10/16/24

No. 24-486

In the
Supreme Court of the United States

WILLIAM B. WALTON, et al.,
Petitioners,
v.
NESKOWIN REGIONAL SANITARY AUTHORITY,
Respondent,
and
EVELYN A. HARRIS, Trustee of the Harris Living Trust, et al.
Defendants.

On Petition for Writ of Certiorari to the Oregon Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the mid-1990s the Neskowin Regional Sanitary Authority (Sanitary Authority) and the Walton Family entered into a purported agreement that allowed the Sanitary Authority to bury a sewer line on the Walton's property in exchange for a free sewer hook-up when needed. The sewer line was then installed and remained on the Walton's property for years without incident. In 2015, however, the Sanitary Authority required the Walton Family to officially hook-up to its sewer system. The Walton Family sought their free hook-up, which the Sanitary Authority summarily refused. The Waltons filed a state takings lawsuit, claiming the Sanitary Authority's refusal to grant their free hook-up, while maintaining a physical sewer line on their property effected an unconstitutional taking without compensation. The state circuit court dismissed the Walton's takings claim under Oregon's statute of limitations, stating the Waltons should have brought their takings claim back when the Sanitary Authority first installed its sewer line. The Oregon appellate and supreme court affirmed.

The question presented is:

Whether a Constitutional Fifth Amendment Takings Claim, based on a physical occupation, fully accrues and the statute of limitations begins to run before the government refuses to provide just compensation.

Parties to the Proceedings and Rule 29.6

The Walton Family, comprised of William B. Walton, James Jefferson Walton Jr., and Victoria K. Walton, were the Plaintiffs and Appellants in all proceedings below.

The Neskowin Regional Sanitary Authority is a public entity.

Evelyn A. Harris, Trustee of the Harris Living Trust; Michael J. Laber; Kristen R. Laber; Carolyn Purvine a/k/a Carolyn Purvine-Burger; Janice Balme, Trustee of the James E. Balme Exemption Trust; Carlton J. McLeod II; Scott S. McLeod; Franca McLeod Dyer; Neskowin Beach Golf Course, Inc.; Catlin Spears Lind; Steve E. Rossman; Audry M. Rossman; Frederick C. Rusina; Douglas F. Frank; Margaret W. Frank; Angelina Caministeanu; Gheorghe Caministeanu; Richard Charles Hook; Penny K. Hook; Richard A. Schmuck; Patricia A. Schmuck; Allen R. Schmuck; Julie McAllister; Mark R. Rosenberg; Abby Safyan; Howard Lichter; and Rebecca Friberg are joined defendants to this litigation. However, the defendant's portion of this case was stayed pending the Oregon state courts' resolution of the statute of limitations issue. A notice of uninterested parties has been filed in this case to remove these defendants from the petition before this Court.

Related Proceedings

Walton v. Neskowin Regional Sanitary Authority, 372 Or. 331 (2024) Supreme Court of the State of Oregon. Judgement entered May 23, 2024.

Walton v. Neskowin Regional Sanitary Authority, 314 Or. App. 124 (2021) Court of Appeals of the State of Oregon. Judgement entered September 01, 2021

Table of Contents

Table of Authorities

Cases

Statutes

Petition for Writ of Certiorari

The Walton Family respectfully petitions for a writ of certiorari to review the judgment of the Oregon Supreme Court.

Opinions Below

The decision of the Oregon Supreme Court can be found at *Walton v. Neskowin Regional Sanitary Authority*, 372 Or. 331 (2024), and is reprinted at Pet.App.39-40a. The Oregon Appellate Court's decision affirming the Sanitary Authority's motion to dismiss on statute of limitations grounds can be found at *Walton v. Neskowin Regional Sanitary Authority*, 314 Or. App. 124 (2021), and is reprinted at Pet.App. 47a.

Jurisdiction

The lower courts had jurisdiction over this case under Article I, Section 18 of the Oregon Constitution, Article XI, Section 4 of the Oregon Constitution, and the Fifth Amendment of the United States Constitution. ORS 14.050 (circuit court); ORS 19.270 (appellate court & supreme court). The Oregon Supreme Court entered final judgment on May 23, 2024. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1257(a),

Constitutional Provision

The Fifth Amendment to the U.S. Constitution provides in relevant part, "nor shall private property be taken for public use, without just compensation."

