

No. _____

In the
Supreme Court of the United States

JOSEPH E. BLACKBURN, JR. AND
LINDA C. BLACKBURN,

Petitioners Et Ux.,

v.

DARE COUNTY, NORTH CAROLINA ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a governmental regulation prohibiting all physical access to a landowner's property is a "per se" taking under the Fifth Amendment of the United States Constitution.

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiffs-Appellants Below

- Joseph E. Blackburn, Jr.
- Linda C. Blackburn

Respondents and Defendants-Appellees Below

The following are all located in North Carolina:

- Dare County
- Town of Nags Head
- Town of Duck
- Town of Kill Devil Hills
- Town of Manteo
- Town of Kitty Hawk
- Town of Southern Shores

CORPORATE DISCLOSURE STATEMENT

The petitioners are individuals, and therefore there is no corporate ownership.

LIST OF PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1 (b)(iii):

1. *Joseph E. Blackburn, Jr. and Linda C. Blackburn, and all similarly situated individuals, Plaintiffs v. Dare County, Town of Nags Head, Town of Duck, Town of Kill Devil Hills, Town of Manteo, Town of Kitty Hawk, Town of Southern Shores, Defendants.* 2:20-CV-27, U.S District Court for the Eastern District of North Carolina. Judgment entered on September 15, 2020.
2. *Joseph E. Blackburn, Jr. and Linda C. Blackburn, and all similarly situated individuals, Plaintiffs-Appellants v. Dare County, Town of Nags Head, Town of Duck, Town of Kill Devil Hills, Town of Manteo, Town of Kitty Hawk, Town of Southern Shores, Defendants-Appellees.* 20-2056, United States Court of Appeals for the Fourth Circuit. Judgment entered on January 25, 2023.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
CORPORATE DISCLOSURE STATEMENT	ii
LIST OF PROCEEDINGS.....	iii
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	2
A. Factual Background.....	2
REASONS FOR GRANTING THE PETITION.....	6
I. THE COURT SHOULD GRANT THE WRIT OF CERTIORARI TO CLARIFY WHAT CONSTITUTES A “PER SE” TAKING UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONST- ITUTION, SPECIFICALLY WHERE A PROPERTY OWNER IS PROHIBITED FROM ALL PHYSICAL ACCESS TO PROPERTY.....	6
CONCLUSION.....	11

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

Opinion of the United States Court of Appeals
for the Fourth Circuit (January 25, 2023)..... 1a

Order of the United States District Court for the
Eastern District of North Carolina
(September 15, 2020)..... 16a

Judgment of the United States District Court
for the Eastern District of North Carolina
(September 15, 2020)..... 35a

OTHER DOCUMENT

Class Action Complaint and Demand
for Trial By Jury (May 15, 2020) 37a

TABLE OF AUTHORITIES

	Page
CASES	
<i>Arkansas Game and Fish Com’n v. U.S.</i> , 568 U.S. 23, 133 S.Ct. 511 (2012)	10
<i>Cedar Point Nursery, et. al. v. Victoria Hassid,</i> <i>et al.</i> , 141 S.Ct. 2063, 210 L.Ed.2d. 369 (2021)	7
<i>First English Lutheran Church of Glendale v.</i> <i>Los Angeles County</i> , 482 U.S. 304, 107 S.Ct. 2378 (1987)	10
<i>John P. Bailey, et al, v. County of Dare</i> , No. 2:20-CV-20-FL (2020)	4
<i>Kaiser Aetna v. United States</i> , 444 U.S. 164, 100 S.Ct. 383 (1979)	6
<i>Kimball Laundry Co. v. United States</i> , 338 U.S. 1, 69 S.Ct. 1434 (1949)	10
<i>Knick v. Township of Scott, Pennsylvania</i> , 139 S.Ct. 2169, 204 L.Ed.2d 558 (2019)	10
<i>Loretto v. Teleprompter Manhattan CATV</i> <i>Corp.</i> , 458 U.S. 419, 102 S.Ct. 3164 (1982)	7, 9
<i>Lucas v. S.C. Coastal Council</i> , 505 U.S. 1003, 112 S.Ct. 2886 (1992)	7
<i>Murr v. Wisconsin</i> , 137 S.Ct. 1933, 198 L.Ed.2d. 497 (2017)	7
<i>Penn Cent. Transp. Co. v. New York City</i> , 438 U.S. 104, 98 S.Ct. 2646 (1978)	7, 8
<i>Pewee Coal Co., v. United States</i> , 341 U.S. 114, 71 S.Ct. 670 (1958)	10

