No. _____

In The Supreme Court of the United States

"I AM" SCHOOL, INC.,

Petitioner,

v.

CITY OF MOUNT SHASTA,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Third Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner "I AM" School, Inc. was denied declaratory relief in which it sought the full extent of State mandated 600-foot protection from cannabis activity encroachment measured from the outermost perimeter of the entirety of its school campus lands – as afforded to all California schools providing instruction in kindergarten or any grades 1 through 12 by California Bus. & Prof. Code (BPC) §26054(b).

Denial of relief was based on a new rule of law reaching beyond *Avco Community Developers, Inc. v. South Coast Regional Com.*, (1976) 17 Cal.3d 785, 791., denying vested rights on *selected parcels* of school campus lands deemed 'undeveloped' within the singular economic unit's duly exercised development approval.

Selected parcels were excluded from the '*existing school*' perimeter measurement by judicial determination, notwithstanding their inclusion in the school's singular overarching Conditional Use Permit approval for school land use, building permits issued, and staged multi-lot development having commenced.

By denying vested rights on selected parcels, the decision below appropriated Petitioner's right to exclude cannabis activity 600 feet from the outermost perimeter of its school campus lands – thereby creating an access easement over a discrete

real property interest statutorily extended 600 feet for the safety and protection of California school children. Such appropriation represents a *per se* taking and imposes a categorical obligation to provide Petitioner with just compensation.

The appellate Court's opinion was unpublished, prohibiting it from being cited – hence barring litigation seeking post-taking compensation.

The question presented is:

Whether state appellate courts, consistent with the Fifth and Fourteenth Amendments, may apply prospective overruling retroactively to a litigant's case appropriating a property right to exclude, and at the same time make their decisions unciteable and therefore selective in their effect; without offending the just compensation clause within the Fifth Amendment, and the rule of law forbidding parties to the proceeding and similarly situated non parties attracting different legal consequences?

PARTIES TO THE PROCEEDING

Petitioner is "I AM" School, Inc. Respondent is the City of Mount Shasta.

CORPORATE DISCLOSURE STATEMENT

"I AM" School, Inc., has no parent corporations and no publicly held company owns 10% or more of the stock of its business.

RELATED PROCEEDINGS

"I AM" School, Inc., v. City of Mount Shasta, No. S271137 (Cal. Nov. 10, 2021). (denial of Petition for review)

"I AM" School, Inc., v. City of Mount Shasta, No. C091575 (Cal. Ct. App. Sep. 13, 2021). (denial of Petition for rehearing)

"I AM" School, Inc., v. City of Mount Shasta, No. C091575 (Cal. Ct. App. Aug. 23, 2021). (unpublished opinion)

"I AM" School, Inc., v. City of Mount Shasta, No. CVPT2019-1269 (Cal. Super. Ct. Feb. 18, 2020). (trial court proceeding)

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"I AM" School, Inc. respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, Third Appellate District. The California Supreme Court denied a timely petition for review on November 10, 2021.

OPINIONS BELOW

The opinion of the California Court of Appeal, Third Appellate District, Case No. CO91575 is unpublished and is reproduced in Petitioner's Appendix (Pet. App.) at A.

The order of the California Superior Court, Siskiyou County, Case No. CVPT2019-1269, is unpublished and is reproduced at Pet. App. B.

JURISDICTION

The California Court of Appeal, Third Appellate District, entered its decision below on August 23, 2021.

Petition for rehearing was denied in the California Court of Appeal, Third Appellate District, on September 13, 2021.

Petition for review was denied in the Supreme Court of California on November 10, 2021.

"I AM" School, Inc. timely files this petition and invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

STATEMENT

Petitioner "I AM" School, Inc. was denied declaratory relief in which it sought the full extent of 600-foot radius protection from cannabis activity encroachment measured from the outermost perimeter of the entirety of its school campus lands – as afforded to all California schools providing instruction in kindergarten or any grades 1 through 12 by California Bus. & Prof. Code (BPC) §26054(b).

