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 Steinbauer, 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 Reply 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.

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INTRODUCTION

Claims subject to this appeal require a full and fair opportunity to litigate under a non-deferential standard of review. Claim preclusion does not apply to present Fifth Amendment takings or associated due process causes of action because these claims had not yet accrued and could not have been properly brought during Vt.R.Civ.P. Rule 75 proceedings involving Municipal Defendants' "reclassification" of a Class III and Class IV segment of TH26, town highway maintenance decisions, or even the Rule 75 proceedings involving a denial of a proposed subdivision's *preliminary* access permit. The Response Brief made no attempt to explain *why* a state court's *deferential* ratification of Municipal Defendants' decisions on narrowly defined administrative issues, with judicial review statutorily limited to Vt.R.Civ.P. Rule 75 and akin to a *writ of certiorari*, can now be extrapolated into decisions *on the merits* involving causes of action which were not previously at issue.

19 V.S.A. § 701(2), *as precedentially applied* after *Ketchum v. Town of Dorset*, 2011 VT 49, 190 Vt. 507, 22 A.3d 500, delayed accrual of present causes of action because alleging TH26 had been "altered" in state court was beyond "implausible," it was statutorily impossible.

CLARIFICATION OF ISSUES UNDER APPEAL

The facts as alleged and answers to the questions Plaintiff-Appellant has brought before this Court for review demonstrate the District Court erred by dismissing *with prejudice* takings and associated due process causes of action based upon Rooker-Feldman Doctrine, *res judicata,* the Statute of Limitations, or a combination of these defenses. Present causes of action were never raised in state or Federal court *and could not have been* fully and fairly litigated *until* Plaintiff had a full and complete 42 U.S.C. § 1983 cause of action which was plausible on its face.

Plaintiff is fully agreeable to seeking leave of the Court to plead First Amendment censorship and retaliation causes of action with additional specificity; despite this *very* early stage of present proceedings, First Amendment retaliation pleadings made in the Amended Complaint (A-96 ¶268) have already been partially substantiated by Exhibits 7 and 8 of Plaintiff's Opposition to Motion to Dismiss (A-211 to A-215).

Plaintiff stipulates to the dismissal of the Ninth and Tenth causes of action as they relate to the Jericho Underhill Land Trust and Front Porch Forum. For the purposes of preservation, causes of action involving

the alleged conspiring of town officials from within either legal entity is either preserved by naming the culpable town official on the Notice of Appeal or is presently unknowable to Plaintiff prior to *any* discovery.

If Federal pursuit of Municipal Defendants' January 12, 2021 violation of the First Amendment 'Right to Petition' *voters* of his town on a ballot is not possible; at a minimum Claims 11 and 12 should have been dismissed *without prejudice* to preserve Plaintiff's right to pursue a state court remedy for claims stemming from Municipal Defendants' refusal to place the *purely advisory* articles of the 2020 Petition On Public Accountability on a ballot, despite being duly submitted by Plaintiff with the required number of voter signatures according to Vermont statute.

Individuals named on the Notice of Appeal are proper to sue in their individual capacities for deliberate indifference, or worse, towards Plaintiff's constitutional rights.

TAKINGS CLAIM IMPLAUSIBLE IF TH26 WAS NOT "ALTERED"

A § 1983 challenge to Municipal Defendants' perfidious efforts to take Plaintiff's private property rights and to circumvent due process rights simply could not as a matter of law accrue if nothing was "altered" (according to the presently challenged statute *as applied*) or while the

requisite personal damages element to a recognized private property right or interest remained unduly speculative.

The Municipal Defendants' Underhill Trail Ordinance strategically maintained plausible recognition of Plaintiff's private rights to continued vehicular access over the former TH26 corridor; granting permits to operate a motor vehicle is *mandatory* based upon the verbiage "*shall be issued" for* any "compelling personal and business purpose" (AD-3). As a result, this makes it impossible for a private takings claim or associated due process claim to accrue *until* the Municipal Defendants caused more than a speculative harm to Plaintiff's private rights by actually rescinding a clearly established and self-executing private right of vehicular access over the former TH26 corridor.

