22-956

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 INSIDE COVER)

On appeal from the United States District Court, District of Vermont, No. 21-cv-167

BRIEF OF APPELLEES

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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 acquisitions of municipal property by the Town of Und,

Defendants.

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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?

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

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?

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?

STATEMENT OF THE CASE

This is an appeal from the March 29, 2022 order of the Hon. William K. Sessions, III of the United States District Court for the District of Vermont (the "Order"). The Order resolved three separate motions to dismiss filed by (1) Defendant Front Porch Forum, (2) Defendant Jericho-Underhill Land Trust ("JULT"), and (3) Defendants Town of Underhill ("Town") and 31 individual defendants who were either elected or appointed Town officials (the Town and the individual defendants, collectively, the "Municipal Defendants"). The Order dismissed Appellant/Plaintiff's Amended Complaint on multiple independent grounds, including *res judicata*, A-243-251 (Order), failure to file within applicable statutes of limitations, A-251-252 (Order), and failure to state a cause of action upon which relief may be granted, A-253-256 (Order).

The facts at issue stretch back to 2001. At that time, the Town conducted reclassification proceedings to downgrade a portion of Town Highway 26 ("TH 26") from a "Class 3" and "Class 4" road to a "trail" and named the new trail Crane Brook Trail. A-26-27 (Am. Compl.) at ¶ 47-48. The initial classification of TH 26 as a "Class 3" and "Class 4" road and the reclassification of a portion of TH 26 to a "trail" is significant because, under Vermont law, a town has a statutory duty to maintain Class 3 and Class 4 roads and preserve vehicular traffic along them. 19 V.S.A. § 310(a) and (b). In contrast, a town is "not liable for construction,

maintenance, repair, or safety of trails" and does not have a statutory duty to preserve vehicular traffic on a trail. 19 V.S.A. § 310(c). Nonetheless, a "trail" is still a public "right of way." 19 V.S.A. § 301(8). The portion of TH 26 that Underhill attempted to reclassify would only cease to be a public right of way if the Selectboard discontinued the segment entirely. 19 V.S.A. § 771 *et seq.*

In attempting to reclassify TH 26 in 2001, Underhill followed all the statutory procedures but one: it "failed to formally record the reclassification order in the land records." *Demarest v. Town of Underhill*, 2013 VT 72, ¶2, 195 Vt. 204, 206. As the discussion below will show, a Vermont superior court subsequently held that the 2001 reclassification was invalid, based on the Town's failure to record the reclassification order. *Demarest v. Town of Underhill*, 2013 VT 72, ¶3 and ¶8, 195 Vt. 204, 206 and 208; *also* A-28 (Am. Compl.) at ¶ 50.A. However, believing that the portion of TH 26 had been successfully reclassified, the Town stopped maintaining the trail and adopted an ordinance that barred vehicular traffic over the trail. *Demarest v. Town of Underhill*, 2013 VT 72, ¶30, 195 Vt. 204, 217.

In 2002, Appellant purchased property located on TH 26. The property abuts both the portion of TH 26 that Underhill attempted to reclassify in 2001 and the portion of TH 26 that remained a Class 4 road in 2001. A-27 (Am. Compl.) at ¶ 48 and accompanying schematic. As a result, even if the 2001 reclassification effort

had been successful, Appellant would have had vehicular access to his property along the Class 4 segment of TH 26.

Over the next ten years, conditions along the purported trail portion of TH 26 deteriorated. *See Demarest v. Town of Underhill*, 2013 VT 72, ¶3, ¶28 - ¶31, 195 Vt. 204, 206, 216-217 (discussing condition of TH 26 in 2011).

In February 2010, Plaintiff and others filed suit, seeking an order directing the Town to maintain Crane Brook Trail in accordance with the Class 3/Class 4 maintenance standards (the "2010 Maintenance Case").[1]

In response to this suit, the Town held new municipal proceedings in 2010 to reclassify the middle portion of TH 26 as a trail. Am. Compl. at ¶ 59. Following these proceedings, the Selectboard issued a June 2010 order reclassifying the disputed portion as a trail. *Demarest v. Town of Underhill*, 2013 VT 72, ¶5, 195 Vt. 204, 207. Plaintiff and others appealed this 2010 reclassification decision in a second action (the "2010 Reclassification Case") via Vermont Rule of Civil Procedure (V.R.C.P.) 75.[2]

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[1] The 2010 Maintenance Case was filed in February 2010 in Vermont Superior Court under Docket No. 234-2-10 Cncv. The Vermont Supreme Court issued a final decision in connection with the case on May 14, 2015 in *In re Town Highway 26*, 2015 Vt. Unpub. LEXIS 87, 199 Vt. 648, 114 A.3d 505, 2015 WL 2383677.

[2] The 2010 Reclassification Case was filed in 2010 in Vermont Superior Court. The Vermont Supreme Court issued a final decision in connection with the

At first, the 2010 Maintenance Case and the 2010 Reclassification Case proceeded simultaneously. However, the trial court in the 2010 Maintenance Case stayed that action while the 2010 Reclassification Case was pending because the trial court recognized that a decision in the 2010 Reclassification Case might render the 2010 Maintenance Case moot. *Demarest v. Town of Underhill*, 2013 VT 72, ¶19, 195 Vt. 204, 213.

On September 27, 2013, the Vermont Supreme Court affirmed the 2010 reclassification, concluding "there is competent evidence to support the Town's decision to reclassify the road." *Demarest v. Town of Underhill*, 2013 VT 72, ¶28, 195 Vt. 204, 216. The Vermont Supreme Court confirmed that the Town's 2010 reclassification effort had succeeded, that the disputed portion of TH 26 was a legal trail, and that the Town of Underhill's Trail Ordinance prohibited vehicular access over the trail. *Demarest v. Town of Underhill*, 2013 VT 72, ¶28 - ¶33, 195 Vt. 204, 216-218.

Following the 2013 decision resolving the 2010 Reclassification Case, the trial court in the 2010 Maintenance Case dismissed the action on the ground that it was now moot, because the disputed portion had been successfully reclassified as a trail. Plaintiff appealed this ruling.

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case on September 27, 2013 in *Demarest v. Town of Underhill*, 2013 VT 72, 195 Vt. 204.

On May 14, 2015, a three-Justice panel of the Vermont Supreme Court held that, given the Court's 2013 decision in the 2010 Reclassification Case, the 2010 Trail Case was "moot" because the case no longer presented

> an actual live, controversy. The ultimate fact remains, as explained by the trial court, that the disputed segment of TH 26 is a trail, and the town has no legal obligation to maintain a trail.

In re Town Highway 26, 2015 Vt. Unpub. LEXIS 87, *9, 199 Vt. 648, 114 A.3d 505. This decision confirmed the Town was not required to maintain Crane Brook Trail.

Taken together, the September 27, 2013 and May 14, 2015 Vermont Supreme Court decisions clarified that Crane Brook Trail is a legal trail and that the Town may prohibit vehicular traffic on the trail.

In August 2015—three months *after* the Vermont Supreme Court decided the 2010 Maintenance Case decision—Appellant filed a subdivision application with the Town of Underhill, asking to subdivide his property and create driveway access on Crane Brook Trail to proposed subdivided lots. The Town denied the application. Appellant "filed . . . suit, seeking a declaration that he had a right of vehicle access over Crane Brook Trail and appealing the denial of the permit." *Demarest v. Town of Underhill*, 2021 VT 14, ¶ 6, 256 A.3d 554, 557.

