No. _____

In The
Supreme Court of the United States

JIM OLIVE PHOTOGRAPHY,
D/B/A PHOTOLIVE, INC.,

Petitioner,

v.

UNIVERSITY OF HOUSTON SYSTEM,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the decision below, the Supreme Court of Texas rejected the argument that copyright infringement by a government entity appropriates "the right to exclude everyone from use of [his] copyrighted materials," and therefore constitutes a *per se* taking under the Fifth and Fourteenth Amendments. App. 16. The court instead held that the government appropriation of a copyright owner's right to exclude was insufficient to warrant *per se* treatment and dismissed Petitioner's case for failing to adequately plead a violation of the Takings Clause. App. 22.

Five days later, this Court issued its decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (June 23, 2021), which held that a government commits a *per se* violation of the Takings Clause when it appropriates an owner's "right to exclude" others from utilizing his property and appropriates for itself "a right to invade" that property. *Id.* at 2072.

The question presented is whether the petition should be granted, the decision below vacated, and the case remanded for further proceedings in light of *Cedar Point Nursery*?

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner is Jim Olive Photography, d/b/a Photolive, Inc. No parent corporation or publicly held company owns more than 10% of Photolive, Inc.

Respondent is the University of Houston System.

RELATED CASES

- *Jim Olive Photography, d/b/a Photolive, Inc. v. The University of Houston System*, No. 2017-84942, in the 295th Judicial District Court of Harris County, Texas. Order entered May 30, 2018.
- *University of Houston System v. Jim Olive Photography, d/b/a Photolive*, No. 01-18-00534-CV, in the Court of Appeals for the First District of Texas. Judgment entered June 11, 2019.
- *Jim Olive Photography, d/b/a Photolive, Inc. v. University of Houston System*, No 19-0605, in the Supreme Court of Texas. Judgment entered June 18, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jim Olive Photography, d/b/a Photolive, Inc., petitions for a writ of certiorari to review the judgment of the Supreme Court of Texas in this case.

OPINIONS AND ORDERS BELOW

The decision of the Supreme Court of Texas, App. 1–22, is reported at 624 S.W.3d 764 (June 18, 2021). The opinion of the Court of Appeals for the First District of Texas, App. 35–71, is reported at 580 S.W.3d 360. The order of the 295th Judicial District Court of Harris County, Texas, App. 72, denying Respondent's plea to the jurisdiction is not reported.

JURISDICTION

The Supreme Court of Texas entered its judgment on June 18, 2021. Under this Court's March 19, 2020 Order, the deadline to file a petition for a writ of certiorari is November 15, 2021. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides, in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

U.S. Const., amend. V.

The Copyright Act provides, in relevant part, that:

> [T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; . . .
>
> (5) in the case of . . . pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly. . . .

17 U.S.C. § 106(1)–(3), (5).

INTRODUCTION

The Supreme Court of Texas held that a government entity may reproduce, display, and utilize a copyrighted work for its own benefit without paying any compensation to the copyright owner. In any other situation, courts would deem that what it is—a taking of personal property without just compensation. *See*, *e.g.*, *Horne v. Dep't of Agric.*, 576 U.S. 350, 359 (2015) ("[A patent] confers upon the patentee an exclusive property in the patented invention which cannot be appropriated *or used* by the government itself, without just compensation . . . .") (quoting *James v. Campbell*, 104 U.S. 356, 358 (1882)) (emphasis added). However, because copyrights are "intangible" personal property, the court below held that there was no "physical" or "*per se*" taking of the property interests guaranteed to Petitioner under the Copyright Act.

This holding contradicts this Court's recent decision in *Cedar Point Nursey*, which equated appropriation of a "right to invade" a property interest with appropriation of the owner's "right to exclude"—a right the Court described as "'one of the most treasured' rights of property ownership" to be "exercise[d] over the external things of the world, in total exclusion of the right of any other individual in the universe." 141 S. Ct. at 2072. Because the "right to exclude" everyone, including the government, from the use of copyrighted materials is the core property interest granted by the Copyright Act, *Cedar Point Nursery* establishes that Respondent's invasion of Petitioner's exclusive domain

over his copyrighted work is a *per se* violation of the Takings Clause.

