No. 21-735

In The
Supreme Court of the United States

JIM OLIVE PHOTOGRAPHY,
D/B/A PHOTOLIVE, INC.,

Petitioner,

v.

UNIVERSITY OF HOUSTON SYSTEM,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Respondent does not dispute that the core holding of *Cedar Point Nursery v. Hassid* is that "by appropriating a right to invade," the government commits "a *per se* physical taking." *See* Resp. 2 (citing 141 S. Ct. 2063, 2072 (2021)). Nor does Respondent dispute that the impact of *Cedar Point* was never considered by the Supreme Court of Texas. *See* Resp. 10. Indeed, Respondent does not even dispute that the opinion below fails to mention, much less examine, the appropriation of a "right to invade" as the foundation of a *per se* takings claim.

Despite this, Respondent devotes just *two sentences* of its brief to the "right to invade"—which focuses on the "essential question" of "whether the government has physically taken property for itself," 141 S. Ct. at 2072—and focuses instead on Petitioner's "right to exclude." Respondent's inability to point to *any* discussion of this vital issue in the opinion below confirms that GVR is appropriate to allow the court to re-examine its decision in light of *Cedar Point*.

By recognizing the appropriation of a "right to invade," *Cedar Point* brings clarity to the treatment of intangible property rights (such as easements and copyrights) under the Takings Clause. Specifically, this framework confirms that—just as the "physical invasion[]" of real property results in the taking of a "servitude or easement," *id.* at 2073—the invasion of Petitioner's exclusive right to use his work results in the taking of a "license." In short, the effect of *Cedar*

Point on Petitioner's rights must be considered, either by this Court in the first instance or by the Supreme Court of Texas on remand. This Court should "respect the dignity" of the Supreme Court of Texas and remand this case to provide that court with the opportunity to reconsider its decision in light of *Cedar Point* and "arguments that were not previously before it." *Stutson v. United States*, 516 U.S. 193, 197 (1996).

I. GVR is appropriate to allow the court below to consider *Cedar Point*'s holding that the appropriation of a "right to invade" is a *per se* taking.

Respondent attempts to frame the opinion below as consistent with *Cedar Point*, arguing that GVR is unnecessary because the court considered the "same precedents" and concluded that "copyright infringement by a government actor does not appropriate the copyright owner's rights to exclude anyone." Resp. 12. But by focusing myopically on Petitioner's "right to exclude," Respondent ignores *Cedar Point*'s holding that the "essential question" in a *per se* takings analysis is "whether *the government* has physically taken property *for itself*." 141 S. Ct. at 2072 (emphasis added). When the focus is shifted to the proper inquiry—whether Respondent has "taken property for itself"—it becomes clear that a *per se* taking has occurred.

1. In *Cedar Point*, the Court explained that "government-authorized invasions of property . . . are physical takings requiring just compensation," as they

"appropriate[] a right to access" private property. *Id.* at 2074. This rule applies with full force when the government "takes possession of property without acquiring title to it," and triggers "a simple, *per se* rule: The government must pay for what it takes." *Id.* at 2071. When examining such informal invasions, "[t]he Court has often described the property interest taken as a servitude or an easement," noting that "[b]ecause the damages suffered by the [plaintiffs] 'were the product of a direct invasion of [their] domain' . . . 'a servitude has been imposed upon the land.'" *Id.* at 2073 (quoting *United States v. Causby*, 328 U.S. 256, 265–66, 267 (1946)).

Of vital importance for this case, *Cedar Point* reaffirmed that "even if the Government physically invades only an easement in property, it must nonetheless pay just compensation." *Id.* at 2073. Moreover, "a physical appropriation is a taking whether it is permanent or temporary," and "compensation is mandated when a leasehold is taken and the government occupies property for its own purposes, even though that use is temporary." *Id.* at 2074 (citations omitted). "The duration of an appropriation—just like the size of an appropriation—bears only on the amount of compensation." *Id.* (citations omitted).

