IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CHESHIRE HUNT, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 18-111
	)	
UNITED STATES OF AMERICA,	)	Hon. Edward Meyers
	)	
Defendant.	)	

NOTICE OF SUPPLEMENTAL AUTHORITY REGARDING *CEDAR POINT NURSERY v. HASSID* AND MEMORANDUM OF LAW DISCUSSING *CEDAR POINT NURSERY*

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Last week the Supreme Court issued its decision in *Cedar Point Nursery v. Hassid*, 594 U.S. ____, 2021 WL 2557070 (June 23, 2021).[1] The slip opinion is attached as Exhibit A. *Cedar Point Nursery* is controlling authority governing Trails Act taking cases.

BACKGROUND

In December 2017 the Surface Transportation Board (the Board) took eighteen properties from fifteen Sarasota County landowners when the Board invoked Section 8(d) of the Trails Act, 16 U.S.C. §1247(d).[2] The Board's order encumbered these owners' property with a servitude for public recreation and a future railway line. This is a compensable taking of private property for which the Takings Clause of the Fifth Amendment requires the federal government to pay these owners. See *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 8 (1990) (*Preseault I*), *Preseault v. United States*, 100 F.3d 1525, 1530, 1550 (Fed. Cir. 1996) (*en banc*) (*Preseault II*); *Toews v. United States*, 376 F.3d 1371, 1376, 1381 (Fed. Cir. 2004). These landowners' private property is now encumbered by a new federal rail-trail corridor easement to create

[1] *Cedar Point Nursery* is the most closely followed Takings Clause case this term. See, *Property Rights at the Supreme Court*, WALL STREET JOURNAL (March 19, 2021); Chris Kieser, *A SCOTUS Case that Could Shape Property Rights for Years to Come*, NATIONAL REVIEW (March 22, 2021); Jim Burling, *The Supreme Court Must Protect the Property Rights of California Farmers*, ORANGE COUNTY REGISTER (March 23, 2021).

[2] The Surface Transportation Board issued a series of three orders invoking section 8(d) of the Trails Act with regard to the Sarasota Legacy Trail. The southern segment of the Legacy Trail – more than seven-miles-long between Venice and Culverhouse Park – was established in 2004. The Board's order was the subject of prior litigation in *Rogers v. United States*, 90 Fed. Cl. 418 (2009), *McCann Holdings, Ltd. v. United States*, 111 Fed. Cl. 608 (2013), and *Childers v. United States*, 116 Fed. Cl. 486 (2014).

the northern extension of the Legacy Trail (a public recreational trail used by more than a quarter million people a year) and establishing a "rail-banked" corridor for a possible future railroad across these owners' land.[3] The original 1910 railroad right-of-way easement terminated when the railroad no longer operated and the owner held title to the fee estate unencumbered by any easement. See *Marvin Brandt Revocable Trust v. United States*, 572 U.S. 93, 105 (2014).

The government acknowledges it took these owners' private property and must pay them. See Joint Title Stipulations, ECF No. 21. See also Order Denying Stay, ECF No. 100, p. 4 ("*Cheshire Hunt* is in the damages phase, as the Government has already stipulated to liability."); *Rogers*, 90 Fed. Cl. at 432 ("[T]he governmental action converting the railroad right-of-way to [the Legacy Trail] public trail right-of-way imposed a new easement on the landowners and effected a Fifth Amendment taking of their property.") (citing *Preseault II*, 100 F.3d at 1550).

These owners' properties have been appraised, and the government and owners were in settlement discussions when Sarasota County, the trail-user constructing the public recreation trail under the Board's jurisdiction, demanded four of the owners (Charleen Rosin, Michelle Witzer, Ducks In A Row Enterprises, and Argos Ready Mix) remove all existing structures from the rail-trail corridor. These owners had constructed fences, buildings, and sheds and other improvements on the right-of-way land. These improvements had been located on the property for decades

[3] The history of the railway corridor and the facts regarding the original conveyance to the railroad are described in the landowners' response to the government's motion for partial summary judgment, ECF No. 130.

and were necessary for the operation of these four owners' businesses. But, by reason of the Board's order and the federal Trails Act, Sarasota County demanded that these owners remove these existing structures. Sarasota County contended the Board's order and the Trails Act granted Sarasota County complete dominion of all the land subject to the Trails Act, including the right to demand these owners remove the existing improvements.

