United States, No. 11–597. 568 U.S. 23, 133 S.Ct. 511 , 184 L.Ed.2d 417)*

CONCLUSION

The district court should apply the higher "plausibility standard" being applied to the initial pleadings equally to Municipal Defendants' motion to dismiss. For the purposes of deciding a Fed.R.Civ.P. Rule 12(b)(6) motion, Plaintiff should have been granted an opportunity to conduct preliminary discovery (given the complexity of claims alleged against Municipal Defendants) followed by leave to file a more artfully pleaded complaint able to reference evidence which meets Federal evidentiary standards.

For the reasons set forth above, the Order (A-226) granting Municipal Defendants' motion to dismiss involving parties on the Notice of Appeal (A-259) should be REVERSED in part, and the case should be REMANDED to the Vermont District Court for further proceedings consistent with the findings of this Court involving Municipal Defendants named on the Notice of Appeal.

Date: June 29, 2022

Respectfully submitted,

s/ David Demarest

David Demarest, *pro se*
P.O. Box 144
Underhill, VT 05489
(802) 363-9962

Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify pursuant to Fed.R.App.P. 32(a) that the attached brief is proportionally spaced, has a typeface (Century) of 14 points, and contains 5169 words (excluding, as permitted by Fed.R.App.P. 32(a)(7)(B), the corporate disclosure statement, table of contents, table of authorities, and certificate of compliance), as counted by the Microsoft Word processing system used to produce this brief.

Date: June 29, 2022

Respectfully submitted,

s/ David Demarest

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(802) 363-9962

Plaintiff-Appellant

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CERTIFICATE OF SERVICE

CAPTION: **Demarest v. Underhill** DOCKET NUMBER **22-956**

I, David Demarest, hereby certify under penalty of perjury:

On June 29, 2022, I served on all parties or their counsel of record through electronic delivery by the CM/ECF system a copy of:

Plaintiff-Appellant's Brief and Plaintiff-Appellant's Appendix

by using the appellate CM/ECF system with consent.

All the participants in this case or their counsel of record are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: June 29, 2022

Respectfully submitted,

/s/ David Demarest

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Plaintiff-Appellant

ADDENDUM OF STATUTES AND ORDINANCES

STATUTES

19 V.S.A. § 302(a)(3)(B): The minimum standards for class 3 highways are a highway negotiable under normal conditions all seasons of the year by a standard manufactured pleasure car. This would include but not be limited to…

19 V.S.A. § 302(a)(5): Trails shall not be considered highways and the town shall not be responsible for any maintenance, including culverts and bridges.

19 V.S.A. § 701(2): "Altered" means a major physical change in the highway such as a change in width from a single lane to two lanes

19 V.S.A § 717(c): A person whose sole means of access to a parcel of land or portion thereof owned by that person is by way of a town highway or unidentified corridor that is subsequently discontinued shall retain a private right-of-way over the former town highway or unidentified corridor for any necessary access to the parcel of land or portion thereof and maintenance of his or her right-of-way. (Added 1999, No. 156 (Adj. Sess.), § 25, eff. May 29, 2000; amended 2005, No. 178 (Adj. Sess.), § 4.)

19 V.S.A. § 740(a): When a person owning or interested in lands through which a highway is laid out, altered, or resurveyed by selectboard members objects to the necessity of taking the land, or is dissatisfied with the laying out, altering, or resurveying of the highway, or with the compensation for damages, he or she may appeal, in accordance with Rule 74 of the Vermont Rules of Civil Procedure, to the Superior Court in the same county, or in either county when the highway or bridge is in two counties. Any number of aggrieved persons may join in the appeal. The appeal shall be filed within 30 days after the order of the selectboard members on the highway is recorded. If the appeal is taken from the appraisal of damages only, the selectboard members may proceed with the work as though no appeal had been taken. Each of the appellants shall be entitled to a trial by jury on the question of damages.

the county, except one laid out by order of the supreme court; and the supreme court may discontinue a highway laid out under the order of such court or which extends into or through two or more counties; and such roads may be discontinued whether they have been made or not. The commissioners appointed to discontinue a highway shall be disinterested freeholders, other than those appointed to lay out the highway. A decree or order made under the provisions of this section may be reviewed by the county or supreme court under the same conditions and the same proceedings shall be had thereon as are provided for the laying out of highways.

SEC. **3901. Notice; costs.** When application by petition is made to the county or supreme court, to discontinue a highway laid by commissioners appointed by either of such courts, which has not been built agreeably to the orders of such court, the petition shall be served on one or more of the original petitioners for the laying of such road, as well as on one or more of the selectmen of the town or towns through which the road is laid, or the same, on motion, shall be dismissed; and, if commissioners are appointed who report adversely to the prayer of the petition, the original petitioners shall, in the discretion of the court, be entitled to costs. V. S. § 3380. R. L. § 2992. 1868, No. 10.

SEC. **3902. County highways.** The selectmen may discontinue such portions of the old county highways laid out by county or county court commissioners as the public good requires, when such highways have not been in use for one year, or have been abandoned by reason of new highways. V. S. § 3381. R. L. § 2993. 1870, No. 53.

SEC. **3903. Highways ordered by general assembly.** Selectmen may alter or discontinue a highway laid out by a committee appointed by the general assembly; but if the highway is laid through two or more towns, the same proceedings shall be had as in laying, altering or discontinuing highways through two or more towns. V. S. § 3382. R. L. § 2994. G. S. 24, § 74. 1842, No. 10.

