No. 25-1426

IN THE

Supreme Court of the United States

CLEMENTE PROPERTIES, INC., *et al.*,

Petitioners,

v.

PEDRO R. PIERLUISI-URRUTIA, *et al.*,

Respondents.

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

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

LAWRENCE S. EBNER
Counsel of Record
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Ave., NW
Washington, DC 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

NANCIE G. MARZULLA
MARZULLA LAW, LLC
1150 Connecticut Ave., NW
Washington, DC 20036
(202) 822-6760
nancie@marzulla.com

Counsel for Amicus Curiae

121169

COUNSEL PRESS
A Proceed Service
The Appellate Experts®
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

Constitutional Provisions

INTEREST OF THE *AMICUS CURIAE*[1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm. ALF's mission for the past five decades has been to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, former government officials, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, ALF pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

* * *

The Fifth Amendment's Just Compensation Clause (also known as the Taking Clause) recognizes that private ownership of property and economic liberty are foundational principles in our nation of individual rights, liberty, and free enterprise, and are intrinsic to our nation's social fabric. ALF has

---

[1] Petitioners' and Respondents' counsel have received timely notice of this brief in accordance with Supreme Court Rule 37.2. No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

participated as *amicus curiae* in many cases where, as here, overly aggressive and confiscatory governmental action raises serious taking concerns.[2]

This is such a case. The question presented—whether Puerto Rico can evade its constitutional duty to pay just compensation for its appropriation of the Roberto Clemente property right simply because the property is intangible (a trademark)—squarely aligns with ALF's mission of protecting private property from unjust and uncompensated government confiscation.

INTRODUCTION

Under Puerto Rico's Trademark Act and its successor provisions, trademark owners acquire the exclusive right to use a mark in commerce.[3] As the Puerto Rico Supreme Court has confirmed, ownership of a mark is acquired through use of that mark or its registration.[4] Recognized as an intangible property right under Puerto Rico law, trademark owners have

---

[2] *See, e.g.*, Br. of Atl. Legal Found. As *Amicus Curiae* In Support of Petitioners in *United Water Conservation District v. United States*, No. 25-523 (U.S. Nov. 28, 2025); *Devillier v. Texas*, No. 22-913 (U.S. Nov. 20, 2023); *Tyler v. Hennepin County*, No. 22-166 (U.S. March 3, 2023); and *Sackett v. Environmental Protection Agency*, No. 21-454 (U.S. April 14, 2022).

[3] *See Veryfine Prods., Inc. v. Colon Bros.*, 799 F. Supp. 240, 250 (D.P.R. 1992); 10 L.P.R.A. § 223–224b.

[4] *See Arribas v. Am. Home*, 165 D.P.R. 598, 605 (D.P.R. 2005) ("Our Trademark Law, therefore, combines 'the right arising from use with the right constituted by registration.'"); *see also* 10 L.P.R.A. § 223a.

an exclusive right to use of that mark, along with incidental rights such assignability, transferability, and the right to injunctive relief against infringement and dilution.[5] The essence of a trademark, however, is the owner's exclusive right to use of that mark.[6]

Petitioners, the three adult sons of baseball legend, Roberto Clemente, and two entities (Clemente Properties, Inc. and 21 In Right, Inc.) (collectively "the Clementes"), have actively worked to protect their late-father's legacy, his philanthropy, and the Roberto Clemente trademark.[7]

There is no question that for its own beneficial use Puerto Rico, under two resolutions enacted by the Puerto Rican legislature, appropriated the Roberto Clemente trademark and earned $15 million from that use as a result.

The Clementes vigorously objected to Puerto Rico's appropriation of their trademark. Affirming the dismissal of the Clementes' per se taking lawsuit, the First Circuit held that Puerto Rico was off the "constitutional hook" because a trademark is an intangible property right under Puerto Rico law.[8]

---

[5] *See Colon Vazquez v. Baez Perez*, 214 D.P.R. 1062, 1084 n.11 (D.P.R. 2024).

[6] 10 L.P.R.A. § 223b; *see also Veryfine Prods.*, 799 F. Supp. at 251 (holding that trademark owner "has the right to the exclusive use of the marks and to preclude the use of similar marks").

[7] Pet. App. 4a.

[8] *See* Pet. App. 59a, 75a, 144a.