Petitioner respectfully requests that the Court grant this petition, vacate the decision below, and remand to the Supreme Court of Texas to reconsider its decision with the benefit of *Cedar Point Nursery*, which was decided just five days after the decision below.

STATEMENT OF THE CASE

A. Copyrights are personal property and cannot be "used" by a government entity without just compensation.

In *Horne v. Department of Agriculture*, this Court held that the Takings Clause "protects 'private property' without any distinction between different types." 576 U.S. 350, 358 (2015). More precisely, *Horne* framed the question presented, and its answer, as follows: "Whether the government's 'categorical duty' under the Fifth Amendment to pay just compensation when it 'physically takes possession of an interest in property' applies only to real property and not to personal property." *Id.* at 357. "The answer is no." *Id.*

Put simply, the holding in *Horne* is that the Takings Clause applies with equal force to personal property. Because copyrights are personal property, *Horne* proves that copyrights (like patents) are protected by the Takings Clause. *See*, *e.g.*, *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020) ("Again, there is no difference

between copyrights and patents under the [Intellectual Property] Clause [of the United States Constitution], nor any material difference between the two statutes' provisions."). Lest there be any doubt, *Horne*'s definition of protected personal property included "intellectual property," and in particular, patents:

> [A patent] confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser.

Id. at 359–60 (quoting *James v. Campbell*, 104 U.S. 356, 358 (1882)) (internal quotation marks omitted).

As *Horne*'s reliance on *James* demonstrates, the proposition that intangible personal property—and particularly patents and copyrights—is protected by the Takings Clause is neither new nor novel. To the contrary, it has been settled law for more than 140 years:

* **"Authoritatively Declared"**: In 1885, this Court explained that *James v. Campbell* had spoken "authoritatively" on the subject of intellectual property being protected against taking without compensation:

> It was authoritatively declared in *James v. Campbell* . . . that the right of the patentee . . . was exclusive of the government of the United States as well as of all others, and stood on the footing of all other property, the right to which

> was secured, as against the government, by the constitutional guaranty which prohibits the taking of private property for public use without compensation.

Hollister v. Benedict & Burnham Mfg. Co., 113 U.S. 59, 67 (1885).

* **"Indisputably Established"**: This Court repeated this point a generation later in *William Cramp & Sons Ship & Engine Building Co. v. International Curtis Marine Turbine Co.*, 246 U.S. 28 (1918). It described the principle that "rights secured under the grant of letters patent by the United States were property and protected by the guarantees of the Constitution and not subject therefore to be appropriated even for public use without adequate compensation" as a principle that was "*so indisputably established* as to need no review of the authorities sustaining [it]." *Id.* at 39–40 (emphasis added).

* **"Long Been Settled"**: In its 1945 decision *Hartford-Empire Co. v. United States*, the Court once again noted "[t]hat a patent is property, protected against appropriation both by individuals and by government, has long been settled." 323 U.S. 386, 415 (1945); *see also United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 189 (1933) ("The title of a patentee is subject to no superior right of the government. The grant of letters patent is not, as in England, a matter of grace or favor, so that conditions may be annexed at the pleasure of the executive."); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527

U.S. 627, 642 (1999) ("Patents . . . have long been considered a species of property. For, by the laws of the United States, the rights of a party under a patent are his private property.") (internal citation and quotation marks omitted).

This Court reaffirmed this understanding on multiple occasions since *Horne*, including twice in the last three years. In *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, this Court went out of its way to it clarify that its decision "*should not be misconstrued* as suggesting that patents are not property for purposes of the Due Process Clause *or the Takings Clause*." 138 S. Ct. 1365, 1369 (2018) (emphasis added). And in *Allen v. Cooper*, 140 S. Ct. at 1004–05—decided just last term—the Court again emphasized that "[c]opyrights are a form of property" protected by the Constitution and that copyright infringement is analogous to "patent infringement," which the Court in *Horne* explicitly stated was prohibited by the Takings Clause. 576 U.S. at 359 ("A patent . . . cannot be appropriated or used by the government itself, without just compensation . . . .").