Denial of relief was based on a new rule of law reaching beyond *Avco Community Developers, Inc. v. South Coast Regional Com.*, (1976) 17 Cal.3d 785, 791., denying vested rights on *selected parcels* of school campus lands deemed 'undeveloped' within the singular economic unit's duly exercised development approval. For that reason, those parcels were excluded from the *'existing school'*

perimeter measurement by judicial determination as having no vested right to be part of the exclusion start point for the Petitioner school's statutory right to State mandated 600-foot perimeter protection from cannabis activity encroachment.

Selected parcels in the singular economic unit were excluded notwithstanding their inclusion in the school's overarching Conditional Use Permit approval for land use, building permits issued, and staged multi-lot development having commenced.

Petitioner "I AM" School, Inc. timely and properly raised in reply to Respondent's position in the appellate Court that there was no evidence of a taking of Petitioner's property that, on the contrary, any revocation of the "I AM" School, Inc.'s State mandated right to exclude cannabis activities 600 feet from the selected parcels constitutes a constructive taking within the meaning of the Fifth Amendment. Pet. App. E-1.

The decision below appropriating the right to exclude cannabis activity represents a *per se* taking yet bars recourse to just compensation remedies as it:

(1) writes an uncitable new rule of law that removes vested rights from *selected parcels* of a contiguous land development approval of one economic unit on which construction has commenced, appropriating the Petitioner's right to rely on those parcels within its outermost perimeter to exclude cannabis activity encroachment; AND

(2) denies future avenues for the affected litigant to petition that such an action represents a *per se* taking to which post-taking compensation remedies should be applied, due to the appellate Court's selective choice of nonpublication and the application of California no-citation rules which removes from judicial review the new rule of law applied in the litigant's case from being further cited, reviewed or contested in subsequent cases seeking post-taking compensation remedies.

The decision below threatens the property rights of tens of millions of Americans who rely on consistency of government license with its attendant checks and balances to develop private property and protect it from intrusion. It explicitly empowers California local municipalities to arbitrarily deny vested rights, in part or in full, to any disfavored property owner so long as they can selectively apply new rules of law with impunity, insulated from review or accountability.

Moreover, by deferring to the appellate Court's view that the announcement of a new rule of law does not automatically bind the Court to order its publication and citation, the decision below makes seeking constitutional right of remedy from those denials all but impossible.

In doing so, the appellate Court decision below decided a question of national significance in a way that split with the decisions of this Court.

In *Cedar Point Nursery et al. v. Hassid et al.*, 594 U.S. ___ (2021), this Court affirmed that when the government physically appropriates a discrete property interest, as has occurred here in appropriating the Petitioner's right to exclude cannabis activity encroachment from its entire property perimeter, the multifactor balancing test of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) has no place and such action represents a *per se* taking — regardless whether the government action takes the form of a regulation, statute, ordinance, or decree.

In *Knick v. Township of Scott, Pennsylvania, et al*, No. 17-647, 588 U.S. ___ (2019) this Court reassessed the issue of ripeness within the "Takings Clause" doctrine set forth in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), which held that a property owner whose property has been taken by a local government has not suffered a violation of his

Fifth Amendment rights *until* a state court has denied his claim for just compensation under state law.

Instead, this Court affirmed that the prior *Williamson County* state-litigation requirement rests on a mistaken view of the Fifth Amendment and that a property owner does acquire a right to compensation *immediately* upon an uncompensated taking because the taking itself violates the Fifth Amendment.

This Court reiterated in *Knick*, that so long as the property owner has some way to obtain compensation after the fact, governments need not fear that courts will enjoin their activities. Here, Petitioner "I AM" School, Inc. is barred from further litigation seeking just compensation from the *per se* taking by the appellate Court's invocation of the no-citation rule through selective nonpublication.

In *James M. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) this Court rejected modified, or selective, prospectivity, and held *Griffith*'s[1] equality principle equally well applies in the civil context as in the criminal in that a new rule may not be retroactively applied to some litigants when it is not applied to others.

[1] *Griffith v. Kentucky,* 479 U.S. 314 (1987)

This Court concluded that, as an issue of choice of law, once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application not barred by procedural requirements or res judicata.