Introduction and Summary of Reasons for Granting the Petition

The fundamental constitutional wrong alleged in every takings claim is not simply that the government has taken property, but rather that it has taken property *and* it has not met its obligation to provide just compensation. The Takings Clause of the Fifth Amendment is not meant "'to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536-37 (2005) (quoting *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 315 (1987)). Thus, a physical occupation takings claim does not merely allege that the government has occupied private property, but also that the government has not provided just compensation.

This Court has long understood that a cause of action accrues, and a statute of limitations does not begin to run until a "plaintiff has a 'complete and present case of action' – i.e., when she has the right to 'file suit and obtain relief.'" *Corner Post, Inc. v. Bd. Of Governors of Federal Reserve System*, 144 S.Ct. 2440, 2450 (2024) (citing *Green v. Brennan*, 578 U.S. 547, 554 (2016)). In a physical takings context, this occurs when "the government physically takes possession of property without acquiring title to it." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021); *see also, John R. Sand & Gravel Co. v. U.S.*, 457 F.3d 1345, 1355-56 (Fed. Cir. 2006) ("A takings claim accrues 'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.' In addition, the claim only accrues if the plaintiff knew or

should have known of the existence of the events fixing the government's liability.") (cleaned up).

Despite this Court's clear guidance on physical takings accrual, many lower courts, including the Oregon Supreme Court in this case, continue to strictly interpret statute of limitations deadlines – despite when the act of physical occupation is divorced from the government's refusal to pay just compensation. *Walton v. Neskowin Reg'l Sanitary Auth.*, 550 P.3d 1, 18-19 (Or. 2024) (holding the statute of limitations began to run when the Sanitary Authority first installed its sewer line, not, as the plaintiffs alleged, when the occupation became adverse to the owners); Pet.App. 39a. This strict adherence erects yet another hurdle for property owners. *See Equity Lifestyle Properties, Inc. v. Cnty. of San Luis Obispo*, 548 F.3d 1184, 1190 (9th Cir. 2008) ("[A] takings claim . . . must be filed neither too early (unripe) nor too late (barred by a statute of limitations)."); *Knick v. Twp. of Scott*, 588 U.S. 180, 189 (2019) (government takings requirements cannot relegate property rights "'to the status of a poor relation' among the provisions of the Bill of Rights.") (citing *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994)). This hurdle, when combined with the continually abused and misunderstood takings ripeness standard, affords the government the extraordinary deference to declare takings claims simultaneously "too early" *and* "too late" – forever keeping takings merits cases out of courts. *See Biddison v. City of Chicago*, 921 F.2d 724, 726 (7th Cir. 1991) ("The incongruity of holding that Biddison's [takings] claim was too early as well as too late was not lost on the district court[.]"); *Crapps v. Nevada*, No. 3:22-cv-00379-ART-CSD, 2024 WL 967441 at *2 (Nev. Mar. 5, 2024) ("[T]he City argues Plaintiffs' takings claim must be dismissed as nonjusticiable because it is either (1) too late . . . or (2) too early[.]"); *Avenida San Juan*

P'ship v. City of San Clemente, 201 Cal.App.4th 1256, 1278 (Cal. App. Ct. 2011) ("In direct contrast to its statute of limitations argument (too late), the City argues that any inverse condemnation claim is unripe (too early)[.]").

As this case demonstrates, an incongruency in physical takings statute of limitations cases exists. The Oregon Supreme Court held the Walton Family's physical takings case was brought outside the six-year statute of limitations (too late) despite the fact the original physical invasion, in the mid 1990s, was permissive. Pet.App. 5a. To bring a timely claim under the Oregon Supreme Court's rule, the Walton Family would have had to bring their takings claim before they were actually injured by the Sanitary Authority's occupation - an impossibility under current standing precedent. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (reiterating that a plaintiff cannot bring a lawsuit until they have suffered an injury in fact).

