

No. 21-735

---

---

**In the Supreme Court of the United States**

---

JIM OLIVE PHOTOGRAPHY, DBA PHOTOLIVE, INC.,  
PETITIONER

*v.*

UNIVERSITY OF HOUSTON SYSTEM

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF TEXAS*

---

**BRIEF IN OPPOSITION**

---

KEN PAXTON  
Attorney General of Texas

BRENT WEBSTER  
First Assistant Attorney  
General

JUDD E. STONE II  
Solicitor General  
*Counsel of Record*

RANCE CRAFT  
Assistant Solicitor General

OFFICE OF THE TEXAS  
ATTORNEY GENERAL  
P.O. Box 12548 (MC 059)  
Austin, Texas 78711-2548  
Judd.Stone@oag.texas.gov  
(512) 936-1700

---

---

### QUESTION PRESENTED

In the decision below, the Supreme Court of Texas held that the University of Houston’s alleged infringement of Petitioner’s copyright in a photograph was not a *per se* physical taking. The court explained that the alleged infringement did not take away “any” of Petitioner’s property rights under the Copyright Act, “including the right to exclude the infringer and everyone else from using the copyrighted work.” Pet. App. 20, 22.

Five days later, this Court decided *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), which held that a California regulation granting labor organizations a “right to take access” to employers’ premises to solicit union support constituted a *per se* physical taking. The Court reasoned that, because “[t]he regulation appropriates a right to invade” the employers’ property, it thereby appropriates “the owners’ right to exclude,” and “is therefore a *per se* physical taking under our precedents.” *Id.* at 2072, 2074.

The question presented is whether this Court should grant the petition, vacate the Supreme Court of Texas’s decision, and remand for further proceedings in light of *Cedar Point* where:

- there is no reasonable probability that the decision below rests on a premise that the court below would now reject in light of *Cedar Point*;
- there are independent, alternative grounds that the court below did not need to reach that would yield the same ultimate outcome on remand; and
- Petitioner caused unnecessary delay by forgoing its opportunity to raise *Cedar Point* in a motion for rehearing below.

**TABLE OF CONTENTS**

	Page
Question Presented .....	I
Table of Authorities .....	III
Introduction .....	1
Statement.....	3
Reasons for Denying the Petition .....	10
I. <i>Cedar Point</i> Did Not Disturb the Supreme Court of Texas’s Basis for Determining That Petitioner Did Not Plead a <i>Per Se</i> Physical Taking.....	11
A. The decision below does not implicate <i>Cedar Point</i> ’s holding that appropriation of the right to exclude is a <i>per se</i> physical taking. ....	12
B. By reaffirming the difference between trespass and takings, <i>Cedar Point</i> supports the decision below.....	14
C. Petitioner’s arguments that <i>Cedar Point</i> has consequences for this case are unavailing. ....	15
II. Independent, Alternative Bases Exist for Determining That Petitioner Did Not Plead a Viable Takings Claim. ....	20
A. There was no government-authorized action.....	21
B. Petitioner did not plead that the University intentionally took its copyright rights.....	22
III. The Equities Weigh Against a GVR.....	23
Conclusion .....	24

### III

#### TABLE OF AUTHORITIES

	Page(s)
<b>Cases:</b>	
<i>Allen v. Cooper</i> , 140 S. Ct. 994 (2020) .....	22
<i>Ark. Game &amp; Fish Comm'n v. United States</i> , 568 U.S. 23 (2012) .....	22
<i>Bassett v. Mashantucket Pequot Museum &amp; Research Ctr., Inc.</i> , 221 F. Supp. 2d 271 (D. Conn. 2002) .....	14
<i>Cedar Point Nursery v. Hassid</i> , 141 S. Ct. 2063 (2021) .....	<i>passim</i>
<i>In re Chi., Milwaukee, St. Paul &amp; Pac. R.R.</i> , 799 F.2d 317 (7th Cir. 1986) .....	21, 22
<i>City of Sherman v. PUC</i> , 643 S.W.2d 681 (Tex. 1983).....	21
<i>Dowling v. United States</i> , 473 U.S. 207 (1985) .....	8, 9, 15, 17
<i>Hairston v. N.C. Agric. &amp; Tech. State Univ.</i> , No. 1:04 CV 1203, 2005 WL 2136923 (M.D.N.C. Aug. 5, 2005) .....	14
<i>Hooe v. United States</i> , 218 U.S. 322 (1910) .....	21
<i>Horne v. Dep't of Agric.</i> , 576 U.S. 350 (2015) .....	6, 7, 8, 18
<i>James v. Campbell</i> , 104 U.S. 356 (1882) .....	6
<i>Lawrence ex rel. Lawrence v. Chater</i> , 516 U.S. 163 (1996) .....	3, 11, 20, 23
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982) .....	8

IV

Page(s)

**Cases—Continued:**

*Penn Cent. Transp. Co. v. New York City*,  
438 U.S. 104 (1978) ..... 10

*Pennington Seed, Inc. v. Produce Exch. No. 299*,  
457 F.3d 1334 (Fed. Cir. 2006)..... 14