On February 26, 2021, the Vermont Supreme Court held that *res judicata* barred the Appellant's effort to obtain a declaration that he was entitled to

vehicular access over Crane Brook Trail. In reaching this conclusion, the Court expressly noted that Appellant could have brought his declaratory judgment action in the 2010 Maintenance Case or the 2010 Reclassification Case:

> Plaintiff does not dispute that he could have included a claim for declaratory relief in the reclassification appeal in 2010 or that both suits involve a similar set of facts. Instead, plaintiff argues that claim preclusion cannot apply in this case because (1) his right-of-access claim did not accrue until there was a final determination in the Rule 75 case regarding the Town's reclassification; and (2) the prior action was a Rule 75 complaint for review of governmental action involving other parties and therefore his personal need for an injunction would have been inappropriately presented.
>
> We reject plaintiff's argument that there was no justiciable controversy in 2010 and therefore the request for a declaratory judgment could not have been brought at that time. The Selectboard's July 2010 reclassification decision created a live controversy regarding plaintiff's right of access over the portion of TH 26 that was now classified as a trail. There was no need to wait until the challenges to the reclassification decision were fully litigated. For this reason, this situation is distinguishable from *Kellogg v. Shushereba*, 2013 VT 76, ¶ 31, 194 Vt. 446, 82 A.3d 1121, in which this Court concluded that claim preclusion did not bar defendant's unjust-enrichment claim because it did not accrue until after resolution of the first case. Plaintiff had all information necessary to bring his declaratory-judgment action at the time he challenged the Town's reclassification decision.

Demarest v. Town of Underhill, 2021 VT 14, ¶17-¶18, 256 A.3d 554, 560.

On June 21, 2021, Plaintiff filed the present complaint in the United States District Court for the District of Vermont. The initial Complaint was 90 pages long and included 270 numbered paragraphs. *Demarest v. Underhill, et al.*, Case No. 2:21-cv-00167-wks, Doc. 1. The Municipal Defendants filed a Motion to Dismiss,

arguing, in part, that the initial Complaint was long, vague, and prolix, and failed to comply with Fed. R. Civ. P. 8(a)(2). *Id.*, Doc. 5. Plaintiff filed the Amended Complaint, which was even longer, clocking in at 96 pages long with 284 numbered paragraphs.

The Municipal Defendants filed a Motion to Dismiss the Amended Complaint. The district court took up this motion, along with Motions to Dismiss filed by Defendant Front Porch Forum and Defendant JULT, and ultimately dismissed the entire Amended Complaint, with prejudice, in its March 29, 2022 Order. The district court granted Plaintiff leave to amend the Amended Complaint for purposes of curing the pleading difficulties in Causes of Action 7 and 8. A-257 (Order). Plaintiff chose not to avail himself of the district court's leave to amend Causes of Action 7 and 8 and instead filed the present appeal to this Court on April 27, 2022.

STANDARD OF REVIEW

This Court will review de novo the dismissal of a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) and will accept as true all the plaintiff's factual allegations, drawing reasonable inferences in the plaintiff's favor. *Teichmann v. New York*, 769 F.3d 821, 825 (2d Cir. 2014). In addition, a court may consider those matters of which judicial notice may be taken, including documents and decisions filed in prior litigation, which are particularly

important in the *res judicata* context, where the court must consider what claims were possible in the prior litigation. *E.g., Simmons v. Trans Express Inc.*, 16 F.4th 357, 360 (2d Cir. 2021); *Dixon v. Blanckensee*, 994 F.3d 95, 103 (2d Cir. 2021); *Williams v. N.Y. City Hous. Auth.*, 816 Fed. Appx. 532, 534 (2d Cir. 2020).

To avoid dismissal, the complaint must allege "enough facts to state a claim to relief that is plausible on its face" and those allegations must "nudge" the plaintiff's claims "across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, (2007). Further, "the tenet that a court must accept as true all the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This Court "may affirm on any basis supported by the record." *Brock v. Zuckerberg*, 2022 U.S. App. LEXIS 11368, *2, 2022 WL 1231044 (2d Cir. 2022) (citing *Coulter v. Morgan Stanley & Co.*, 753 F.3d 361, 366 (2d Cir. 2014)).

This Court will "review a pro se complaint with 'special solicitude,' interpreting it 'to raise the strongest claims that it suggests.'" *Marvin v. Peldunas*, 2022 U.S. App. LEXIS 16345, *2, 2022 WL 2125851 (2d Cir. 2022) (quoting *Hill v. Curcione*, 657 F.3d 116, 122 (2d Cir. 2011)). However, even with this solicitude, a *pro se* complaint must nonetheless "state a plausible claim for relief." *Brock v.*

Zuckerberg, 2022 U.S. App. LEXIS 11368, *2-3, 2022 WL 1231044 (2d Cir. 2022).

Although the court will "accord filings from pro se litigants a high degree of solicitude, even a litigant representing himself is obliged to set out 'identifiable arguments' in his principal brief." *Terry v. Inc. Vill. of Patchogue*, 826 F.3d 631, 632-633 (2d Cir. 2016). Accordingly, "a pro se litigant abandons an issue by failing to address it in the appellate brief." *Green v. Dep't of Educ. of N.Y.*, 16 F.4th 1070, 1074 (2d Cir. 2021) (citing *LoSacco v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir. 1995)). Therefore, if a *pro se* appellant's "opening brief on appeal fails to challenge [a court's] additional holdings . . . each of which constitutes an independent reason to dismiss," then the appellant "forfeit[s] any challenges to those holdings." *Taneja v. Preuss (In re Taneja)*, 789 Fed. Appx. 907, 909-910 (2d Cir. 2019).

SUMMARY OF THE ARGUMENT

Responding adequately to Appellant's Brief is difficult, perhaps impossible, because the Brief does *not* clearly identify which Causes of Action Plaintiff seeks to preserve, what legal arguments Appellant advances to preserve those claims, how the Appellant believes the district court erred, or even which portions of the district court's order Appellant seeks to have reversed. Responding to the argument in the Appellant's Brief is therefore an exercise in guesswork and anticipation—

one attempts to divine what the Appellant *might* mean and respond accordingly. Due to the solicitude to which *pro se* litigants are entitled, the Appellees have made their best effort to discern and respond to the arguments asserted in the Appellant's Brief. Nonetheless, the shortcomings of the Appellant's Brief are so great that the Appellees urge this Court to take those shortcomings into account in resolving this appeal.

Accordingly, the Appellees argue the following:

First, this Court should dismiss the appeal in toto and affirm the district court order 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).

Second, if the Court is unwilling to dismiss the entire appeal on this basis, then the Court should dismiss Causes of Action 7-10 of the Amended Complaint and all claims brought against the defendants not named in the Notice of Appeal on the ground that Plaintiff has expressly abandoned them. In addition, this Court should affirm the district court's dismissal of the remaining claims in the Amended Complaint because Appellant has failed to address the district court's separate and independent bases for dismissing those claims.

Third, if the Court is unwilling to dismiss all claims on either of the bases discussed above, and considers the Appellant's substantive arguments, then this Court should hold that the United States Supreme Court's decision in *Knick v.*

Twp. of Scott, 139 S. Ct. 2162, 2167 (2019) does not extend or toll the accrual date on Plaintiff's claims to June 21, 2019 and that Appellant's taking claims are therefore barred by 12 V.S.A. § 511. Furthermore, this Court should affirm the district court's conclusion that the *Rooker-Feldman* doctrine bars consideration of Causes of Action 1 and 2 because Appellant seeks to have a federal court review and reject a state court judgment under which Plaintiff lost in state court. The Brief will consider each of these arguments in turn.

ARGUMENT

I. This Court should affirm the district court's dismissal of the Amended Complaint because the Appellant's Brief is incomprehensible and fails to comply with Fed. R. App. P. 28(a) and L.R. 28.1(a).

Fed. R. App. P. 28(a) provides that an appellant's argument must contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Furthermore, Local Rule 28.1(a) provides

> A brief must be concise, logically arranged with proper headings, and free of irrelevant matter. The court may disregard a brief that does not comply with this rule.