This diaspora does not exist in the Oregon Supreme Court alone. Other courts too have addressed this same quandary, with varying outcomes. *See City of Anchorage v. Nesbett*, 530 P.2d 1324, 1332 (Alaska 1975) (finding that the right to damages, in an initially permissive physical occupation, did not arise until the occupation became adverse to the property owner); *Kimco Addition, Inc. v. Lower Platte S. Nat. Res. Dist.*, 232 Neb. 289, 294-95 (1989) (holding that when a physical occupation is initially permissive, said occupation "retains that [prescriptive easement] character until notice that the use is claimed as a matter of right is communicated to the owner of the servient estate."); *Petersen v. Port of Seattle*, 94 Wash.2d 479, 483 (1980) (finding a landowner's right to compensation cannot be barred by the passage of time). The split between these state court

decisions demonstrates that, despite this Court's precedent regarding claim accrual and physical takings, the loophole of initially permissive physical occupations remains an exceedingly uncertain area of the law. Without this Court's review, property owners who agree to work with the government – divorcing the physical occupation from the later injury -, like the Walton Family, are left with no recourse. No other constitutional civil rights plaintiff faces this type of hurdle, highlighting that more is needed to ensure that property rights are not relegated to the "poor relation" of the Bill of Rights. *Dolan*, 512 U.S. at 392.

This Court should grant the Walton Family's petition for a writ of certiorari.

Statement of the Case

In the mid-1990s, the Neskowin Regional Sanitary Authority recognized a need for additional sewer lines throughout central coastal Oregon. Pet.App.5-6a. In an effort to establish this infrastructure, the Sanitary Authority began working with homeowners like the Walton Family to place sewer lines throughout the area. Pet.App.5-6a. In the Walton Family's case, the Sanitary Authority entered into a purported agreement[1] with the Family's late father permitting the installation of a

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[1] Whether or not this agreement exists is a matter of some debate among the parties. However, both the Oregon Appellate Court and Oregon Supreme Court assumed, for the sake of argument, that the agreement did exist. *Walton*, 314 Or.App. at 126-28; *Walton*, 372 Or. at 358-60; Pet.App.37-38a. This Court should do the same.

physical sewer line on their property in exchange for a free sewer hookup when necessary down the line. Pet.App.5a.

Pursuant to the purported agreement, sometime before 1995, the Sanitary Authority dug a trench on the Walton Family's residential property and buried a sewer line. Pet.App.5a. The sewer line remained on the Walton Family's property with no incidents until 2015 when the Sanitary Authority required the Walton Family to hook-up to its sewer system. Pet.App.5a. When the Walton Family sought their free hook-up, the Sanitary Authority denied their request, refusing to recognize the existence of any agreement. Pet.App.5a. As a result, the Walton Family were forced to pay the sewer hook-up fee themselves. Pet.App.5a.

Having been forced to pay for their own sewer hook-up, in contravention of the purported agreement, the Walton Family brought a takings lawsuit in Oregon state court, demanding the Sanitary Authority pay just compensation for physically occupying their property for over twenty years. Pet.App.6a. The Walton Family alleged that only when the Sanitary Authority reneged on the agreement did the physical sewer line's presence on their property become adverse, ripening their physical takings claim. Pet.App.6-7a. The Oregon trial court disagreed, granting the Sanitary Authority's motion for summary judgment on statute of limitations grounds. Pet.App.53a. Specifically, the trial court held that the Walton Family had to bring their claim within six years of the start of the sewer line's physical occupation on their property – not when the Sanitary Authority refused to pay just compensation, making the occupation adverse to them. Pet.App.51a.

The Oregon Appellate Court affirmed. Pet.App.47a. It too found the six-year statute of limitations began running "when that physical occupation began." *Walton*, 314 Or.App. at 128; Pet.App.45a. The court of appeals reasoned that the taking occurred not when just compensation was denied but instead when the property was first occupied, even if that occupation was initially permissive. Pet.App.45-46a. Thus, despite the lack of just compensation, the Walton Family's physical takings claim accrued when the sewer line was first placed on their property in the mid-90s. Pet.App.46-47a.