TABLE OF AUTHORITIES – Continued

Page

United States v. General Motors Corporation,
323 U.S. 373, 65 S.Ct. 357 (1945) 6, 10

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. V i, 2, 7, 8, 9, 10

STATUTES

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1291 1
28 U.S.C. § 1332(d)(2)(A) 1
28 U.S.C. § 1391(b), (c) 1

JUDICIAL RULES

Fed. R. Evid. 201 3

TABLE OF AUTHORITIES – Continued

Page

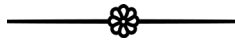
OTHER AUTHORITIES

Dare County, <i>COVID-19 Bulletin #2</i> (March 17, 2020).....	3, 4
JOHN ADAMS, DISCOURSES ON DAVILA, VOL 6 (C. ADAMS ED. 1851)	6
N.C. Governor Roy Cooper, Exec. Order No. 121 (March 27, 2020)	2
President Donald J. Trump, <i>Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak</i> , Proclamation 9994 of March 13, 2020.....	2



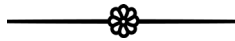
PETITION FOR A WRIT OF CERTIORARI

Petitioner, Joseph E. Blackburn, Jr. and Linda C. Blackburn, respectfully seek a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit and reverse and remand the decision below.



OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Fourth Circuit, dated January 25, 2023, is included at App.1a. The Order and Judgment of the United States District Court for the Eastern District of North Carolina, dated September 15, 2020, is included at App.35a.



JURISDICTION

The United States Court of Appeals entered judgment on January 25, 2023. (App.1a) The Court has jurisdiction under 28 U.S.C. § 1254(1). The district court had subject matter jurisdiction over this class action suit under 28 U.S.C. § 1332(d)(2)(A) and venue under 28 U.S.C. § 1391(b), (c). The court of appeals had jurisdiction under 28 U.S.C. § 1291.



CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.



STATEMENT OF THE CASE

A. Factual Background

In response to the COVID-19 virus, the President of the United States declared a national emergency on March 13, 2020.¹ North Carolina Governor Roy Cooper issued an emergency “Stay at Home” ordinance on March 27, 2020.² Neither the President’s declaration

¹ President Donald J. Trump, *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, Proclamation 9994 of March 13, 2020

² N.C. Governor Roy Cooper, Exec. Order No. 121 (March 27, 2020).

nor the Governor's order banned travel between the various states, banned travel between counties within the states, especially within North Carolina, nor banned non-resident property owners from using their residences wherever situated.³

On March 20, 2020 at 10:00 p.m., Dare County prohibited the entry of non-resident property owners, and others similarly situated who were not in Dare County on the above referenced date including the Plaintiffs. App.37a-44a. Entrance to the property was prevented by armed Sheriff's Deputies. The ordinance in question not only made it impossible for a non-resident landowner to go to his or her land because he or she was barred by armed officers of the law at each entrance to Dare County, but it subjected any landowner that attempted to do so subject to criminal penalty. The March 20, 2020 ordinance adopted at 10:00 p.m. states that: "Any violation of the restrictions and prohibitions imposed under this declaration is punishable as a Class 2 misdemeanor." Upon information and belief, the counties of Dare, Currituck, and Hyde are the only counties in the entire State of North Carolina that excluded non-resident property owners from their real property.⁴

Of equal significance, Dare County, under *Dare County COVID-19 Bulletin Number 2*, allowed non-

³ See Footnotes 1 and 2. This Court may consider scientific articles, news articles, and government publications regarding Coronavirus and other facts that are generally known in the trial court's territorial jurisdiction or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201.

⁴ Fed R. Evid. 201

resident employees of Dare County businesses to enter after applying for and receiving entry guidelines at www.darenc.com/entry.⁵ There is no allegation that on March 20, 2020 at 10:00 p.m. in the Complaint that the non-resident property owners had COVID-19 or had been in contact with anyone with COVID-19. There is no allegation that the residences and real property from which the non-resident property owners were barred were contaminated in any way with COVID-19 or held any type of communicable disease.

