No. 22-1048

In The
Supreme Court of the United States

JOSEPH E. BLACKBURN, JR., et ux.,

Petitioners,

v.

DARE COUNTY, NORTH CAROLINA, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a temporary regulation which prevented Petitioners from traveling to their vacation homes for a 45-day period constituted a *per se* taking under the Federal Constitution's Fifth and Fourteenth Amendments, when such restriction did not require or result in any physical invasion, entry, occupation, or appropriation of Petitioners' property for public use.

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, and Town of Southern Shores (collectively the "Defendant Towns")*

CORPORATE DISCLOSURE STATEMENT

The respondents are local municipalities, and therefore there is no corporate ownership.

* While Defendant Towns were named as defendants in Appellants' Complaint, Appellants did not appeal the District Court's Order as to the Defendant Towns, and only Dare County was part of the appeal to the United States Court of Appeals for the Fourth Circuit.

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STATEMENT OF THE CASE

This case involves a 45-day travel restriction which Dare County enacted in March of 2020, in the very initial stages of the COVID-19 pandemic. The U.S. Court of Appeals for the Fourth Circuit aptly summarized the facts as alleged by the Appellants:

> In March 2020, Dare County's Board of Commissioners, like many governments across the country, enacted several public health restrictions to limit the spread of COVID-19. Dare County announced the restrictions on March 16 and implemented them over three phases. Phase one, which took effect immediately, declared a state of emergency and prohibited mass gatherings. Phase two, which took effect one day later, prohibited non-resident visitors from entering the county. Phase three, which took effect four days after the restrictions were announced, prohibited non-resident property owners from entering the county. In effect, Dare County told non-resident property owners: "If you want to quarantine at your beach house, get there by March 20." This gave non-resident property owners four days to travel to the county.
>
> The Blackburns live in Richmond, Virginia. For whatever reason, they did not travel to their beach house by March 20 when the non-resident-property-owners ban took effect. So the Blackburns could not then access their beach house until the order was partially lifted forty-five days later.

Blackburn v. Dare Cty., 58 F.4th 807, 809 (4th Cir. 2023). While Dare County's restrictions prevented the Appellants from traveling to their vacation homes after the four-day warning period, Appellants were free to manage their properties from out-of-state and "were still able to rent their property to someone within the County or certain adjoining counties." *Id.* at 812. The restriction was lifted forty-five (45) days later, on May 8, 2020. (Compl. ¶ 14, Appellants' Appendix pp. 39a–40a.)

After the restriction was lifted, Appellants filed a civil action in the U.S. District Court for the Eastern District of North Carolina, alleging a taking under the Fifth and Fourteenth Amendments of the United States Constitution. In their Complaint, Appellants allege and concede that the COVID-19 pandemic constituted an actual emergency. (*See* Compl. ¶¶ 6, 9, 15, Appellants' Appendix pp. 37a–40a.) Appellants also concede that Dare County had the authority to enact the restriction at issue. (*Id.*) Here, and in the lower courts, Appellants present only the question of whether Dare County was obligated to compensate Appellants as a result of the 45-day restriction.

Dare County and the Defendant Towns filed a motion to dismiss the Complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and the District Court granted that motion on September 15, 2020. (*See* Appellants' Appendix pp. 16a–35a.) Appellants appealed the order and judgment of the District Court as to the dismissal Dare County, and, after oral arguments, the U.S. Court of

Appeals for the Fourth Circuit affirmed. (*See id.* pp. 1a–15a.)

REASONS THE COURT SHOULD DENY THE PETITION

I. The Court Should Deny the Petition Because It Is Well-Settled That a Regulation Which Does Not Physically Appropriate a Person's Property Is Not a *Per Se* Taking

Appellants have not presented any compelling reasons for this Court to grant their Petition. Instead, they have asked the Court to adopt a novel and unworkable rule that any prohibition on access to property should be deemed a physical appropriation or invasion. Since Appellants have not—and cannot—allege that any physical appropriation or invasion occurred by way of the 45-day emergency access restriction at issue, the lower courts appropriately rejected Appellants' *per se* taking arguments.