Although the Underhill Trail Ordinance has *never* been enforced for over 21 years, Municipal Defendants' knowledge of Plaintiff's continued motor vehicle[1] use on the TH26 segment which was

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[1] Municipal Defendants' sustained refusal to provide *any* maintenance to portions of both Class IV and "Legal Trail" segments of TH26 (*and refusal to permit Plaintiff to maintain the "Legal Trail" segment at his own expense*) now physically constrains Plaintiff's motor vehicle access to very cautious use of "off-road" capable motor vehicles.

"discontinued as a town highway and reclassified as the "Crane Brook Trail" is confirmed by sworn testimony by Municipal Defendant Mike Wiesel on August 2, 2021 during the peripheral matter of the construction of a new bridge and associated public trail extension with a new entrance onto the northern Class IV segment of TH26 without any required permits, safe sight lines, or constructive notice to interested parties (Underhill Development Review Board Docket No. DRB-21-12).

The plausible personal damages element required for accrual of a takings claim was also delayed by Municipal Defendants strategic decision to only place boulders in the way of the current and former TH26 corridor *temporarily.* They were consistently and timely moved out of Plaintiff's way when requested, *until* Municipal Defendants' "written promise to move boulders placed in the way of Plaintiff's right of way was first broken on November 13, 2019." [as alleged, A-60 ¶153]

Municipal Defendants' willful disregard for the rights of private property owners abutting the central segment of TH26 is plainly evident in selectboard meeting minutes dated October 18, 2001 (excerpt on A-186) and a plethora of other public meeting minutes not yet in the record at the Motion to Dismiss stage of present proceedings.

The strategic failure to file a reclassification order in 2001 undeniably eliminated the standing of all interested parties to exercise their right to appeal the claimed 2001 reclassification "effort" and resulted in the Vermont State Agency of Transportation continuing to fund maintenance of the Class III portion of TH26 between the Town Highway Department garage and Plaintiff's domicile, despite Municipal Defendants' refusal to properly maintain the central Class III or Class IV segments of TH26.

The Municipal Defendants appeared to avoid any plausible claim of interference with personal property rights by the following acts: (1) promises made to Plaintiff prior to purchasing his property, (2) the issuance of a permit to build a domicile with a permit issued to New Road, and (3) passing of the willfully vague Underhill Trail Ordinance, which initially referenced a non-existent trail. Municipal Defendants have continued to treat Plaintiff dramatically differently than other similarly situated residents (for example, as alleged A-66 ¶171) and presently have continued to refuse to provide ***any*** maintenance to Plaintiff's limited remaining Class IV public road frontage.

Twenty-one years ago, it was unbelievable that a town would try to *rescind* landowners' self-executing private right of access on a road which

had been continuously used since the 1800's. Plaintiff could not plausibly plead a personal "injury in fact" to establish Article III standing until Municipal Defendants' decision[2] to actually exercise the *ipse dixit* discretion they now claim in an otherwise unenforced Trail Ordinance, which did not occur until the May 5, 2016 (Opening Brief, Chronological Statement of Facts, page 9).

> The essential question is not, as the Ninth Circuit seemed to think, whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—**or has instead restricted a property owner's ability to use his own property**. See *Tahoe-Sierra*, 535 U.S. at 321–323, 122 S.Ct. 1465. Whenever a regulation results in a physical appropriation of property, a per se taking has occurred
> *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021)

RETROACTIVE APPLICATION OF *KNICK* INCLUDED TOLLING

Municipal Defendants' Response acknowledges that the *retroactive application of Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) *included*

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[2] The Vermont Supreme Court ratified this decision February 26, 2021 under the Vt.R.Civ.P. Rule 75 deferential standard of review and "discretion" in the Trail Ordinance (Opening Brief, page 16)

equitable tolling for Plaintiffs, which had been dutifully attempted to exhaust potential state remedies, but failed to expand upon the rationale of applying state tolling laws in *4th Leaf, LLC v. City of Grayson*, 425 F. Supp. 3d 810 (E.D. Ky. 2019) :