"An appellant's failure to comply with Rule 28 invites dismissal of the appeal." *Taylor v. Harbour Pointe Homeowners Ass'n*, 690 F.3d 44, 48 (2d Cir. 2012); *also Ernst Haas Studio, Inc. v. Palm Press, Inc.*, 164 F.3d 110, 111-112 (2d Cir. 1999); *Murray v. Mitsubishi Motors of N. Am., Inc.*, 462 Fed. Appx. 88, 91 (2d Cir. 2012);

Sioson v. Knights of Columbus, 303 F.3d 458, 459-460 (2d Cir. 2002). *Pro se* appellants are bound by these rules, and their appeals may be dismissed if their briefs do not comply with them. *Williams v. R.R.*, 2022 U.S. App. LEXIS 9451, *3-5, 2022 WL 1053265 (2d Cir. 2022).

Appellant's Brief does not comply with Fed. R. App. P. 28(a) or Local Rule 28.1. The Brief does not "present a coherent legal theory, even one unsupported by citation to authority, that would sustain the complaint." *Ernst Haas Studio, Inc. v. Palm Press, Inc.*, 164 F.3d 110, 111, (2d Cir. 1999). In the Brief's Argument, case quotations and legal phrases are glued together in an abstract collage that provides no clear picture of what Appellant argues, upon what caselaw the Appellant relies, or how the relevant caselaw should be applied to the allegations in the Complaint to show that the district court erred or that Plaintiff's claims can survive dismissal. The Appellant's "brief borders on the incomprehensible." *Murray v. Mitsubishi Motors of N. Am., Inc.*, 462 Fed. Appx. 88, 91 (2 Cir. 2012).

For example, Argument Section C is labelled "Statute of Limitations and Accrual Date" and is comprised of three sentences. Appellant's Brief at 20-21. [3]

[3] The Section, in its entirety, reads:

> 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* [sic]. Vermont statutory changes delayed the ability to raise claims of

The first sentence appears to argue that the accrual date for Plaintiff's claims should be the date of the United States Supreme Court's decision in *Knick v. Twp. of Scott*. Appellant's Brief at 19. However, the second sentence states, without explanation or citation, that unspecified "statutory changes in Vermont" somehow "delayed the ability to raise claims of a taking." *Id.* The third sentence of the Section ends by asserting, without legal support, that

> Plaintiff should be granted leave to correct the unartfully pleaded portions of [his] complaint . . . after a limited discovery period to reach the higher 'plausibility standard' created by *Ashcroft v. Iqbal*, 556 U.S. 6662, 678 (2009).

Id. at 20.

The sentences in this Section do not provide a coherent legal theory concerning the relevant statute of limitations or the relevant accrual date. "A reasonable reader of [this Section] is left without a hint of the legal theory proposed as a basis for reversal" on these issues. *Ernst Haas Studio, Inc. v. Palm*

> 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).

Appellant's Br. at 20-21.

Press, Inc., 164 F.3d 110, 112 (2d 1999). Section C is just a small, manageable sample of the confusion that reigns in the rest of the Appellant's Brief.

Sections D, E, and F of the Argument are longer and contain more words, but they are no clearer than Section C. In each section of the Argument, the reader struggles repeatedly to grasp a sustained sense of meaning. The reader may latch hopefully onto one sentence as a glimmering source of understanding, only to have the next sentence douse the light by plunging off in another direction. When an appellant's brief "contains no argument identifying any claim of error on the District Court's part" the court "'need not manufacture' such an argument [itself]." *Williams v. R.R.*, 2022 U.S. App. LEXIS 9451, *4, 2022 WL 1053265 (2d Cir. 2022).

In addition to not providing a proposed "legal theory . . . as a basis for reversal," *Ernst Haas Studio, Inc. v. Palm Press, Inc.*, 164 F.3d 110, 112 (2d Cir. 1999), the Appellant's Brief provides no sustained discussion applying relevant caselaw to the allegations in Plaintiff's Amendment Complaint. The Appellant's Argument provides few citations to the record, and the citations that do appear are not part of a contextual discussion.

For example, Section E of the Argument, which bears the heading "Vague statutory definition of 'altered'", states:

> The affidavits (A-13 and A-194 to A-196) of former Underhill Road Foreman increase the plausibility of present Causes of Action against Municipal Defendants.

Appellant's Brief at 23. However, the discussion in Section E does not explain why these Affidavits may be considered on a Motion to Dismiss, given that review of such a motion considers *only* the allegations in the complaint and those matters of which judicial notice may be taken and given that factual matters outside the pleadings are irrelevant on a 12(b)(6) motion. *See* Fed. R. Civ. P. 12(d) (stating that consideration of matters outside the pleadings converts a 12(b)(6) motion to a summary judgment motion under Fed. R. Civ. P. 56).[4]

Even if Appellant had made the effort to explain why these Affidavits may be considered in this appeal, the Argument in the Appellant's Brief does not explain which "Causes of Action" the Affidavits make more plausible, how the Affidavits "increase the plausibility" of those claims, or how those Affidavits impact the "Vague statutory definition of 'altered'" referenced in the Section heading. In sum, although the cited passage contains a reference to the record, it is

[4] These Affidavits were not referenced, cited, or relied on in the Amended Complaint. They are therefore matters outside the pleadings under Rule 12(d). *See, e.g., Singh v. Wells*, 445 Fed. Appx. 373, 375 (2d Cir. 2011) ("In adjudicating a motion to dismiss, a court may consider only the complaint, written instruments attached to the complaint as exhibits, statements or documents incorporated by reference, and documents on which the complaint heavily relies'). Because the Affidavits are matters outside the pleadings, the Municipal Defendants respectfully request this Court exclude those Affidavits from consideration in this appeal.

not part of a contextualized argument that targets whether the claims—as alleged in the Amended Complaint—can survive a Motion to Dismiss.

Similarly, Section D, which bears the heading "Rooker-Feldman & *Res Judicata* Inapplicable," states:

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

Appellant's Brief at 21-22. Setting aside the question of whether the meaning of this sentence can be discerned, the Brief provides no further explanation of how the referenced portion of the "Response in Opposition" applies in the context of this appeal. Moreover, although this passage makes an express reference to the Plaintiff's "Response in Opposition" and to the Amended Complaint, [5] Appellant has made no effort to provide a sustained or cohesive argument as to why ¶ 50 of the Amended Complaint supports Appellant's contention that his Complaint should not be dismissed.

[5] Notably, the Argument in Appellant's Brief specifically cites allegations in the Amended Complaint only twice. One occurrence is the reference discussed *supra* in the text; the other occurrence references Table 1 of the Amended Complaint but the reference does not link the citation to any specific argument in the brief. *See* Appellant's Br. at 5 (citing "Table 1 of Amended Complaint (A-39)").

"Appellants do not preserve questions for appellate review by '[m]erely incorporating an argument made to the district court' by reference in their brief." *Lederman v. N.Y. City Dep't of Parks & Rec.*, 731 F.3d 199, 203 (2d Cir. 2013) (citing *Frank v. United States*, 78 F.3d 815, 833 (2d Cir. 1996), vacated on other grounds, 521 U.S. 1114, 117 S. Ct. 2501, 138 L. Ed. 2d 1007 (1997) (mem.). This Court has said, "[We] will [not] take the absence of an argument on appeal as an invitation to dig up and scrutinize anew the memorandum in opposition to summary judgment that Appellant submitted to the court below." *Sioson v. Knights of Columbus*, 303 F.3d 458, 460 (2d Cir. 2002).

The two examples discussed above are the only substantive references to the record—Amended Complaint or otherwise—that appear in the Appellant's Argument. *See* Appellant's Brief at 18-27. The Appellant has failed to provide any sustained contextual discussion of the record, the applicable caselaw, or the allegations in the Amended Complaint. This failure to provide contextual references to the Amended Complaint is particularly egregious when the complaint is 99 pages long and includes over 283 paragraphs. *See* A-15-114 (Amended Complaint). In failing to provide this contextual discussion, the Appellant invites this Court "to scour the record, research any legal theory that comes to mind, and serve generally as an advocate for appellant." *Ernst Haas Studio, Inc. v. Palm Press, Inc.*, 164 F.3d 110, 112 (2d Cir. 1999). This Court should "decline the

invitation" and affirm the district court's dismissal of the Complaint. *Ernst Haas Studio, Inc. v. Palm Press, Inc.*, 164 F.3d 110, 112 (2d Cir. 1999).