This Court should grant certiorari to affirm that there is no "no-citation" exception to the Fifth Amendment, in cases where an appellate Court has selected to not certify its opinion for publication, thereby barring its new rule of law – extending the taking of private property for public use – from being cited when petitioning for post-taking compensation remedies.

Furthermore, it should grant certiorari to reaffirm its central holding in *Cedar Point Nursery* that the right to exclude is not an empty formality that can be modified at the government's pleasure, as well as confirming as per *Knick*, the right to compensation is immediate upon an uncompensated taking.

These two recent holdings in the context of this Court's rejection of modified prospectivity in the civil context as held in *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) and *James M. Beam* point to a compelling necessity for the decision below's citation in order to enable Petitioner's recourse to just compensation remedies as a matter of constitutional right.

This Court should consider as a matter of first impression whether the selective and non-appealable use of California Rules of Court, rule 8.1115(a), prohibiting courts and parties from citing or relying on opinions not certified for publication unduly interferes with the Fifth Amendment constitutional right to just compensation and the Fourteenth Amendment right to due process.

I. Petitioner's Conditional Use Permit & Respondent Denial of Vested Rights for Selected Land Parcels within the Development.

In 2002, Petitioner "I AM" School, Inc. was granted a single definitive overarching Conditional Use Permit ("CUP") for staged construction of a full-service K-12 boarding school over contiguous lots comprising its 2.64 acre school campus.

The Permit approval of a School Campus Master Plan detailed location, size and use of all proposed buildings and acknowledged four lot parcels covered by the CUP as "School Campus Lands." A Mitigated Negative Declaration under California Environmental Quality Act (CEQA) was granted in respect to the entire staged project being viewed as one economic unit. Building permits have been issued. Two classroom buildings and a school boarding dormitory now occupy half of the school campus, construction having been completed at significant cost.

Petitioner's CUP is in good standing and has no time limitation or completion date imposed.

On November 9, 2016, Sec. 6.1 of The Adult Use of Marijuana Act (Proposition 64) added BPC §26054(b): "A premises licensed under this division shall not be located within a 600-foot radius of a school providing instruction in kindergarten or any grades 1 through 12, daycare center, or youth center that is in existence at the time the license is issued, unless a licensing authority or a local jurisdiction specifies a different radius. The distance specified in this section shall be measured in the same manner as provided in subdivision (c) of Section 11362.768 of the Health and Safety Code unless otherwise provided by law."

California Health & Saf. Code (HSC) §11362.768 (c) states: "The distance specified in this section shall be the horizontal distance measured in a straight line from the property line of the school to the closest property line of the lot on which the medicinal cannabis cooperative, collective, dispensary, operator, establishment, or provider is to be located without regard to intervening structures."

In 2017, an Oregon corporation purchased 1119 Ream Ave. as a possible cannabis business location in the Respondent's Employment Center zoning district located less than 600 feet from Petitioner's school.

Respondent approved a condominium lot subdivision and a Cannabis License Business Permit application for 1119 Ream Ave. substantially less than 600 feet from Petitioner's school campus perimeter property line, but being more than 600 feet from Petitioner's lot parcel containing existing school classrooms.

Respondent argued that local regulatory agencies could determine which land parcels within the single contiguous boarding school economic unit providing instruction in K through 12, that is in existence at the time the license is issued are to be included or not be included as being those constituting an existing "school", daycare center", or "youth center" and therefore permitted to be included or excluded within the 600-foot distance measurement.

Respondent determined that, in Petitioner "I AM" School, Inc.'s case, only those land parcels containing existing constructed *classrooms* constituted an *'existing school';* while the vested rights pertaining to those land parcels without classrooms within the school campus were of no consequence and would be barred from the school perimeter measurement excluding cannabis activities encroachment at a distance of 600 feet.