*Preseault v. I.C.C.*,  
494 U.S. 1 (1990)..... 21

*Ruckelshaus v. Monsanto Co.*,  
467 U.S. 986 (1984) ..... 10, 21

*Seminole Tribe of Fla. v. Florida*,  
517 U.S. 44 (1996) ..... 9, 13

*Sony Corp. of Am. v. Universal City Studios, Inc.*,  
464 U.S. 417 (1984) ..... 9, 15

*Student Lifeline, Inc. v. Senate of N.Y.*,  
No. 04-CV-5484(JS)(JO), 2005 WL  
8159826 (E.D.N.Y. Nov. 30, 2005) ..... 14

*Stutson v. United States*,  
516 U.S. 193 (1996) ..... 11

*Tahoe-Sierra Pres. Council, Inc. v. Tahoe  
Reg'l Planning Agency*,  
535 U.S. 302 (2002) ..... 2

*Wellons v. Hall*,  
558 U.S. 220 (2010) ..... 11

**Constitutional Provisions, Statutes, and Rules:**

U.S. Const.:

Amend. V ..... 4

Amend. XIV ..... 4

17 U.S.C.:

§ 201(e) ..... 8, 13, 18

§ 502(a) ..... 9, 13

**Constitutional Provisions, Statutes, and  
Rules—Continued:**

S. Ct. R. 10 .....	7
Tex. Const. art. I, § 17.....	4
Tex. Educ. Code § 111.38 .....	22
Tex. R. App. P.:	
64.1.....	10, 23
64.5.....	10, 23

**Miscellaneous:**

John T. Cross, <i>Swing the States for Copyright Infringement</i> , 39 Brandeis L.J. 337 (2001).....	9
---	---

**In the Supreme Court of the United States**

---

No. 21-735

JIM OLIVE PHOTOGRAPHY, DBA PHOTOLIVE, INC.,  
PETITIONER

*v.*

UNIVERSITY OF HOUSTON SYSTEM

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF TEXAS*

---

**BRIEF IN OPPOSITION**

---

**INTRODUCTION**

The decision below ended years of litigation that started from a dubious premise: Petitioner claims that the University of Houston’s alleged infringement of its copyright in a photograph—a statutory tort—is also a *per se* physical taking simply because the University is a governmental entity. The Texas appellate courts unanimously rejected that theory. Applying a long line of precedent from this Court, the Supreme Court of Texas held that the alleged infringement did not qualify as a *per se* taking because it did not appropriate *any* of Petitioner’s property rights in the copyright. Pet. App. 16–22.

Petitioner now asks this Court to facilitate a last-ditch effort to save the case. It urges the Court to grant certiorari, vacate, and remand (“GVR”) so that the Supreme Court of Texas can reconsider its decision in light of *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021).

There is no basis for a GVR here, however, because there is no chance the court below will think *Cedar Point* changes the outcome.

In *Cedar Point*, this Court held that a California regulation granting labor organizations a “right to take access” to employers’ premises to solicit union support was a *per se* taking. *Id.* at 2074. By appropriating “a right to invade” the employers’ property, the Court explained, the regulation appropriated “the owners’ right to exclude” and “therefore constitutes a *per se* physical taking.” *Id.* at 2072.

That holding broke no new ground. In the Court’s words, its “physical takings jurisprudence is ‘as old as the Republic.’” *Id.* at 2071 (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002)). And the Court applied a “basic distinction” between takings and torts that is “firmly grounded in our precedent.” *Id.* at 2078. The Ninth Circuit had strayed from that settled law, however, prompting the Court to reaffirm that government appropriation of a property owner’s right to exclude is “a *per se* physical taking under our precedents.” *Id.* at 2074.

In contrast to the Ninth Circuit, the Supreme Court of Texas did not deviate from those precedents. It correctly concluded that, unlike in *Cedar Point*, there was no appropriation of Petitioner’s right to exclude in the first place. Pet. App. 20–22. The University’s alleged infringement, the court explained, did not take away or destroy Petitioner’s rights in its copyright, “including the right to exclude the infringer and everyone else from using the copyrighted work.” Pet. App. 22. Because of that fundamental difference, *Cedar Point* is not the game-changer Petitioner imagines it to be.

The Court has cautioned that the “GVR power should be exercised sparingly.” *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 173 (1996). It need not be expended on this case. *Cedar Point* applied long-established takings standards and nothing in the decision below calls those settled principles into question. Moreover, Petitioner already had an opportunity to bring *Cedar Point* to the attention of the Supreme Court of Texas in a motion for rehearing but failed to do so. Under these circumstances, a GVR is unwarranted. The petition should be denied.

#### STATEMENT

1. This appeal arose from a jurisdictional challenge to Petitioner’s pleadings, so the courts below accepted as true the following factual allegations. Pet. App. 2, 38.

In 2005, Petitioner took a series of aerial photographs of the City of Houston. Pet. App. 2. It registered the digital photographs with the United States Copyright Office. Pet. App. 2. One of the photographs, “The Cityscape,” is the subject of this dispute. Pet. App. 2.

Petitioner alleged that, in 2012, the University of Houston posted The Cityscape on several of its webpages without obtaining Petitioner’s permission. Pet. App. 2. Petitioner further alleged that before posting The Cityscape, the University “intentionally or knowingly removed identifying material” from the photo. CR.53.<sup>1</sup> Petitioner did not allege that this “identifying material” alerted the University to its copyright; instead, it alleged only that the University displayed The

---

<sup>1</sup> “CR” refers to the record on appeal before the Supreme Court of Texas.