> Because Kentucky's tolling laws are consistent with the federal policy underling section 1983, see *infra*, Kentucky's tolling laws apply here.
> *4th Leaf, LLC v. City of Grayson*, 425 F. Supp. 3d 810 (E.D. Ky. 2019)

It is precisely because the state's tolling laws were consistent with Federal policy that accrual was dictated by Federal law with tolling being applied in accordance with the state law. Federal law is controlling if a state's tolling provisions (or lack thereof) conflict with Federal policy; Federal law requires equitable tolling of takings and associated due process violations, when necessary, under the unique combination of fact and law leading up to the filing of present causes of action.

If *Knick* were to be applied retroactively without tolling for claims which as a matter of fact and law undeniably could not previously accrue under the Federal precedent of *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108 (1985), this could easily result in a travesty of justice. Equitable tolling of Federal takings and

associated due process claims is proper for any similarly situated Vermont resident documented to have exercised Plaintiff's timely diligence through a maze of Kafkaesque Vt.R.Civ.P. Rule 75 proceedings caused by statutory denial of a Vt.R.Civ.P. Rule 74 appeal process due to 19 V.S.A. § 701(2) as precedentially applied after *Ketchum v. Town of Dorset*, 2011 VT 49, 190 Vt. 507, 22 A.3d 500. In short, Municipal Defendants' hope that *Knick* can create a retroactive accrual date without equitable tolling would constitute a dramatic departure from Federal policy.

In addition, *Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014) succinctly summarized the error of a retroactive application of the Statute of Limitations when a town uses Municipal Defendants' strategy:

> But that argument would mean that a government entity could engage in conduct that would constitute a taking when viewed in its entirety, so long as no taking occurred over any three[3]-year period. We do not accept this. **The Town used extreme delay to effect a taking. It would be perverse to allow the Town to use that same delay to escape liability.**
> …
> A claim based on such a "death by a thousand cuts"

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[3] In Vermont, six years is clearly the appropriate Statute of Limitations after takings cause of action accrual according to 12 V.S.A. § 511

> theory requires a court to consider the entirety of the government entity's conduct, not just a slice of it.
> *Sherman v. Town of Chester*, 752 F.3d 554 (2d Cir. 2014)

PUBLIC ISSUES ARE DISTINCT FROM A TAKINGS CLAIM

Even if Vermont statute recognized the central segment of TH26 had been "altered" in some way by Municipal Defendant decisions, the Causes of Action subject to this appeal are separate and distinct from proceedings to which Plaintiff was a *co-party* involving a general public interest in what level of maintenance or highway classification is appropriate for a town road. Plaintiff never *could or should have* attempted to interject present non-deferential § 1983 takings or associated due process causes of action prior to their accrual into any of the prior deferential Vt.R.Civ.P. Rule 75 appeal proceedings.

The requisite personal damages element necessary for a plausible § 1983 claim was unduly speculative during TH26 maintenance and reclassification administrative proceedings. Since no segment of TH26 was "altered" according to 19 V.S.A. § 701(2) *as applied*, Plaintiff could not plausibly challenge the decision to indefinitely block abutters'

reversionary[4] property rights. Even if, *en arguendo*, *Knick* were to be applied retroactively without *any* tolling, as Municipal Defendants hope, takings or associated due process cause of action would have been unripe. At that time, Municipal Defendants' had not yet plausibly acted to sufficiently interfere with either Plaintiff's personal investment-backed returns, or the self-executing *and exercised* rights to continued vehicular access to Plaintiff's domicile and surrounding land conferred by both common law and 19 V.S.A. § 717(c) to plausibly allege *non-speculative* personal harm. Plaintiff incorporates by reference the chronology provided in the Opening Brief and the below reply given to the third question posed by Municipal Defendants' Response Brief.

