

No. 25-523

IN THE
Supreme Court of the United States

UNITED WATER CONSERVATION DISTRICT,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

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

**Brief of the Liberty Justice Center as
Amicus Curiae Supporting Petitioner**

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Question Presented

Whether the government's appropriation of water that a person had a property right to use is analyzed as a physical taking, rather than a regulatory taking, under the Fifth Amendment.

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Interest of the Amicus Curiae

The Liberty Justice Center is a nonprofit, nonpartisan public-interest litigation firm that pursues strategic, precedent-setting litigation aimed at revitalizing constitutional restraints on government power and protecting individual rights. The Liberty Justice Center is interested in this case because the protection of private property rights is a core value vital to a free society.¹

Summary of Argument

When the government physically appropriates private property, it must provide just compensation. When the government regulates, though, a more involved analysis is needed to determine whether a taking has occurred. This fork in the road is key, because the treatment of the two types of takings is entirely different under this court's precedents. For physical takings, a person need not show grave economic harm, a large intrusion, a long intrusion, or a continuous intrusion to prove a taking has occurred. While those factors can affect the amount of compensation one can receive, they are not threshold matters to determine whether a person is entitled to any compensation.

The court below mixed the matter up, treating a physical taking as a regulatory one, and undermining

¹ Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than Amicus funded its preparation or submission. All parties received timely notice of Amicus's intent to file this brief.

the protection of property rights in the process. Calling physical takings regulatory takings risks making these factors complete bars to recovery, rather than considerations when determining the amount of compensation, that could allow the government to take private property without *any* compensation.

The case below demonstrates this risk. This Court should grant review to clarify the distinction between physical and regulatory takings and make it easier to ensure the government cannot evade its duty to provide Constitutionally mandated just compensation when it takes private property.

Argument

I. Protection of private property rights from government invasion, particularly physical appropriation, is critical to liberty.

This Court has long recognized the importance of private property rights to the pursuit of the American dream. “Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them.” *Murr v. Wisconsin*, 582 U.S. 383, 394 (2017). Takings without just compensation undermine private property rights and shake this foundation of American society.

Physical appropriations are the principal threat that the Constitution’s protection of property guards against, such that this Court has recognized them as *per se* takings, “without regard to other facts.” *Horne*

v. Dep't of Agric., 576 U.S. 351, 360 (2015) (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). Indeed, “such protection [is] justified not only by history, but also because ‘[s]uch an appropriation is perhaps the most serious form of invasion of an owner’s property interests,’ depriving the owner of ‘the rights to possess, use and dispose of the property.’” *Id.* (quoting *Loretto*, 458 U.S. at 435).

For this reason, it is essential that physical appropriations can be clearly identified as *per se* takings, ensuring the right of property to owners to just compensation for the deprivation of their property.

II. Ensuring compensation for physical takings is essential to the protection of private property rights.

A. This Court has made clear that different analyses are required for physical and regulatory takings.

It is “inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking,’ and vice versa.” *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 323 (2002). This first order question dictates all that comes after, since “[w]henver a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place.” *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021)).

In determining which precedents to apply, courts consider whether “the government, rather than appropriating private property for itself or a third

party, instead imposes regulations that restrict an owner's ability to use his own property." *Id.* at 148. When "the government has physically taken property for itself or someone else—by whatever means—"a physical taking has occurred, and when the government "has instead restricted a property owner's ability to use his own property" a regulatory taking has occurred. *Id.* at 149 (citing *Tahoe-Sierra*, 535 U.S. at 321–23).

A physical taking is analyzed in a straightforward manner: if property is physically taken, there must be compensation. "When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation." *Id.* at 147. (citing *Tahoe-Sierra*, 535 U.S. at 321).

For regulatory takings, by comparison, a heightened showing that must be made before compensation is granted. "[A] different standard applies." *Id.* at 148 (citing *Tahoe-Sierra*, 535 U.S. at 321–22). "To determine whether a use restriction effects a taking, this Court has generally applied the flexible test developed in *Penn Central*, balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action." *Id.* (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

Physical appropriations do not require analysis of these additional factors and thus receive heightened protection. "[A] physical *appropriation* of property [gives] rise to a *per se* taking, without regard to other factors," such as "the claimed public benefit or the

economic impact on the owner.” *Horne*, 576 U.S. at 360 (emphasis in original).