Cityscape “without any independent verification of [Petitioner’s] rights.” CR.52–53.<sup>2</sup>

Petitioner did not discover this alleged copyright infringement until over three years later. Pet. App. 2, 37. Petitioner notified the University of the alleged infringement and demanded that it cease using the photo. Pet. App. 2. In response, the University immediately removed the copy of The Cityscape from its websites. Pet. App. 2.

Petitioner claims the University used The Cityscape without paying compensation. Pet. App. 2. It also claims that the University’s failure to attribute the photograph to Petitioner led to Forbes Mexico obtaining and publishing a copy of The Cityscape on its website without permission. Pet. App. 37.

2. Petitioner sued the University in state court, asserting takings claims under article I, section 17 of the Texas Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. Pet. App. 2–3. The University filed a plea to the jurisdiction seeking dismissal. Pet. App. 3. The plea urged that, although the Texas Constitution waives immunity from suit

---

<sup>2</sup> According to the decisions below, Petitioner alleged that the University downloaded The Cityscape from Petitioner’s website and removed “copyright” material from the photo. Pet. App. 2, 36. Those statements are inaccurate. Petitioner’s pleadings did not address how or where the University obtained a copy of the photo, nor did they allege that the University removed copyright information. CR.52–53. Those omissions were the basis of an independent ground for dismissal raised by the University below: Petitioner failed to allege that the University *intentionally* appropriated its copyright rights, as required for a taking. Pet. App. 37. The courts below did not reach that issue, but as discussed later in this brief, that pleading deficiency provides another reason why a GVR will not change the ultimate outcome of this case. *See infra* pp. 22–23.

for takings claims against state universities, Petitioner had not pleaded a viable claim within that waiver. Pet. App. 3, 37. The trial court denied the plea. Pet. App. 3.

3. The University appealed. Pet. App. 3. It argued that Petitioner's suit should be dismissed for four independent reasons: (1) a copyright is not property protected by the federal and state Takings Clauses; (2) an act of copyright infringement by the government does not amount to a taking; (3) a taking must result from authorized government action, but the University has no capacity under state law to take copyright rights; and (4) Petitioner did not plead that the University had the intent required for a taking. Pet. App. 37.

The court of appeals reversed the denial of the University's plea and dismissed the case. Pet. App. 70. The court did not decide whether the Takings Clauses protect copyright. Pet. App. 4–5. Rather, assuming that copyright is so protected, the court reasoned that “a single act of copyright infringement” does not state a viable takings claim. Pet. App. 67. Instead, the court explained, copyright infringement is analogous to a common-law trespass, a tort for which the University's immunity is not waived. Pet. App. 5, 65–66. The court did not reach the University's remaining arguments.

4. Petitioner sought review in the Supreme Court of Texas. Pet. App. 4. That court granted review and unanimously affirmed. Pet. App. 4, 23.

The Supreme Court of Texas's analysis generally tracked the court of appeals' approach. The University had reasserted all four of its arguments as independent grounds for affirming the court of appeals' judgment. Resp. Tex. S. Ct. Br. 8–55. But like the court of appeals, the Supreme Court of Texas addressed only one of them. It, too, assumed *arguendo* that copyright is protected

property for takings purposes. Pet. App. 7. And it likewise concluded that “factual allegations of [copyright] infringement do not alone allege a taking.” Pet. App. 22.

a. At the outset, the court noted that Petitioner claimed only that a *per se* taking had occurred. Pet. App. 12. Specifically, Petitioner argued that the University’s alleged infringement deprived it of its exclusive rights under its copyright and that this deprivation was comparable to the “physical appropriation” of raisins held to be a *per se* taking in *Horne v. Department of Agriculture*, 576 U.S. 350 (2015). Pet. App. 12.

The court agreed that *Horne* generally defined *per se* takings, but it disagreed that *Horne* established that copyright infringement by the government qualifies as one. Pet. App. 12–13. *Horne*, the court explained, held that the *per se* taking rule applies to personal property as well as real property. Pet. App. 13 (citing *Horne*, 576 U.S. at 357–58). And the court acknowledged that intellectual property, like copyright, is personal property. Pet. App. 13. But that is where Petitioner’s analogy ran its course. Because *Horne* involved the physical appropriation of tangible property, the court found that it did not directly answer “whether or to what extent, state action may be asserted as a *per se* taking of an intellectual property right.” Pet. App. 13.<sup>3</sup>

---

<sup>3</sup> Petitioner claims (at 7) that *Horne* “explicitly stated” that patent infringement is “prohibited by the Takings Clause.” It did not. Petitioner is referring to language in *James v. Campbell*, 104 U.S. 356, 358 (1882), stating that a patent “cannot be appropriated or used by the government itself[] without just compensation.” *Horne* quoted that language solely to show that the Takings Clause has long applied to the “physical appropriation” of personal property. 576 U.S. at 359–60. But *Horne* had no occasion to address whether the government’s nonexclusive “use” of a patented invention would be a *per se* taking, as that case involved raisins that were “physically

b. To obtain those answers, the court turned to the nature of copyright infringement and this Court’s precedents on *per se* takings.