CLAIM PRECLUSION DURING VT.R.CIV.P. RULE 75 APPEAL

Claim preclusion involving causes of action statutorily subject to an identical standard of review, which is akin to a *writ of certiorari,* is fundamentally different than the misapplication of *res judicata* on appeal. Unlike *all* prior Vt.R.Civ.P. Rule 75 proceedings, the Standard of Review involving the present causes of action requires fact-finding with

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[4] "Recovery of lands" in Vermont has a 15 year statute of limitations (12 V.S.A. § 501).

proper evidentiary support and is not deferential to unsubstantiated Municipal Defendant narratives.

The deferential Rule 75 ratification of Municipal Defendant discretion under the Underhill Trail Ordinance, and the application of *res judicata,* in *Demarest v. Town of Underhill*, 2021 VT 14, 214 Vt. 250, 256 A.3d 554, demonstrates that Plaintiff's private access rights on the former TH26 segment has been "altered" by Municipal Defendants from a functional publicly maintained Class III and Class IV town highway according to every common definition of the word "altered" (other than the vague definition given by 19 V.S.A. § 701(2) as applied under the *Ketchum v. Town of Dorset*, 2011 VT 49, 190 Vt. 507, 22 A.3d 500 precedent).

It is undisputed that causes of action on appeal were never litigated in state court. Therefore, issue preclusion does not apply. Since non-deferential causes of action require *facts* there is no nexus in common with a prior ratification of the "reclassification" in Demarest v. Town of Underhill, 2013 VT 72, 195 Vt. 204, 87 A.3d 439 which involved, "no fact-finding. It is an appellate-style review of an administrative decision." (A-200).

Claim preclusion requires a "common nucleus of operative facts," this essential element is elaborated upon by *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589 (2020):

> Put simply, the two suits here were grounded on different conduct, involving different marks, occurring at different times. They thus did not share a "common nucleus of operative facts."
> …
> Claim preclusion generally "does not bar claims that are predicated on events that postdate the filing of the initial complaint." *Whole Woman's Health* v. *Hellerstedt* , 579 U.S. ——, ——, 136 S.Ct. 2292, 2305, 195 L.Ed.2d 665 (2016) (internal quotation marks omitted); *Lawlor v. National Screen Service Corp.* , 349 U.S. 322, 327–328, 75 S.Ct. 865, 99 L.Ed. 1122 (1955) (holding that two suits were not "based on the same cause of action," because "[t]he conduct presently complained of was all subsequent to" the prior judgment and it "cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case").

The Response Brief notably fails to even mention *Ketchum v. Town of Dorset*, 2011 VT 49, 190 Vt. 507, 22 A.3d 500 *a single time* or explain *how* Plaintiff could have "fully and fairly" litigated claims on appeal, which require a non-deferential review of genuine facts, if according to current Vermont law *as applied* nothing has been "altered."

As alleged in the Amended Complaint:

> Numerous portions of the legal record contained in preceding state litigation are so severely prejudiced by misconduct of Defendant Town of Underhill, and town officials presently sued in their individual capacity, so as to serve as little more than a very compelling reason to issue Declaratory relief involving the precedent Vermont courts set in *Ketchum*… (A-36 ¶76).

As already quoted in the Opening Brief (Doc. 43), but not responded to in Municipal Defendants' Response Brief (Doc. 62), *Nance v. Ward*, 142 S. Ct. 2214 (2022) clearly recognizes:

> [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.
> (Opening Brief, page 27)
> *Nance v. Ward*, 142 S. Ct. 2214 (2022)

REPLIES TO DEFENDANT-APPELLEE QUESTIONS RAISED

Reply To Defendant-Appellee Question #1:

> Should Appellant's Amended Complaint be dismissed because the Appellant's Brief is nearly incomprehensible and fails to comply with Fed. R. App. P. 28(a) and Local Rule 28.1(a)?

As required by Fed.R.App.P. 28(a) and Local Rule 28.1(a) Plaintiff-Appellant's Brief (Doc. 43) strived to be both concise and free of irrelevant matter by only presenting questions necessary to correct the premature dismissal *with prejudice* of meritorious claims. The primary arguments against the application of Rooker-Feldman Doctrine (A-156, III(A)), *Res judicata (A-153)*, or the Statute of Limitations (A-169, IIIC) were already made in Opposition to Municipal Defendants' Motion to Dismiss; Plaintiff-Appellant's Brief (Doc. 43, pages 7-16) and elaborated on in the chronology which demonstrates the absolute earliest date Plaintiff-Appellant *could* have filed the claims subject to this appeal.