For all these reasons, the Municipal Defendants respectfully request this Court dismiss the appeal in its entirety and affirm the district court Order on the ground that the Appellant's Brief fails to comply with Fed. R. App. P. 28(a)(1) and L.R. 28.1(a).

II. This appeal should be dismissed because Appellant has failed to address the district court's separate and independent grounds for dismissal.

Although the Town respectfully asks this Court to dismiss the Appellant's appeal and affirm the district court ruling based on the Appellant's failure to comply with Fed. R. App. P. 28(a)(1) and L.R. 28.1(a), the Town is aware that this Court treats *pro se* parties with "solicitude." *Terry v. Inc. Vill. of Patchogue*, 826 F.3d 631, 632-633 (2d Cir. 2016). The Court may therefore be reluctant to dismiss Appellant's appeal without more substantive consideration.

However, even when the substance of the Appellant's Brief is considered, the Court should affirm the district court ruling and dismiss the Amended Complaint because, *first*, Appellant has expressly abandoned *some* of his causes of action in their entirety and *all* his causes of action with respect to certain defendants, and, *second*, for the remaining causes of action, the Appellant fails to address the separate and independent grounds upon which the district court

dismissed the claims. *E.g.*, *Taneja v. Preuss (In re Taneja)*, 789 Fed. Appx. 907, 909-910 (2d Cir. 2019).

A. Appellant expressly abandoned Counts 7 through 10 of his Amended Complaint and all the claims brought against certain defendants.

Appellant expressly and voluntarily narrowed his appeal before this Court to the dismissal of Counts 1-6 and 11-12 of his Amended Complaint as those claims were brought against the twenty defendants specifically named in his Notice of Appeal. A-259 (Notice of Appeal); Appellant's Brief at 1, 3, 20, and 28. Appellant thereby abandons all other claims asserted in the Amended Complaint (i.e., Causes of Action 7 through 10) and all other claims asserted against the individual defendants who are *not* named in the Notice of Appeal. *E.g., Terry v. Inc. Vill. of Patchogue*, 826 F.3d 631, 632-633 (2d Cir. 2016); *Cooke v. U.S. Bank Nat'l Ass'n*, 749 Fed. Appx. 69, 71 (2d Cir. 2019); *McCarthy v. DeJoy*, 2022 U.S. App. LEXIS 4613, *2, 2022 WL 519180 (2d Cir. 2022); *Gachette v. Metro-North Commuter R.R. Co.*, 804 Fed. Appx. 65, 67, 2020 U.S. App. LEXIS 8776, *4, 2020 WL 1289097 (2d Cir. 2020).

Therefore, the Municipal Defendants respectfully request this Court affirm the district court's dismissal of Causes of Action 7 through 10 of the Amended Complaint and affirm dismissal of all claims against the defendants *not* named in

the Appellant's Notice of Appeal on the ground that Appellant has abandoned these claims.

B. Appellant has abandoned or waived the remainder of his causes of action by failing to address the district court's separate and independent bases for dismissing them.

With the claims discussed in the preceding section abandoned and dismissed, the only claims nominally subject to consideration in this appeal are Counts 1-6 and 11-12 as those causes of action are brought against the Town and the twenty individual defendants named in the Notice of Appeal. Those Causes of Action are:

- Causes of Action 1 and 2: Fourteenth Amendment procedural due process claims;
- Causes of Action 3 and 4: Ninth and Fourteenth Amendment substantive due process claims;
- Causes of Action 5 and 6: Fifth Amendment taking claims;
- Causes of Action 11 and 12: First Amendment petition clause claims.

The district court dismissed these eight causes of action on a variety of grounds.

First, the district court dismissed Causes of Action 1 through 6 on *res judicata* grounds, determining that the issues asserted in Causes of Action 1 through 6 could have been asserted in the parties' prior Vermont litigation and

therefore, under Vermont law, the claims are barred by *res judicata*. A-245-251 (Order).

Second, as a separate and independent ground for dismissal, the district court held that Causes of Action 1 through 6 were barred by applicable statutes of limitation because these Causes of Action were supported only by conduct that is alleged to have occurred more than six years prior to the filing of the present action (i.e., conduct occurring before June 21, 2015). A-251-252 (Order).

Third, as a separate and independent ground for dismissal of Counts 1 and 2, the district court determined that the *Rooker-Feldman* doctrine would bar Plaintiff's efforts to challenge *Ketchum*. A-247-248 (Order).

Fourth, the district court dismissed Causes of Action 11 and 12 because the Amended Complaint failed to state a claim upon which relief could be granted. A-255-256 (Order). This ruling was based on the ground that merely failing to grant a request contained in a petition does not constitute a constitutional injury. *Id*.

The Appellant's Brief does not address all the grounds for dismissing these claims that appear in the district court's ruling. After attempting a good faith and solicitous reading of the Appellant's Brief, the Appellees believe the Appellant to be making the following three primary arguments: [6]

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[6] Appellant also states

> Plaintiff should be granted leave to correct the unartfully pleaded portions of the complaint involving Municipal Defendants named in

1. The *Rooker-Feldman* doctrine does not apply to Plaintiff's taking claims because the conduct of which Plaintiff complains was merely *ratified* by the previous Vermont court decisions, not *produced* by them.[7]

2. The *Rooker-Feldman* doctrine should not be applied to Plaintiff's challenge to *Ketchum* because Plaintiff was not a party in privity to the *Ketchum* decision.[8]

3. Until the United States Supreme Court overturned *Williamson* in *Knick*, Plaintiff was required to exhaust his state court litigation efforts before filing his takings claims in federal Court, therefore, the accrual date for purposes of applying the statute of limitations to his taking claims should be June 21, 2019, the decision date of the *Knick* decision.[9]

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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).

Appellant's Br. at 25; *see also* Appellant's Br. at 27 (repeating suggestion).

Appellant cites no legal basis for this assertion and does not provide any legal argument in support of it, beyond the conclusory statements cited here. The suggestion is contrary to ordinary review of a motion to dismiss, in which a complaint is dismissed if a plaintiff fails to state a plausible claim in the complaint.

[7] Appellees believe Appellant intended to make this argument based on Appellant's Statement of Issues Presented No. 1, Appellant's Br. at 2, the Brief's reference to "*Cho ex rel. Situated v. City of N.Y.*, Docket No. 18-337-cv (910 F.3d 629)," Appellant's Br. at 17, and the Brief's repeated characterization of the Vermont court decisions as "ratifications," Appellant's Br. at 5, 12, 13, 14, 17, 18, 21, 24.

[8] The Appellees believe the Appellant to be making this argument based on the Appellant's Statement of Issues Presented No. 2, Appellant's Br. at 2, Appellant's express assertion that he has "standing to challenge" *Ketchum's* interpretation of 19 V.S.A. § 701(2) because he was "not a party in privity to the *Ketchum* decision." Appellant's Br. at 23; *also id.* at 8, 16.

[9] The Appellees believe the Appellant to be making this argument based on the Appellant's Statement of the Issues Presented No. 3, Appellant's specific assertion of June 21, 2019 as the appropriate accrual date, Appellant's Br. at 19,

These three arguments do *not* address the district court's dismissal of Causes of Action 11 and 12 (violations of First Amendment Petition Clause) for failure to state a claim.[10] Nor do these arguments directly address the district's ruling that Causes of Action 1 through 6 are barred by *res judicata* under Vermont law. With respect to the district court's determination that Causes of Action 1 through 6 are also independently barred by applicable statutes of limitations, the Brief's sole argument is that the accrual date should be the date *Knick* was decided.