II. Proceedings Below

On December 5, 2019 Petitioner "I AM" School, Inc. filed a Second Amended Petition/Complaint For Writ of Mandate, Administrative Mandamus and Order in Siskiyou County Superior Court, asserting various causes of action including its right to:

a. rely on the actions of Respondent's Ordinance which prohibited cannabis activities in its Employment-Center-Zone;

b. insist that any amendments to that Zone comply with the requirements of Respondent's own Municipal Code and with CEQA §21080(a) and §21065;

c. recognize that the State mandated, BPC §26054(b) 600-foot radius around schools be measured from the CUP approved perimeter of the school campus property line; and

d. rely on the vested rights gained by Petitioner's School under its CUP approval for its entire campus multi-lot development - by way of issuance of the first building permit - as determining the start point for the 600-foot measurement.

As a result of Respondent's acceptance and apparent imminent intention to grant a license to a cannabis business within 600 feet of Petitioners' school campus before its case could be heard, Petitioner "I AM" School, Inc. filed a Notice of

Motion for an injunction and other relief on December 18, 2019. Respondent replied.

On January 9, 2020, the Superior Court ordered that only the 600-foot buffer zone issue would be heard by way of Declaratory Relief Complaint, after determining that parties agreed a resolution on the immediate controversy concerning the 600-foot buffer zone could resolve the most pressing issue of restraining the Respondent from issuing Cannabis licenses within 600 feet of Petitioner's school until the entire scope of its case could be heard.

The Superior Court heard the matter on February 13, 2020 and focused on Respondent's Exhibit "D", a Court photocopy of an originally submitted color aerial view of the school campus. This photocopy blurred the existing school boarding dormitory on lot parcel 057-621-360-000 making it appear that only two school buildings existed on the entire campus, thereby potentially causing the misapprehension that no building permits had been issued, or that construction development had not occurred subsequent to the CUP being approved.

The Court ignored Petitioner's statement outlining the timeline of staged development of the contiguous land parcels within the singular boarding school campus economic unit following CUP

approval, including the construction of the million dollar school dormitory.

Instead, the Court applied an extended interpretation of *Avco Community Developers, Inc. v. South Coast Regional Com.*, (1976) 17 Cal.3d 785, 791., ultimately ruling that under the *Avco* rule, Petitioner "I AM" School, Inc. did not have vested rights for *selected lots* under the CUP where buildings had not yet been constructed and those lots would not be included as part of the school property line. The Court gave no ruling on Respondent's argument concerning the meaning of the words *"existing school."* Pet. App. B-2.

On February 20, 2020, Petitioner "I AM" School, Inc. filed and served a Notice of Appeal of Superior Court's Order of February 18, 2020.

On February 24, 2020, Petitioner's Ex Parte application for a stay of the February 18, 2020 Order was heard and denied. Petitioner requested permission to pursue its other causes of action raised in its Second Amended Petition/Complaint in the Superior Court. The Court stated, but did not rule, the February 18, 2020 Order disposed of every issue raised in the entire action.

On August 23, 2021, the California Court of Appeal, Third Appellate District's unpublished decision below affirmed and modified the Superior Court judgment. The Court applied a de novo

standard of review to its statutory interpretation of BPC §26054(b) and HSC §11362.768 citing prior case law on statutory interpretation. Pet. App. A-12.

The Court stated: "We conclude the trial court was right, section 11362.768 requires the measurement be taken from the lot or lots with existing school structures, and, under *Avco Community Developers, Inc. v. South Coast Regional Com.*, supra, 17 Cal.3d 785, Appellant had no vested rights in the undeveloped lots." Pet. App. A-15.

On September 7, 2021, Petitioner "I AM" School, Inc. sought rehearing and was denied September 13, 2021. Pet. App. C-1.

On October 1, 2021, Petitioner "I AM" School, Inc. sought review in the California Supreme Court and was denied November 10, 2021. Pet. App. D-1.

Petitioner "I AM" School, Inc. then timely filed this petition.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Empowers State Courts, Selectively Operating under Nonpublication Rules, to Arbitrarily Offend the Rule of Law and Principles of Natural Justice, Free from Judicial Scrutiny.

The issue in this case is whether the government may avoid the Fifth Amendment's

requirement to pay just compensation for a *per se* taking merely by placing a no-citation restriction on its new rule of law.