When private property has been physically taken it is therefore much more straightforward for a person to receive just compensation than it is when property is taken by regulation. “The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions.” *Tahoe-Sierra*, 535 U.S. at 323 (quoting *Yee v. Escondido*, 503 U.S. 519, 523 (1992)) (citing *Loretto*, 458 U.S. at 440; *Keystone Bituminous Coal Ass’n v. DeBenedictus*, 480 U.S. 470, 489 n. 18 (1987)).

This heightened protection is provided because of the severity of harm physical takings pose to private property rights. “[P]hysical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights.” *Id.* at 324. By physically appropriating property, the government gets “possession of the property, the right to admit and exclude others, and the right to use it for a public purpose.” *Id.* at 324 n. 19. The government does not get these same benefits in regulatory takings. *See id.*

B. An incorrect characterization of a taking claim as physical or regulatory could lead to a loss of private property rights’ Constitutional protection.

If a court incorrectly characterized a potential taking as regulatory, as opposed to physical, it would require a person to show more than the Constitution requires. To receive compensation, a person would have to provide evidence of a variety of factors that

are not required for a *per se* taking. Analysis of these factors might then lead to an incorrect outcome, where a court might decide the government's action did not rise to the level of a taking, and thus compensation is not required. In such a case, a person would be deprived of the just compensation the Constitution requires.

In regulatory takings analysis “the goal is usually to determine how the challenged regulation affects the property’s value to the owner.” *Murr*, 582 U.S. at 395. Factors considered include the “economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action.” *Cedar Point*, 594 U.S. at 148 (citing *Penn Central*, 438 U. S. at 124).

“But when there has been a physical appropriation, ‘we do not ask . . . whether it deprives the owner of all economically valuable use’ of the item taken.” *Horne*, 576 U.S. at 363 (quoting *Tahoe-Sierra*, 535 U.S., at 323). A physical appropriation is a *per se* taking “without regard to . . . the economic impact on the owner.” *Id.* at 360. *See also Cedar Point*, 594 U.S. at 151 (“a permanent physical occupation constitutes a *per se* taking regardless whether it results in only a trivial economic loss.”) (citing *Loretto*, 458 U.S. at 434–35).

Incorrectly categorizing physical takings as regulatory taking as opposed to a physical taking, places the burden on plaintiffs to make an economic showing beyond what should be required. This difference was highlighted by the Court when explaining the outcome in *Horne*: “The physical appropriation by the government of the raisins in that case was a *per se* taking, even if a regulatory limit

with the same economic impact would not have been.” *Cedar Point*, 594 U.S. at 152 (citing *Horne*, 576 U.S. at 362). This is because “[t]he Constitution,” as the Court explained, “is concerned with means as well as ends.” *Id.* (quoting *Horne*, 576 U. S. at 362).

Similar incorrect results occur where courts look to other factors applicable to regulatory takings, but not to physical takings, to determine whether a taking has occurred. Factors include the amount of property involved, *see Tahoe-Sierra*, 535 U.S. at 322 (“When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.”) (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)) (internal citation removed); the length of time the government invaded on the right, *see Cedar Point*, 594 U.S. at 152 (“a physical appropriation is a taking whether it is permanent or temporary”) (citing *Tahoe-Sierra*, 535 U. S. at 322); and whether the invasion was continuous, *see id.* at 153 (“physical invasions constitute takings even if they are intermittent as opposed to continuous”) (citing *United States v. Causby*, 328 U.S. 256, 259 (1946)).

Such factors can be used by courts during physical takings cases, but only to determine how much compensation is required. “The duration of an appropriation—just like the size of an appropriation—bears only on the amount of compensation.” *Id.* (citing *Loretto*, 458 U. S., at 436-437; *United States v. Dow*, 357 U. S. 17, 26 (1958)) (internal citations removed). They should not be used to determine whether or not a physical taking has occurred.

III. This Court should clarify the line between physical and regulatory takings to ensure the government cannot take private property without compensation.

A. The case below demonstrates the need for further clarification of the distinction between physical and regulatory takings.

In this case, the Federal Circuit held that the claim was a regulatory taking, rather than a physical one, in part because the United Water Conservation District “has not alleged that the government *completely* cut off its access to the water or caused it to return any volume of water it had previously diverted to its possession . . .” *United Water Conservation Dist. v. United States*, 133 F.4th 1050, 1057 (Fed. Cir. 2025) (emphasis added). The Federal Circuit appears to have used the size of the government’s appropriation as a threshold matter to determine the classification of the taking claim. In a physical taking claim, size would be relevant to determining compensation. In a regulatory taking claim, it would be used in determining whether a taking has occurred. This Court should clarify what factors should be used to determine whether a taking is physical or regulatory, in addition to how they are used to analyze the validity of the claim and amount of compensation.