Setting aside for the moment the merits of the argument, the *Knick* argument could only address Plaintiff's *takings* claims because *Knick* was expressly focused on takings claims, separate and apart from other constitutional claims. *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2169 (2019) (observing that *Williamson*'s "state litigation requirement relegates the Takings Clause 'to the status of a poor relation' among the provisions of the Bill of Rights" and overruling the requirement to

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and Appellant's assertion that he filed the present action within "two years" of the *Knick* decision, Appellant's Br. at 18 at 27.

[10] The Appellant makes only a single reference to the First Amendment in his Brief, in connection with stating that the prior litigation did not consider his First Amendment Claims. Appellant's Br. At 10. This is an argument best directed to *res judicata*, but the district court dismissed the First Amendment claims based on grounds of failure to state a claim, not on *res judicata* grounds. *See* A-253-256 (Order) (dismissing Causes of Action 7, 8, 11, and 12 for failure to state claim). Nowhere in the Appellant's Brief does the Appellant explain how the Amended Complaint alleges a plausible First Amendment violation or how the district court erred in concluding that the Amended Complaint failed to state a First Amendment claim.

"restor[e] takings claims to the full-fledged constitutional status the Framers envisioned . . . ."). Thus, whatever impact *Knick* may have had on Plaintiff's claims, that impact could only apply to Plaintiff's takings claims, *not* his due process claims. The Appellant's Brief offers no argument directly addressing the due process claims or explaining why they should be handled differently because of *Knick*.

In sum, Appellant has spent the bulk of his Argument addressing the district court's decision to apply *Rooker-Feldman* to Causes of Action 1 and 2 and trying to establish that the date of the *Knick* decision should be the accrual date for his taking claims under Causes of Action 5 and 6. The Brief ignores the other separate and independent bases for dismissal in the district court's opinion, i.e., the fact that Vermont's statute of limitation *and* res judicata doctrine independently and separately bar Causes of Action 1 through 6 and the fact that Plaintiff has failed to state a claim in Causes of Action 11 and 12 for violation of the First Amendment's Petition Clause.

When an appellant—even a *pro se* appellant—fails to address a district court's grounds for dismissing one or more claims, the appeal with respect to those claims is properly dismissed. *E.g., Diaz v. Pelo*, 2022 U.S. App. LEXIS 2843, *5, 2022 WL 288070 ("[W]hile 'appellate courts generally do not hold *pro se* litigants rigidly to the formal briefing standards[,] . . . we need not manufacture claims of

error for an appellant proceeding *pro se*, especially when he has raised an issue below and elected not to pursue it on appeal.'") (citing *LoSacco v. City of Middletown*, 71 F.3d 88, 92-93 (2d Cir. 1995)); *Green v. Dep't of Educ. of N.Y.*, 16 F.4th 1070, 1074 (2d Cir. 2021) ("[A] a pro se litigant abandons an issue by failing to address it in the appellate brief."); *Adams v. City of New York*, 756 Fed. Appx. 85, 87, 2019 U.S. App. LEXIS 6949, *4, 2019 WL 1057406 ("Because Adams has failed to challenge the bases for the district court's dismissal of his complaint in his brief on appeal, he has abandoned any such challenges."); *Terry v. Inc. Vill. of Patchogue*, 826 F.3d 631, 632-633 (2d Cir. 2016); *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal."); *LoSacco v. City of Middletown*, 71 F.3d 88, 92 (2d Cir. 1995) ("[Appellant] did not raise this issue in his appellate brief. Consequently, he has abandoned it.").

Because Plaintiff fails to provide adequate legal argument, supported by citation to the record, addressing the district court's separate and independent grounds for dismissing Causes of Action 1 through 6 and 11 and 12, the appeal with respect to those claims should be dismissed. Similarly, because Plaintiff has failed to provide *any* response to the district court's reasons for dismissing Plaintiff's other claims (i.e., Causes of Action 7 through 10), those claims should be dismissed as well.

For these reasons, the Municipal Defendants respectfully request this Court affirm in its entirety the district court's Order dismissing Plaintiff's Amended Complaint and dismiss *all* Plaintiff's claims—both those he expressly and specifically abandoned and those he abandoned by failing to address—all with prejudice.

III. The Appellant's Brief does not demonstrate that the Amended Complaint should not be dismissed.

As argued in the preceding sections, the Plaintiff's Amended Complaint should be dismissed either (1) because the Appellant's Brief fails to comply with Fed. R. App. P. 28(a) and L.R. 28.1(a) or (2) because the Appellant has expressly and specifically abandoned many of his claims and, with respect to the remaining claims, has failed to address the district court's separate and independent bases for dismissing them. However, in the event this Court is unwilling to dismiss the Amended Complaint on these grounds, dismissal is nonetheless appropriate because the arguments presented in the Appellant's Brief do not demonstrate that the district court erred or that the Amended Complaint states plausible causes of action against the Municipal Defendants.

A. The *Knick* decision does not save Plaintiff's takings claim from the applicable statute of limitations.

The Appellant acknowledges his Fifth Amendment takings claims are subject to a six-year statute of limitations under 12 V.S.A. § 511. Appellant's Brief

at 19; *Dep't of Forests, Parks & Rec. v. Town of Ludlow Zoning Bd.*, 2004 VT 104, ¶6, 177 Vt. 623, 625-626, 869 A.2d 603, 606-607. Although the Appellant's Brief does not address the issue, Appellant's § 1983 due process claims are subject to Vermont's shorter, three-year statute of limitations for personal injury actions under 12 V.S.A. § 512(4). *See* 12 V.S.A. § 512(4); *Shields v. Gerhart*, 155 Vt. 141, 144 n.2 and 145, 582 A.2d 153, 155 n.2 and 156 (1990) (applying 12 V.S.A. § 512(4) to due process claims). The district court noted that the "statute of limitations for a § 1983 claim brought in federal court in Vermont is three years," but the court reasoned that, even if the longer six-year statute of limitations for takings claims is applied to all claims, Plaintiff's Causes of Action 1 through 6 would still be time-barred. A-251 (Order).

Appellant does not dispute the length of the limitations periods; instead, he appears to argue that his takings and due process claims did not *accrue* until the date the United States Supreme Court decided *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019):

> 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*.

Appellant's Brief at 19; *see also id*. at 18 (arguing that Appellant's claims were "timely filed . . . exactly two years after *Knick*") and 27 ("Plaintiff timely filed the

present § 1983 Takings and Due Process Causes of Action two years after *Knick*.").

Appellant provides no legal argument in support of this contention. Nor does he explain how *Knick*'s date of decision would provide the relevant factual basis for the *accrual* date of his claims. Nor does the Appellant's Brief offer any argument in the alternative, identifying any other potential accrual date. For good or for ill, Appellant has chosen to offer *Knick*'s June 21, 2019 decision date as the accrual date for his claims.

This choice is unsupported by law or fact.

Knick v. Twp. of Scott, ____ U.S. ____, 139 S. Ct. 2162 (2019) overturned a portion of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108 (1985). *Williamson* held that a person pursuing a takings claim needed to meet two distinct and independent requirements: First, the plaintiff must demonstrate that "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, 473 U.S. at 186, 105 S. Ct. at 3116. Second, the plaintiff must demonstrate he or she has sought "compensation through the procedures the State has provided for doing so." *Williamson*, 473 U.S. at 194, 105 S. Ct. at 3120. *Williamson* also held that any attendant due process claims must also meet the final decision test that is applied to

takings claims. *Williamson*, 473 U.S. at 199-200, 105 S. Ct. at 3123. *Knick* did *not* overturn *Williamson*'s final decision requirement with respect to either takings claims *or* due process claims. *Knick*, ____ U.S. at ____, 139 S. Ct. at 2169.