The federal government, however, said it took only a "non-exclusive easement" to use these owners' land for public recreation and a future railroad. According to the federal government, the Trails Act "does not provide the trail sponsor an exclusive right to use the corridor," and "a trail use easement does not prohibit servient estate owners from making non-conflicting uses of their land." Gov. Motion for Partial Summary Judgment, ECF No. 120, p. 3. The government continued, "trail use and potential rail reactivation exhibit the fundamental attributes of a non-exclusive easement: the servient estate owner can use their land if they do not interfere with the use prescribed in the statute." *Id.* at 13. As such, according to the federal government, the owners could still use the land for purposes that did not interfere with a public recreational trail or a future railroad, including the existing structures that were on the land when it was once used for a railroad.

To resolve this matter the federal government filed a motion for partial summary judgment, ECF No. 120. The issue was briefed, and this Court heard argument on May 7, 2021. The matter is now under submission to the Court.

Last Wednesday the Supreme Court issued its decision in *Cedar Point Nursery*. Even though the government acknowledges its constitutional obligation to pay these owners, the Court's decision in *Cedar Point Nursery* provides controlling authority that is relevant to this Trails Act taking case.

The Board's invocation of section 8(d) of the Trails Act is an exercise of the federal government's eminent domain authority. As Chief Justice Roberts explained earlier this week,

> Eminent domain is the power of the government to take property for public use without the consent of the owner. It can be exercised either by public officials or by private parties to whom the power has been delegated. And it can be exercised either through the initiation of legal proceedings or simply by taking possession up front, with compensation to follow.
>
> *PennEast Pipeline Co. v. New Jersey*, No. 19-1039, 2021 WL 2653262, at *4 (June 29, 2021), slip op., p. 1.

While the government's power of eminent domain allows it to take private property without paying the owner up front, the payment must be certain and prompt. *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 677 (1923) ("the taking of property for public use...need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when the public faith and credit are pledged to *a reasonably prompt ascertainment and payment*, and there is adequate provision for enforcing the pledge") (emphasis added).[4] An almost four-year delay –

[4] See also *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U.S. 641, 659 (1890) ("The constitution declares that private property shall not be taken 'for public use without just compensation.' It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken; but the owner is

the time between Pearl Harbor and Hiroshima – is not "prompt." The federal government took these owners' property in December 2017 and the government has still not paid these owners in mid-2021, nearly four years later.[5]

In *Knick v. Township of Scott*, the Court declared, "[w]e have long recognized that property owners may bring Fifth Amendment claims against the Federal Government as soon as their property has been taken. …[a]nd we have explained that 'the act of taking' is the 'event which gives rise to the claim for compensation.'" 139 S.Ct. 2162, 2170 (2019) (quoting *United States v. Dow*, 357 U.S. 17, 22 (1958). *Knick* held that taking an owner's property without paying the owner violates the owner's civil rights, and this violation is ongoing until the owner receives that just compensation the Constitution requires. *Id.* at 2168 ("the property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under §1983 at that time"). As the Supreme Court noted earlier this week, "[g]iven that the Fifth Amendment enjoys 'full-fledged constitutional status,' the [lower court] had no basis to relegate petitioners' claim ""to the status of a poor relation' among the provisions of the Bill of Rights."" *Pakdel v. City & County of San Francisco*, 594 U.S. ___, 2021 WL 2637819, at *4 (June 28, 2021).

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entitled to reasonable, certain, and adequate provision for obtaining compensation *before his occupancy is disturbed*.") (emphasis added).

[5] Pearl Harbor was December 7, 1941. The atomic bomb was dropped on Hiroshima on August 6, 1945, less than four years later, effectively ending the Second World War.

The Supreme Court's *Cedar Point Nursery* decision directly addresses issues raised in the owners' and the government's briefing and argument; hence, we file *Cedar Point Nursery* as supplemental authority.