It is against this backdrop that Petitioner filed suit against the University of Houston System ("Respondent") for its appropriation and display of Petitioner's copyrighted work for three years, without either attribution or compensation.

B. Factual Background.

The facts are simple because the case has been handled on the pleadings. Petitioner Jim Olive, a professional photographer, took a series of aerial photographs of the City of Houston at dusk. App. 36. Aerial photography is no ordinary endeavor, and these were no ordinary photographs. To obtain these photographs, Olive needed to rent a helicopter, hire a pilot, and then—utilizing special photography equipment—suspend himself from the helicopter with a harness. App. 36. It was while suspended in this harness that Olive captured photograph SKDT1082 ("The Cityscape"), which has become the subject of this litigation. App. 36.

Olive registered The Cityscape with the United States Copyright Office on November 18, 2005 and displayed it for purchase on his website. App. 36. At all relevant times, Olive owned all rights associated with The Cityscape, and the copyright data associated with SKDT1082 was displayed alongside the photograph. App. 36.

Sometime later, however, Respondent downloaded The Cityscape from Olive's website, removed all identifying copyright and attribution material, and displayed it on several webpages for the purposes of promoting the University of Houston's C.T. Bauer College of Business. App. 36.

Over three years passed before Olive discovered that his hard-earned photograph was being displayed without his permission and without compensation to promote the Bauer College of Business. App. 37. And

although Respondent immediately removed the photograph from the College's website, it has never compensated Olive for its use of The Cityscape, a use that resulted in The Cityscape being viewed (without attribution) an innumerable number of times. App. 37. To compound the issue, Respondent's decision to display The Cityscape without attribution allowed additional private actors to republish and display The Cityscape without Petitioner's permission and without compensation. App. 37.

When confronted with its appropriation and display of Petitioner's copyrighted personal property, Respondent asserted that Petitioner has no remedy for its unauthorized use of his photograph. Petitioner filed suit in the 295th Judicial District Court in Harris County, Texas, seeking just compensation under Article I, Section 17 of the Texas Constitution and the Fifth Amendment of the United States Constitution. App. 36.

C. Proceedings Below.

Respondent filed a plea to the jurisdiction, arguing that (1) copyright infringement by a state actor was not a "taking" under either the Texas or United States Constitutions, and therefore (2) Respondent had not waived sovereign immunity for Petitioner's claims. App. 37. The trial court denied Respondent's plea, and Respondent appealed. App. 37.

On appeal, Respondent argued that (1) copyrights are not property protected by either the federal or state

takings clauses, and alternatively (2) even if copyrights were protected, copyright infringement is insufficient to state a cognizable claim for a taking as a matter of law. App. 37. The court of appeals assumed *arguendo* that copyrights were protected by the Takings Clause, but held that Respondent's "act of copyright infringement was not a taking because it did not take away Olive's right to use, license, or dispose of the underlying creative work." App. 3. It therefore reversed the trial court's denial of Respondent's plea to the jurisdiction and rendered judgment dismissing Petitioner's case. App. 70.

Petitioner filed his petition for review with the Supreme Court of Texas, which was granted. App. 4. Following briefing and oral argument, the court affirmed the judgment of the court of appeals. App. 23.