The decision below's uncitable new rule of law appropriates an easement in gross allowing cannabis activity to invade the Petitioner "I AM" School, Inc.'s school property perimeter's exclusion right to a State mandated 600-foot safety buffer zone.

The California Court of Appeal, Third Appellate District held that "I AM" School, Inc. may be shut out from its fundamental right to operate, exclude others and develop its economic occupation based on an uncitable new rule of law that extended loss of vested rights to *selected parcels* of land within a staged contiguous development approval of a singular economic unit in good standing.

The determination that certain lots that were not yet developed lacked vested rights and were not afforded inclusion in the *'existing school'* perimeter measurement excluding cannabis activity encroachment, notwithstanding that those lots were part of the specifically definitive integrated four-lot development approval on which construction had commenced, reaches beyond established principles set forth in *Avco*.

The decision below stated that:

> "The fact that appellant has a conditional use permit allowing educational facilities on lot 4 is

> of no consequence because appellant has not developed *that lot* and therefore has no vested right in it." Pet. App. A-14.

The vested rights rule protects developers from government interference to proceed with a particular development project which was lawful when begun and has not become a nuisance. *Dobbins v City of Los Angeles* 195 U.S. 223 (1904).

The decision below constitutes a *per se* taking as it grafts extra judicial conditions onto a valid CUP contract duly exercised, appropriating Petitioner's right to exclude cannabis activities. It constitutes a revocation of the discrete property rights obtained inclusive of the State mandated right to exclude cannabis encroachment to the full 600-foot extent statutorily allowed and constitutes constructive taking, necessitating at the very least the opportunity for seeking post-taking compensation remedies.

That opportunity was extinguished by the appellate Court through concurrent nonpublication of its decision.

Petitioner "I AM" School, Inc.'s CUP is a valid contract with the Respondent. Valid Contracts constitute property within the meaning of the Fifth Amendment and are susceptible to a taking within

the meaning of the Takings Clause. *Lynch v. United States*, 292 U.S. 571, 579 (1934).

Respondent gave Petitioner the right to use and stage a school development of four contiguous land parcels within a singular economic unit designated under a single overarching CUP according to the definitive terms of that CUP. Good faith reliance on that right occurred with building permits being issued and hard construction costs being incurred. One-half of its 2.46 acre campus under its CUP is already developed with school facilities of specific use, location and size being built sequentially on each lot.

The extra and judicially imposed conditions of conducting a temporal *lot by lot* examination and selective removal of vested rights obtained in the decision below invalidates Petitioner's overarching CUP staged development approval that has been duly exercised and is in good standing, impairs the timely completion of Petitioner school's multiple-lot staged project, and appropriates the Petitioner's right to exclude cannabis activities closer than 600-foot from selected lots of its school campus lands.

The grafting of an extra judicial temporal examination of the vested rights status of individual parcels within Petitioner's CUP approval brings the future prospect of additional, distinct and singular new applications to establish Petitioner's continued right and abilities to build on the singled-out lots

deemed underdeveloped and lacking vested rights. It removes the full extent of State mandated 600-foot protection of the school campus land's perimeter to exclude cannabis activity encroachment and detrimentally impacts Petitioner's exercise of its first amendment right to practice its religion without undue interference. Pet. App.E-1-12.

The decision below states a new rule of law reaching beyond *Avco* – that of differential vested rights existing simultaneously within one contiguous multi-lot staged development approval of a singular economic unit – through the insertion of a judicial determination of the timing of vested rights *on a lot by lot* basis while concurrently making that new rule unciteable by way of unpublished opinion.

The choice of nonpublication of the new rule of law irreparably impacts the Petitioner "I AM" School, Inc.'s ability to seek post-taking compensation remedies in subsequent litigation when this case is put forward to the same deciding court that first made the uncitable decision without fear of contempt.[2] Cal. Rules, rule 8.1115(a) prohibits courts and parties from citing or relying on opinions not certified for publication in any other action.

The wrongful nonpublication of the new rule of law appropriating Petitioner's Fifth Amendment

[2] *People v. Williams,* (2009) 176 Cal.App.4th 1521, 1529.

rights and remedies erodes the inherent justness, equality, boundaries of and attendant requirements of prospective overruling and undermines one of the most important legal foundations in America today: STARE DECISIS.