DISCUSSION

The Supreme Court's decision in *Cedar Point Nursery* is controlling authority governing Trails Act takings and is directly relevant to the issues before this Court. Cedar Point Nursery owned a strawberry farm in California. Fowler Packing Company also owned agricultural property in California. California adopted a regulation granting labor organizations a "right to take access" to Cedar Point Nursery's and Fowler Packing Company's property for up to three hours a day, 120 hours a year, to recruit the owners' employees to join a union. Cedar Point Nursery and Fowler Packing Company challenged this regulation as a *per se* physical taking of their private property in violation of the Fifth and Fourteenth Amendments. The owners argued, and the Supreme Court agreed, the California regulation compelling landowners to allow union organizers a limited right of access to their property imposed a "servitude or easement" upon the owners' land, which took the owners' right to exclude others from their property. Slip op., pp. 1, 8.

As the Court stated: "the right to exclude is 'universally held to be a fundamental element of the property right,' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Cedar Point Nursery*, slip op., p. 7 (citations omitted). Thus, the Court held, a regulation imposing a servitude or easement upon an owner's property is a *per se* physical taking for which

the Takings Clause "imposes a clear and categorical obligation to provide the owner with just compensation." *Id.* at 5.

I. *Cedar Point Nursery* held that imposing a servitude (like a Trails Act easement) upon an owner's property is a *per se* physical taking for which the government has a categorical duty to pay the owner.

In *Cedar Point Nursery*, the Supreme Court wrote that the imposition of a servitude allowing others to access an owner's property (such as a Trails Act easement) is a *per se* physical taking of private property and not a "regulatory" taking to be analyzed under the *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1971), multi-factor balancing test. Slip op., p. 7. This is because allowing others to access private property invades one of the most important rights of a property owner — the right to exclude the world from the property. Thus, when the government appropriates a right to invade private property (and thereby destroys the owner's right to exclude) by imposing a servitude or easement upon an owner's property, it is a *per se* physical taking for which the "Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation." *Id.* at 5.

The Supreme Court held that taking cases are easily resolved by "using a simple *per se* rule: The government must pay for what it takes." *Cedar Point Nursery*, slip op., p. 5. Chief Justice Roberts explained that "'even if the government physically invades only an easement in property, it must nonetheless pay just compensation.' … appropriation of an easement constitutes a physical taking." *Id.* at 9 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979), and citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 423 (1982), and *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 828 (1987)).

After reviewing a century of the Court's Takings Clause jurisprudence going back to *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 330 (1922), Chief Justice Roberts concluded, "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. As in those cases, the government has appropriated a right of access.... It is therefore a *per se* physical taking under our precedents." *Cedar Point Nursery*, slip op., p. 10. So too if the government authorized invasion is by bicycle or locomotive. The fact that the government effected the taking by regulation does not alter the holding that it is a *per se* physical taking. "Government action that physically appropriates property is no less a physical taking because it arises from a regulation." *Id.* at 6.

The Solicitor General agreed that regulations imposing an access easement on private property are a *per se* physical taking. The Solicitor General filed an amicus brief supporting the landowners. See United States amicus brief, 2021 WL 86905 (filed January 2021). The Solicitor General said, "[b]y imposing an indefinite access right, the access regulation grants permanent legal authorization to physically invade real property." *Id.* at *20 (quotation converted to sentence case). Quoting *Loretto*, 458 U.S. at 435, the Solicitor General explained,

> [A] permanent physical occupation of another's property...is perhaps the most serious form of invasion of an owner's property interests," because it does not "take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." When the government authorizes such a permanent occupation, "the owner has no

> right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space."

Id. (citation omitted).[6]

Eleven state attorneys general and sixteen private organizations also filed amicus briefs supporting the owners.[7]

Cedar Point Nursery applies in spades to Trails Act cases where the Surface Transportation Board encumbers an owner's land with an easement denying the owner's right to exclude others from his land and imposes a servitude upon the owner's property allowing the public to invade the owner's land for recreation and allows a railroad to build a railway line across the land. See *Preseault I*, 494 U.S. at 8; *Preseault II*, 100 F.3d at 1531, 1550; *Toews*, 376 F.3d at 1376, 1381.

The Surface Transportation Board's invocation of the Trails Act is a "government authorized invasion" of the owner's private property. The servitude

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[6] With the change in administrations, the Acting Solicitor General filed a letter notifying the Court "that the previously filed brief no longer represents the position of the United States." See https://www.supremecourt.gov/DocketPDF/20/20-107/168955/20210212160515182_20-107%20letter.pdf.

