No. 16-1466

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KEVIN BROTT, et al.,
Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA,
Defendant - Appellee.

On Appeal from the United States District Court
for the Western District of Michigan
Honorable Janet T. Neff, District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, REASON FOUNDATION, AND AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PLAINTIFFS-APPELLANTS AND IN SUPPORT OF REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-1466 Case Name: Brott et al. v. United States

Name of counsel: John M. Groen, Ethan W. Blevins

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I certify that on July 1, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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ISSUE ADDRESSED BY AMICI

The Seventh Amendment preserves the right to a jury trial as it existed in England and the American colonies prior to 1791. Juries usually assessed compensation in pre-independence takings cases in England and the colonies. Does Kevin Brott have a constitutional right to a jury in his inverse condemnation claim against the federal government?

IDENTITY AND INTEREST OF AMICI

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, Pacific Legal Foundation (PLF), Reason Foundation, and the American Civil Rights Union respectfully file this amicus curiae brief in support of Appellants Kevin Brott, et al. All parties have consented to this filing in accordance with Rule 29(a).[1]

Founded in 1973, PLF is the nation's most experienced public interest legal organization defending Americans' property rights. PLF attorneys have often participated as lead counsel or amicus curiae in takings cases at all levels of the federal court system.[2] PLF's familiarity with constitutional takings law will assist the Court in considering the issues here.

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[1] This brief was not authored in whole or in part by counsel for any of the parties. Nor did any party, their counsel, or any other person besides the amici contribute money intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015); *Brandt v. United States*, 134 S. Ct. 1257 (2014); *Koontz v. St. Johns River Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

Reason Foundation is a nonpartisan public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing *Reason* magazine, online commentary, and policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason files briefs on significant constitutional issues.

American Civil Rights Union (ACRU) is a 501(c)(3) legal policy organization dedicated to educating the public on constitutional government and supporting litigation that will advance and restore principles enshrined in the U.S. Constitution. The policy board of the ACRU includes such constitutional conservative leaders as former United States Attorney General Edwin Meese III, former Assistant Attorney General Charles J. Cooper, former Assistant Attorney General William Bradford Reynolds, and former Ambassador J. Kenneth Blackwell. The ACRU is participating as amicus here to advance an originalist understanding of the Fifth and Seventh Amendments of the U.S. Constitution.

INTRODUCTION

Kevin Brott asks this Court to affirm his right to have a jury assess just compensation. His plea joins a rich history. Indeed, the birth of judicial review in the American colonies involved the right to a jury in a property matter. After the battle

of Monmouth in 1778, the British occupied much of New Jersey.[3] With Tory sympathies and revolutionary fervor at a frenzied pitch, the state faced fierce turmoil.[4]

Trade with the enemy plagued the colony.[5] It deflated morale, eroded loyalty, and provided the British with precious intelligence.[6] Thus, New Jersey authorized the seizure of commercial goods crossing British lines.[7] Because of the dire circumstances, New Jersey limited seizure disputes to summary proceedings with a six-man jury, instead of the usual 12.[8] Soon after, the privateer and vigilante Elisha Walton seized a massive stock of silk and other goods owned by John Holmes and Solomon Ketcham.[9]

Holmes challenged the constitutionality of the six-man jury before the New Jersey Supreme Court.[10] Like the Seventh Amendment, the New Jersey Constitution

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[3] *See* Philip Hamburger, *Is Administrative Law Unlawful?* 152 (2014); Austin Scott, *Holmes vs. Walton: The New Jersey Precedent*, 4 Am. Historical Rev. 456, 456 (1899).

[4] Hamburger, *supra* note 3 at 152.

[5] *See* Scott, *supra* note 3 at 461 ("The evils of the illicit trade with the British during the last five years of the war can hardly be exaggerated.").

[6] *Id.*; Hamburger, *supra* note 3 at 152.

[7] Scott, *supra* note 3 at 461.

[8] Hamburger, *supra* note 3 at 152.

[9] Scott, *supra* note 3 at 457.