Respondent's use of Petitioner's copyright falls squarely within the *per se* takings framework established by *Cedar Point*. The Copyright Act vests Petitioner with the "exclusive rights to do and to authorize" the reproduction, distribution, and display of his work. 17 U.S.C. § 106(1), (3), (5). Respondent invaded that

exclusive domain, taking for itself not only physical possession of the work, but also access to Petitioner's exclusive rights to reproduce, distribute, and display the work. "[B]ecause the damages suffered by [Petitioner] 'were the product of a direct invasion of [his] domain' . . . 'a servitude has been imposed'" on his copyright. *Cedar Point*, 141 S. Ct. at 2073 (citations omitted).

Just as government intrusion onto real property creates the equivalent of an easement, government appropriation of a right to access and utilize a copyrighted work takes the equivalent of a license. As explained in *Cedar Point*, while "the government's intrusion does not vest it with a property interest recognized by state law, such as a fee simple or a leasehold. . . . we recognize a physical taking all the same." "Because the government appropriated a right to invade, compensation was due." *Id.* at 2076.

2. Respondent therefore misses the point when it focuses exclusively on the "right to exclude" and repeatedly contends that "copyright infringement by a government actor does not appropriate the copyright owner's rights to exclude anyone." *See* Resp. 2, 7–9, 12–14, 18–20. This formulation ignores Respondent's appropriation of a "right to access" Petitioner's work. The fact that Petitioner technically retains legal title to his copyright does not excuse Respondent's prior taking of a license to use that work without just compensation. *Cedar Point*, 141 S. Ct. at 2076 (physical taking occurs even though "the government's intrusion does not vest

it with a property interest"). As this Court explained more than 130 years ago:

> It was at one time somewhat doubted whether the government might not be entitled to the use and benefit of every patented invention, by analogy to the English law, which reserves this right to the crown. But that notion no longer exists. . . . The [government] has no such prerogative as that which is claimed by the sovereigns of England, by which it can reserve to itself . . . a superior dominion and use in that which it grants by letters patent. . . .

United States v. Palmer, 128 U.S. 262, 270–71 (1888).

Respondent and the opinion below thus go astray when they assert that "the 'right to exclude' was never taken away," Resp. 13, 17–18, as this formulation ignores the taking of a three-year, royalty-free license to reproduce, copy, and display Petitioner's work. *Cedar Point*, 141 S. Ct. at 2073 ("[E]ven if the Government physically invades only an easement in property, it must nonetheless pay just compensation."). So while Petitioner retains his right to enjoin Respondent from taking a *future* license to his work, Respondent still owes just compensation for its *past* invasion of Petitioner's exclusive domain over his work. As explained in *Cedar Point*, "a physical appropriation is a taking whether it is permanent or temporary," and "compensation is mandated when a leasehold is taken and the government occupies property for its own purposes, even though that use is temporary." *Id.* at 2074. The fact that Respondent has ceased its use of the

copyrighted work "bears only on the amount of compensation," not whether a taking occurred in the first place. *Id*.

3. Respondent dedicates a mere *two sentences* to the appropriation of a "right to invade," arguing that 17 U.S.C. § 201(e) "renders a nullity any governmental action 'purporting to seize' or 'expropriate' any right 'with respect to the copyright.'" Resp. 13. But whether the government is able to *formally* "seize" or "expropriate" ownership of a copyright is immaterial under *Cedar Point*, which recognizes that "the government can commit a physical taking . . . by simply 'enter[ing] into physical possession of property without authority of a court order.'" 141 S. Ct. at 2076 (citations omitted). This provision does not eliminate takings claims when the government "takes possession of property without acquiring title to it," as permitted by *Cedar Point* and its progeny. *Id.* at 2071.

4. Respondent complains of "Petitioner's strained effort (at 24) to paint the decision below as an 'echo' of the *Cedar Point* dissent." Resp. 19. But Respondent's brief amplifies the echo, arguing that "the government's violation of the copyright owner's exclusive rights 'does not destroy them.'" *Id.* This is the same narrow view of "appropriation" advanced by the dissent, which argued that the regulation "does not *appropriate* anything" and "does not take from the owners a right to invade (whatever that might mean)." *Cedar Point*, 141 S. Ct. at 2083 (Breyer, J., dissenting).