Even now, the original Class III and Class IV segments of TH26, which were "discontinued and reclassified by the Town as a legal trail" and which Municipal Defendants now have the discretion to rescind Plaintiff's self-executing private property right of access ***still*** has not been "altered" according to *Ketchum* since TH26 was not "widened from

one lane to two lanes." Plaintiff incorporates by reference the reply to Question #3 below and the chronology on pages 7-16 of the Opening Brief.

Municipal Defendants' Response Brief has dramatically departed from prior arguments in their Motion to Dismiss which claimed, "Plaintiff enjoys a common law right of access to Crane Brook Trail as an abutting landowner." (top of A-130) and the quoting of the presently challenged *Ketchum v. Town of Dorset*, 2011 VT 49, 190 Vt. 507, 22 A.3d 500 precedent, "[D]owngrading a road does not involve a taking." (A-129).

The Response Brief has completely failed to respond to the Opening Brief's quote of *Nance v. Ward*, 142 S. Ct. 2214 (2022), Federal policy does not support a *retroactive* claim preclusion argument, given that *Knick* expressly corrected the error of *Williamson County* delay (or potential complete denial) of meritorious takings and associated due process claims. Also, even the denial of a *preliminary* access permit application to a proposed subdivision of Plaintiff's property did not yet create a personal damages claim plausible on its face if nothing had been "altered," explained on pages 22 through 27 of Plaintiff's Opening Brief and elaborated upon on page 3 and page 23 of this Reply.

Reply To Defendant-Appellee Question #2:

> Should Appellant's Amended Complaint be dismissed because the Appellant's Brief expressly abandons many of the claims asserted in the Amended Complaint and abandons the remaining claims by failing to address the district court's dispositive and independent bases for dismissal?

The preliminary statement (Opening Brief, page 8) and issues presented for review (Opening Brief, page 2) clarified the parties and issues on appeal, further elaborated under the heading "Clarification Of Issues Under Appeal" (page 2). The District Court erred by dismissing Causes of Action 1 through 6 *with prejudice* based upon Rooker-Feldman Doctrine, *res judicata*, the Statute of Limitations, Failure to State a Claim, or a combination of these defenses. After a limited discovery period, leave to amend should be feely granted on all claims against the Municipal Defendants named on the Notice of Appeal.

Reply To Defendant-Appellee Question #3:

> Has Appellant demonstrated any error in the District Court's decision?

Appellant has demonstrated the dismissal *with prejudice* of takings and associated due process causes of action was in error because present causes of action were not *and could not have* been fully and fairly litigated in preceding deferential state court Vt.R.Civ.P. Rule 75 appeal

proceedings, which ratified narrowly defined issues. Present takings and due process causes of action could not accrue until *Knick* wisely overturned the prior *Williamson County* precedent. A retroactive application of *Knick* in accordance with a Federal law accrual determination requires the simultaneous application of equitable tolling in accordance with the Federal policy underlying § 1983 takings and associated due process claims. In addition, these claims were timely filed because they did not accrue until Plaintiff was harmed, when the personal damages element of these claims was plausible on its face. Accordingly, these claims are not barred by *res judicata.* Plaintiff did not *and could not have* properly brought any present causes of action during any of the prior deferential Vt.R.Civ.P. Rule 75 proceedings, including the May 26, 2016, appeal of Municipal Defendants' discretionary denial of a *preliminary* access permit application to Plaintiff's proposed subdivision. A permit application denial does not, *in and of itself*, create a cause of action for the taking of a protected property right.

Reply To Defendant-Appellee Question #4:

> Does *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019) provide a basis for extending the accrual date of Appellant's Fifth Amendment takings claims or tolling the applicable statute of limitations?