Therefore, they concluded, the taking was analyzed as a regulatory taking under the *Penn Central*[9] ad hoc, factual inquiry standard, referred to as a three-factor taking test.[10]

Applying this standard, the district court held that the Clementes had not met their pleading burden and dismissed the complaint, which the First Circuit affirmed.[11]

But few plaintiffs can meet the *Penn Central* taking standard, as Justice Thomas noted in his dissenting opinion in *Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*.[12] As one survey of takings cases brought using this test has shown, out of "more than 1,700 cases over a 25-year period, there were only 27 successful takings claims . . . a success rate of just 1.6%[.]"[13] This is because, as Justice Thomas also noted, "nobody—not States, not property owners, not

[9] *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

[10] *See* Pet. App. 63a–64a, 147a–148a.

[11] *See id.*

[12] *See Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, 141 S. Ct. 731 (2021) (Thomas, J., dissenting).

[13] *Id.* at 731 (Thomas, J., dissenting) (citing Brown & Merriam, On the Twenty-Fifth Anniversary of *Lucas*: Making or Breaking the Takings Claim, 102 Iowa L. Rev. 1847, 1849–1850 (2017)).

courts, nor juries—has any idea how to apply this [the *Penn Central*] standardless standard."[14]

SUMMARY OF ARGUMENT

In *Webb's Fabulous Pharmacies, Inc.*,[15] this Court declared that government cannot "by *ipse dixit* . . . transform private property into public property" without payment of just compensation.[16] This is, however, just what Puerto Rico has done here. That the property taken for public use is intangible is a red herring. This issue is whether the core component of the property rights—the right to exclusive use—has been transformed by Puerto Rico's two resolutions into public property. This property has. Puerto Rico is now constitutionally obligated to pay for what it has taken.

The First Circuit's opinion, which relies on the unworkable *Penn Central* taking standard, also highlights the need to revisit the artificial dichotomy between the per se taking test and the unworkable, ad hoc, factual inquiry under the *Penn Central* regulatory taking standard. Calling the *Penn Central* standard the "know-it-when-you-see-it test[,]" Justice

---

[14] *Id.*

[15] *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

[16] *Id.* at 164.

Thomas has stated that any test is "no good if one court sees it and another does not."[17]

In tacit recognition that the *Penn Central* standard is not a test at all, this Court ignores more often than it applies the three *Penn Central* factors: the character of the government's action, the reasonableness of the owner's investment-backed expectations, and the economic impact of the regulation. For example, in *Ruckelshaus v. Monsanto*,[18] a case involving the government's disclosure of a trade secret (another intangible property right), the Court decided the taking based only on the destruction of the owner's reasonable, investment-backed expectation.[19]

And in *Hodel v. Irving*,[20] a case involving the taking of Indian tribal members' right to devise property, the Court found a taking of that right unconstitutional. Noting that the right to devise property is such a long-standing right in Anglo-American law, the holding turned on the character of the government's actions, which the Court found was so intrusive as to support a taking determination.[21]

---

[17] *Bridge Aina Le'a*, 141 S. Ct. at 732 (Thomas, J., dissenting).

[18] *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

[19] *See id.* at 1011.

[20] *Hodel v. Irving*, 481 U.S. 704 (1987).

[21] *See id.* at 705.

Lower courts, too, routinely ignore the *Penn Central* three-factor test. The Federal Circuit found that the government's required destruction of a healthy turkey-breeder's entire stock was a taking because of the character of the government's actions: "Why should the Yanceys be forced to bear their own losses when their turkeys were not diseased? The Yanceys' losses came about because of the Government's action."[22]

On at least two occasions, Justice Thomas has called on the Court to revisit the *Penn Central* taking test.[23] In one of these instances, he specifically stated: "It is time to give more than just 'some, but not too specific, guidance.' If there is no such thing as a regulatory taking, we should say so. And if there is, we should make clear when one occurs."[24]

This Court has never held that the government's transformation of private property into public property should be analyzed under the ad hoc, factual inquiry discussed in *Penn Central*. And contrary to the First Circuit's analysis, there is nothing in Puerto

---

[22] *Yancey v. United States*, 915 F.2d 1534, 1542 (Fed. Cir. 1990).

[23] *See Bridge Aina Le'a*, 141 S. Ct. at 732 (Thomas, J., dissenting); *see also Murr v. Wisconsin*, 582 U.S. 383, 419 (2017) (Thomas, J., dissenting) ("In my view, it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment.").

[24] *Bridge Aina Le'a*, 141 S. Ct. at 732 (Thomas, J., dissenting) (citing *Palazzolo v. Rhode Island*, 533 U. S. 606, 617 (2001)).

Rico law that suggests that Puerto Rico is free to by ipse dixit transform a trademark into public property. Trademarks are recognized as property rights under Puerto Rico law and therefore are fully protected against the kind of taking that occurred here without facing constitutional consequences.[25]

Nor does the Just Compensation Clause itself admit of any suggestion that the government can take for its own beneficial use intangible forms of property, without paying just compensation for the taking. The clause says the opposite: "[N]or shall private property be taken for public use, without just compensation."[26]

ARGUMENT

The Court Should Grant Certiorari and Adopt a Per Se Rule For the Taking of Intangible Property.