Knick did, however, expressly overturn *Williamson*'s state-litigation exhaustion requirement for takings claims. In doing so, the Court emphasized—repeatedly—that a takings claim accrues "at the time" property is taken by a local government without compensation:

> The state-litigation requirement of *Williamson County* is overruled. A property owner may bring a takings claim under §1983 upon the taking of his property without just compensation by a local government.

Knick, ____ U.S. at ____, 139 S. Ct. at 2179 (2019); *also Knick*, ____ U.S. at ____, 139 S. Ct. at 2170, 2172, 2175, and 2177 (emphasizing "at the time").

Accordingly, a plaintiff may bring a takings claim at the time the governmental agency responsible for interpreting a regulation makes a final decision with respect to the plaintiff's property. The Supreme Court subsequently explained

> The finality requirement is relatively modest. All a plaintiff must show is that "there [is] no question . . . about how the 'regulations at issue apply to the particular land in question.'"

Pakdel v. City & Cty. of San Francisco, ____ U.S. ____, 141 S. Ct. 2226, 2230 (citing *Suitum*, 520 U.S., at 739, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (brackets omitted)). The *finality* requirement does not require litigation to proceed all the

way to a full and final judgment handed down by the highest court in a state—that is the province of the *state litigation* requirement. Thus, a plaintiff may bring a taking claims based on a zoning issue when "the initial decisionmaker has arrived at a definitive position on the issue." *Pakdel v. City & Cty. of San Francisco*, 141 S. Ct. 2226, 2229 (2021).

Importantly, constitutional decisions like *Knick* are usually applied retroactively:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993). Indeed, courts have applied *Knick* retroactively in the takings context, "even if it makes a previously timely action untimely." *4th Leaf, LLC v. City of Grayson*, 425 F. Supp. 3d 810, 819 n.9 (Ky. E.D. 2019) (citing *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995)); *also Evans v. City of Ann Arbor*, 2022 U.S. Dist. LEXIS 34603, *23, 2022 WL 586753 (E.D. Mich. 2022); *Stensrud v. Rochester Genesee Reg'l Transp. Auth.*, 507 F. Supp. 3d 444, 452, 2020 U.S. Dist. LEXIS 236602, *12 (W.D.N.Y. 2020) (same). Because *Knick* is applied retroactively, Plaintiff's takings claim was ripe when the Town allegedly took the Plaintiff's property without compensation,

i.e., when the Town made a final decision regarding Plaintiff's right to use vehicles on TH 26.

However, if one applies the *Knick* rule, the Amended Complaint shows on its face that Plaintiff's takings claim expired long before he filed the present action. The Amended Complaint alleges that—in 2010—the Town took Plaintiff's "prior reasonable access" and "reversionary property rights" by reclassifying a portion of TH 26. A-34 (Amended Compl.) at ¶ 70 and ¶ 71 and A-103 (Amended Compl.) at ¶ G. The reclassification of a portion of TH 26, and the attendant loss of vehicular access, is the key injury alleged in the Amended Complaint.[11] Accepting as true the allegations asserted in Plaintiff's Amended Complaint, and applying the accrual rules announced in *Knick*, Plaintiff's takings claim expired in June 2016—six years *after* the Town issued the June 2010 order reclassifying a portion of TH 26 as a trail. Far from extending the accrual date for Plaintiff's claims, *Knick* demonstrates that Plaintiff's claims expired long before he filed the present action.

Even if one imagines that *Knick* had not overturned *Williamson*'s state litigation requirement, the relevant accrual date on Plaintiff's takings claim would be September 27, 2013, the date the Vermont Supreme Court conclusively affirmed that the Town properly reclassified a portion of TH 26 as a legal trail in

[11] *E.g.*, A-16 (Amended Compl.) at ¶ 1, A-65 (*Id.*) at ¶ 168, A-73 (*Id.*) at ¶ 195, and A-74 (*Id.*) at ¶ 195.

2010 and therefore prohibited vehicular access on the trail. *Demarest v. Town of Underhill*, 2013 VT 72, ¶28, 195 Vt. 204, 216; *see also* Appellant's Brief at 18 ("On September 27, 2013, the Vermont Supreme Court ratified the 2010 New Road Reclassification . . . ."). This accrual date—September 27, 2013—also puts Plaintiff's present action—filed on June 21, 2021, nearly eight years later—out of time.

Therefore, regardless of whether one applies *Knick*'s "ripeness" test or *Williamson*'s "ripeness" test, Plaintiff's takings claims are time-barred. Appellant's Brief offers no authority or argument—other than citing *Knick*—to explain why the accrual date for Plaintiff's claims should be June 21, 2019. Although the Amended Complaint is awash with allegations of official conduct occurring between 2001 and the 2010 reclassification of Crane Brook Trail, other than references to the ongoing state litigation, the Amended Complaint makes *no* factual allegation of conduct occurring after 2010 related to terminating Plaintiff's vehicular access over Crane Brook Trail.[12] The Town prohibited vehicular access over Crane Brook

[12] *See* A-18, 28 (Amended Compl.) at ¶ 4, ¶ 50.A (referencing May 31, 2011 Vermont Superior Court Ruling); A-74 (*Id.*) at ¶ 50.B (referencing June 26, 2013 road commissioners findings reported to Vermont Superior Court); A-74 (*Id.*) at ¶ 196 (referencing April 2013 communication between Plaintiff's Counsel and Town Counsel); A-76 (*Id.*) at ¶ 200 (alleging October 24, 2013 meeting minutes defame Plaintiff's character by referring to "the litigious nature of the appellants"); A-86 (*Id.*) at ¶ 232 (alleging that, on April 29, 2014, JULT's interests "completely outweighed" other voices in an unspecified context); A-65 (*Id.*) at ¶ 169 (alleging Defendant Sabalis "willfully misrepresented" Plaintiff's speech during a May 18,

Trail in 2010 and has maintained that prohibition continuously since that date. Therefore, Plaintiff's takings claim based on that decision accrued in June 2010, and the statute of limitations on any takings claim related to that conduct long since expired.

Perhaps Appellant means to argue, not that *Knick* provided a new *accrual* date, but rather that the statute of limitations governing his takings claims should somehow be *tolled* because of the *Knick* decision. Appellant does not expressly make this argument in his Brief or provide any case law in support of it, but, nonetheless, perhaps this is what he meant.

Appellant's Brief provides no basis for concluding *Knick* would toll the statute of limitations applied to Plaintiff's taking claims. Appellant's Brief cites *Knick,* but *Knick* does not discuss tolling, so *Knick* cannot be the authority for tolling the limitations period. In the district court, Plaintiff asserted *Dixon v. United States*, 1999 U.S. App. LEXIS 13215 (10th Cir. 1999) as a basis for tolling the accrual date, but the district court concluded that *Dixon* "provides no analysis or explanation of how or when equitable tolling would apply." A-222. Appellant does not rebut the district court's analysis or conclusion here, indeed, Plaintiff offers no

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2018 Selectboard Meeting); A-66 (*Id.*) at ¶ 172 - ¶ 173 (alleging 2019 misrepresentations by Town officials); A-68 (*Id.*) at ¶ 177 - ¶ 179 (alleging disputes and misrepresentations in meeting minutes in 2019).

authority on tolling at all. Appellant has therefore failed to demonstrate that he is entitled to tolling.

In any event, it appears that there is no basis for tolling the accrual date in this case. In § 1983 actions, federal law provides the accrual date for a claim, but *state* law provides both the statutes of limitation and any applicable tolling principles. *E.g., Bd. of Regents v. Tomanio*, 446 U.S. 478, 484-486, 100 S. Ct. 1790, 1795-1796 (1980); *Pearl v. City of Long Beach*, 296 F.3d 76, 80 (2d Cir. 2002). Therefore, any basis for tolling must be found in Vermont law.