In reaching its decision, the Supreme Court of Texas—like the court of appeals below—assumed *arguendo* that (1) "a copyright is property entitled to . . . protection" under the Takings Clause of the Fifth Amendment,[1] and (2) intellectual property is "[c]learly" entitled to protection under the Takings Clause "in some circumstances." App. 7, 13. As such, its analysis

[1] Consistent with Texas jurisprudence, the decision below treated the takings clauses of the Texas and United States Constitutions as co-extensive and did not distinguish between them for purposes of its analysis. App. 9 ("Although our state takings provision is worded differently, we have described it as 'comparable' to the Fifth Amendment's Just Compensation Clause. And, Texas 'case law on takings under the Texas Constitution is consistent with federal jurisprudence.' ") (internal citations omitted).

focused on the narrow question of "whether the [Respondent's] unauthorized use of a copy [of Petitioner's copyrighted work] amounts to a taking of the copyright itself." App. 15.

Dismissing Petitioner's argument that "the unauthorized posting of a copy of The Cityscape photograph on University websites was 'akin to a physical invasion' that deprived [Petitioner] 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," App. 16, the court below instead focused on the intangible nature of copyrights. App. 12–13, 16, 18. It dismissed as mere dicta this Court's decision in *Horne*—which held that the Takings Clause "protects 'private property' without any distinction between different types" and that the *per se* analysis applies to both real *and* personal property (such as patents and copyrights)—concluding that *Horne* "makes no attempt to address intellectual property." App. 12–13. Instead, the court held that copyright infringement was not subject to a *per se* takings analysis because "[i]nfringement of a copyright . . . is different than a typical appropriation of tangible property." App. 16.

Although the court acknowledged that "an infringer 'invades a statutorily defined province guaranteed to the copyright holder alone,'" App. 17, it held that "copyright infringement does not result in a 'physical occupation' of property required for a per se taking" because an infringer (1) "does not assume physical control" over the intangible copyright (and therefore

does not "appropriate" the copyright), and (2) "does not necessarily destroy any of the copyright owner's rights in the copyright." App. 18, 20.

Thus, under the decision below, Respondent's appropriation of a "right to invade" Petitioner's exclusive right to use and authorize the use of his copyrighted work—and concurrent appropriation of his "right to exclude" others from exercising those rights—was insufficient to state a *per se* takings claim.

REASONS FOR GRANTING THE PETITION

I. The decision below conflicts with this Court's decision in *Cedar Point Nursery*, which held that the appropriation of a "right to invade" property or "the owner's right to exclude" others from utilizing the property is a *per se* violation of the Takings Clause.

The Court should grant this petition, vacate the decision below, and remand for further consideration ("GVR") in light of its recent decision in *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), which was issued five days after the decision below. This Court often finds it appropriate to GVR for reconsideration in light of one of its intervening decisions where the later decision is "sufficiently analogous and, perhaps, decisive to compel re-examination of the case," *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964), or where, in light of the intervening decision, "there [is]

a 'reasonable probability' that the [lower court] would reject a legal premise on which it relied and which may affect the outcome of the litigation." *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001) (quoting *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (*per curiam*)). This is clearly a case for a GVR because this Court's decision in *Cedar Point Nursery* calls into serious question the correctness of the decision below and creates a "reasonable probability" that the court would reach a different outcome on reconsideration.

In *Cedar Point Nursery*, the Court held that the government commits a *per se* taking when it "appropriates a right to invade" property or "appropriates . . . the owners' right to exclude" others from utilizing his property. 141 S. Ct. at 2072. Although the "right to exclude" was the centerpiece of Petitioner's argument below, the state court—lacking the guidance provided by this Court in *Cedar Point Nursery*—held that the government's appropriation of Petitioner's right to exclude was insufficient to plead a *per se* violation of the Takings Clause, and focused instead on Respondent's alleged inability to physically acquire intangible property or completely destroy Petitioner's rights in the work. Because the clarification provided by this Court in *Cedar Point Nursery* creates a "reasonable probability" that the state court will "reject a legal premise on which it relied and which may affect the outcome of the litigation," *Tyler*, 533 U.S. at 666 n.6, Petitioner respectfully submits that the Court should GVR this case for reconsideration by the Supreme Court of Texas.

A. *Cedar Point Nursery* held that the appropriation of a "right to invade" private property or the "owners' right to exclude" others from utilizing its property "constitutes a *per se* physical taking."