The court first clarified that, as pleaded, Petitioner’s theory was that the property allegedly taken was its copyright—i.e., the bundle of rights in its photograph conferred by the Copyright Act. Pet. App. 15. The relevant property was *not* any physical manifestation of that copyright, such as Petitioner’s “original photograph or the unauthorized copy displayed on the University’s website.” Pet. App. 15.

The court then noted that Petitioner “equates [copyright] infringement by the State to a *per se* taking of the copyright.” Pet. App. 15–16. In particular, Petitioner claimed that the alleged infringement deprived it of its “core” copyright right: “the right to exclude everyone from use of its copyrighted materials and its exclusive right to reproduce and display the work.” Pet. App. 16 (cleaned up).

That claim, the court concluded, did not meet this Court’s requirements for a *per se* taking. Pet. App. 16–18. An “appropriation of property” that effects a *per se* taking occurs when “the property was ‘actually occupied or taken away’ from the owner” or the government takes “possession” of it. Pet. App. 16 (quoting *Horne*, 576 U.S. at 360, 361, 362). But the court found that does not happen when the government commits copyright infringement. Pet. App. 16.

---

segregated” from the owners and “transferred” to the government. *Id.* at 361. Regardless, to the extent Petitioner asserts that the court below misapplied *Horne*, that complaint is both outside the scope of the question presented (as Petitioner does not seek plenary review) and unworthy of the Court’s intervention. *See* S. Ct. R. 10.

To begin, the court observed that the government’s *violation* of the copyright owner’s exclusive rights does not take those rights away from the owner. Pet. App. 16–18. To the contrary, the Copyright Act provides that “no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title.” Pet. App. 17 (quoting 17 U.S.C. § 201(e)). And this Court has held that while an infringer “invades a statutorily defined province guaranteed to the copyright holder alone,’ it ‘does not assume physical control over the copyright.” Pet. App. 17 (quoting *Dowling v. United States*, 473 U.S. 207, 217 (1985)).

The court further reasoned that copyright infringement “does not implicate the reasons for creating a *per se* rule” for physical takings. Pet. App. 18. It recounted that this Court has repeatedly justified the *per se* rule on the ground that a physical appropriation deprives the owner of his “entire bundle of rights” in the appropriated property. Pet. App. 18–20 (citing, *e.g.*, *Horne*, 576 U.S. at 361–62; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435–36 (1982)). But copyright infringement by the government, the court noted, does not take or destroy “any” right in the copyright bundle. Pet. App. 20. During the infringement, the owner retains its rights under the Copyright Act to possess, use, and dispose of its copyright and to exclude anyone else from doing those things. Pet. App. 20–21.

In particular, the court rejected Petitioner’s view that governmental infringement appropriates or destroys the “exclusive right[s]” conferred by the Act:

Nor does the government's infringement deny the copyright owner the right to exclude third parties. Because the owner retains the copyright in the original work, it "may still turn to the copyright laws to prevent third parties from using or copying that original." [John T.] Cross, [*Suing the States for Copyright Infringement*, 39 Brandeis L.J. 337,] 396 [(2001)]. Specifically, the owner may seek injunctive relief "to prevent or restrain infringement of a copyright." 17 U.S.C. § 502(a). And, injunctive relief is available against the infringing government itself for violating the owner's rights. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 n.16 (1996) (explaining that "an individual may obtain injunctive relief under *Ex parte Young* in order to remedy a state officer's ongoing violation of federal law," including "copyright" law).

Pet. App. 20–21 (parallel citations omitted).

So, the court concluded that the government's copyright infringement at most "trespasses into [the copyright owner's] exclusive domain." Pet. App. 22 (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984)). But it "does not equate to the 'theft' or 'conversion' of the copyright owner's exclusive rights." Pet. App. 22 (quoting *Dowling*, 473 U.S. at 217). Nor does the infringement destroy those rights, the court added, "because the copyright owner retains them even after the infringement, including the right to exclude the infringer and everyone else from using the copyrighted work." Pet. App. 22.

c. Because Petitioner had argued only that a *per se* taking occurred, the court expressed no view on whether the University's alleged infringement would qualify as a

taking under the multi-factor balancing test of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Pet. App. 17 n.10; *see also* Pet. App. 13 (noting that this Court applied that test to find a taking of a trade secret in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984)). For the same reason, the court did not address whether Petitioner could state a takings claim for “damaged” property under the Texas Constitution’s Takings Clause, Pet. App. 9 n.8—a possibility flagged by the concurrence, Pet. App. 23, 28–34.

5. Five days after the Supreme Court of Texas issued its decision, this Court decided *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021). The question in *Cedar Point* was whether a California regulation that granted labor organizations a “right to take access” to an agricultural employer’s premises for certain periods to solicit support for unionization constitutes a *per se* physical taking. 141 S. Ct. at 2069. The Court concluded that, because “[t]he access regulation appropriates a right to invade” the employers’ property, it thereby “appropriates for the enjoyment of third parties the owners’ right to exclude” and “is therefore a *per se* physical taking under our precedents.” *Id.* at 2072, 2074.

Petitioner did not bring *Cedar Point* to the Supreme Court of Texas’s attention, though it could have. When *Cedar Point* was handed down, Petitioner still had 10 more days to file a motion for rehearing and 25 more days to file a motion to extend the time to seek rehearing. Tex. R. App. P. 64.1, 64.5. It filed neither.