The Oregon Supreme Court granted review, limiting its analysis to whether a constitutional takings claim based on a physical occupation fully accrues and the statute of limitations begins to run before the government refuses to provide just compensation. Pet.App.4a. It held, like the Oregon Court of Appeals, that physical occupation takings claims accrue "when the occupation occurs[.]" *Walton*, 372 Or. at 358; Pet.App.39-40a. In the Walton Family's case, that meant when the Sanitary Authority installed its sewer lines in 1995. Pet.App.11a. The court did not examine whether the installation's initially permissive nature, effected the takings analysis. Pet.App.37-38a. Instead, the court reasoned any discussion of the sewer line's permissive placement would affect only whether the Sanitary Authority breached the purported agreement with the Walton Family. Pet.App.39a. In other words, the Walton Family should have brought a breach of contract claim instead of a takings claim. Pet.App.39a. This petition follows.

Reasons for Granting the Petition

The doctrines of standing and the statute of limitations were established to prevent a plaintiff from bringing a lawsuit either "too early" or "too late". *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006); *CTS Corp. v. Waldburger*, 573 U.S. 1, 7-8 (2014). But both ultimately "boil down to the same question" of whether a plaintiff has properly alleged an injury such that a claim has accrued. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n.8 (2007). As a general matter, a claim accrues when a plaintiff has "a complete and present cause of action." *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997) (citing *Rawlings v. Ray*, 312 U.S. 96, 98 (1941); *See also, Graves v. United States*, 160 Fed.Cl. 562, 568 (2022) ("Generally, 'a takings claim accrues when "all events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence."'") (internal citations omitted). In the Fifth Amendment physical takings context, this is when the government has physically acquired private property for a public use and refused to provide just compensation. *Cedar Point Nursery*, 594 U.S. at 147 ("When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation."). The government's refusal to pay just compensation in the wake of a physical occupation is the triggering event for claim accrual. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536-37 (2005) ("As its text makes plain, the Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.' In other words, it 'is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of

otherwise proper interference amounting to a taking.'") (citing *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 314-15 (1987)). However, many courts have held, contrary to this view, that physical takings claims accrue only upon the physical occupation itself. *Boling v. U.S.*, 220 F.3d 1365, 1370 (Fed. Cir. 2000) ("[T]he key date for [physical taking] accrual purposes is the date on which the plaintiff's land has been clearly and permanently taken.").

This Court has never addressed the timeframe for physical takings accrual when the physical occupation itself is divorced from the government's refusal to pay just compensation. *See Barlow & Haun, Inc. v. U.S.*, 87 Fed.Cl. 428, 435 (2009) ("There is, at present, some doubt regarding the date of the accrual of a physical taking claim versus the date at which such a claim becomes ripe for litigation."); Bridget Tomlinson, *Statute of Limitations in Rails-to-Trails Act Compensation Claims*, 56 Cath. U. L. Rev. 1307, ___ (2007) (observing that, under current jurisprudence, a landowner may not have a viable physical takings claim until after the statute of limitations has already run). And although this is a rare occurrence, the Walton Family's case is a prime example of what happens when a property owner agrees to willingly work with the government and the government later refuses to pay just compensation – divorcing the physical occupation from the refusal to pay and leaving property owners with no recourse. The burden of the government's failure to pay just compensation should not fall on the property owner. And property owners should not be expected to bring a physical takings claim until the government affirmatively disclaims its obligation to pay, thus making the previously permissive use adverse.

I. Lower Courts Conflict as to When Physical Takings Claims Accrue, Leading to Disparate Applications of Statutes of Limitations

This Court consistently reinforces the rule that plaintiffs must proactively bring lawsuits and avoid "sleeping" on their rights. *Burnett v. New York Cent. R. Co.*, 380 U.S. 424, 428 (1965). Hence the almost unilateral reaffirmance of statute of limitations cases across the Country. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944). But just as this Court avoids creating harsh bright-line rules, it too should avoid unworkable statutes of limitations that eliminate all judicial recourse for unoffending plaintiffs, particularly in the takings context. *Ark. Game & Fish Comm'n v. U.S.*, 568 U.S. 23, 31-32 (2012) ("In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area.").

This Court has spent the last decade reinforcing its takings jurisprudence in an effort to restore "takings claims to the full-fledged constitutional status the Framers envisioned when they included the Clause among the other protections in the Bill of Rights." *Knick*, 588 U.S. at 189. Yet, significant hurdles still remain for property owners to get to the merits of their takings case – one of those hurdles remains, as in the Walton Family's case, an inflexible adherence to statutes of limitations.