[10] *Id.* at 457-58.

protected the right to a jury trial in civil cases.[11] In this first recorded instance of judicial review in American history, the New Jersey Supreme Court agreed with Holmes.[12] Despite the desperate circumstances and the gravity of the allegations, the Court held that only a twelve-man jury could satisfy the constitutional guarantee of a civil jury trial.[13]

This seminal case inaugurated a tradition of judicial review that has shaped our nation. Senator Gouverneur Morris said of the case: "Such power in judges is dangerous; but unless it somewhere exists, the time employed in framing a bill of rights and form of government was merely thrown away."[14]

Over two centuries later, however, the right to a jury trial does not enjoy the same level of devotion. Administrative agencies and legislative courts often adjudicate civil cases without juries.[15] Like John Holmes, Kevin Brott wants to litigate his wrongful takings claim in front of a jury. His case involves a recreational trail, not a military crisis. Kevin Brott is not undermining national security. And he is not asking for more jurors—he is asking for any jury at all. But the Court of

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[11] *Id.* at 458.

[12] *Id.* at 468; *see also* Wayne D. Moore, *Written and Unwritten Constitutional Law in the Founding Period: The Early New Jersey Cases*, 7 Const. Comment. 341, 341 (1990).

[13] Hamburger, *supra* note 3 at 152; Scott, *supra* note 3 at 463.

[14] Scott, *supra* note 3 at 464.

[15] *See* Hamburger, *supra* note 3 at 242-48.

Federal Claims, which enjoys exclusive jurisdiction over his constitutional claim, offers none.

The right to a jury trial in 2016 has traveled far from the right that inaugurated judicial review in 1780. That right, preserved by the Seventh Amendment, involved a strong tradition of juries in takings cases, including inverse condemnation. This Court should reverse the lower court to preserve the fundamental right to a trial by jury.

ARGUMENT

I

THE SEVENTH AMENDMENT'S EXTENSION TO "SUITS AT COMMON LAW" EMBRACES ALL CIVIL TRIALS OUTSIDE EQUITY AND ADMIRALTY, INCLUDING INVERSE CONDEMNATION CLAIMS AGAINST THE FEDERAL GOVERNMENT

The Seventh Amendment states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[16]

This unqualified right embraces inverse condemnation claims against the federal government.

The phrase "Suits at common law" refers to all civil suits that do not sound in

[16] U.S. Const. amend. VII.

equity or admiralty. Under Supreme Court precedent, the phrase refers to "cases tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not."[17] The Amendment, while preserving the traditional jury right, also extends to "actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than an action in equity or admiralty."[18] This includes all actions "for the recovery and possession of specific real or personal property."[19] And it certainly embraces eminent domain, which "always was a right at common law."[20] The Supreme Court has similarly concluded that inverse condemnation claims are actions at law.[21]

This broad understanding of "Suits at common law" finds support in the Judiciary Act of 1789. The Supreme Court considers that early Act to be "a contemporaneous exposition of the highest authority" in interpreting the Constitution.[22] When defining the role of the jury in federal courts, the Act

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[17] *Atlas Roofing Co., Inc. v. OSHA Review Comm'n*, 430 U.S. 442, 449 (1977).

[18] *Pernell v. Southall Realty*, 416 U.S. 363, 375 (1974).

[19] *Id.* at 370.

[20] *Kohl v. United States*, 91 U.S. 367, 376 (1875).

[21] *See Hurley v. Kincaid*, 285 U.S. 95, 104 (1932).

[22] *Patton v. United States*, 281 U.S. 276, 301 (1930), *abrogated on other grounds by Williams v. Florida*, 399 U.S. 78 (1970)); *see also* Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 N.W. U. L. Rev. (continued...)

distinguished between common law suits on the one hand, and equity and admiralty on the other. It says: "And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury."[23] The Seventh Amendment extends to any action at law with the exceptions of equity and admiralty.

Kevin Brott and his fellow landowners have brought "Suits at common law." The federal government took his land to create a recreational trail. Brott believes he deserves compensation. His inverse condemnation claim thus falls among those cases that—even if unknown in traditional common law—involve "rights and remedies of the sort traditionally enforced in an action at law, rather than an action in equity or admiralty."[24] As a claim for monetary recovery, Kevin Brott's inverse condemnation claim is a "Suit at common law." He is entitled to a jury.