Dare County was sued by another group of non-residents in the Eastern District of North Carolina Northern Division in the United States Federal District Court in an action entitled *John P. Bailey, et al, Plaintiffs, v. County of Dare*, file No. 2:20-CV-20-FL. In this suit, the Plaintiffs sought to have the ordinance barring non-residents from Dare County stricken as improperly enacted and illegal.

Dare County settled that action by unanimous vote of its commissioners as reflected in its minutes of July 6, 2020 at 8:30 a.m. as follows:

- (1) Non-resident property owners in Dare County would be classified similar to full-time residents during future “public health emergencies”. The World Health Organization defines a public health emergency as one that requires the governor to declare “an occurrence or imminent threat of an illness or health condition, caused by bio terrorism, epidemic or pandemic disease or a novel and highly fatal infectious agent or biological

⁵ *COVID-19 Bulletin #2*, Dare County (March 17, 2020).

toxin, that poses a substantial risk of a significant number of human fatalities or incidents or permanent or long-term disability”. “The declaration of a state of public health emergency permits the governor to suspend state regulations, change the functions of state agencies.” In those events in the future, the County would classify a non-resident as a resident. They clarified the classification would not include hurricanes or other emergencies and would only apply in a health emergency, as earlier defined. The term “non-resident” would include property owners, their spouses, parents, children, brothers, sisters, grandparents, grandchildren, as well as step, half, and in-law relationships.

- (2) Dare County would formally readopt Chapter 92, the ordinance related to emergency powers.
- (3) Dare County would pay certain plaintiffs’ attorney fees and costs totaling \$16,500.00.
- (4) The proposed settlement would not constitute an admission of liability or fault on behalf of Dare County. Mr. Outten explained the plaintiffs would file a voluntary dismissal with prejudice which would release the County from any liability now or in the future.⁶

⁶ Minutes, Dare County Board of Commissioners Special Meeting, 8:30 a.m., July 6, 2020.



REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT THE WRIT OF CERTIORARI TO CLARIFY WHAT CONSTITUTES A “PER SE” TAKING UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION, SPECIFICALLY WHERE A PROPERTY OWNER IS PROHIBITED FROM ALL PHYSICAL ACCESS TO PROPERTY.

“Government action short of acquisition of title or occupancy has been held [a taking], if its effects are so complete as to deprive the owner of all or most his interest in the subject matter.” *United States v. General Motors Corporation*, 323 U.S. 373, 378, 65 S.Ct. 357, 359 (1945). This is consistent with the legal maxim that certain rights in property are deemed to be fundamental and when removed require compensation. *Kaiser Aetna v. United States*, 444 U.S. 164, 179–180, 100 S.Ct. 383, 393 (1979). Quoting John Adams and the Courts holding in *Murr v. Wisconsin*, Chief Justice Roberts expounds upon the essential nature of property rights in *Cedar Point Nursery*, holding,

As John Adams tersely put it, “[p]roperty must be secured, or liberty cannot exist.” DISCOURSES ON DAVILA, IN 6 WORKS OF JOHN ADAMS 280 (C. ADAMS ED. 1851). This Court agrees, having noted that protection of property rights is “necessary to preserve freedom” and “empowers persons to shape and to plan their own destiny in a world where

governments are always eager to do so for them.

Cedar Point Nursery, et. al. v. Victoria Hassid, et al., 141 S.Ct. 2063, 2071, 210 L.Ed.2d. 369 (2021) *citing Murr v. Wisconsin*, 137 S.Ct. 1933, 198 L.Ed.2d. 497 (2017).

Fifth Amendment jurisprudence has set forth three distinct categories of takings:

- 1) permanent physical invasion of property (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421, 102 S.Ct. 3164, 3168 (1982)); *see also Cedar Point Nursery Et. Al. v. Hassid, Et. Al.* 141 S.Ct. 2063, 210 L.Ed.2d. 369 (2021)
- 2) regulatory deprivation to a landowner of all economically beneficial use of the land (*Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029-30, 112 S.Ct. 2886, 2901 (1992); and
- 3) Those factors enumerated by the balancing test set forth in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646 (1978).