[7] The states of Alabama, Arizona, Arkansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, Oklahoma, South Carolina, and Texas supported the landowners. Other amici supporting the landowners included the Cato Institute, California Farm Bureau Federation, American Farm Bureau Foundation, Institute for Justice, Chamber of Commerce of the United States, Buckeye Institute, Western Growers Association, California Fresh Fruit Association, Grower-Shipper Association of Santa Barbara and San Luis Obispo Counties, Ventura County Agricultural Association, Pelican Institute for Public Policy, New England Legal Foundation, Americans for Prosperity, Mountain States Legal Foundation, Center for Constitutional Jurisprudence, and Liberty Justice Center. Colorado, Connecticut, Delaware, Hawaii, Illinois, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington and the District of Columbia submitted an amicus brief in support of the California Agriculture Labor Relations Board.

imposed by the Trails Act is far more intrusive than California's regulation allowing union organizers limited access to private property. If a regulation requiring an owner to grant union organizers access the owner's property three hours a day for a total of 120 hours a year is a *per se* physical taking for which the government has a "categorical" obligation to pay the owner for "what [the government] takes" (which the Supreme Court held to be so), the Trails Act imposition of a perpetual easement encumbering an owner's property twenty-four hours a day, 365 days a year, allowing the public and a future railroad to use the owner's land is a far more intrusive *per se* physical taking. Both take the owner's right to exclude — "'one of the most treasured' rights of property ownership." *Cedar Point Nursery*, slip op., p. 7.

II. The Supreme Court held the *Penn Central* fact-specific balancing test "has no place" in the analysis of Trails Act-types of takings.

The government has been trying to gaslight courts by arguing Trails Act takings are subject to a *Penn Central* fact-intensive balancing analysis applicable to use restrictions like zoning regulations. The Supreme Court flatly rejected the government's argument that Trails Act takings should be evaluated as a "regulatory taking" under the "fact-intensive" *Penn Central* balancing test. *Cedar Point Nursery* recognized a principle "as old as the Republic," and under this principle, held that taking an owner's right to exclude others from his or her property is a *per se* taking and not a "regulatory" taking subject to a *Penn Central* balancing test. Slip op., p. 5. "Whenever a regulation results in a physical appropriation of property, a *per se* taking

has occurred, and *Penn Central* has no place." *Id.* at 7.[8] Like California's union-organizing servitude, the Trails Act, "[r]ather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of the third parties the owner's right to exclude." *Id.*

Justice Breyer's dissent advanced the same *Penn Central* argument the government has advanced in this and other Trails Act cases. Justice Breyer (like the government in Trails Act cases) argued the Court should adopt a "flexible approach, under which the Court 'balanced several factors' to determine whether the physical invasions at issue effected a taking." *Cedar Point Nursery*, slip op., p. 16 (quoting dissenting op., pp. 11-12). "According to the dissent, this kind of latitude toward temporary invasions is a practical necessity for governing in our complex modern world." *Id.*

Chief Justice Roberts trenchantly discredited the dissent's argument. See *Cedar Point Nursery*, slip op., pp. 15-16. "We cannot agree that the right to exclude is an empty formality, subject to modification at the government's pleasure. On the contrary.... [o]ur cases establish that appropriations of a right to invade are *per se* physical takings, not use restrictions subject to *Penn Central*...." *Id.* at 16. And,

[8] See also *Kaiser Aetna*, 444 U.S. at 179-80 ("the right to exclude is universally held to be fundamental element of the property rights and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property'"); *Loretto*, 456 U.S. at 436 ("The right to exclude is 'one of the most treasured' rights of property ownership."). The Court also cited Professor Merrill, *Property and the Right to Exclude,* 77 NEB. L. REV. 730 (1998) (calling the right to exclude the '*sine qua non*' of property), slip op., pp. 7-8, and Blackstone, 2 COMMENTARIES ON THE LAWS OF ENGLAND 2 (1766).

regarding the "complexities of modern society," which the dissent and the government advance in support their *Penn Central* argument, the Court held these arguments "only reinforce the importance of safeguarding the basic property rights that help preserve individual liberty as the Founders explained." *Id.* See also *Kaiser Aetna*, 444 U.S. at 180 (right to exclude "falls within [the] category of interests that the Government cannot take without compensation").