II

TAKINGS CASES IN ENGLAND AND THE AMERICAN COLONIES PRIOR TO AMERICAN INDEPENDENCE SHOW A STEADY PATTERN OF JURY TRIALS

The history of condemnation practices in England and the colonies show that

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[22] (...continued)
144, 168-73 (1996) (describing how the Act supports a broad reading of the Seventh Amendment).

[23] Judiciary Act of 1789, Ch. 20, § 9, 1 Stat. 73; *see also* § 12.

[24] *Pernell*, 416 U.S. at 375.

the right to a jury trial—the right memorialized in the Constitution—applied in the takings context. Therefore, the right "preserved" by the Seventh Amendment extends to Kevin Brott's claims.

A. The American Colonies Prior to Independence Consistently Relied on Juries in Condemnation Proceedings

The jury trial has a long history, dating back before the thirteenth century.[25] Those roots nourished a firm commitment to the right to a jury among Americans on the brink of independence. Indeed, John Adams called the jury "the heart and lungs" of liberty.[26] And the right's impoverishment by the Crown stands among the grievances listed in the Declaration of Independence.[27]

The right to a jury trial dominated among the concerns that inspired the Bill of Rights.[28] Parliamentary attempts to erode this right through laws such as the Stamp Act of 1765 contributed to apprehension regarding the future of the jury.[29] The Stamp Act established that vice-admiralty courts—courts with no jury—would adjudicate all

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[25] Hamburger, *supra* note 3 at 148.

[26] J. Adams, Letter from the Earl of Clarendon to William Pym (Jan. 20, 1766), *quoted in* Clinton Rossiter, *Seedtime of the Republic: The Origin of the American Tradition of Political Liberty* 389 (1953).

[27] The Declaration of Independence, para. 3 (U.S. 1776).

[28] *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 745 (1973).

[29] *See* Grant, *supra* note 22 at 150-53.

disputes regarding customs duties imposed by the Act.[30] Indeed, though taxation without representation stood out as the primary grievance against the Stamp Act, this deprivation of the right to a jury trial fomented equal revolutionary ardor.[31] As a newspaper at the time put it, "If we are Englishmen . . . Is not our property . . . to be thrown into a prerogative court? a court of admiralty? and there to be adjudged, forfeited and condemned without a jury?"[32] The founding generation held this jury right in veneration: "No civil provision was more highly cherished in the European and American dominions of George III than jury trial."[33] And they guarded it jealously.

On the eve of the American Revolution, most of the colonies offered rights to a jury in various condemnation proceedings. Condemnation during that era usually made way for the construction of mills or highways.[34] Thus, colonies' approaches to mill and highway takings reflect on the general practices of the time. In mill and highway acts across the colonies, the jury trial is a recurring pattern.[35] Ten of the thirteen colonies had highway statutes with condemnation provisions that provided

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[30] *Id.* at 152-53.

[31] *Id.*

[32] Hamburger, *supra* note 3 at 151.

[33] 1 John P. Reid, *Constitutional History of the American Revolution: The Authority of Rights* 4 (1986).

[34] *See* Grant, *supra* note 22 at 178.

[35] *See id.* at 179-87.

a jury.[36] The other three colonies' highway statutes contained no provision for just compensation at all.[37] Seven of the thirteen colonies had mill acts.[38] Each one provided a right to a jury for aggrieved property owners.[39] Thus, each colony that had specific acts requiring compensation offered a jury to assess it. None of the colonies erected condemnation proceedings for highways or mills that did not offer property owners the right to a jury.

B. English Practice Confirms a Robust Jury Right in Condemnation Proceedings

The British had an abiding commitment to the jury. Juries regularly assessed compensation for takings. Thus, the right "preserved" by the Seventh Amendment applies to Kevin Brott's takings claim.

First introduced by the Norman kings in the eleventh century,[40] jury practices in England have long involved the valuation of real property. For example, William the Conqueror commissioned a massive survey—the Domesday Book—which assessed the value of lands all across England.[41] The survey relied entirely on jury

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[36] *See id.* at 179-84.

[37] *See id.* at 182-83.

[38] *See id.* at 184-87.

[39] *See id.*

[40] 1 William Holdsworth, *A History of English Law* 312 (3d ed. 1922).