The wide-ranging discretion California appellate Courts hold when assessing the merits of whether to certify for publication a decision, in combination with the lack of binding forums for direct evidence based appeal on such decisions, necessitates that this Court decide on the constitutionality of California's nonpublication rules and whether the Constitution places limits to their extent and breadth.

Citation can only occur in California through the act of publication. Cal. Rules, rule 8.1105(c) Standards for certification does not bind, but merely recommends, (by the use of wording "*should be*") standards of publication on appellate Courts.

Rule 8.1105 subd.(c) states:

(c) Standards for certification

An opinion of a Court of Appeal or a superior court appellate division - whether it affirms or reverses a trial court order or judgment - *should be certified* for publication in the Official Reports if the opinion:

(1) Establishes a new rule of law;

(2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions;

(3) Modifies, explains, or criticizes with reasons given, an existing rule of law;

(4) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;

(5) Addresses or creates an apparent conflict in the law;

(6) Involves a legal issue of continuing public interest;

(7) Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the Legislative or judicial history of a provision of a constitution, statute, or other written law;

(8) Invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision; or

(9) Is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law.

Moreover, California has no binding procedural rule based forum for the aggrieved litigant to raise

on *direct appeal* an opinion's wrongful nonpublication.

On the contrary, Cal. Rules Rule 8.1120 – Requesting publication of unpublished opinions, merely provides an administrative avenue *for a request* to the California Supreme Court for publication of unpublished opinions by *any person* stating the person's interest and the reason why the opinion meets a standard for publication.

Following such request, the California Supreme Court *may* order the opinion published or deny the request, but it is not bound or required to conduct an equitable evidence based enquiry against objective standards.

Wrongful nonpublication makes such uncitable cases second-class before the law – effectively diminishing their accessibility to further judicial scrutiny and review and, here, barring them from being cited further by the litigant when seeking just compensation remedies.

While litigants must abide by retroactive application of each new rule announced, similar situated non parties and even the litigants themselves in future cases are forbidden - not allowed to rely on, or even to mention - unpublished opinions in California state courts. Such selective or modified prospectivity offends the rule of law at its very core.

In *Harper,* this Court unanimously prohibited the erection of selective temporal barriers to the application of federal law in noncriminal cases. The case further stated that "the Supremacy Clause, … does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law." *Harper v. Va. Dep't of Taxation*, 509 U.S. at 88.

By corollary, this Court in 2006 abandoned the federal judiciary's experiment with no-citation rules in California with the adoption of Federal Rule of Appellate Procedure (FRAP) 32.1. The judiciaries of more than half the states (not including California) have followed. Two Authors of FRAP 32.1, the Hon. Samuel Alito, now Justice, and the Hon. John Roberts, now Chief Justice, wrote at the time:

> "A prior restraint on what a party may tell a court about the court's own rulings may also raise First Amendment [Free Speech] concerns: But whether or not no-citation rules are constitutional ... they cannot be justified as a policy matter."

The inherent danger represented by the risk of wrongful nonpublication occurring within the ninety-one percent (91%) of California appellate decisions that are ordered unpublished by their author judges[3], while offering no binding equitable

[3] Judicial Council of California, *2021-Court-Statistics-Report*, *available at* https://www.courts.ca.gov/documents/2021-Court-Statistics-Report.pdf

rule-based forum for direct appeal against such arbitrary decision-making, threatens to destroy the fundamental public trust in California state courts as the pre-eminent medium for delivering equal justice before the law in the minds of tens of millions of Americans.

Faced with that danger, millions of Americans may over time reject the use of this State regulated medium, in part or in full, as being perceivably unjust and lacking prospect of open review and remedy, preferring instead to seek more transparent justice in California Federal Courts.

The decision below highlights and exacerbates these problems.

II. The Decision Below Conflicts with Decisions of This Court.

The right to exclude is "a fundamental element of the property right." *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) and is "one of the most treasured" rights of property ownership regardless whether it results in what may seem to be only a trivial economic loss. *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 435 (1982).