The Court, however, explained that its "understanding of the role of property rights in our constitutional order is markedly different" from that advanced by Respondent and the dissent. "In 'ordinary English' 'appropriation' means '*taking* as one's own.'" *Id.* at 2077. Thus, "when government planes use private airspace to approach a government airport, the government is required to pay for that share no matter how small." *Id.* (cleaned up). By the same token, when Respondent *uses* Petitioner's copyright, it is required to pay just compensation for that use. This is confirmed by this Court's precedents, dating back nearly 140 years, that "a patented invention . . . cannot be appropriated *or used* by the government itself, without just compensation." *Horne v. Dep't of Agric.*, 576 U.S. 350, 359–60 (2015) (citation omitted) (emphasis added). *See also* Pet. for Certiorari at 4–7.

5. Finally, Respondent incorrectly challenges Petitioner's assertion that the opinion below required "the complete destruction of Petitioner's rights in the copyrighted work." Resp. 19. This requirement is clear from the opinion itself, which explained that "[c]opyright infringement . . . does not implicate the reasons for creating a per se rule in the first place" because a physical appropriation "'effectively destroys each' strand in the bundle." App. 18–19.

The crucial point, however, is that Respondent once again fails to answer Petitioner's central criticism: that the opinion below failed to "address[] the fact that Respondent—by appropriating and displaying Petitioner's work for three years—took for itself a

'right to access' Petitioner's copyrighted work." Pet. 26. Respondent's retort that "the court's point was that the infringement did not destroy 'any' of Petitioner's rights in its copyright," *see* Resp. 20, simply highlights the need for GVR, as it demonstrates that the court below lacked *Cedar Point*'s guidance, which asks "whether the government has physically taken property for itself." 141 S. Ct. at 2072. The lower court's focus on the rights allegedly retained by Petitioner, rather than those taken by the government for its own use, is misplaced in the context of *per se* takings. GVR is appropriate to allow the Supreme Court of Texas to address that issue.

II. Copyright infringement is not a mere "tort."

1. Respondent's attempt to transform copyright infringement into a mere "tort" ignores nearly 140 years of precedent—up to and including this Court's decision in *Horne*—explaining that the Takings Clause protects owners of patents from appropriation "or use[] by the government itself, without just compensation." 576 U.S. at 359–60. Respondent asks the Court to relegate this statement to mere dicta, Resp. 6 n.3, but that request ignores the lineage of *Horne*'s observation, which dates back to this Court's 1882 decision in *James v. Campbell* and has been repeatedly reaffirmed ever since. *See* Pet. for Certiorari at 5–7 (collecting authorities).

Against these authorities, Respondent cites dicta from two cases that colloquially refer to copyright

infringement as a "trespass." *See* Resp. 15. Neither of these cases address the Takings Clause or government actors, much less consider (or establish) the proposition that copyright infringement by a government actor is a trespass rather than a taking. Dicta from off-point precedents cannot overcome the significant weight of this Court's authority demonstrating that intellectual property "cannot be appropriated *or used* by the government itself, without just compensation." *Horne*, 576 U.S. at 359–60 (emphasis added).

2. Contrary to Respondent's contention, this Court's discussion of trespass in *Cedar Point* counsels in favor of GVR. While "[i]solated physical invasions" are often considered torts, *Cedar Point* explained that "a continuance of [invasions] in sufficient number and for a sufficient time may prove [the intent to take property]. Every successive trespass adds to the force of the evidence." 141 S. Ct. at 2078 (cleaned up). The alleged infringement in this case is the intentional download and display of Petitioner's work, "on several webpages," for *more than three years*. *See* App. 2. This is a far cry from a "truckdriver parking on someone's vacant land to eat lunch." *Cedar Point*, 141 S. Ct. at 2078 (citation omitted). The better analogy is to this Court's decisions in *Causby* and *Portsmouth*, where the government's consistent invasion of a property interest resulted in the taking of an easement requiring just compensation. *Id.* at 2073 ("[W]e cited *Causby* and *Portsmouth* for the proposition that 'even if the Government physically invades only an easement in property, it must nonetheless pay just compensation.'")