In *Cedar Point Nursery*, this Court considered whether a government action—in that case, a regulation requiring property owners to "allow union organizers onto their property for up to three hours a day, 120 days per year," 141 S. Ct. at 2069—constituted a *per se* taking or was instead subject to *Penn Central*'s multi-factor balancing test. *Id.* at 2072. Reciting the holding below, this Court explained that the Ninth Circuit "identified three categories of regulatory actions in takings jurisprudence: regulations that impose permanent physical invasions, regulations that deprive an owner of all economically beneficial use of his property, and the remainder of regulatory actions." *Id.* at 2070 (describing holding in *Cedar Point Nursery v. Shiroma*, 923 F. 3d 524, 530–31 (9th Cir. 2019) (hereinafter "*Shiroma*")). Applying this framework, the Ninth Circuit in *Shiroma* held that no *per se* taking occurred because (1) the regulation "did not 'allow random members of the public to unpredictably traverse [the growers'] property 24 hours a day, 365 days a year," and (2) "the growers did not contend that the regulation deprived them of all economically beneficial use of their property." *Id.* (quoting *Shiroma*, 923 F.3d at 532, 531, 534).

This Court rejected the Ninth Circuit's narrow reading of its *per se* takings jurisprudence:

> The essential question is not, as the Ninth Circuit seemed to think, whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It 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. Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place.

Id. at 2072 (internal citation omitted) (emphasis added).

In reaching this conclusion, the Court began broadly, explaining that a *per se* taking occurs when the government "physically takes possession of property without acquiring title to it," as well as "when it uses its power of eminent domain to formally condemn property." *Id.* at 2071. "These sorts of physical appropriations constitute the 'clearest sort of taking, and we assess them using a simple, *per se* rule: The government must pay for what it takes." *Id.* (internal citation omitted).

Having clarified the landscape, the Court identified the precise property interest at issue—the "owners' right to exclude" others from the enjoyment of his property—explaining that the "right to exclude is 'one of the most treasured' rights of property ownership,"

entailing "that sole and despotic dominion which one man claims and exercises over the external things of the world, in *total exclusion of the right of any other individual in the universe.*" *Id.* at 2072 (quoting 2 W. Blackstone, Commentaries on the Laws of England 2 (1766)) (emphasis added).

In describing the boundaries of the right to exclude, the Court went to great lengths to clarify that the right to exclude is of such "central importance to property ownership" that the "direct invasion of [that] domain" constitutes a *per se* taking, even if it did not completely destroy the property interest or result in the acquisition of that interest by the government itself. 141 S. Ct. at 2073. Delving into precedent, the Court explained when the government commits a direct—but limited—invasion of the right to exclude, it "has often described the property interest taken as a servitude or an easement." *Id.* Importantly, the Court left no doubt that such interference with the right to exclude is a compensable taking: "[E]ven if the Government physically invades only an easement in property, it must nonetheless pay just compensation." *Id.* (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979)). The basis for this rule is as fundamental as it is straightforward: "[P]eople . . . do not expect their property, real or personal, to be actually occupied and taken away." *Id.* at 2074 (quoting *Horne*, 576 U.S. at 361).

Thus, even though the California regulation at issue in *Cedar Point Nursery* only allowed intermittent access to the property for a subset of the general public

for a duration of three hours—and did not grant the government title to the property, deprive the owner of his own right to use the property himself, or completely destroy the property's economic value—the Court found that such an interference with the owners' right to exclude "appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking." *Id.* at 2072.

As a result, this Court reversed the Ninth Circuit's decision limiting *per se* takings to (1) permanent physical invasions and (2) complete deprivations of all economic use, explaining that "a physical appropriation is a taking whether it is permanent or temporary" and 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 2074. "The duration of an appropriation—just like the size of an appropriation—bears only on the amount of compensation." *Id.* (internal citation omitted).

B. There is a "reasonable probability" that the decision below would have been decided differently in light of *Cedar Point Nursery*.