When the government physically acquires private property for a public use, the Takings Clause obligates the government to provide the owner with just compensation. see *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,

535 U.S. 302 (2002). Per *Tahoe*, this Court has assessed such physical takings using a *per se* rule: The government must pay for what it takes. Id., at 322.

Per se treatment is particularly appropriate when, as here, the discrete property interest – the right to exclude – taken by the government is an easement in gross. This Court has repeatedly held that an easement is a permanent physical invasion of property that cannot be taken without just compensation, see *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987). The scope of the easement goes only to the amount of compensation due. *United States v. Causby*, 328 U.S. 256 (1946). at 267–68.

In the decision below, Petitioner "I AM" School, Inc. has had its vested property rights appropriated by the application of a new rule of law over *selected parcels* of land in a definitively consented multi-lot development of one economic unit on which construction had commenced. The new rule of law was selectively applied retroactively to the Petitioner in direct conflict with this Court's prohibition in *Harper* and *James M. Beam*, while per *Knick* the immediate right to post-taking compensation has been likewise appropriated by the Court's decision being barred from being cited in any future litigation claims for post-taking compensation through wrongful nonpublication.

Here, by denying vested rights to *selected parcels* of land approved for development within the one economic unit, with that right having been duly exercised; the decision below appropriates a right to invade the Petitioner's school property perimeter's exclusion right to a State mandated 600-foot safety buffer zone protection away from cannabis activity. It appropriates for the enjoyment of third parties (here cannabis activities) the owner's right to exclude them at the full statutory distance of 600 feet from encroaching on the entire extent of its property perimeter.

Per *Cedar Point Nursery,* when the government physically appropriates property, the multifactor balancing test of *Penn Central* has no place. Regardless whether the governmental action comes as statute, or ordinance, or miscellaneous order or decree, if the government has physically taken property for itself or someone else — by whatever means — or has instead restricted a property owner's ability to use his own property, the result is a physical appropriation of property. This Court's precedents have treated such government-authorized physical invasions as *per se* takings requiring just compensation.

Here, the commensurate choice by an appellate Court not to publish and make its decision uncitable extinguishes Petitioner's right to seek just compensation. This Court has repeatedly held that a

physical appropriation is a taking whether it is permanent or temporary; the duration of the appropriation, similar to the size of an appropriation, bears only on the amount of compensation due. *United States v. Dow*, 357 U.S. 17 (1958).

III. This Case Is a Good Vehicle in Which to Resolve These Issues.

This case is a good vehicle for the Court to answer the questions presented for two reasons.

First, it provides this Court with an opportunity to clarify specifically how its decisions in *Harper and James M. Beam* applies to (1) a State appellate Court's ability to selectively choose not to publish an opinion when a new rule of law, or a new interpretation of law, is advanced with its attendant consequences with regard to overruling existing legal precedent, (2) the decision below's equality of prospectivity to similarly situated non parties versus selective retroactive application confined solely to the litigants, (3) the lack of citeability regarding the consequential bar to future post-taking compensation litigation and most importantly (4) questions of judicial scrutiny and review — a combination of issues not directly addressed in either case, but which are of profound nationwide importance.

Second, the case comes to this Court with a clean record, and this Court's answer to the question presented would almost certainly be outcome determinative.

The City of Mount Shasta made no effort to defend under strict scrutiny its rejection of Petitioner's overarching CUP development approval and good faith reliance on such for development of the entire four parcels of land approved and in good standing thereunder and, as a matter of course, be included in the measurement of the start point of its 600-foot State mandated protection from cannabis activity encroachment.

This is the rare case in which the local government agency admits that it denied the full extent of the uniform State-wide 600-foot protection purely because it considered *selected parcels* of land individually and separate from the rest of their contiguous school land use approval, despite them being an integral and indivisible part of the granted staged development land use consent of a singular economic unit on which development had commenced.

These facts present an exceptionally clean opportunity to address these issues with no ambiguity, and to provide the lower courts with the guidance they need.

CONCLUSION

This Court should grant the petition.

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Respectfully submitted,

/s/

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