It has never been argued that *Knick* extends an accrual date; the error of *Williamson County* precedent is what requires equitable tolling of the claims subject to this appeal. The error would occur if *Knick* were to be applied retroactively after Plaintiff dutifully followed established Federal precedent while subjected to Vermont statute 19 V.S.A. § 701(2), which presently grants local municipalities unconstitutionally broad discretion to reclassify, convert, or substantially change a town highway according to this statute in any number of ways which do not meet the vague statutory definition of "altered" as precedentially applied due to *Ketchum*. Without the impartial determination of "necessity" required under Vermont eminent domain laws (10 V.S.A. § 958), under *Ketchum* significant changes to a town highway *may or may not* eventually result in the taking of private property rights for public use without compensation or a meaningful time and manner to oppose a likely taking,

Plaintiff incorporates by reference reply to Appellee Question #3 and adds emphasis to the impossibility of a successful takings claim (or indeed *any* claim), if nothing was "altered" according to the challenged statute, 19 V.S.A. § 701(2), as applied after the *Ketchum* precedent.

In addition to equitable tolling, equitable estoppel, and promissory estoppel arguments already raised (A-169) in relation to tolling of the Statue of Limitations, tolling due to the State of Emergency caused by COVID (A-171) must be taken into account when determining the timeliness of present causes of action. *En arguendo*, solely factoring in tolling due to COVID and no other tolling arguments, all claims which would have otherwise expired between March 13, 2020 and the filing date of the original complaint are timely filed according to Vermont law.[5]

Reply To Defendant-Appellee Question #5:

> Does the Rooker-Feldman doctrine bar Plaintiff's Causes of Action 1 and 2 because those claims seek review and rejection of previous state court orders in which Plaintiff was the losing party?

Rooker-Feldman does not bar causes of Action 1 and 2 because these causes of action explicitly attack Municipal Defendants' willful

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[5] Section 6 of Act No. 95 (S.114), signed into law April 28, 2020, states, in part, "all statutes of limitations or statutes of repose for commencing a civil action in Vermont that would otherwise expire during the duration of any state of emergency declared by the Governor arising from the spread of COVID-19 are tolled until 60 days after the Governor terminates the state of emergency by declaration."
Vermont Governor Phil Scott's Executive Order 06-21, confirms the statewide COVID-19 Declaration of State of Emergency was "issued March 13, 2020 as amended and restated, and which expired by its terms June 15, 2021." Claims at issue were filed June 21, 2021.

actions and inactions. The partial ratification of Municipal Defendants' decisions in accordance with their own narrative and associated record under a deferential Vt.R.Civ.P. Rule 75 standard of administrative review of a municipal decision, akin to a *writ of certiorari*, does not undermine District Court jurisdiction over present causes of action. Critical to analysis of the Rooker-Feldman's jurisdictional bar, Plaintiff does not complain of any damages *caused by* a state court judgement on the merits *to which he was or could have been a party*.

Notably, Defendants" Response Brief (Doc. 62) blatantly ignored[6] the precedent set in *Ketchum* which jurisdictionally forced the Vermont Supreme Court to ratify Municipal Defendants' Order of Reclassification, and also Municipal Defendants' discretion in the maintenance case of *Demarest v. Town of Underhill*, 2016 VT 10, 201 Vt. 185, 138 A.3d 206:

> It is not for this Court to consider the merits of the Town's justification or reasoning…
> …
> ¶ 15. We note appellees' concern that the broad discretion under § 310(b) binds the Commissioners

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[6] The Response Brief Table of Authorities does not include the *Ketchum* precedent *at all* despite Municipal Defendants *complete* reliance on this precedent in *all* Vermont Supreme Court *ratifications* of a town's *ipse dixit* discretion. The 12(b)(6) motion to dismiss (including A-126 ¶A and A-129) also heavily relied on *Ketchum's stare decis*.