Generally, a statute of limitations cannot begin to run until a claim has fully accrued.[2] *Rotkiske v. Klemm*, 589

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[2] Any restrictions on a self-executing right must be viewed through an extraordinarily careful lens,

U.S. 8, 13 (2019). And a claim does not accrue until a plaintiff has a "right to 'file suit and obtain relief", which necessarily means a plaintiff must have suffered an "injury required to press [a] claim in court." *Corner Post, Inc.*, 114 S.Ct. at 2450-51 (internal citation omitted). The injury in a physical takings case is, at its core, the government's refusal to provide just compensation not as the Oregon Supreme Court suggests the physical occupation itself. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 717 (1999) ("Although the government acts lawfully when, pursuant to proper authorization, it takes property and provides just compensation, the government's action is lawful solely because it assumes a duty, imposed by the Constitution, to provide just compensation.").

Physical occupation or invasion takings claims arise from the idea that physically invading private property prevents the owner from using it in another capacity, resulting in a taking. *See Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 181 (1871) ("[I]t remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectively destroy or impair its usefulness, it is a taking, within the meaning of the Constitution[.]"); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) ("We affirm the traditional rule that

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especially when applying statutes of limitations, which somewhat arbitrarily wipe out even constitutional claims based on merely the passage of time. *Barlow & Haun, Inc.*, 87 Fed.Cl. at 434 ("Denial of a taking claim on the basis of the defense of limitations is warranted only when the facts alleged demonstrate conclusively that such a decision is required as a matter of law.") (citing *Juda v. United States*, 6 Cl.Ct. 441, 450 (1984)).

a permanent physical occupation of property is a taking."); *Cedar Point Nursery*, 594 U.S. at 152-62 (any invasion of property is presumptively a taking requiring compensation). Consequently, whenever the government physically occupies or invades property that is not its own, whether that occupation is temporary or permanent, the government effects a *per se*, categorical taking necessitating the payment of just compensation. *Cedar Point Nursery*, 594 U.S. at 152 ("The upshot of this line of precedent is that government-authorized invasions of property – whether by plane, boat, cable, or beachcomber – are physical takings requiring just compensation.").

The government's duty to pay just compensation is non-discretionary. *Lingle*, 544 U.S. at 536-37 ("[The Takings Clause] 'is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.'") (internal citation omitted); *Kirby Forest Indus., Inc. v. U.S.*, 467 U.S. 1, 9 (1984) ("[Governments are] obligated by the Fifth Amendment to provide 'just compensation'[.]"). And, even in a physical takings case, it is not the action of physical occupation that triggers the taking but the government's failure to provide the required just compensation.[3] *See First English Evangelical Lutheran Church of Glendale*, 482 U.S. at 314 ("[The] government action that works a taking of property rights necessarily

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[3] The government's failure to pay just compensation acts as the triggering accrual date because that is the moment "the plaintiff was or should have been aware [of the government's liability]." *Graves v. United States*, 160 Fed.Cl. 562, 568 (2022). At any time before that, the plaintiff was not yet injured and did not yet know a lawsuit was necessary.

implicates the 'constitutional obligation to pay just compensation.'") (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); *Jacobs v. U.S.*, 290 U.S. 13, 16 (1933) ("[The right to just compensation] was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of remedy did not qualify the right."); *Infinium Builders LLC & KE Holdings LLC d/b/a Ascent Construction v. Metropolitan Government of Nashville & Davidson Cnty.*, No. 3:23-cv-00924, 2024 WL 4009874 at *7 (M.D. Tenn. Aug. 30, 2024) ("The taking itself does not violate a property owner's rights; rather, it is the taking without compensation. And the claim accrues upon the taking without compensation.").

More often than not this distinction between the time of the government's physical occupation and the failure to pay just compensation is of little importance. This is because these incidents typically occur concurrently. However, that is not always the case. *Benedict v. City of New York*, 98 F. 789, 790 (2d Cir. 1899) ("The fundamental doctrine that private property cannot be taken for public uses without just compensation does not require that the compensation be made in all cases concurrently[.]"). In some instances, however, like in the Walton Family's case, the time of the physical occupation is divorced from the government's refusal to pay, leading to dispute over the claim accrual date. *See Mildenberger v. U.S.*, 91 Fed.Cl. 217, 234-35 (2010) (explaining the claim accrual date for cumulative physical damage in takings cases).