In the proceedings below, Petitioner argued that copyright infringement by a government entity constitutes a *per se* taking because it deprives the copyright owner 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." App. 16. The Texas court held that the taking of Petitioner's right to exclude was insufficient to warrant *per se* treatment, holding instead that there could not be a *per se* taking because (1) the government did not "assume physical control over"—i.e., take title to—the copyright itself, and (2) infringement does not completely "destroy any of the copyright owner's rights in the property rights in the copyright." App. 17, 20. But this analysis ignores the specific property interest created by the Copyright Act—the right to exclude others from the use of the copyrighted work—and cannot be reconciled with the Court's holding in *Cedar Point Nursery* that the appropriation of an owners' "right to exclude" constitutes a *per se* violation of the Takings Clause. GVR is therefore appropriate, as there is a "reasonable probability" that this case would have been decided differently if the court below had the benefit of that decision.

1. The "right to exclude" is the core property interest created by the Copyright Act and violated by acts of copyright infringement.

Copyright infringement by a government entity constitutes a *per se* violation of the Takings Clause because it appropriates the core property interest created by the Copyright Act: the copyright owner's "right to exclude" others from utilizing his work. In *Ruckelshaus v. Monsanto Co.*, this Court explained that it is a "basic axiom that '[p]roperty interests . . . are created and their dimensions are defined by existing rules or

understandings that stem from an independent source such as state law.'" 467 U.S. 986, 1001 (1984). It is therefore essential to understand the precise dimensions of the bundle of rights held by the copyright owner as personal property, as it is the "rights secured under the grant of letters patent by the United States [that] [a]re property and protected by the guarantees of the Constitution." *Wm. Cramp & Sons Ship & Engine Bldg. Co. v. Int'l Curtis Marine Turbine Co.*, 246 U.S. 28, 39–40 (1918); *see also Allen*, 140 S. Ct. at 1003 ("Again, there is no difference between copyrights and patents under the [Intellectual Property] Clause [of the United States Constitution], nor any material difference between the two statutes' provisions.").

For copyrights, that independent source of law is the Copyright Act, which defines the property interests vested in a copyright owner as follows:

> [T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; . . .
>
> (5) in the case of . . . pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual

> work, to display the copyrighted work publicly. . . .

17 U.S.C. § 106(1)–(3), (5).

As the text of the Copyright Act makes clear, a copyright does not vest the owner with the mere "right" to reproduce, distribute, display, and prepare derivative works; it vests the owner with the "*exclusive* right to do and to authorize" these activities, to the exclusion of the rest of the universe. 17 U.S.C. § 106 (emphasis added). The right to exclude is thus the core component of each specific right granted under the statute—it is not a separate stick amongst a bundle of rights. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising *the right to exclude* others from using his property.") (emphasis added).

This right to exclude, as the Court held in *Cedar Point Nursery*, is "'one of the most treasured' rights of property ownership," entailing "that sole and despotic dominion which one man claims and exercises over the external things of the world, in *total exclusion of the right of any other individual in the universe.*" 141 S. Ct. at 2072 (quoting 2 W. Blackstone, Commentaries on the Laws of England 2 (1766)) (emphasis added); *id.* at 2073 (referring to the right to exclude as the "'*sine qua non*' of property") (citation omitted). By reproducing and displaying Petitioner's copyrighted work—for its own benefit—for more than three years, Respondent "appropriated a right to invade" the exclusive sphere

of rights granted to Petitioner by the Copyright Act: the "exclusive" right to use and authorize the use of his work. *Cedar Point Nursery*, 141 S. Ct. at 2077 ("In 'ordinary English' 'appropriation' means '*taking* as one's own.' "). Such an invasion of Petitioner's "sole and despotic dominion" over his work, intended to be exercised "in total exclusion of the right of any other individual in the universe," constitutes a *per se* "taking" of Petitioner's "right to exclude" others from the use of his work. Because the opinion below cannot be reconciled with *Cedar Point Nursery*, there is a "reasonable probability" that this decision below would have been decided differently after that decision. The Court should GVR this case for reconsideration by the Supreme Court of Texas.