None of Vermont's statutory tolling provisions apply in this case. *See* 12 V.S.A., Chapter 23, Subchapter 3, § 551 *et seq*., and Appellant has not claimed that they do.

Dixon referenced "equitable tolling" so perhaps Appellant means to assert equitable tolling. However, Vermont courts apply the doctrine of equitable tolling

> only when the defendant actively misled the plaintiff or prevented the plaintiff in some extraordinary way from filing a timely lawsuit, or the plaintiff timely raised the precise claim in the wrong forum.

Town of Victory v. State, 174 Vt. 539, 541, 814 A.2d 369, 372 (2002). The Amended Complaint alleges neither circumstance. Appellant's Brief does not identify any allegations in the Amended Complaint—or elsewhere in the record—that would provide a basis for equitable tolling. The Appellant's Brief also does not identify any cases in which a takings claim was equitably tolled based on

Knick.[13] As a result, assuming Appellant meant to argue for equitable tolling based on the *Knick* decision, the Appellant's Brief has failed to provide any legal or factual basis for such tolling.

The district court reached the correct result. Plaintiff's Causes of Action 1 through 6 are barred by applicable statutes of limitation imposed by Vermont law. These Causes of Action are based solely on allegations related to the 2010 reclassification of Crane Brook Trail and rely solely on allegations occurring prior to June 21, 2015, which is six years prior to the filing of the Amended Complaint. (A-251 to A-252.) Appellant's reliance on *Knick* as a basis for extending the accrual date or equitably tolling the limitations period is unsupported by law or by facts in the record. Therefore, the Municipal Defendants respectfully request this Court affirm the District Court's dismissal of Causes of Action 1 through 6 on the ground those claims are time-barred.

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[13] Counsel for the Municipal Defendants could find only two cases applying equitable tolling to a takings claim based on *Knick*'s reversal of *Williamson*, and these cases were expressly based on tolling provisions provided by non-Vermont state law. *See 4th Leaf, LLC v. City of Grayson*, 425 F. Supp. 3d 810, 820-821, 2019 U.S. Dist. LEXIS 200449, *15-17, 2019 WL 6135041 (E.D. Ky. 2019) (finding equitable tolling because Kentucky "allows equitable tolling 'in limited circumstances where a plaintiff was diligent in pursuing his rights but factors beyond his control prevented the action from being commenced within the limitation period.'"); *Wireman v. City of Orange Beach*, 2020 U.S. Dist. LEXIS 170947, *15, 2020 WL 5523403 (S.D. Ala. 2020) (denying tolling argument based on Alabama law).

B. Vermont's Claim Preclusion doctrine applies to Plaintiff's Causes of Action 1 through 6.

Before turning to Appellant's *Rooker-Feldman* arguments, it should be noted that, although Appellant suggests he is addressing the district court's application of *res judicata* to his claims, Appellant's argument does not directly address *res judicata* in any cohesive or substantive manner. Appellant briefly references "*res judicata*" in connection with both the statute of limitations[14] and *Rooker-Feldman*[15] but Appellant provides no differentiated argument with respect to *res judicata*. As mentioned above, the Appellant should be deemed to have abandoned any argument on *res judicata* due to the failure to address substantively the district court's ruling on the issue.

However, even if the issue is considered, Appellant cannot prevail. Under Vermont law,

> claim preclusion will preclude a claim from being litigated if "(1) a previous final judgment on the merits exists, (2) the case was between the same parties or parties in privity, and (3) the claim has been or could have been fully litigated in the prior proceeding."

Iannarone v. Limoggio, 2011 VT 91, ¶15, 190 Vt. 272, 279 (citing *In re St. Mary's Church Cell Tower*, 2006 VT 103, ¶ 3, 180 Vt. 638, 910 A.2d 925 (mem.)).

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[14] *See* Appellant's Br. at 2 and 8 (suggesting *res judicata* cannot bar a filing made two years after *Knick*).

[15] Appellant's Br. at 20 and 21.

At no point in the Appellant's Brief does appellant discuss the requirements of *res judicata* or claim preclusion. Although Appellant mentions three prior Vermont state court decisions between the parties in his statement of the case,[16] Appellant does not discuss whether these decisions constitute a final judgment on the merits and thereby meet the first required element of Vermont's claim preclusion doctrine. Despite the Appellant's failure to consider this issue, these decisions, each of which was litigated all the way to the Vermont Supreme Court, clearly constitute "previous final judgments on the merits."

Similarly, Appellant provides no relevant discussion of the second element, i.e., whether the parties in the present action are the same parties or in privity with the same parties who were involved in the three Vermont State Court actions.[17]

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[16] *See* Appellant's Br. at 12 ("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)," quoting without citation, *Demarest v. Town of Underhill*, 2013 VT 72, ¶9, 195 Vt. 204, 208-209); Appellant's Br. at 14 ("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," quoting without citation *Demarest v. Town of Underhill*, 2016 VT 10, ¶12, 201 Vt. 185, 190, 138 A.3d 206, 209); Appellant's Br. at 16 ("On February 26, 2021, the Vermont Supreme Court decision affirmed the lower court's application of res judicata," quoting without citation *Demarest v. Town of Underhill*, 2021 VT 14, ¶33, 256 A.3d 554, 564-565).

[17] Appellant mentions privity twice in his Brief. Appellant's Br. at 20 and 23. In these references, Appellant argues that he

> presently has standing to challenge the unconstitutionally vague statutory definition of "altered" given by 19 V.S.A. § 701(2) as

The Appellant was the plaintiff in all the actions and the Town of Underhill was the defendant, so clearly the requirement is met for the Town. The individual defendants named in the appeal on this action are all elected or appointed town officials, sued in their official capacities.[18] Moreover, the specific conduct of the individual defendants alleged in the Amended Complaint is related entirely to their *official* actions as elected and appointed officers. Accordingly, under Vermont law, all the individual defendants, including the targets of this appeal, are in privity with the Town for *res judicata* purposes. *Cornelius v. State*, 2021 Vt. Unpub. LEXIS 49, *5, 2021 WL 1853674 (Vt. 2021); *Deyo v. Pallito*, 2013 Vt. Unpub. LEXIS 115, *8, 193 Vt. 683, 69 A.3d 291 (Vt. 2013). Therefore, the second required element of claim preclusion is present here.

> precedentially interpreted in the *Ketchum v. Town of Dorset* because Plaintiff was not a party in privity to the *Ketchum* decision.

Appellant's Br. at 23. This argument misunderstands and misapplies Vermont's claim preclusion doctrine. Privity between the parties is analyzed by reference to the previous judgments that are offered as a basis for preclusion, not by reference to any caselaw that may have been applied in those judgments.

[18] A-21-25 (Amended Compl.) at ¶ 12 - ¶ 42 (naming all individual defendants in their official capacities, including the subjects of the appeal Defendants Steinbauer (¶ 12); Stone (¶ 13), Albertini (¶ 15), Friedman (¶ 18), Gibson (¶20); Heh (¶ 23), Holden (¶ 24), Kelsey (¶ 27), McKnight (¶ 28), McRae (¶ 29), Owens (¶31), Petersen (¶33), Sabalis (¶34), Seybolt (¶ 35), Squirrell (¶ 36), St. Germain (¶ 37), Tanis (¶38), Tedford (¶ 39), Walkerman (¶ 40), and Weisel (¶ 41).

With reference to the third required element—i.e., whether "the claim has been or could have been fully litigated in the prior proceeding," *Iannarone*, 2011 VT 91, ¶15, 190 Vt. At 279—the Appellant argues that *res judicata* should not apply because the "present Federal Causes of Action had not yet accrued and were never previously litigated." Appellant's Brief at 21; *see also* Appellant's Brief at 18 (arguing *res judicata* should not apply because Plaintiff's federal complaint was filed two years after *Knick*). This argument relies on Appellant's *Knick* argument, which, as discussed extensively in the previous section, does not extend the accrual date or toll the limitations period for Plaintiff's claims. The argument therefore fails because *Knick* does not extend or toll the accrual date on Plaintiff's claims.