A. Lower Courts Conflict as to When a Physical Takings Claim Accrues When the Physical Occupation is Divorced from the Government's Failure to Pay

Cedar Point confirmed that physical takings claims are *per se* takings, requiring the payment of just compensation. 594 U.S. at 147-48. Yet many lower courts remain confused about when these claims actually accrue, particularly when the time of the physical occupation is divorced from the government's refusal to pay just compensation. Some property owners thus, in the states who interpret accrual as the time of the occupation, are time barred from bringing their takings claims.

Here, the Oregon Supreme Court ruled all physical takings claims accrue only when the "physical occupation occurs." *Walton*, 372 Or. at 352-53; Pet.App.36-37a. But requiring a property owner to bring a lawsuit before they are actually injured – as the Sanitary Authority argued was appropriate – defies the very laws of standing. *Lujan*, 504 U.S. at 560-61 (explaining the "constitutional minimum" for standing requires a plaintiff to have suffered an injury in fact). What is required for a physical takings claim to accrue is for the government to physically occupy a piece of private property *and* that government refuse to pay just compensation. The Sanitary Authority occupied the property in the 90s. Pet.App.3a. But it only refused to pay in 2014 when it denied the Walton Family their free hook-up. Pet.App.57a. That refusal to pay should be the operative date for triggering Oregon State's six-year statute of limitations. Or. Rev. Stat. § 12.080(3)-(4) (2021). But the Oregon Supreme Court's decision held otherwise, pointlessly demanding the Walton Family have brought their physical takings claim in the 1990s –

before they were even injured. Pet.App.37a. Even before *Cedar Point*, this couldn't be the case. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("To establish an Art. III case or controversy, a litigant first must clearly demonstrate that he has suffered an 'injury in fact.' That injury, we have emphasized repeatedly, must be concrete in both a qualitative and temporal sense.").

Unfortunately, the Oregon Supreme Court is far from the only legal jurisdiction forcing physical takings claimants out of court. In *Casitas Municipal Water District v. United States*, 708 F.3d 1340, 1359-60 (2013), the United States Federal Circuit held "[t]he act that causes accrual of a physical taking claim is the act that constitutes a taking." Making no distinction between the physical occupation itself and the government's failure to provide just compensation. The Federal Circuit reasoned this was appropriate because physical takings, unlike regulatory takings, do not require a detailed ad hoc analysis – the physical occupation is the taking itself. *Id.* at 1345 n.3.

Contrary to the Federal Circuit and Oregon, however, other jurisdictions faithfully view the denial of just compensation in physical takings as the triggering date for claim accrual. In *City of Anchorage v. Nesbett*, 530 P.2d 1324 (Alaska 1975)[4], a property owner brought suit

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[4] Both the *Nesbett* & *Kimco Addition, Inc.* cases are somewhat distinguishable as prescriptive easement cases. *Nesbett*, 530 P.2d at 1327; *Kimco Addition, Inc.*, 232 Neb. at 293-95. However, takings and prescriptive easements bear many similarities, including a requirement to pay for what is lost. *Weidner v. State, Dep't of Transp. & Pub. Facilities*, 860 P.2d 1205, 1212 ("The theory of prescriptive easement does *not* grant the State affirmative authority to take property without just

to dispossess the City of Anchorage of a power line they had installed on the plaintiff's property. *Id.* at 1326-27. The line was installed prior to the plaintiff's ownership of the land. *Id.* at 1327. After the plaintiff became the owner of the land, however, the City approached the plaintiff asking to be granted an easement to anchor down a guy wire. *Id.* The plaintiff permitted the easement but specifically denied the City the right to maintain any other type of electric transmission system across the property. *Id.* The City did not object to the omission. *Id.* The plaintiffs then, a few years later, requested the City remove the existing powerline. *Id.*