2. The opinion below ignores Respondent's appropriation of Petitioner's "right to exclude."

In the decision below, the court acknowledged that copyright infringement " '*invades* a statutorily defined province guaranteed to the copyright holder alone." App. 17 (emphasis added). In light of *Cedar Point Nursery*'s clarification that the appropriation of a "right to invade" constitutes a *per se* violation of the Takings Clause, 141 S. Ct. at 2072, this acknowledgement should be outcome determinative on remand, requiring a holding that Petitioner adequately pleaded a *per se* violation of the Takings Clause.

However—like the Ninth Circuit in *Shiroma* and the dissent in *Cedar Point Nursery*—the decision below failed to adequately respect the "central importance" of the right to exclude, and instead narrowly construed this Court's *per se* takings jurisprudence as limited to the acquisition of the property interest by the government or the complete destruction of the property interest at issue. App. 18 ("[W]hile an infringer violates the owner's rights, it 'does not assume physical control over the copyright.'"); App. 17 ("[T]he government's violation of those rights does not destroy them."); App. 20 (copyright infringement "does not deprive the copyright owner of the right to possess and use the copyrighted work"). Because the decision below was decided without the benefit of *Cedar Point Nursery*—which explained that neither (1) the failure to acquire a formal property interest nor (2) the complete destruction of that interest is required to apply the *per se* takings analysis to a government action—the Court should grant certiorari, vacate the decision below, and remand for reconsideration in light of *Cedar Point Nursery*.

a. *Cedar Point Nursery* does not require Respondent to acquire legal title to the copyrighted work to effectuate a *per se* taking.

Beginning with the failure of Respondent to acquire the copyright, the court below reasoned that Respondent did not "appropriate" Petitioner's property because "the government does not take possession or

control of, or occupy, the copyright." App. 16. In support, the court cited the text of the Copyright Act, which states that "no action by any governmental body . . . 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." App. 17 (quoting 17 U.S.C. § 201(e)). Thus, under the logic below, the failure of the government to acquire title to Petitioner's rights of ownership over the work prohibits a finding that Respondent committed a *per se* taking of Petitioner's property.

This reasoning cannot be reconciled with *Cedar Point Nursery*, which made clear that the Court has "never paused to consider whether the physical invasions at issue vested the intruders with formal easements according to the nuances of state property law (nor do we see how they could have)." 141 S. Ct. at 2076. Indeed, the Court was insistent that—even if "the government's intrusion does not vest it with a property interest recognized by state law, such as a fee simple or a leasehold"—the Court will "recognize a physical taking all the same," as "[a]ny other result would allow the government to appropriate private property without just compensation so long as it avoids formal condemnation. We have never tolerated that outcome." *Id.* at 2076 (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 116–17 (1951)). "Instead, we followed our traditional rule: Because the government appropriated a right to invade, compensation was due. That same test governs here." *Id.*

Giving short shrift to the right to exclude, the opinion below echoed the dissent in *Cedar Point Nursery*, which argued that the regulation at issue "does not *appropriate* anything," as it "does not take from the owners a right to invade" or "give the union organizers the right to exclude"—it simply allows the "temporary" invasion of "a portion of the property owners' land." 141 S. Ct. at 2083 (Breyer, J., dissenting). *Compare with* App. 17 ("no action by any governmental body" allows it to "exercise rights of ownership with respect to the copyright," so "[t]he copyright owner thus retains the key legal rights that constitute property for purposes of a *per se* takings analysis, despite the government's interference.") (citing 17 U.S.C. § 201(e)). But the Court rejected this line of reasoning, emphasizing that "[i]n 'ordinary English' 'appropriation' means '*taking* as one's own'" and that it "cannot agree that the right to exclude is an empty formality, subject to modification at the government's pleasure." *Id*. at 2077. "On the contrary, [the right to exclude] is a 'fundamental element of the property right,'" and "[o]ur cases establish that appropriations of a right to invade are *per se* physical takings." *Id.* Like the dissent, the holding below—that a *per se* taking requires Respondent to physically acquire for itself Petitioner's "right to exclude" others from utilizing the work—"hearkens back to views expressed (in dissent) for decades" and "bear[s] the sound of 'Old, unhappy, far-off things, and battles long ago.'" *Id.* at 2078. Whatever the merits of that argument before, it has no place in a post-*Cedar Point Nursery* world.