The Supreme Court noted the distinction between a use restriction (such as a zoning regulation) and a law or regulation permitting others to use and enter an owner's property. As stated above, the Court reiterated its long-standing holding that "the right to exclude others from one's property is 'one of the most treasured' rights of property ownership." *Cedar Point Nursery*, slip op., p. 7 (citing *Loretto* 458 U.S. at 435).

In *Caquelin v. United States*, 121 Fed. Cl. 658 (2015), and 697 Fed. App'x 1016 (Fed. Cir. 2017), the government claimed a court considering a Trails Act taking must engage in a detailed multi-factored analysis to determine the "causation" of the Trails Act taking. The government premised this argument on the supposition that Trails Act takings are a species of "regulatory" takings and not a *per se* physical taking. Assuming this premise, the government then said Trails Act takings are subject to the *Penn Central* multi-factor balancing analysis. The government also reads *Arkansas Game & Fish* as requiring some multi-factor analysis in Trails Act cases. See *Caquelin v. United States*, 697 Fed. App'x at 1019. (More about the government's reading of *Arkansas Game & Fish* below.)

The Federal Circuit described the government's argument as follows:

> [The government] does not argue that, as a matter of law, no taking occurs unless a trail use agreement is reached. Nor does the government dispute that if a temporary taking occurred, it began on … the date of the NITU. Rather, the government argues that the 180-day blocking of reversion was not a categorical taking but instead calls for a multi-factor takings analysis. It invokes the general "regulatory takings" framework set forth to govern land-use restrictions in *Penn Central* [ ] and the temporary-takings analysis set forth to govern the repeated controlled floodings, for water management projects, at issue in *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23, 38-40[ ] (2012) – without indicating whether those standards differ materially.

Caquelin, 697 Fed. App'x at 1019.

The Federal Circuit remanded *Caquelin*. When Judge Lettow again ruled for the landowner on remand, the government renewed its addlepated appeal clinging to its *Caquelin* argument like a limpet. The Federal Circuit explained:

> The government accepts that the trial court's judgment is supported by *Ladd* [*v. United States*, 630 F.3d 1015 (Fed. Cir. 2010), (*Ladd I*)], but it renews its two arguments that this court should no longer adhere to *Ladd I*. First, it contends, the Supreme Court's decision in *Tahoe-Sierra* [*Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002),] requires that the general regulatory-takings analysis of *Penn Central* be applied to assess whether a NITU is a taking when no trail-use agreement has been reached before it expires, and that such a NITU should not be treated as a categorical taking. Second, it contends, at a minimum we should replace the categorical approach with the multi-factor approach of *Arkansas Game* — which shares certain features of the *Penn Central* analysis. ...
>
> The only post-*Ladd I* decision of the Supreme Court invoked by the government is *Arkansas Game*. We do not think, however, that *Ladd I* is inconsistent with the decisions on which the government relies, including *Arkansas Game*.

Caquelin v. United States,
959 F.3d 1360, 1366 (Fed. Cir. 2020).

The Federal Circuit rejected the government's appeal and adumbrated the Supreme Court's decision in *Cedar Point Nursery* – at least in part – by writing, "[w]e reject the contention that *Arkansas Game* calls for displacing the categorical-taking analysis adopted in our precedents for a NITU that blocks termination of an easement, an analysis applicable even when that NITU expires without a trail-use agreement that would indefinitely extend the federal-law blocking of the easement's termination." *Caquelin*, 959 F.3d at 1363.

The Supreme Court held that "whenever regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place." *Cedar Point Nursery*, slip op., p. 7. The Court explained, "our cases establish that appropriations of a right to invade [an owner's property] are *per se* physical takings, not use restrictions subject to *Penn Central*." *Id.* at 16. The point bears repeating. *Penn Central* "has no place" in the analysis of the taking of a servitude, such as a Trails Act taking.