[41] *Id.* at 313.

verdicts.[42] Henry II, in 1188, used juries to gauge property values for the Saladin Tithe—a 10% property levy to fund a crusade to oust invaders from Jerusalem.[43] London's redevelopment acts in the seventeenth century also used juries to assess increases in land value due to public works.[44] For much of its history, the jury played a vital role in assessing the value of land.

Juries also determined property values in English eminent domain cases. Prior to amendments to the Land Clauses Act in 1919, juries set compensation in condemnation proceedings.[45] The House of Lords laid out the history of jury assessments in takings cases in *Attorney-General v. De Keyser's Royal Hotel*.[46] There, the House of Lords considered whether the Crown must compensate a hotel for temporary occupation by the military during wartime.[47] Sir Swinfen Eady, who drafted the lead opinion, detailed English history regarding takings compensation, including the role of juries. Speaking of a 1708 statute, he wrote: "It is somewhat

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[42] *Id.*

[43] *Id.*

[44] Keith Davies, *The Law of Compulsory Purchase and Compensation* 265 (4th ed. 1984).

[45] *See* 1 Lewis Orgel, *Valuation Under the Law of Eminent Domain* 268 (2d ed. 1953); *Cripps on Compulsory Acquisition of Land* 484 (Harold Parrish ed., 11th ed. 1962).

[46] *Attorney-General v. De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508 (H.L.) (appeal taken from Eng.).

[47] *Id.* at 508-09.

significant that in the first statute of all dealing with the acquisition of land, . . . we have a reference to the usual methods that had been taken to prevent extortionate demands, and the usual methods are said to be a valuation by jury."[48] *De Keyser's Royal Hotel* establishes not only that the right to a jury in condemnation cases existed in 1708, but that such a practice had been "the usual method" prior to that time. This pattern reasserted itself in 1757, when Parliament feared that takings during the Seven Years' War might lead to "extravagant claims."[49] Parliament thus provided "a statutory provision for vesting the lands taken in trustees till the price may be paid as fixed by assessment by jury."[50] This right to a jury in takings cases received repeated affirmation, with condemnation statutes passed in 1798, 1803, and 1845, each repeating that juries determined compensation.[51] This unflagging history shows that the jury trial right "preserved" by the Seventh Amendment embraced the right to a jury in condemnation proceedings. The preservation of that storied right applies to Kevin Brott's inverse condemnation claim.

C. Actions for Unlawful Takings Also Qualified for Juries in English Practice

Inverse condemnation claims operate like eminent domain proceedings for

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[48] *Id.* at 527.

[49] *Id.*

[50] *Id.*

[51] *Id.*; *Cripps on Compulsory Acquisition of Land*, *supra* at 484.

constitutional purposes.[52] Thus, the historical right to a jury in eminent domain cases applies equally to the inverse condemnation context. Moreover, English common law also establishes a clear history of jury practices in claims similar to inverse condemnation.

Inverse condemnation claims resemble English common law actions that relied on juries. As a general matter, prior to 1791, a plaintiff who suffered a wrongful taking of land could pursue an ejectment action.[53] Ejectment and similar trespass torts all went before juries.[54] Juries also tried wrongful takings by the Crown. The plaintiff suffering such a wrong would file a "petition of right," an action that always enjoyed trial by jury well before 1791 and beyond.[55]

Inverse condemnation claims also resemble English actions against "promoters." In much of English eminent domain practice, the condemnors were often private "promoters"—individuals or companies authorized by Parliament to take property for roads and so forth.[56] If the promoters failed to pay adequate compensation, the landowner could sue them in tort for a trespass action, much like

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[52] *See First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty.*, 482 U.S. 304, 316 (1987).

[53] Keith Davies, *The Jury in Eminent Domain*, SF 54 ALI-ABA 145, 155 (2001).

[54] *Id.* at 155-56.

[55] *Id*. at 157-58.

[56] *See* William D. McNulty, *The Power of "Compulsory Purchase" Under the Law of England*, 21 Yale L. J. 639, 645 (1912).

inverse condemnation.[57] These claims went before juries.[58] The Seventh Amendment promised that similar actions—like Kevin Brott's takings claim—enjoy this same right, preserved in the same form as it had long existed by 1791.