> and the trial court, leaving them virtually powerless to reach a differing conclusion absent a showing of arbitrary and discriminatory decision making. This argument was raised, and addressed by this Court, in Town of Calais. We again note, as we did in that case, that although "it is difficult to imagine a circumstance under which any class 4 road would ever be repaired," even when required by the public good, that is not "the policy adopted by the Legislature, and we must implement the Legislature's policy choice rather than the court's." *Town of Calais v. Cnty. Rd. comm'rs*, 173 Vt. 620, 795 A.2d 1267 (2002) Nearly fifteen years have passed since that decision, but the Legislature has yet to amend either § 971 et seq. or § 310(b) to clarify the Commissioners' role, or lack thereof, as it relates to repairs and maintenance of Class 4 highways. We are left to restate our conclusion from *Town of Calais*.
>
> *Ketchum v. Town of Dorset*, 2011 VT 49, 190 Vt. 507, 22 A.3d 500

Plaintiff has standing to challenge the constitutionality of 19 V.S.A. § 701(2) *as applied* and to finally receive a full and fair opportunity to litigate present causes of action under a non-deferential standard of review. Municipal Defendants' Response Brief also fails to address the implications of *Sung Cho v. City of N.Y.*, 910 F.3d 639 (2d Cir. 2018) as it relates to the prior *deferential ratifications* of Municipal Defendants' *ipse dixit* record and narratives while simultaneously ignoring the clear implications of the Opening Brief's quote of *Nance v.*

Ward, 142 S. Ct. 2214 (2022) (Opening Brief, page 22).

ACCRUAL OF TAKINGS & DUE PROCESS CAUSES OF ACTION REQUIRES *NON-SPECULATIVE* PERSONAL HARM

> Each element of standing "must be supported ... with the manner and degree of evidence required at the successive stages of the litigation," and at the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice." (Lujan , 504 U.S. at 561, 112 S.Ct. 2130)
> …
> Injury in fact consists of "an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical."
> (Spokeo, 136 S.Ct. at 1548)
> As cited in *John v. Whole Foods Mkt. Grp., Inc.,* 858 F.3d 732 (2d Cir. 2017)

Under a deferential standard of review akin to a *writ of certiorari,* a state court's inquiry into plausible accrual of a never before litigated takings claim and associated due process claims, or any substantial alteration to TH26 which fails to meet the statutory definition of altered such as the findings of fact made in the report of the County Road Commissioners (A-202), would have been circumvented by Municipal Defendants' unbridled statutory discretion and ability to create their own narrative as a substitute for genuine facts.

Judicial estoppel requires Municipal Defendants to somehow

manage to keep their consistently changing narrative consistent. Municipal Defendants' response brief dramatically departed from the original arguments presented in their Motion to Dismiss claiming, "Nothing has been taken from Plaintiff that was not already taken from his predecessors in title…" (middle of page A-129) or Municipal Defendants' *new* arguments which no longer argue "[Plaintiff] had the opportunity to present his claims to the County Road Commissioners…" (A-133) as a *meaningful time and manner to be heard* for the purposes of a procedural due process analysis simply because the County Road Commissioner's Decision found "Repairs are to consist of those repairs recommended by petitioners…" (A-207). Comity dictates *Full Faith* be extended to *findings of fact* in prior state proceedings *but not to deferential ratifications* of a defendant-created record. Judicial notice should be taken that Municipal Defendants' original response and defenses raised to the first-filed Notice of Insufficiency (A-182) have been found *as a matter of law and fact* to be without *any* merit (A-193, Court Ruling the "2001 attempt to reclassify TH26 was not valid") and (A-202 to A-210, Report of County Road Commissioners) *at a non-deferential standard of review.*

Despite only being at the initial pleadings, Plaintiff has also submitted credible support (affidavit A-13 and table A-39) of factual allegations made in the Amended Complaint ¶79-84 of A-37 to A-38.

The Response Brief's dramatic departure from prior arguments now concedes "reclassification of a portion of TH26 to a 'trail' is significant…" (Response Brief, page 2), while still ignoring the reversionary property rights guaranteed TH26 abutters at the time the town highway was established by Vermont Statutes of 1906, Chapter 107, Sec. 3904 (AD-2); this new concession does not create a retroactive accrual date for takings or associated due process claims. No matter how "significant" Municipal Defendants' may presently concede the willful changes to the central segment of TH26 have been, these changes still do not statutorily meet the vague statutory definition of "altered" given by 19 V.S.A. § 701(2) as applied after the precedent set in *Ketchum v. Town of Dorset*.