This Court has clearly—and recently—set forth the standard for a *per se* taking. It is well-established that a *per se* taking cannot occur absent a "physical" occupation or appropriation of property. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021). In other words, a *per se* taking only occurs where the regulation at issue "appropriates a right to invade the [appellants'] property. . . ." *Id.* The question under the *per se* takings analysis is "whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a

property owner's ability to use his own property." *Id.* (citing *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321–23, 122 S. Ct. 1465, 1478–79 (2002)).

The Court's "narrow" holding in *Loretto* is unambiguous: "We affirm the traditional rule that a permanent physical occupation of property is a taking." *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 441, 102 S. Ct. 3164, 3179 (1982) (emphasis added). The term "physical" means just that—a physical occupation on property, whether by persons or other tangible things, or a relinquishment of physical bounties of the property. Flowing from this principle, the regulation in *Cedar Point Nursery* constituted a *per se* taking because it "grant[ed] union organizers a right to physically enter and occupy the growers' land for three hours per day, 120 days per year." 141 S. Ct. at 2072. The regulation in *Horne v. Department of Agriculture* constituted a *per se* taking because it appropriated physical property—47 percent of growers' raisin crop—for use by the government. 576 U.S. 351, 366–67, 135 S. Ct. 2419, 2430–31 (2015). The governmental action in *Loretto* was, again, physical in nature, and involved the installation of a physical television cable on the plaintiff's property. *Loretto*, 458 U.S. at 422–24, 102 S. Ct. at 3168–70.

Cases cited in Appellants' Petition fare no better for Appellants and involve "physical" intrusions upon land, which simply did not occur in this case. *See*, *e.g.*, *Knick v. Township of Scott, Pa.*, 139 S. Ct. 2169 (2019) (involving an ordinance which required property

owners to allow public persons to occupy their private cemeteries during daylight hours); *Arkansas Game and Fish Comm. v. United States*, 568 U.S. 23, 26–29 (2012) (involving intermittent physical flooding of property which occurred in connection with governmental operation of the Clear Water Dam); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (involving the appropriation of a private pond into a marina to be physically occupied by members of the public); *United States v. Pewee Coal Co.*, 341 U.S. 114, 115–16, 71 S. Ct. 670, 671 (1951) (involving the federal government's physical occupation and operation of a coal mine during World War II); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 3, 69 S. Ct. 1434, 1436–37 (1949) (involving the U.S. Army's physical occupation and possession of a laundry plant); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 375, 65 S. Ct. 357, 358 (1945) (analyzing taking claim resulting after "the United States became subtenants of a portion of the floor space in the building").

In light of the aforementioned guidance, it is undisputed that Dare County's emergency access restriction was not "physical" in nature, and thus not a *per se* taking. It has never been the law, and it should not be the case, that a regulation which temporarily restricts a person's access to their property constitutes a physical, *per se* taking. While the right to access one's property is no doubt included in the bundle of sticks inherent to property ownership, federal, state, and local governments routinely restrict access to areas in

times of emergency without physically appropriating that bundle of ownership.

For example, times of natural disaster, such as hurricanes, flooding, earthquakes, and forest fires—and human-created disasters such as gas leaks, bomb threats, or active shooter situations—sometimes require temporary road closures or restrictions on access to property. *See generally Zemel v. Rusk*, 381 U.S. 1, 15–16 (1965) ("[F]reedom [of travel] does not mean that areas ravaged by . . . pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area or the Nation as a whole."). Persons owning property in those affected areas have suffered no appropriation or invasion of their property, and such temporary restrictions have never been considered a *per se* taking.