The Federal Circuit also distinguished prior precedents about water rights because they occurred before this Court’s decision in *Penn Central*, which described the distinction between physical and regulatory takings. *Id.* at 1058. But the precedents a

court should apply vary depending on whether a claim is a physical or regulatory taking. The Court should clarify that those historical precedents before *Penn Central* still apply to physical takings.

The Federal Circuit also distinguished prior cases because they did not involve regulations, whereas the current case does. *Id.* But this Court has explained that the “essential question is not . . . whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree),” but rather “whether the government has physically taken property for itself or someone else—by whatever means.” *Cedar Point*, 594 U.S. at 149. Just because a government uses a regulation to justify its action does not mean the action is necessarily a regulatory taking, rather than a physical one. The Court should reaffirm this principle regarding the classification of takings claims.

Finally, the Federal Circuit looked to the distinction between riparian and appropriative water rights to determine whether the taking claim was physical or regulatory, even though both are private property rights. *United Water Conservation Dist.*, 133 F.4th at 1058. This Court should clarify whether that distinction matters when classifying a takings claim as physical or regulatory.

B. A continued lack of clarity in the law could allow the government to take private property without compensation.

The risk of an incorrect classification of a case is severe. If the distinction between physical takings claims and regulatory takings claims is not clarified,

courts might apply the wrong precedents, and thus the wrong analysis, leading to Constitutionally deficient outcomes.

If a court characterizes a claim as a regulatory taking, rather than a physical taking, a person will be required to make an economic showing they would not otherwise have needed to prove a taking had occurred. If a person does not make a significant enough economic showing, they may lose their case and receive no compensation when the Constitution requires that they do. This could allow the government to take private property without providing *any* compensation, let alone *just* compensation.

A court might also inappropriately use factors such as size and duration of government invasion to determine whether a taking has occurred, and thus whether any compensation at all is required. To do so would change what should be an issue of the *amount* of compensation into a bar to *any* compensation, and a bar to Constitutional protection of private property rights.

C. By clarifying the distinction between physical and regulatory takings, the Court would make protection of private property rights easier and more likely.

As detailed above, physical takings claims are much easier to show than regulatory takings claims are. A physical taking claim “requires courts to apply a clear rule”, whereas a regulatory taking claim “entails complex factual assessments of the purposes and economic effects of government actions.” *Tahoe-*

Sierra, 535 U.S. at 323 (quoting *Yee v. Escondido*, 503 U.S. 519, 523 (1992)) (citing *Loretto*, 458 U.S. at 440; *Keystone Bituminous Coal Ass’n v. DeBenedictus*, 480 U.S. 470, 489 n. 18 (1987)).

By clarifying when a takings claim is physical, as opposed to regulatory, this Court would ensure the easier, clearer *per se* rule is applied in all the cases where it should be. This would save courts and litigants from having to conduct the in-depth analysis required by *Penn Central* when it is not required. Meeting the higher *Penn Central* standard for a regulatory taking claim requires additional evidence as a threshold matter than a physical takings claim does. Such evidence likely requires extra research and discovery, and thus additional effort and cost.

If this Court makes clear when takings claims are physical ones, and when they are regulatory, people will likely be more apt to bring physical takings claims, knowing exactly what standard they must meet to be owed at least some compensation. It is one thing to spend time and money when *some* amount of compensation is guaranteed, it is another when it is unclear whether *any* will be given. By ensuring the clearer test is applied every time it is appropriate, the Court can make it easier and more likely that physical takings claims will be brought to protect private property rights.

Conclusion

The Federal Circuit’s decision, if left undisturbed, would undermine the protections of the Fifth Amendment Takings Clause against government appropriation of private property. The Constitution

does not permit government officials to evade their duty to justly compensate persons for their private property by claiming their actions are “regulatory” and insisting that a variety of factors must be analyzed. When the government physically appropriates private property, it must pay. No balancing test needed.

This Court should grant review to clarify the distinction between physical and regulatory takings so that Americans can have the full security in their private property rights that the Constitution provides.

November 26, 2025 Respectfully submitted,

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