III

SCATTERED SUPREME COURT DICTA DOES NOT UNDERMINE THE RIGHT TO A JURY IN TAKINGS CASES

Two arguments drawn from Supreme Court dicta have led some to the erroneous conclusion that the right to a jury trial does not apply in condemnation proceedings against the federal government. The first argument says the jury right does not apply in proceedings against the federal government in general. The district court relied on this theory below.[59] The second argument says the right to a jury does not extend to condemnation proceedings. Both buckle beneath the weight of history and binding caselaw.

The Sixth Circuit is not bound by Supreme Court dicta. The Supreme Court has itself said, "any opinion given here or elsewhere cannot be relied on as a binding

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[57] *See* Davies, *supra* note 53 at 155-56; Gideon Kanner, *Shattering the Myth of Eminent Domain*, The Conn. L. Trib. (Mar. 31, 2003), *available at* http://www.ctlawtribune.com/id=900005383472/Shattering-the-Myth-of-Eminent-Domain.

[58] *See id.*; Kanner *supra* note 57.

[59] *See Brott v. United States*, No. 1:15-cv-00038 (W.D. Mich. March 28, 2016).

authority, unless the case called for its expression."[60] Supreme Court dicta does not merit adoption if there exists "clear precedent to the contrary."[61] Other reasons, "such as age or subsequent statements undermining its rationale" can justify deviation from dicta as well.[62] This Court should decline to follow any dicta stating that a jury trial does not exist against the federal government or in condemnation proceedings.

One example of this dicta is found in *Lehman v. Nakshian,* where a federal employee sued the Navy under the Age Discrimination Act of 1967.[63] The Court concluded she lacked a right to a jury trial because "[i]t has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government."[64] This limit on the Seventh Amendment, the Court said, derived from sovereign immunity.[65]

Nakshian cited two cases for this conclusion: *McElrath v. United States* and *Galloway v. United States*.[66] In *McElrath*, a naval officer disputed the Secretary of the Navy's accusation that he deserted, seeking backpay that he could not receive

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[60] *Carroll v. Carroll's Lessee*, 57 U.S. 275, 287 (1853).

[61] *Wright v. Morris*, 111 F.3d 414, 419 (6th Cir. 1997).

[62] *In re Baker*, 791 F.3d 677, 682 (6th Cir. 2015).

[63] *Lehman v. Nakshian*, 453 U.S. 156, 158 (1981).

[64] *Id.* at 160.

[65] *Id.*

[66] *Galloway v. United States*, 319 U.S. 372 (1943); *McElrath v. United States*, 102 U.S. 426 (1880).

otherwise.[67] The Court of Claims heard the case, and the Supreme Court rejected the plaintiff's argument that he was entitled to a jury: "Suits against the government in the Court of Claims . . . are not controlled by the Seventh Amendment. They are not suits at common law within its true meaning."[68] And in *Galloway*, the Court concluded that a veteran's suit to enforce a war insurance policy had no right to a jury for similar reasons: "It hardly can be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign."[69] None of these cases, however, dealt with constitutional claims, and none matched the clear tradition of jury resolution of condemnation proceedings.

Nakshian's overbroad statement that the Seventh Amendment does not apply against the federal government defies the historical understanding of the jury trial right and the nature of constitutional governance. At most, *Nakshian*'s statement should be limited to cases involving statutory rights. When adjudicating a constitutional right—such as Kevin Brott's right to just compensation—Congress cannot control the forum, because Congress is not the source of the right being litigated. Otherwise, sovereign rights would preempt constitutional rights.[70]

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[67] *See generally McElrath*, 102 U.S. 426.

[68] *Id.* at 440.

[69] *Galloway*, 319 U.S. at 388. This brief does not address at length the question of sovereign immunity—an issue dealt with at length in other briefing.

[70] *See* Hamburger, *supra* note 3 at 247 (Courts should not "elevate[] sovereign rights (continued...)

To the extent that *Nakshian*'s broad statement embraces constitutional cases, it is dictum in direct conflict with historical evidence that the founding generation expected to have juries in cases against the government. After all, the Stamp Act—the poster child of parliamentary oppression—enraged colonists by removing juries from disputes with the Crown.[71] Thomas Jefferson, in a 1789 letter to Thomas Paine, also reflected upon the importance of placing government litigants before a jury: "I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[72] Whatever *Nakshian* might say about adjudicating statutory rights, Congress may not remove this anchor where constitutional rights—such as Kevin Brott's right to just compensation—are the subject of the litigation.