#### REASONS FOR DENYING THE PETITION

Petitioner asks that the Court grant the petition, vacate the Supreme Court of Texas’s decision, and remand for further proceedings in light of *Cedar Point*. That request should be rejected.

The rationale behind a GVR is that it “promotes fairness and respects the dignity of the [court below] by enabling it to consider potentially relevant decisions and arguments that were not previously before it.” *Stutson v. United States*, 516 U.S. 193, 197 (1996). As this Court has instructed:

A GVR is appropriate when “intervening developments ... reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome” of the matter.

*Wellons v. Hall*, 558 U.S. 220, 225 (2010) (quoting *Lawrence*, 516 U.S. at 167–68). “Whether a GVR order is ultimately appropriate depends further on the equities of the case.” *Lawrence*, 516 U.S. at 167–68.

A GVR is unwarranted here. The decision below is consistent with—and, indeed, bolstered by—*Cedar Point*. There is no reasonable chance the Supreme Court of Texas would reach a different outcome on remand. And the equities weigh against prolonging this litigation based on a decision Petitioner could have raised below on rehearing. The petition should be denied.

**I. *Cedar Point* Did Not Disturb the Supreme Court of Texas’s Basis for Determining That Petitioner Did Not Plead a *Per Se* Physical Taking.**

The holding of *Cedar Point* does not undermine the Supreme Court of Texas’s decision that the University’s alleged copyright infringement was not a *per se* physical taking. *Cedar Point* reiterated and applied a line of precedent that established that government appropriation of a property owner’s right to exclude is a *per se* taking.

That rule is not implicated here because, as the court below correctly recognized, copyright infringement by a government actor does not appropriate the copyright owner's rights to exclude anyone, including the infringing actor itself. And *Cedar Point* reaffirmed that its holding does not apply to a trespass, which is exactly how this Court has described copyright infringement. Petitioner's attempts to portray the decision below as conflicting with *Cedar Point* belie what the state court actually held.

**A. The decision below does not implicate *Cedar Point*'s holding that appropriation of the right to exclude is a *per se* physical taking.**

In *Cedar Point*, the Court explained that, under its physical takings jurisprudence, the government commits a *per se* taking when it “physically acquires private property for a public use.” 141 S. Ct. at 2071. And that is true whether the government “formally condemn[s],” “physically takes possession” of, or “occupies” property. *Id.* Within the “occupy” category, the Court noted that it has “long treated government-authorized physical invasions” of property, such as the appropriation of an easement, as physical takings. *Id.* at 2073. The California regulation at issue fit that description because it “appropriate[d] a right to invade” employers’ property by granting union organizers “a right to physically enter and occupy” the premises at certain times. *Id.* at 2072. In doing so, it “appropriate[d] for the enjoyment of third parties the owners’ right to exclude,” *id.*, which made it “a *per se* physical taking under our precedents,” *id.* at 2074.

The decision below fully recognized that Petitioner was invoking the same precedents. It noted that, under Petitioner’s theory, the alleged copyright infringement was “akin to a physical invasion that deprived it of the core right guaranteed by its copyright: the right to

exclude everyone from use of its copyrighted materials and its exclusive right to reproduce and display the work.” Pet. App. 16 (cleaned up); *see also* Pet. App. 20 (noting Petitioner’s argument that “‘exclusivity’ is the core component of each specific right granted under the Copyright Act”).

The court correctly rejected Petitioner’s theory, however, because—unlike in *Cedar Point*—the alleged infringement did *not* appropriate Petitioner’s right to exclude *anyone* from its property. Pet. App. 20–21.

For one thing, the University’s alleged violation of Petitioner’s copyright did not “appropriate a right to invade” it. As the court observed, the Copyright Act renders a nullity any governmental action “purporting to seize” or “expropriate” any right “with respect to the copyright.” 17 U.S.C. § 201(e) (providing that no such action “shall be given effect”), *quoted at* Pet. App. 17.

And because Petitioner retained all of its rights under the Act, its “right to exclude” was never taken away. The court accurately noted that Petitioner never lost the right to “seek injunctive relief ‘to *prevent or restrain* infringement’” of its copyright. Pet. App. 21 (quoting 17 U.S.C. § 502(a)) (emphasis added). Not only could Petitioner exclude “third parties” in this way, but it also could exclude “the infringing government itself.” Pet. App. 20–21. As the court explained, this Court has held that “‘an individual may obtain injunctive relief under *Ex parte Young* in order to remedy a state officer’s ongoing violation of federal law,’ including ‘copyright’ law.” Pet. App. 21 (quoting *Seminole Tribe*, 517 U.S. at 72 n.16). Several lower courts have confirmed that a copyright

owner can invoke its rights under the Act to enjoin infringing government officials in an *Ex parte Young* suit.<sup>4</sup>

The court thus concluded that the University's alleged copyright infringement did not appropriate Petitioner's "right to exclude the infringer and everyone else from using the copyrighted work." Pet. App. 22. As such, it correctly held that the *per se* taking rule reiterated in *Cedar Point* did not apply here. Pet. App. 22.