Because the decision below admitted that copyright infringement "*invades* a statutorily defined province guaranteed to the copyright holder alone," App. 17, this Court's guidance demonstrating that the appropriation of a "right to invade" Petitioner's property constitutes a *per se* taking is potentially "decisive" and "compel[s] re-examination of the case." *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964). Respondent's failure to acquire title to the copyright—or the right to exercise Petitioner's rights against others—does not prohibit treating its appropriation of a "right to invade" Petitioner's exclusive rights in the work as a *per se* taking. The Court should GVR this case for reconsideration in light of *Cedar Point Nursery*.

b. *Cedar Point Nursery* does not require the complete destruction of Petitioner's rights in the copyrighted work.

Borrowing from regulatory takings cases requiring that a *per se* taking "forever den[y] the owner any power to control the property" and "empty the right of any value," App. 19, the decision below argued that copyright infringement cannot constitute a *per se* taking because it "does not necessarily destroy any of the copyright owner's rights in the copyright." App. 20. It justified this conclusion by noting that (1) the copyright owner retains "the right to possess and use the copyrighted work," and (2) "the government's infringement [does not] deny the copyright owner the right to exclude third parties." App. 20. Again, neither of these

arguments addresses the fact that Respondent—by appropriating and displaying Petitioner's work for three years—took for itself a "right to access" Petitioner's copyrighted work, and thereby appropriated Petitioner's "right to exclude" the world from its use.

Indeed, the reasoning below cannot be reconciled with the resolution of *Cedar Point Nursery* itself, which addressed a regulation allowing union organizers to access the property for three hours per day, 120 days per year. 141 S. Ct. at 2069. Like the decision below, *Cedar Point Nursery* did not involve a claim that the regulation completely deprived the owners of all rights to their property or entirely destroyed its economic value. *See id.* at 2070. But unlike the decision below, the fact that the landowners in *Cedar Point Nursery* retained their rights (1) "to exclude third parties" who were not union organizers from their property and (2) to full possession and use of their property (subject to this government easement) was irrelevant to the Court's *per se* takings analysis. To the contrary, the Court reaffirmed the well-established rule that "even if the Government physically invades only an easement in property, it must nonetheless pay just compensation." *Id.* at 2073; *id.* ("Because the damages suffered by the Causby's 'were the product of a direct invasion of [their] domain' . . . 'a servitude has been imposed on the land.") (citing *United States v. Causby*, 328 U.S. 256, 265–66, 267 (1946)); *id.* ("[T]he appropriation of an easement constitutes a physical taking . . . .").

As in *Cedar Point Nursery*, the simple fact that Petitioner retains his right to license his work and exclude the general public from utilizing his work, *see* App. 20, says nothing about whether Respondent appropriated for itself a three-year, royalty-free license to utilize, reproduce, and display the copyrighted work in direct violation of Petitioner's right to exclude. When "the government has physically taken property for itself . . . a *per se* taking has occurred," *id.* at 2072, irrespective of whether the property owner retains additional rights to utilize the same property subject to the government's interference.

Because there is a reasonable probability that the decision below would have come out differently following this Court's guidance in *Cedar Point Nursery*, the Court should grant this petition for review, vacate the decision below, and remand this case for further proceedings consistent with that decision.

CONCLUSION

The petition should be granted, the decision below should be vacated, and the case should be remanded to the Supreme Court of Texas for re-examination in light

of *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (June 23, 2021).

Respectfully submitted,

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