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compensation.") (emphasis in original); *Gentili v. Town of Sturbridge*, 484 Mass. 1010, 1012 (Mass. 2020) ("[A] prescriptive easement is not a means for the government 'to take private property without just compensation.'") (internal citation omitted). The primary difference, the permissive/passive nature of a prescriptive easement and the hostile/active nature of a taking, effects only the cause of action. For example, the lack of knowledge in certain physical takings distinguishes cases like the Walton Family's – where they knew of the occupation but not of the Sanitary Authority's refusal to pay just compensation (a necessary element in a physical taking) – from prescriptive easement cases where the "open" / known nature of the government's acquisition is engrained in the cause of action. The government payment of just compensation, however, is only an element of a takings claim not a prescriptive easement claim, where any damages a property owner may recover depends on whether they "slept" on their rights. *See Gentili*, 484 Mass. at 1012 ("[T]he prescriptive period . . . requires a private landowner to bring a [takings] action . . . within a specified period of time. At the expiration of the prescriptive period, the landowner's right to bring suit is extinguished.") (internal citation omitted).

After the City declined, the plaintiffs filed suit to compel the City to remove the powerline. *Id.* The City answered asserting that it had obtained a prescriptive easement under Alaska law. *Id.* at 1327-28. The lower court found the City did not have a prescriptive easement because it had maintained the power line with the implied permission of the plaintiffs. *Id.* at 1328. The Alaska Supreme Court affirmed in part and reversed in part, holding, as relevant to damages, that "[t]he right to damages [in a land use case did] not arise until the City refuse[d] to remove the power line." *Id.* at 1332. In other words, the plaintiff only suffered a concrete injury once the City refused to refused to remove its physical structure and pay the owed just compensation. *Id.*

Nebraska also has found the government's refusal to pay owed just compensation as the triggering event for a statute of limitations. *Kimco Addition, Inc.*, 232 Neb. at 290-91. In *Kimco Addition, Inc. v. Lower Platte South Natural Resources District*, the plaintiff sought damages for an expanded portion of an easement that the government acquired through its land. *Id.* The district court dismissed the plaintiff's motion for summary judgment, finding the plaintiff's claim was time barred. *Id.* The Nebraska Supreme Court affirmed in part and reversed in part, holding the permissive beginning of the government's easement occupation, prevented the statute of limitations from running on a takings claim – which was necessarily adverse. *Id.* at 293-95.

By finding adversity a necessary sub-element for a takings claim, these prescriptive easement cases pinpoint the exact problem with the Oregon Supreme Court's decision. And while this Court granted certiorari in *Cedar Point Nursery* to solidify the *per se* nature of physical takings, a new problem has come to light. Despite this Court's guidance, lower courts remain

confused about the actual accrual date for physical takings claims, particularly when it comes to whether it is the physical occupation or the government's failure to pay just compensation that triggers the cause of action. Making matters worse, this accrual issue is often fatal to the claim itself, rendering a constitutional claim lost forever. *Federal Recovery of Washington, Inc. v. Wingfield*, 162 Or.App. 150, 158-59 (1999) ("[B]ecause plaintiff's only claim was barred by the statute of limitations, plaintiff was not entitled to . . . relief."). Without this Court's intervention, property owners whose physical takings claims are divorced from a government's refusal to pay just compensation stand to lose court access over a vital constitutional claim. This Court should grant the petition to ensure that the lower courts adhere to the same modest claim accrual date for physical takings, allowing property owners their day in court to challenge land use regulations.

B. An Existing Agreement Does Not Turn a Property Owner's Takings Claim Into a Breach of Contract Claim

The Framers specifically intended for the Constitution to protect the property rights of the people against encroachment from the government. James Maddison famously stated that it "is not a just government, nor is property secure under it, where the property, which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest."[5] Without the right to private

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[5] James Maddison, "Property" (March 29, 1792).

property, there is no liberty. The same cannot be said for contracts.

Takings Claims rooted in the Fifth Amendment are unique. As the only self-executing clause in the Bill of Rights, the Fifth Amendment Takings Clause inherently includes the requirement that the government provide just compensation for a taking. *See First English*, 482 U.S. at 315 (recognizing a landowner is entitled to bring a takings claim and recover just compensation because of the "self-executing character" of the Fifth Amendment); *In re Financial Oversight & Mgmt. Bd.*, 41 F.4th 29, 45 (1st Cir. 2022) (explaining the Takings Clause uniquely spells out a remedy). In contrast, a breach of contract claim is based in statute or common-law, with no inherent constitutional remedy.[6] *Advon Corp. v. Coopwood's Air Conditioning Inc.*, 517 F.Supp.3d 656, 662-63 (S.D. Tex. 2021) (stating a breach of contract claim is based in either the Uniform Commercial Code or common-law). Nothing, however, states that a plaintiff must bring only one or the other. To the contrary, plaintiffs often raise both claims in the same lawsuit. *PGB Hanger, LLC v. United States*, 170 Fed.Cl. 473, 481-82 (2024) (evaluating both a breach of contract and takings claim in the same suit).