**B. By reaffirming the difference between trespass and takings, *Cedar Point* supports the decision below.**

If anything, *Cedar Point* bolsters the Supreme Court of Texas's determination that Petitioner did not plead a *per se* physical taking.

In *Cedar Point*, the Court stressed that its holding "does nothing to efface the distinction between trespass and takings"—a "basic distinction [that] is firmly grounded in our precedent." 141 S. Ct. at 2078. "Isolated

---

<sup>4</sup> See, e.g., *Student Lifeline, Inc. v. Senate of N.Y.*, No. 04-CV-5484(JS)(JO), 2005 WL 8159826, at \*3-4 (E.D.N.Y. Nov. 30, 2005) (holding that "the *Ex Parte Young* doctrine allows Plaintiff to move forward with its claims for injunctive relief against the Senators" "to enjoin the Senators from continuing this [copyright] infringement"); *Hairston v. N.C. Agric. & Tech. State Univ.*, No. 1:04 CV 1203, 2005 WL 2136923, at \*8 (M.D.N.C. Aug. 5, 2005) (concluding that "the *Ex Parte Young* doctrine therefore applies to [the plaintiff's] copyright infringement claim seeking prospective injunctive relief" against state university officials); *Bassett v. Mashantucket Pequot Museum & Research Ctr., Inc.*, 221 F. Supp. 2d 271, 279 (D. Conn. 2002) (subjecting tribal officials to suit under *Ex parte Young* for injunctive relief to stop "an alleged ongoing violation of federal copyright law"); cf. *Pennington Seed, Inc. v. Produce Exch. No. 299*, 457 F.3d 1334, 1341 (Fed. Cir. 2006) (holding that "continuing prospective violations of a federal patent right by state officials may be enjoined by federal courts under the *Ex parte Young* doctrine").

physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right.” *Id.* The California regulation fell on the takings side of the line because “[u]nlike a mere trespass, the regulation grants a formal entitlement to physically invade the growers’ land.” *Id.* at 2080.

*Cedar Point*’s reaffirmation of the trespass-takings distinction supports the decision below. The Court has analogized copyright infringement to a trespass. *Sony Corp.*, 464 U.S. at 433 (defining a copyright infringer as “anyone who trespasses into [the copyright owner’s] exclusive domain by using or authorizing the use of the copyrighted work”); *accord Dowling*, 473 U.S. at 217. The courts below embraced that comparison. Pet. App. 22, 66 (citing *Sony Corp.*, 464 U.S. at 433). That analogy further squares the decision in this case with *Cedar Point*. Like a trespass, the University’s alleged infringement was “not undertaken pursuant to a granted right of access” or “a formal entitlement to physically invade” Petitioner’s copyright. *Cedar Point*, 141 S. Ct. at 2078, 2080. Rather, Petitioner alleged only that someone at the University posted The Cityscape on its website without permission. Pet. App. 2. Under *Cedar Point*, that act is “properly assessed as [an] individual tort[] rather than appropriation[] of a property right.” 141 S. Ct. at 2078. That is precisely what the court below did, so a GVR to consider *Cedar Point* would serve no purpose.

**C. Petitioner’s arguments that *Cedar Point* has consequences for this case are unavailing.**

Petitioner has provided no reason to believe that a review of *Cedar Point* would lead the Supreme Court of Texas to reach a contrary conclusion in this case.

Petitioner's arguments all rest on mischaracterizations of the decision below.

1.a. Petitioner first contends (at 21–22) that the Supreme Court of Texas “ignore[d]” the University's appropriation of Petitioner's right to exclude. It did not.

Again, the court below held that there was no *per se* taking in part because, “even after the infringement,” Petitioner retained its rights under the Copyright Act “to exclude the infringer and everyone else from using the copyrighted work.” Pet. App. 22; *see also* Pet. App. 20–21 (explaining that Petitioner never lost “the right to exclude third parties” and officials of “the infringing government itself”). Far from ignoring Petitioner's right to exclude, the court found there was no appropriation of that right in the first place.

b. Petitioner nonetheless argues (at 21) that the court below necessarily overlooked the right to exclude because it expressly acknowledged that infringement “invades” the copyright holder's exclusive province. That acknowledgment, Petitioner urges, would be “outcome determinative on remand” in light of *Cedar Point*. Pet. 21. Petitioner is wrong.

Unlike the regulation in *Cedar Point*, the “invasion” caused by the University's alleged copyright infringement did not appropriate Petitioner's right to exclude everyone from its property. In *Cedar Point*, the employers lost the right “to exclude union organizers from their property” for prescribed periods because the regulation “took that right from them.” 141 S. Ct. at 2076. By contrast, as the court below noted, the University's alleged infringement did *not* take away Petitioner's rights under the Copyright Act to exclude University officials and everyone else from using its copyrighted work. Pet. App.

20–22. In fact, Petitioner invoked those very rights in this case to stop the alleged infringement. Pet. App. 2.

Moreover, Petitioner ignores *Cedar Point*'s caveat that some “invasions” of property, such as trespasses, are not takings. 141 S. Ct. at 2078. So describing copyright infringement as an “invasion,” as the court below did, does not have the import Petitioner assigns to it. Indeed, the court was just repeating *this* Court's observation that while an infringer “invades a statutorily defined province guaranteed to the copyright holder alone,” that invasion only “*trespasses* into his exclusive domain” and does not effect a “conversion” of the holder's rights. *Dowling*, 473 U.S. at 217–18 (emphasis added). In relying on that language, the court below simply recognized that this Court had already likened copyright infringement to trespass—a category of invasions that *Cedar Point* did not disturb. Pet. App. 17, 22.