The government's *Caquelin* – *Penn Central* argument is nothing more than attempted legerdemain trying to transmogrify a *per se* physical taking for which the government has a "categorical" obligation to pay the owner into a "regulatory" taking subject to "multi-factor" analysis under *Penn Central*. The government's *Caquelin* argument makes a magical soritical leap in its effort to metamorphose *per se* takings into "regulatory" takings.[9] Property owners relegated to the *Penn Central* purgatory

[9] For an example of sorites, see the Abbott and Costello routine, *"I'll bet I can prove you're not here*," available at: https://www.youtube.com/watch?v=Lh2E0z42RGA

rarely receive compensation for property subject to use restrictions. See, *e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992), and *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).[10]

Cedar Point Nursery makes it emphatically clear that *Penn Central* "has no place" nor relevance to Trails Act *per se* takings. Slip op., p. 7.

III. *Arkansas Game & Fish* does not require a multi-factor analysis in Trails Act takings.

The Supreme Court rejected the government's twisted reading of *Arkansas Game & Fish*. Recall that in *Arkansas Game & Fish* the federal government intermittently flooded private property as part of a flood-control project. The government didn't want to pay the owner of the land it flooded and argued that government-induced flooding is only an non-compensable tort or trespass because the government only flooded the land temporarily. In *Arkansas Game & Fish*, the Supreme Court unanimously rejected the government's argument, holding that "[w]hen the government physically takes possession of an interest in property for

[10] See also Richard A. Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985), David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan *and What State and Federal Courts Are Doing About It,* 28 STETSON L. REV. 523 (1999); Michael M. Merger & Gideon Kanner, *The Need for Takings Law Reform; A View from the Trenches – A Response to Taking Stock of the Takins Debate,* 38 SANTA CLARA L. REV. 837 (1998); Lynda L. Butler, *The Politics of Takings: Choosing the Appropriate Decisionmaker,* 38 WM. & MARY L. REV. 749 (1997); Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Efforts to Formulate Coherent Regulatory Takings Law?,* 30 URBAN LAW J. 307 (1998).

some public purpose, it has a categorical duty to compensate the former owner."[11] 568 U.S. at 32-33. Justice Ginsberg, writing for the unanimous Court, held the government must compensate the owner even when private property is taken temporarily.

> [O]ur decisions confirm that takings temporary in duration can be compensable. This principle was solidly established in the World War II era, when "[c]ondemnation for indefinite periods of occupancy [took hold as] a practical response to the uncertainties of the Government's needs in wartime." In support of the war effort, the Government took temporary possession of many properties. These exercises of government authority, the Court recognized, qualified as compensable temporary takings.[12]
>
> Notably in relation to the question before us, the takings claims approved in these cases were not confined to instances in which the Government took outright physical possession of the property involved. A temporary takings claim could be maintained as well when government action occurring outside the property gave rise to "a direct and immediate interference with the enjoyment and use of the land."[13]

Arkansas Game & Fish, 568 U.S. at 32-33 (citations omitted).

Notwithstanding this clear holding, the government still argued that *Arkansas Game & Fish* established a "multi-factor" formula applicable to Trails Act takings. In *Cedar Point Nursery*, the Supreme Court rejected the government's reading of *Arkansas Game & Fish*. The Court again affirmed, "we have held that a physical

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[11] Citing and quoting *Tahoe–Sierra*, 535 U.S. at 322, and *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951).

[12] Quoting *United States v. Westinghouse Elec. & Mfg. Co.*, 339 U.S. 261, 267 (1950), and citing *Pewee Coal*, 341 U.S. at 114, *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), and *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

[13] Quoting *United States v. Causby*, 328 U.S. 256, 266 (1946), and citing *United States v. Dickinson*, 331 U.S. 745, 751 (1947).

appropriation is a taking whether it is permanent or temporary." Slip op., p. 10. The Court repeated this point, stating, "we have recognized that physical invasions constitute takings even if they are intermittent as opposed to continuous." *Id.* at 11 (citing *United States v. Causby*, 328 U.S. 256, 259 (1946)). "Our cases establish that 'compensation is mandated when a leasehold is taken and the government occupies property for its own purposes, even though that use is temporary.'" *Id.* at 10-11 (citing *Tahoe-Sierra,* 535 U.S. at 322, *General Motors*, 232 U.S. at 373, and *United States v. Petty Motor Co.*, 327 U.S. 372 (1946)).