(citation omitted). And contrary to Respondent's implication on page 15 of its brief, a "formal entitlement to invade" is unnecessary to find a taking. *Id.* at 2076 ("[T]he government can commit a physical taking . . . by simply 'enter[ing] into physical possession of property without authority of a court order.' "); *id.* at 2071 ("[T]he government commits a physical taking when it . . . . physically takes possession of property without acquiring title to it.").

Thus, even if this Court's precedents did not dictate that copyright infringement is a taking, *Cedar Point* demonstrates that the taking of a three-year, royalty-free license to display Petitioner's work is not an "isolated physical invasion" that would fall outside the scope of the Takings Clause.

3. Finally, the trespass/taking distinction is not a proper basis for dismissal on the pleadings. "Every successive trespass adds to the force of the evidence" of an intent to take. *Id.* at 2078. As such, *Cedar Point* demonstrates that the line between a trespass and a taking is a question of fact, rendering it inappropriate for adjudication on a plea to the jurisdiction. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227–28 (Tex. 2004). *Cedar Point*'s discussion of trespass demonstrates that GVR is appropriate, at a minimum, to allow the lower courts to develop this jurisdictional evidence.

III. Respondent's "alternative bases" of decision are irrelevant to this Court's inquiry.

Respondent asks the Court to deny certiorari on the basis of two theories that were not considered below. The Court should decline this invitation. *Glover v. United States*, 531 U.S. 198, 205 (2001) ("[W]e do not decide questions neither raised nor resolved below.").

Abstention is particularly warranted here, as Respondent's "alternative bases" fail on the merits and would require remand for repleading, not dismissal. *See Miranda*, 133 S.W.3d at 226–27 ("If the pleadings . . . do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiffs should be afforded the opportunity to amend.").

1. Respondent's allegation that Petitioner failed to plead "intent" is incorrect. *See* App. 2; CR.53. Moreover, such a defect is easily cured and Petitioner "should be afforded the opportunity to amend." *Miranda*, 133 S.W.3d at 227. This alleged failure provides no independent basis for disposition.

2. Respondent's "formal authorization" argument likewise fails to justify dismissal. *Cedar Point* makes it clear that a specific grant of "authority to take," Resp. 21, is not required. 141 S. Ct. at 2076 ("[T]he government can commit a physical taking . . . by simply 'enter[ing] into physical possession of property without authority of a court order.' ") (citations omitted). This is confirmed by other decisions of this Court, which explain that "the entire doctrine of inverse condemnation

is predicated on the proposition that a taking may occur without such formal proceedings." *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty., Cal.*, 482 U.S. 304, 316 (1987). In sum, Respondent's "alternative bases" are not properly before the Court and provide no independent grounds for disposition.

IV. The equities do not favor denying this petition.

This Court should follow its normal procedures and GVR this case if there is a "reasonable probability" that *Cedar Point* "may affect the outcome" below. *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001). The "equities" provide no reason to deny review of a case that meets this standard.

Petitioner comes to this Court in the normal course of proceedings. Petitioner is not required by this Court's rules or the Texas Rules of Appellate Procedure to seek rehearing in the Supreme Court of Texas before seeking review in this Court. Moreover, such motions are *strongly* disfavored in the Supreme Court of Texas, as the most recent statistics show that the court granted only four motions for rehearing between 2015–2019, and never granted more than one motion in a year. That works out to a five-year average of 2% of rehearing petitions following an opinion on the merits.[1] There is no special procedure or custom in state

[1] *See* Pamela Baron & Don Cruse, What are the Odds? Texas Supreme Court Docket Update 2020 at 8 (2021).

practice for granting rehearing to consider the impact of an intervening decision by this Court. Petitioner is not required to expend time and effort pursuing a futile avenue of relief.

CONCLUSION

The petition should be granted, the decision below should be vacated, and the case should be remanded to the Supreme Court of Texas for re-examination in light of *Cedar Point*.

Respectfully submitted,

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