2. Petitioner next claims (at 22–25) that the decision below clashes with *Cedar Point*'s holding that the government does not have to acquire a recognized property interest, such as a formal easement, to effect a *per se* taking. 141 S. Ct. at 2076. In Petitioner's view, the court below rejected its takings claim because the University did not “acquire title” to Petitioner's copyright rights. Pet. 23. That is incorrect.

According to Petitioner, the court below must have believed that acquiring title was essential to a *per se* taking because it noted that a government infringer “does not take possession or control of, or occupy, the copyright.” Pet. 22–23 (quoting Pet. App. 16). That statement has nothing to do with title. The court was simply repeating this Court's explanation that the “appropriation of property” required for a *per se* physical taking “means the property was ‘actually occupied or taken away’ from

the owner” or involves an “actual taking of possession and control’ by the government.” Pet. App. 16 (quoting *Horne*, 576 U.S. at 360, 361, 362). *Cedar Point* cited the same explanation. 141 S. Ct. at 2074 (quoting *Horne*, 576 U.S. at 361). But whereas the regulation in *Cedar Point* took away the employers’ right to exclude union organizers from their property, *id.* at 2076, the University’s alleged infringement did *not* take away Petitioner’s right to exclude anyone, Pet. App. 20–22. *That* is why there was no *per se* taking here; the fact that the University did not acquire a formal license to use Petitioner’s photograph had nothing to do with it.

Petitioner also believes the court below insisted on title passing to the government based on the decision’s citation of section 201(e) of the Copyright Act. Pet. 23 (citing Pet. App. 17). That section provides that a governmental body’s action purporting to “seize,” “expropriate,” or “exercise” a copyright owner’s rights will not be given “effect” under the Act. 17 U.S.C. § 201(e). Again, Petitioner misses the point. Section 201(e) was relevant to the court’s takings analysis not because a use “seized” by the University would not be recognized under the Act, but because the Act preempts any effect the University’s actions could have on the copyright owner’s rights. Pet. App. 17 (“The copyright owner thus retains the key legal rights that constitute property for purposes of a *per se* takings analysis, despite the government’s interference.”). That reasoning is consistent with *Cedar Point*. There, “the access regulation took that right [to exclude] from [the employers],” 141 S. Ct. 2076, but under the Copyright Act, the government’s infringement has no effect on a copyright owner’s right to exclude, 17 U.S.C. § 201(e).

That leaves Petitioner’s strained effort (at 24) to paint the decision below as an “echo” of the *Cedar Point* dissent. To that end, Petitioner suggests the decision erred in relying on the fact that the University did not acquire copyright rights “for itself.” Pet. 24. Not so. The court below reasoned that, under the Copyright Act, the government’s violation of the copyright owner’s exclusive rights “does not destroy them,” meaning that the owner “retains” those rights—including the right to exclude. Pet. App. 17. In other words, what mattered was not that the government failed to acquire “for itself” Petitioner’s copyright rights, but that those rights were not taken from Petitioner. Finding no *per se* taking under those circumstances is entirely consistent with *Cedar Point*.

3. Finally, Petitioner argues (at 25–27) that the decision below cannot be reconciled with *Cedar Point* because it purportedly held that a *per se* taking requires “the complete destruction of Petitioner’s rights in the copyrighted work.” Again, Petitioner is wrong.

Petitioner’s argument rests entirely on an incomplete rendering of the state court’s reasoning. As Petitioner notes, the court observed that the University’s alleged infringement did not deprive Petitioner of its rights to possess and use its work and to exclude third parties. Pet. App. 20. From there, Petitioner makes the unfounded leap (at 25–26) that the court overlooked “Petitioner’s ‘right to exclude’ the world” from using its work and, therefore, the court must have required the “complete destruction” of Petitioner’s rights before finding a *per se* taking. But, again, the court did *not* overlook Petitioner’s right to exclude the world. It held that Petitioner retained its rights under the Copyright Act “to

exclude *the infringer and everyone else* from using the copyrighted work.” Pet. App. 22 (emphasis added).

The court below did not list all the rights that Petitioner retained during the alleged infringement to hold that a “complete destruction” of “every” right was necessary to find a *per se* taking. Rather, the court’s point was that the infringement did not destroy “any” of Petitioner’s rights in its copyright. Pet. App. 20. Because Petitioner never lost any property rights—including the “right to exclude” at issue in *Cedar Point*—there was no *per se* physical taking here.

\* \* \* \*

In sum, nothing in *Cedar Point* suggests that the Supreme Court of Texas would reach a different conclusion if it reconsidered this case. To the contrary, applying the long-settled physical-takings jurisprudence discussed in *Cedar Point* confirms that the state court reached the correct conclusion. For this reason alone, Petitioner has failed to show a “reasonable probability” that the decision below would be reversed if the Court exercised its GVR authority.