As a recent example, the Mayor of the County of Maui, Hawaii, enacted an Emergency Proclamation as a result of the wildfires which caused unprecedented injury to persons and property in Hawaii.[1] The County of Maui's Second Emergency Proclamation included emergency restrictions on access to, *inter alia*, the "Lahaina wildfire disaster area." Under Appellants' proposed interpretation, property owners in disaster areas would have a claim for a purported physical, *per se* taking. Such an interpretation would contradict

[1] *See* Office of the Mayor, County of Maui, *Second Emergency Proclamation Relating to Wildfires* (August 11, 2023), https://www.mauicounty.gov/DocumentCenter/View/142335/2023-08-11-Second-Emergency-Proclamation-Relating-to-Wildfires.

takings jurisprudence and unnecessarily quell governmental responses to emergencies, including temporary access restrictions. Since Appellants' *per se* taking theory has no basis in precedent and was appropriately rejected by the lower courts, this Court should deny the Petition.

II. The Court Should Deny the Petition Because Dare County's Access Restriction Was Not a Total Taking Under *Lucas*, Nor a Regulatory Taking Under *Penn Central*

In addition to correctly concluding that the restriction enacted by Dare County did not amount to a *per se* taking or physical appropriation, the lower courts also correctly concluded that the restriction did not "den[y] all economically beneficial or productive use of land" under *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 2893 (1992), nor was it a regulatory taking under the balancing test set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659 (1978).

Appellants do not allege in the Complaint, nor can they plausibly argue, that the 45-day restriction completely eviscerated the beneficial use of their property under *Lucas* simply because they could not access it during that time, nor that their property was diminished in value to the extent required to constitute a taking under *Penn Central*. *See Penn Central*, 438 U.S. at 131 (citing *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (loss of value of 87.5% insufficient) and *Euclid*

v. Ambler Realty Co., 272 U.S. 365 (1926) (loss of value of 75% insufficient)). Instead, Appellants' main arguments as to diminution of value were the inability to visit their secondary homes and diminished ability to repair the property or obtain rental income from persons living outside of Dare County and the adjoining, contiguous counties. Such allegations and arguments do not come close to what is required under *Lucas* and *Penn-Central*. Consequently, the lower courts correctly concluded that Appellants did not plausibly allege a taking under any theory, *per se* or otherwise.

Other Circuits, citing the opinion of the District Court and the Fourth Circuit in this case, agree with the holding in this case. *See*, *e.g.*, *Golden Glow Tanning Salon, Inc. v. City of Columbus, Miss.*, 52 F.4th 974 (5th Cir. 2022) (citing the lower court in *Blackburn*, holding that no *per se* taking occurred as a result of closure of tanning salon in light of COVID-19-related regulation); *Bojicic v. DeWine*, No. 21-4123, 2022 U.S. App. LEXIS 23652 (6th Cir. Aug. 22, 2022) (same, affirming Rule 12(b)(6) dismissal of taking claim brought by dance studio owners regarding COVID-19-related regulation); *Nowlin v. Pritzker*, 34 F.4th 629 (7th Cir. 2022) (same, affirming Rule 12(b)(6) dismissal of taking claim regarding business owners); *Glow in One Mini Golf, LLC v. Walz*, 37 F.4th 1365 (8th Cir. 2022) (same, granting qualified immunity to governor regarding COVID-19 restrictions); *Best Supplement Guide, LLC v. Newsom*, No. 20-17362, 2022 U.S. App. LEXIS 19192 (9th Cir. July 12, 2022) (same, affirming Rule 12(b)(6) dismissal of taking claim brought by gym owners);

Abshire v. Newsom, No. 21-16442, 2023 WL 3243999 (9th Cir. May 4, 2023) (same, rejecting *per se* taking theory brought by business owners). As set forth in the cases above, the U.S. Courts of Appeal agree that allegations such as those made by Appellants do not give rise to a *per se* taking under the Constitution. Thus, there is no conflict amongst federal courts or any other compelling reason for this Court to grant review.

CONCLUSION

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

Respectfully submitted,

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