Chief Justice Roberts explained, "The duration of an appropriation – just like the size of the appropriation – bears only on the amount of compensation." *Id.* (internal citation omitted; citing *Loretto*, 458 U.S. at 436-37, *Dow*, 357 U.S. at 26, and *Causby*, 328 U.S. at 267-68). As the Court previously explained, "'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 318 (1987).

Chief Justice Roberts also debunked the government's attempt to read *Arkansas Game & Fish* as requiring a court considering a Trails Act taking to engage in some multi-factor "causation" analysis. The Court explained the "multi-factor causation analysis" the government tries to extract from *Arkansas Game & Fish only* applies when the court must distinguish between a "trespass" and a "taking" in the "unique" situation of government-induced flooding.

> The distinction between trespass and takings accounts for our treatment of *temporary government-induced flooding* in *Arkansas Game* [ ]. There we held, "simply and only," that such flooding "gains no automatic exemption from Takings Clause inspection." [568 U.S.] at 338. Because *this type of flooding can present complex questions of causation*, we instructed lower courts *evaluating takings claims based on temporary flooding* to consider a range of factors, including the duration of the invasion, the degree to which it was intended or foreseeable, and the character of the land at issue. … Our approach in *Arkansas Game and Fish Commission* reflects nothing more than an application of the traditional trespass-versus-takings distinction to *the unique considerations that accompany temporary flooding*.

Cedar Point Nursery, slip op., p. 18 (emphasis added).

The Court held that government-induced intermittent flooding cases are a "unique" situation that do not apply to takings, such as Trails Act takings, where the servitude imposed upon an owner's property is not due to temporary flooding and it is not necessary to distinguish between a trespass and a taking.

In response to the government's *Arkansas Game & Fish* argument, the Federal Circuit remanded *Caquelin* and directed Judge Lettow to engage in a multi-factor "causation" analysis for *per se* taking. The panel issuing the *per curiam* decision that remanded *Caquelin* did not have the benefit of *Cedar Point Nursery*. If the panel had the benefit of *Cedar Point Nursery*, they would *not* have remanded the case for a "multi-factor causation" analysis because the Supreme Court said this analysis is "unique" to government-induced flooding cases. Slip opinion, pp. 18-19.

In its *Caquelin per curiam* decision, the Federal Circuit recognized that "this panel cannot declare *Ladd* no longer to be good law based on the Supreme Court's post-*Ladd* decision in *Arkansas Game*...." 697 F. App'x at 1019. The Federal Circuit added, "[w]e recognize that, under *Ladd* as the current governing law in this court, it

does not appear that this remand [for a multi-factor analysis] could result in a different Court of Federal Claims judgment." *Id.* at 1020. In other words, the panel recognized that having Judge Lettow engage in a "multi-factor" analysis was a pointless exercise, but the *per curiam* decision nonetheless accepted the government's misreading of *Arkansas Game & Fish*.

To the extent the Federal Circuit's *per curiam* remand of *Caquelin* represents a belief that *Arkansas Game & Fish* requires the court to engage in some "causation analysis" in Trails Act cases, the Supreme Court corrected that misapprehension. *Cedar Point Nursery* explained that the "multi-factor" analysis in *Arkansas Game & Fish* applies – if at all – to only "unique" government-induced flooding cases and does not extend to Trails Act and other *per se* taking cases.[14]

Furthermore, as a practical matter, "causation analysis" makes absolutely no sense in Trails Act takings cases. The federal government takes a landowner's private property when the Board first issues an order invoking section 8(d) of the Trails Act. See *Preseault I*, 494 U.S. at 8; *Preseault II*, 100 F.3d at 1330, 1550; *Toews*, 376 F.3d at 1371; *Caldwell v. United States*, 391 F.3d 1226, 1233-34 (Fed. Cir. 2004); *Barclay v. United States*, 443 F.3d 1368, 1376 (Fed. Cir. 2006); *Illig v. United States*, 274 Fed. App'x 883, 884 (2008); *Ladd I*, 630 F.3d at 1025; *Ladd v. United States*, 713

[14] *Cedar Point Nursery* also reaffirmed the holding that government-induced flooding is a *per se* taking in its own right. "[T]he government likewise effects a physical taking when it occupies property – say, by recurring flooding as a result of building a dam. These sorts of physical appropriations constitute the 'clearest sort of taking.'" Slip op., p. 5 (internal citation omitted; citing *United States v. Cress*, 243 U.S. 316, 327-328 (1917), and quoting *Palazzolo*, 533 U.S. at 617).