SEC. **3904. Title to discontinued highway.** When a highway is discontinued, it shall be set and belong to the owners of the adjoining lands; if it is located between the lands of two different owners, it shall be set to the lots to which it originally belonged, if they can be ascertained; if not, it shall be equally divided between the owners of the lands on each side. V. S. § 3383. R. L. § 2995. G. S. 24, § 75. R. S. 20, § 50. 1813, p. 165. 7 Vt. 514.

SEC. **3905. Assessment of damages void.** When a public highway is laid out, and the damages are assessed to the owners of the land, and the highway is legally discontinued before being worked or opened, the assessment of damages shall become void, and no action shall be maintained thereon. V. S. § 3384. R. L. § 2996. G. S. 24, § 82.

SEC. **3906. Recovery of actual damages.** The owner of the land over which such discontinued highway was laid may recover of the town the actual damages sustained by him in consequence of laying out the highway, in an action on the case founded on this statute. Such damages shall be fixed and allowed by the board discontinuing the road, at the time of discontinuance; and the same proceedings may be had in fixing the V. S. § 3385. R. L. § 2997. G. S. 24, § 82.

UNDERHILL TRAIL ORDINANCE

TRAVEL ON TRAILS

SECTION 1. AUTHORITY. This is a civil ordinance adopted under authority of 24 V.S.A. §§ 1971 and 2291(14), and 19 V.S.A. § 304(5).

SECTION 2. PURPOSE. The purpose of this ordinance is to prevent environmental damage and pollution caused by vehicular traffic on the trail. Such damage and pollution are hereby deemed to be a public nuisance.

SECTION 3. DEFINITIONS. For purposes of this ordinance, the following definitions shall apply:

a. *Motor Vehicle* shall include all vehicles propelled or drawn by power other than muscular power, except tractors used entirely for work on the farm, vehicles running only upon stationary rails or tracks, motorized highway building equipment, road making appliances or snowmobiles, or implements of husbandry.
b. *Operate, operating* or *operated* as applied to motor vehicles shall include *drive, driving* and *driven* and shall also include an attempt to operate, and shall be construed to cover all matters and things connected with the presence and use of motor vehicles, whether they be in motion or at rest.
c. *Owner* shall include any person, corporation, co-partnership or association, holding legal title to a motor vehicle, or having exclusive right to the use or control thereof.
d. Crane Brook Trail shall mean the Legal Trail on New Road (Town Highway #26).

SECTION 4. ACTIVITY PROHIBITED. The operation of a motor vehicle is prohibited on the Crane Brook Trail from November 1st until May 1st unless the operator of the vehicle has a valid permit issued by the Underhill Selectboard.

SECTION 5. PERMITS.

a. Permits shall be issued only to persons who, in the judgment of the Selectboard, have a legitimate need to operate a vehicle on the Crane Brook Trail. For the purposes of this ordinance, 'legitimate need' shall mean a compelling personal or business purpose.
b. The only acceptable permit shall be one entitled "TOWN OF UNDERHILL PERMIT TO OPERATE A MOTOR VEHICLE ON THE CRANE BROOK TRAIL" and signed by the members of the Underhill Selectboard. One copy of the permit shall be issued to the permittee and one copy shall be filed with the Underhill Town Clerk.
c. Permits shall be valid for residents and property owners so long as they continue to be residents or property owners. All other permits shall be renewed annually.

SECTION 6. PENALTIES. Any person who operates a motor vehicle on the Crane Brook Trail from November 1st to May 1st or who allows another person to operate their motor vehicle on Crane Brook Trail without a permit shall be fined $50.00, with a waiver fee of $35.00. If the owner and the operator of a vehicle being operated without a permit are not the same person, the owner and the operator shall each be liable for the fine of $50.00 or the waiver fee of $35.00.

SECTION 7. ENFORCEMENT OFFICERS. Enforcement shall be performed by the Underhill Town Constable or by any officer of the Chittenden County Sheriff's Department or by any other Vermont law enforcement officer.

SECTION 8. SEVERABILITY. If any portion of this ordinance is held unconstitutional or invalid by a court of competent jurisdiction, the remainder of the ordinance shall not be affected.

SECTION 9. EFFECTIVE DATE: This ordinance shall become effective 60 days after its adoption by the Underhill Selectboard. If a petition is filed under 24 V.S.A. § 1973, that statute shall govern the taking effect of this ordinance.

Stanton Hamlet, Chair
Walter 'Ted' Tedford
Peter T. Brooks

Wednesday, January 30, 2002 at 11:45 AM

Received for record: February 6. 2002

Attest: Nancy C. Bradford
Nancy C. Bradford, Town Clerk

ADOPTION HISTORY:

1. Agenda item at regular Selectboard meeting held on Wednesday, January 30, 2002.
2. Read and approved at regular Selectboard meeting on Wednesday, January 30, 2002 and entered in the minutes of that meeting which were approved on February 12th 2002
3. Posted on Friday, February 1st, 2002.
   Underhill Town Hall
   Underhill Country Store
   Jacob's IGA
   Underhill Center Post Office 05490
   Underhill Flats Post Office 05489
4. Notice of adoption published in the Burlington Free Press on Saturday, February 2, 2002 with a notice of the right to petition.

TOWN OF UNDERHILL
PERMIT TO OPERATE A MOTOR VEHICLE
ON CRANE BROOK TRAIL

PURSUANT TO THE ORDINANCE REGULATING TRAVEL ON THE CRANE BROOK TRAIL, as defined in the ordinance, the Underhill Selectboard hereby issues this permit to operate a motor vehicle on the trail to:

A. _____ (landowner/resident of the trail) and his/her invited guests); such permit to be valid so long as he/she is an owner/resident; or

B. _____, a person determined by the Underhill Selectboard to have a legitimate need to operate a motor vehicle on the trail, such permit to expire one year from this date.

_____ _____
Date For the Selectboard