The argument also suggests (again, without any authority) that claim preclusion does not apply to federal claims that "were never previously litigated." However, Vermont claim preclusion bars *all* claims that "could" or "should" have been brought in a previous action between the parties. *E.g., Demarest v. Town of Underhill*, 2021 VT 14, ¶19, 256 A.3d 554, 561; *Iannarone v. Limoggio*, 2011 VT 91, ¶22, 190 Vt. 272, 282; *Faulkner v. Caledonia County Fair Ass'n*, 2004 VT 123, ¶8, 178 Vt. 51, 54. Actual litigation of the issues is not required.

Plaintiff could have brought Causes of Action 1 through 6 in the 2010 Reclassification Case or the 2010 Maintenance Case. Plaintiff was the master of his own Complaint in both actions, and he was fully aware of all the defendants'

conduct that formed the basis of his claims when he began to litigate them. He could have brought these federal claims—just as he could have brought, but failed to bring, a declaratory judgment action—in the 2010 Reclassification Case or the 2010 Maintenance Case. *See Demarest v. Town of Underhill*, 2021 VT 14, ¶20, 256 A.3d 554, 561 ("[P]laintiff could have sought declaratory relief in that case [the 2010 Reclassification Case], and having failed to do so, is barred from now relitigating the issue."). That Plaintiff could have brought these federal claims in those 2010 cases is further demonstrated by the proffered basis for these claims in this appeal, namely, official Town actions dating exclusively from before 2010. *See* Appellant's Brief at 7-8 (highlighting events dating from 2001 through June 2010).

All the required elements of claim preclusion under Vermont law are present here with respect to Causes of Action 1 through 6. The district court reached the same conclusion. A-245-251. Appellant offers no persuasive rebuttal to this conclusion. Therefore, the Municipal Defendants respectfully request this Court reject Appellant's arguments with respect to *res judicata* and affirm the district court's dismissal of Causes of Action 1 through 6 on the ground that these claims are barred under Vermont's claim preclusion doctrine.

C. *Rooker-Feldman* applies to Plaintiff's claims.

Strangely, Plaintiff spends most of his argument contesting application of the *Rooker-Feldman* doctrine to his claims. This topic is identified in two of the Appellant's three Questions Presented and appears to consume about six pages of Appellant's eight-page argument. *See* Appellant's Brief at 20-26. The special attention Appellant gives *Rooker-Feldman* is curious, considering the district court discussed *Rooker-Feldman* only in connection with Causes of Action 1 and 2 and only "to the extent Plaintiff seeks review of the VSC's ruling in *Ketchum*." A-247 (Order).

In any event, the district court properly resolved this issue. Here, Plaintiff seeks to have a federal district court overrule the Vermont Supreme Court and tell the Vermont Supreme Court how to interpret Vermont highway law, to the point of dictating state procedures. To this end, Plaintiff seeks:

> Injunctive relief finding the current Vermont Supreme Court Precedent set in *Ketchum* creates an unconstitutional interpretation of Vermont law which results in *de facto* structural due process violation; a *constitutionally valid interpretation* of Vermont law requires road maintenance and reclassification decisions be appealable in accordance with the procedural due process protections of 19 V.S.A. § 740 and that this process shall be *competently* conducted in a *timely* manner, as was the case due to well-established law prior to the Vermont Supreme Court's *Ketchum* decision.

Amended Complaint, A-101 (emphases in original). Plaintiff also seeks to have a federal court "remand[] a *new* Notice of Insufficiency appeal in Vermont courts,"

to be administered under 2010 law. Amended Complaint, A-102 (emphasis in original).

In sum, Plaintiff asks the federal courts to overrule the *Ketchum* decision, and, based on that overruling, to reopen and reverse the 2010 Reclassification Case and the 2010 Maintenance Case, and then to direct the Vermont courts to give Plaintiff a do-over in these two cases, this time based on a *federal* court interpretation of *Vermont* law. Such direct federal interference in state adjudication begs for application of the *Rooker-Feldman* doctrine. Plaintiff's claims are an express "invitation" to the district court to "review and reject" the Vermont Supreme Court rulings in the 2010 Reclassification Case and the 2010 Maintenance Case. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S. Ct. 1517, 1521-1522 (2005) (*Rooker-Feldman* bars "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments."); *also Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 85, 2005 U.S. App. LEXIS 19071, *15 (for *Rooker-Feldman* to apply, "the plaintiff must 'invite district court review and rejection of [that] judgment[].'") (citing *Exxon Mobil*).

For these reasons, the district court correctly applied *Rooker-Feldman*

And properly explained that the district court "does not sit as a court of appeals for the state courts" and "does not remand cases to the state court." A-247 (Order).

Appellant, relying on *Sung Cho v. City of New York*, 910 F.3d 639, 641 (2d Cir. 2018) appears to argue that the Vermont court decisions in the 2010 Reclassification Case and the 2010 Maintenance Case are not the *cause* of Plaintiff's injuries but rather "merely ratified" the Municipal Defendant's injurious conduct. *See* Appellant's Brief at 12, 13, 14, 17, 18, 21, and 24 (characterizing Vermont court decisions as "ratif[ications]"). Under *Sung Cho*, Appellant argues, such mere ratification should not trigger the *Rooker-Feldman* doctrine. Appellant's Brief at 21.

Sung Cho does not support Appellant's argument. In *Sung Cho*, and the cases upon which *Sung Cho* relied, the parties presented previously-signed settlement agreements to the Court, which incorporated the agreements by reference into "so-ordered judgements," and the plaintiff claimed that the agreements themselves were injurious. *Sung Cho*, 910 F.3d at 646-647. The Court agreed that under those circumstances, and where the plaintiff did not seek to reverse court action beyond ratification, the court decisions could not be said to have "caused" the injuries of which the plaintiff complained:

> The instant case thus does not entail the evil *Rooker-Feldman* was designed to prevent. Plaintiffs are attempting to remedy an alleged injury caused when, prior to any judicial action, they were coerced to settle, not an injury that flows from a state-court judgment. By

> allowing an action such as this to go forward, we do not risk turning our federal district courts into quasi-appellate courts sitting in review of state-court decisions.

Sung Cho, 910 F.3d at 649.

Sung Cho is nothing like the present case. Here, the parties never reached a settlement agreement, and no Vermont state court simply "ratified" a Town action. The issues in this case have been vigorously litigated and disputed by the parties for over a decade, and the Vermont court decisions have sided with the Town after making thoroughly reasoned rulings based on substantive interpretations of Vermont law. Plaintiff now asks the federal courts to give him what the Vermont courts say he did not deserve. The federal court cannot do that without reversing the fully litigated, fully-reasoned decisions in the 2010 Reclassification Case and the 2010 Maintenance Case. Attempting to describe the Vermont Supreme Court decisions as mere "ratification" is a gross mischaracterization of the facts, and a misapplication of *Sung Cho*.

For these reasons, the Municipal Defendants respectfully request the Court affirm the district court's dismissal of Causes of Action 1 and 2 based on the alternate and independent ground that the federal courts lack jurisdiction over them based on the *Rooker-Feldman* doctrine.

CONCLUSION

For the foregoing reasons, the Municipal Defendants respectfully request that the Court affirm the District Court's March 29, 2022 Order dismissing Plaintiff's Amended Complaint in its entirety.

Respectfully submitted on this 1st day of August, 2022.

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CERTIFICATE OF COMPLIANCE

Counsel for Appellees hereby certifies that the foregoing brief complies with the type-volume set forth in Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.1(a)(4). Based on the word count tool in Microsoft Word, the number of words in the foregoing brief, excluding the sections excludable under Fed. R. App. P. 32(f), is 11,246.

Respectfully submitted on this 1st day of August, 2022.

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