F.3d 648, 652-53 (Fed. Cir. 2013); *Rogers v. United States*, 814 F.3d 1299, 1303 (Fed. Cir. 2015); *Navajo Nation v. United States*, 631 F.3d 1268, 1274-75 (Fed. Cir. 2011).[15] See also *Illig v. United States*, Solicitor General Elena Kagan, Brief for the United States in Opposition to Petition for Writ of Certiorari, 2009 WL 1526939, *12-13 (filed May 29, 2009) ("The issuance of the NITU 'thus marks the "finite start" to either temporary or permanent takings claims.' When the NITU is issued, all the events have occurred that entitle the claimant to institute an action based on federal-law interference with reversionary interests, and any takings claim premised on such interference therefore accrues on that date.").

The "*cause*" of a Trails Act taking is the Surface Transportation Board issuing an order invoking section 8(d) of the federal Trails Act. Period. Full stop. No "multi-factor analysis" necessary.

After Chief Justice Robert's decision in *Cedar Point Nursery*, it is simply not possible to claim *Arkansas Game & Fish* established a "multi-factor" analysis required in Trails Act takings. Rather, *Arkansas Game & Fish* applies to the "unique" circumstances of government-induced flooding where it is necessary to distinguish between a "trespass" and a "taking." As the Supreme Court explained, "[i]solated physical invasions, not undertaken pursuant to a granted right of access, are properly

[15] See also *Caquelin v. United States*, Brief for National Association of Reversionary Property Owners, Cato Institute, Southeastern Legal Foundation, Reason Foundation, Inversecondemnation.com, and Professor James W. Ely, Jr., as *Amici Curiae*, 2019 WL 3491813 (filed July 21, 2019); *Caquelin v. United States*, Brief for National Association of Reversionary Property Owners, National Cattlemen's Beef Association, and Public Lands Council as *Amici Curiae*, 2017 WL 388589 (filed January 19, 2017).

assessed as individual torts rather than appropriations of a property right. This basic distinction is firmly grounded in our precedent." *Cedar Point Nursery*, slip op., p. 17. The Court then explained, quoting *Portsmouth Harbor*, 260 U.S. at 329-30, that "[w]hile a single act may not be enough, a continuance of them in sufficient number a for a sufficient time may prove [the intent to take the property]." *Id.* (citing 1 P. *Nichols*, THE LAW OF EMINENT DOMAIN §112, p. 311 (1917)). The Supreme Court also quoted the Federal Circuit's decision in *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991), that identified an example of a trespass as a "truckdriver parking on someone's vacant land to eat lunch." *Id.* at 18. The Trails Act's imposition of a perpetual servitude upon an owner's property allowing the public and a railroad to invade an owner's land is not a trespass like a "truck driver parking on someone's vacant land to eat lunch."

CONCLUSION

Cedar Point Nursery is controlling authority governing issues pending before this Court. "[W]hen the government physically takes an interest in property, it must pay for the right to do so." *Cedar Point Nursery*, slip op., p. 12 (citing *Horne v. Department of Agriculture*, 576 U.S. 351, 357-58 (2015), and *Tahoe-Sierra*, 535 U.S. at 322). More bluntly, "the government must pay for what it takes." Slip op., p. 5.

Cedar Point Nursery provides three lessons applicable to Trails Act takings. *First*, a regulation or law such as the Trails Act that imposes a servitude allowing others to use an owner's property is a *per se* physical taking for which the government has a categorical obligation to compensate the owner. *Second*, the *Penn Central*

analysis applicable to "regulatory" takings, such as zoning and other use restrictions, does not apply to Trails Act takings and other *per se* takings in which a servitude is imposed on an owner's property. And *third*, *Arkansas Game & Fish*, which applied to the "unique" situation of intermittent government-induced flooding, does not require a "multi-factor" analysis in Trails Act taking cases.

While the government's *Caquelin* argument wasn't wiggling before *Cedar Point Nursery*, after the Supreme Court's decision the government's argument is as dead as a roadkill raccoon.

Respectfully submitted,

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