## **II. Independent, Alternative Bases Exist for Determining That Petitioner Did Not Plead a Viable Takings Claim.**

Even if *Cedar Point* did cast doubt on the basis for the Supreme Court of Texas’s decision, a GVR would still not be warranted because vacating and remanding would not affect “the ultimate outcome of the litigation.” *Lawrence*, 516 U.S. at 167. Petitioner failed to allege a viable takings claim for two additional reasons that the courts below did not need to address: (1) a taking must result from authorized government action, but the University has no authority to take copyright rights; and (2)

Petitioner did not plead that the University had the intent required for a taking. Because this suit would likely be dismissed anyway on one of these independent grounds, a GVR should not issue.

**A. There was no government-authorized action.**

A taking must result from a government act “duly authorized by law.” *Ruckelshaus*, 467 U.S. at 1016. *Cedar Point* itself repeatedly confirms that rule. 141 S. Ct. at 2073, 2074, 2079 (noting that “government-authorized” physical invasions may be takings). So, for example, in *Preseault v. I.C.C.*, the Court held a takings claim could proceed because, contrary to the government’s position, the acts that caused the asserted taking were “clearly authorized” by statute. 494 U.S. 1, 13 (1990).

The authorized-action requirement reflects that the Takings Clause is “directed against the government, and not against individual or public officers proceeding without the authority of legislative enactment.” *Hooe v. United States*, 218 U.S. 322, 335–36 (1910). The upshot of that distinction is that “[a]uthorized acts of the government may be takings,” but “unauthorized or mistaken ones are torts for which the officer alone is answerable (unless immune).” *In re Chi., Milwaukee, St. Paul & Pac. R.R.*, 799 F.2d 317, 326 (7th Cir. 1986) (Easterbrook, J.).

Petitioner’s claim fails on this point. A Texas state agency like the University “may only exercise those powers granted by statute, together with those necessarily implied from the statutory authority conferred or duties imposed.” *City of Sherman v. PUC*, 643 S.W.2d 681, 686 (Tex. 1983). But the Texas Legislature did not grant the University authority to take intellectual property. Instead, it explicitly granted the University only limited takings authority “to acquire for the use of the university

any *land* necessary and proper for carrying out its purposes as a state-supported institution of higher education.” Tex. Educ. Code § 111.38 (emphasis added). On the facts alleged here, then, the University was acting at most as a tortfeasor, like any private entity that commits the statutory tort of copyright infringement.

**B. Petitioner did not plead that the University intentionally took its copyright rights.**

As the Court recently explained in the due-process context, copyright infringement by a State must be “intentional” to even “raise a constitutional issue.” *Allen v. Cooper*, 140 S. Ct. 994, 1006 (2020). That principle applies with equal force to takings because “unintended injuries inflicted by governmental actors are treated as torts, not takings.” *Chi., Milwaukee, St. Paul & Pac. R.R.*, 799 F.2d at 326. For example, in determining whether a temporary physical invasion caused by flooding constitutes a taking, the Court has held that it depends in part on “the degree to which the invasion is intended or is the foreseeable result of authorized government action.” *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23, 39 (2012).

Here, Petitioner alleged only negligence supporting a tort claim, not the intent necessary for a takings claim. Petitioner alleged that it was damaged when the University posted a copy of its copyrighted photograph on University webpages. CR.53. But it did not allege that the University *knew* the image was copyrighted and thus did not allege that invasion of its copyright rights was an “intended” or “foreseeable result.” *Ark. Game & Fish Comm’n*, 568 U.S. at 39.

The University’s only other allegedly intentional act was to “remove[] identifying material” from the photograph before posting it. CR.53. But nowhere did

Petitioner allege that this material was copyright information or otherwise alerted the University to its copyright. CR.52–53. So that allegation also fell short because, again, it did not aver that the University knew or could foresee it was infringing Petitioner’s *copyright*—the property allegedly taken. Indeed, Petitioner effectively admitted this when it alleged that the University displayed the photograph “without any independent verification of the rights” to the image. CR.52. That supposed failure to act sounds in negligence, not the intentional taking of copyright rights.

### **III. The Equities Weigh Against a GVR.**

The equities of this case further support a denial of the petition. Where, as here, “the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate.” *Lawrence*, 516 U.S. at 168.

The delay and further cost of a GVR are especially unjustified here because Petitioner could have easily avoided them. The Court issued its opinion in *Cedar Point* just five days after the decision below—well within the 15 days Petitioner had to file a motion for rehearing and the 30 days it had to request an extension to file such a motion. Tex. R. App. P. 64.1, 64.5. But rather than avail itself of that immediate chance to seek reconsideration in light of *Cedar Point*, Petitioner waited 150 days to ask this Court to make exactly the same request of the court below. Under these circumstances, the Court should not use its GVR power to give Petitioner a second chance to raise a rehearing point it missed in the Supreme Court of Texas.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KEN PAXTON  
Attorney General of Texas

BRENT WEBSTER  
First Assistant Attorney  
General

JUDD E. STONE II  
Solicitor General  
*Counsel of Record*

RANCE CRAFT  
Assistant Solicitor General

OFFICE OF THE TEXAS  
ATTORNEY GENERAL  
P.O. Box 12548 (MC 059)  
Austin, Texas 78711-2548  
Judd.Stone@oag.texas.gov  
(512) 936-1700

FEBRUARY 2022