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[6] "A breach of contract claim accrues 'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.' 'The mere announcement that the Government does not intend to perform its contractual obligation is a repudiation, not a breach, and that repudiation does not commence the running of the statute of limitations.' Such a repudiation ripens into a breach either when the Government actually fails to honor its obligations or when the promise brings suit." *Barlow & Haun, Inc.*, 87 Fed.Cl. at 435-36 (internal citations omitted).

That does not mean, however, that both claims need to be brought or that one claim can be substituted for the other. Instead, because a physical takings claim is directly tied to the property itself and utilizes the unique self-executing remedy of just compensation, takings claims cannot be directly substituted for breach of contract claims even where the claim is tied to an agreement and the remedy is damages. *See Integrated Logistics Support Systems Intern., Inc. v. U.S.*, 42 Fed.Cl. 30, 34 (1998) ("[T]akings claims are not presumed to be foreclosed by claims for breach of express contract merely because the claims share the same factual background.").

In the Walton Family's case, there was never a formal transfer of property. Pet.App.5a. Rather the Walton Family permitted the Sanitary Authority to occupy a portion of their property in exchange for the promise of a future free hook-up. Pet.App.5a. The Sanitary Authority's later repudiation of that free hook-up did not obviate the Walton Family's physical takings claim, which remained tied to the property. *Atlas Corp. v. United States*, 895 F.2d 745, 756-58 (1990) (reaching the merits of claims for breach of express contract, breach of implied contract, and Fifth Amendment taking); Pet.App.5a. Particularly as the Walton Family's claim directly challenged the Sanitary Authority's sewer line's physical presence on their property without the payment of just compensation not the Sanitary Authority's failure to honor the alleged agreement. *See Barlow & Haun, Inc.*, 87 Fed.Cl. at 439 (finding a plaintiff's success on concurrently alleged takings and breach of contract claims depends on "whether the property rights alleged to have been taken were solely created by the terms of the contract."); Pet.App.39a. The purported existence of an agreement should not be an impediment to the

Walton Family raising and a court analyzing the Walton Family's physical takings claim. *Detroit Edison Co. v. U.S.*, 56 Fed.Cl. 299, 302 (2003) (recognizing that rights existing independently of a contract cannot be restricted to contractual remedies).

II. Without This Court's Intervention, Property Owners Are Uniquely Deprived of Adjudication of Constitutional Claims

Local governments have every incentive to avoid reaching "merits" decisions. *See San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 655 n.22 (1981) (Brennan, J., dissenting) (quoting article advising city attorneys on legal tactics to avoid judicial resolution of takings claims). Eliminating takings claims either through ripeness or statute of limitations serves exactly that purpose. *Bay-Houston Towing Co., Inc. v. U.S.*, 58 Fed.Cl. 462, 471 (2003) ("[A] strict interpretation of the ripeness doctrine would provide agencies with no incentive to issue a final decision."); *John R. Sand & Gravel Co.*, 552 U.S. at 133-34 (recognizing statutes of limitations often protect a defendant's case-specific interests).

This effect is well known to this Court and others, which emphasizes the importance of access to courts. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 n.5 (1982) (finding the due process right of access to courts exists when "fundamental interests are present and the State has the exclusive control over 'the adjustment of [the] legal relationship[s]' involved.") (citing *U.S. v. Kras*, 409 U.S. 434, 443 (1973)). If this Court fails to explain the correct claim accrual date for physical takings claims, one can expect these "shell games" to continue and property owners to continue to lose access to courts. *But see Niz-Chavez v. Garland*, 593 U.S. 155, 172 (2021) ("If

men must turn square corners when they deal with the government, it cannot be too much to expect the government to turn square corners when it deals with them."); *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 387-88 (1947) (Jackson, J., dissenting) ("It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street.").

CONCLUSION

This Court should grant the petition.

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Respectfully submitted,

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