The theory that jury trial rights do not apply to condemnation proceedings also stems from dictum. In *United States v. Reynolds*, plaintiffs argued that 78 acres of a 250-acre condemnation were not part of the original scope of the government's project, so increased property values due to the improvements planned for the

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[70] (...continued)
over constitutional rights.").

[71] *See* Grant, *supra* note 22 at 151 (The Stamp Act "allowed customs officials . . . to enforce the Act's revenue and regulatory provisions in the juryless vice-admiralty courts.").

[72] Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), *quoted in* 8 *The Writings of Thomas Jefferson* 408 (Memorial Edition, Andrew A. Lipscomb, ed. 1903).

condemned property should be included in just compensation.[73] The Court held that the question of the original scope of the project should not have been presented to the jury.[74] In an off-hand remark, the Court also said: "[I]t has long been settled that there is no constitutional right to a jury in eminent domain proceedings."[75]

That statement, however, does not bind this Court. Although the Supreme Court mentioned the Seventh Amendment, *Reynolds* is not a Seventh Amendment case. The parties in *Reynolds* did not raise any Seventh Amendment issue in briefing. Instead, the parties focused only on the proper scope of Federal Rule of Civil Procedure 71.1(h), which allows a jury to assess compensation.[76] Nor did the court of appeals address the Seventh Amendment in the proceedings below.[77] Indeed, Reynolds did not even present an alternative argument that if Rule 71.1(h) did not allow the jury to consider the scope of the project, the Seventh Amendment still demanded it.[78] The Court expressly recognized that the parties had not raised a Seventh Amendment issue: "There is no claim that the issue is of constitutional

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[73] *United States v. Reynolds*, 397 U.S. 14, 14 (1970).

[74] *Id.* at 20.

[75] *Id.*

[76] *See generally* Brief for the Respondent, *United States v. Reynolds*, 397 U.S. 14 (1970) (No. 88) 1969 WL 119877; Brief for the Petitioner, *United States v. Reynolds*, 397 U.S. 14 (1970) (No. 88) 1969 WL 119876.

[77] *See generally United States v. 811.92 Acres of Land*, 404 F.2d 303 (6th Cir. 1968).

[78] *See generally* Brief for the Respondent 1969 WL 119877.

dimension."[79] Thus, the Court's statement that juries do not belong in condemnation proceedings is not binding because—as the Court admitted and the case history demonstrates—the Seventh Amendment was never at issue.

The *Reynolds* dictum relied on an inaccurate secondary source. *Reynolds* quoted from Moore's Federal Practice, which concluded that eminent domain practices in England and the colonies prior to 1791 did not include juries.[80] Moore cites nothing to clothe this naked proposition,[81] and the numerous sources cited in Part II of this brief refute it. *Reynolds* also cites to *Bauman v. Ross*, a takings case that considered whether the same jury should review damages and off-setting benefits.[82] It did not, however, address the broader Seventh Amendment issue here. The *Reynolds* dictum does not preclude Kevin Brott's Seventh Amendment right to a jury trial.

CONCLUSION

Much has changed since a court first introduced judicial review by upholding the right to a jury trial in 1780. As Gouverneur Morris said, that power is dangerous but essential, and "unless it somewhere exists, the time employed in framing a bill of

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[79] 397 U.S. at 18.

[80] *Id.*; 5 J. Moore, *Federal Practice* 239 (2d ed. 1969).

[81] *See* Moore, *supra* note 80 at 239.

[82] *See generally Bauman v. Ross*, 167 U.S. 548 (1897).

rights and form of government was merely thrown away."[83] That Bill of Rights promises that the right to a jury trial does not change, but "shall be preserved." English common law and condemnation statutes and colonial practice before 1791 all testify with the same voice: the usual method of determining just compensation for a taking occurred through a jury. The Seventh Amendment preserves that practice for Kevin Brott and any others seeking just compensation.

The decision below should be reversed.

DATED: July 1, 2016.

Respectfully submitted,

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[83] Scott, *supra* note 3 at 464.

CERTIFICATE OF COMPLIANCE

This amicus brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,472 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

DATED: July 1, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2016, I electronically filed the foregoing brief amicus curiae with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

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