> In adjudicating a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) , the court must "accept as true all of the allegations contained in a complaint" and decide whether the complaint states a claim for relief that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009) (internal quotation marks omitted). (A-233)

The more egregious any defendant's conduct, the greater a burden any plaintiff faces to file plausible pleadings before the opportunity to conduct ***any*** discovery. The facts alleged and the answers to the questions raised on appeal demonstrate Plaintiff has plausible takings and associated due process claims against Municipal Defendants named on the Notice of Appeal, granting Plaintiff a limited period for discovery followed by Leave of the Court to file a Second Amended Complaint on Claims 1 through 8 (and claims 9 and 10, but only to the extent claims 9 and 10 implicate individual town officials either named on the Notice of Appeal or presently unknowable to Plaintiff) properly balances the judicial efficiency created by the plausibility standard with a grave risk of premature dismissal of meritorious civil rights claims absent any discovery. From 2001 until the present day, it is profoundly implausible Municipal Defendants could have been unaware of the implications of *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) or that 10 V.S.A. § 958 limits Vermont municipalities legal exercise of eminent domain authority to "necessity" as defined by that statue.

A recent overt act in furtherance of Municipal Defendants' conspiracy to take Plaintiff's *private* property rights and associated

appurtenances over the current and former TH26 corridor without just compensation or a meaningful time and manner to oppose the taking of a private property right occurred on January 21, 2021 when "money was pulled out of the budget for a bridge on the Crane Brook Trail abutting Mr. Demerest's [sic] property." (A-214)

Reasonable conclusions from facts alleged underscores to Justice Thomas' reasoning in *Knick*:

> This "sue me" approach to the Takings Clause is untenable. The Fifth Amendment does not merely provide a damages remedy to a property owner willing to "shoulder the burden of securing compensation" after the government takes property without paying for it. *Arrigoni Enterprises, LLC v. Durham*, *[578 U.S. 951, 136 S. Ct. 1409 (2016)]* (THOMAS, J., dissenting from denial of certiorari). Instead, it makes just compensation a "prerequisite" to the government's authority to "tak[e] property for public use." Ibid. A "purported exercise of the eminent-domain power" is therefore "invalid" unless the government "pays just compensation before or at the time of its taking." Id. , at ——, 136 S.Ct., at 1410.
> *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019)

CONCLUSION

Causes of action subject to this appeal could not accrue until (1) *Knick* overturned the state-litigation requirement of the *Williamson County* precedent, and (2) harm to Plaintiff's private property rights was no longer unduly speculative. Plaintiff presently has standing to challenge the constitutionality of the vague statutory definition of "altered" provided by 19 V.S.A. § 701(2), *as precedentially applied* due to *Ketchum v. Town of Dorset*, 2011 VT 49, 190 Vt. 507, 22 A.3d 500.

Plaintiff respectfully requests the opportunity to conduct discovery followed by leave to file an amended complaint in accordance with Fed. R. Civ. P. 15(a)(2) involving all claims against the Municipal Defendants named on the Notice of Appeal. Takings and associated due process causes of action are timely filed and require a non-deferential standard of review. Rooker-Feldman Doctrine, Claim Preclusion, the Statute of Limitations, Failure to State a Claim, or a combination these defenses, do not bar claims on appeal. The District Court's Order dismissing Causes of Action 1-6 and 11-12 *with prejudice* and Causes of Action 7-10 *without prejudice* 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's well-reasoned answers to the three questions Plaintiff has raised on appeal. Upon remand, and after a limited discovery period, leave to amend should be feely granted on all claims against the Municipal Defendants named on the Notice of Appeal.

Dated: August 15, 2022

Respectfully submitted,

/s/ David Demarest

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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 5710 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.

Dated: August 15, 2022

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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 August 15, 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 Reply Brief

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Dated: August 15, 2022

Respectfully submitted,

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