Each of the above referenced cases and their progeny establish two rights of property ownership upon which the Court has focused its attention. One right is what the Court describes as the fundamental right to exclude. The second right is that of the property owner's right to receive economic benefit from use of land. Where all economic benefit is removed a *per se* taking occurs, where only some economic benefit is removed the *Penn Central* balancing test is applied.

The concept of fundamental rights which define property ownership has been developed and established throughout the 18th century until present. This idea of what rights define property ownership have been described as a “bundle of sticks”. These rights or “sticks” are, 1) Right of Possession 2) Right of Control 3) Right of Disposition 4) Right of Enjoyment and 5) Right of Exclusion. Limiting “takings” under the Fifth Amendment to only scenarios involving two of the five fundamental rights of property ownership, fails to acknowledge the unique nature of property ownership and the fundamental right to enjoyment and use of property. To deprive a property owner of these fundamental rights is no different than depriving the property owner of the right of exclusion or disposition.

The present case is one of first impression. The facts of this case arise from the prohibition of complete physical access to property. This has not heretofore been directly addressed in “takings” claims. Here the Defendant Dare County specifically excluded the Plaintiffs from their real property under the threat of imprisonment. Both the District Court and 4th Circuit Court of Appeals found that no claim for taking had been pleaded, specifically that the Defendants’ total deprivation of the Plaintiffs’ rights to access and use of their property does not constitute a “per se” taking under the Fifth Amendment. Both lower courts focused upon the regulatory balancing test under *Penn Central*, however this analysis does not adequately address the Fifth Amendment concerns presented, specifically the total prohibition of the Plaintiff’s access to their property.

This right to enjoyment and use is as fundamental to property rights as that of exclusion. Logically the

rights of enjoyment and exclusion are intertwined and cannot exist without the other. An invasion of either right is in essence a physical occupation. The government asserting physical dominion over a piece of property by acquiring title has the same chilling effect as asserting dominion over property by surrounding and prohibiting access. The effect being the loss of dominion and control over one's property.

Limiting the protections of the Fifth Amendment to only physical appropriation and economic considerations ignores other fundamental rights and presupposes the preeminence of the economic use of property over the right of enjoyment and use. This proposition stands in stark contrast to the reasoning the Courts have attached to the right of exclusion. As stated in *Lorreto*, “[P]roperty law has long protected an owner’s expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permits another to exercise complete dominion literally adds insult to injury. Furthermore, such an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.” 458 U.S., at 436, 102 S.Ct., at 3176 (citation omitted).

At a fundamental level, the ability to enter upon one's property for personal use and the right to prohibit others from doing the same are the two basic tenants of property ownership. To take one is to take the other, and both should be considered *per se* takings under the Fifth Amendment of the United States Constitution. Failing to acknowledge this, as the lower courts' rulings did, create untenable scenarios

where a person could receive economic benefit from their property while maintaining title, yet still be prohibited from access and receive no compensation, further encouraging a governmental entity to flagrantly ignore a person's basic rights to private property ownership. This outcome is antithetical to property rights set for under the United States Constitution.

Dare County's March 20, 2020, emergency declaration was a complete taking of Plaintiff's property. While the access prohibition was temporary, a taking temporary is no different, "in kind from permanent takings, for which the Constitution clearly requires compensation." *First English Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 318; 107 S.Ct. 2378, 2388 (1987). *See also Knick v. Township of Scott, Pennsylvania*, 139 S.Ct. 2169, 204 L.Ed.2d, 558 (2019) *see also Arkansas Game and Fish Com'n v. U.S.*, 568 U.S. 23 at 33; 133 S.Ct. 511 at 519 (2012) *see also Peewee Coal Co.*, 341 U.S. 114, 71 S.Ct. 670; *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S.Ct. 1434; *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357.

Therefore, the Petitioner seeks a Writ of Certiorari to the United States Supreme Court on the Question Presented, whether a governmental regulation prohibiting all physical access to a landowner's property is a "per se" taking under the Fifth Amendment of the United States Constitution.



CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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