Puerto Rico transformed the Clementes' exclusive use to their trademark into public property by enactment of two resolutions. Transforming private property into public property by ipse dixit is exactly what the Fifth Amendment was designed to address by preventing the majority from destroying individual rights with impunity. As John Adams, in his *Defence of the Constitutions of Government*, said: "The moment

---

[25] *See Colon Vazquez*, 214 D.P.R. at 1084 n.11 ("'The right to use a trademark is recognized as a kind of property, of which the owner is entitled to the exclusive enjoyment to the extent that it has actually been used'" (quoting *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 259 (1916))).

[26] *See* U.S. Const. amend. V.

the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."[27]

The *Penn Central* taking standard should not be allowed to shield government against outright appropriations of private property, such as occurred here. This case provides the Court an excellent opportunity to adopt a per se taking rule for the government appropriation of intangible property rights.

A. There is no constitutional basis for holding that government can transform intangible property into public property by ipse dixit without triggering Fifth Amendment protections.

The district court dismissed the Clementes' per se taking claim, holding that because the Clementes had failed to plead that their trademark still retained some economic value, they had not filed a taking claim under the *Penn Central* standard.[28] Focusing on the nature of the property right, instead of the fact that Puerto Rico has taken for itself the Clementes' property, the Court reached the untenable conclusion that government may simply enact a law authorizing

---

[27] 6 John Adams, *The Works of John Adams* 9 (Charles Francis Adams ed., Little, Brown & Co. 1851) (reprinting *A Defence of the Constitutions of Government of the United States of America* (1787)).

[28] Pet. App. 147a–148a.

it to make beneficial and profitable use of that property with constitutional impunity.

How the district court could have determined that the Clementes' complaint should have been dismissed on the pleadings in the face of these facts is inexplicable. Puerto Rico is using the Clementes' trademark for their license plates, and far from paying the Clementes for their trademark, Puerto Rico is greatly profiting from it.[29]

There is nothing in the Just Compensation Clause that supports the holdings below. As the only express money damages provision in the Constitution, the clause demands that money be paid to an owner of private property whenever that property is taken for public use. And whenever the government requires a property owner to surrender "to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."[30]

B. A test that courts routinely ignore is no test at all.

The courts below relied on the *Penn Central* ad hoc, three-factor taking standard to reach their conclusion that the Clementes are not even entitled to bring their claim for just compensation for review on the merits. That this taking standard could be used to bar a

---

[29] Pet. App. 49a.

[30] *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893).

blatant transformation of private property into public property from constitutional review points up the need for serious scrutiny of this standard. As Justice Thomas noted in his dissenting opinion in *Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*,[31] in which he urged the Court to revisit the unworkable *Penn Central* standard, commentators from a variety of perspectives have noted that *Penn Central* should be replaced with a workable taking test. In his dissent, he cites to one article entitled, "Is the *Penn Central* Three-Factor Test Ready for History's Dustbin?[,]"[32] in which the author described *Penn Central* as "so vague and indeterminate that it invites unprincipled, subjective decision making[.]"[33] He also cites to another commentator who observed that the standard "has become a compilation of moving parts that are neither individually coherent nor collectively compatible."[34]

The *Penn Central* taking standard was not designed as a takings test, nor was it applied as a three-factor test in *Penn Central* itself. In 1922, Justice Holmes articulated the famous "too far"

---

[31] *Bridge Aina Le'a*, 141 S. Ct. 731 (Thomas, J., dissenting).

[32] John D. Echeverria, Is the *Penn Central* Three-Factor Test Ready for History's Dustbin?, 52 Land Use L. & Zon. Dig. 3 (2000).

[33] *Id*. at 7.

[34] Steven J. Eagle, The Four-Factor *Penn Central* Regulatory Takings Test, 118 Pa. St. L. Rev. 601, 602 (2014).

standard for evaluating takings claims.[35] Over 50 years later, Justice Brennan, writing for this Court in *Penn Central Transp. Co. v. City of New York*,[36] quoted Justice Holmes's too far standard finding then that a better taking standard was needed. But, after surveying takings jurisprudence in the intervening decades, Justice Brennan observed that no workable test had emerged: "[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[37]

He then observed that courts generally use three factors to guide themselves in determining whether the Fifth Amendment has been violated: (1) the character of the government action; (2) the reasonableness of the owner's investment-backed expectations; and (3) the economic impact.[38]

But the *Penn Central* court never said that all of these factors had to be used all the time and in all cases. Instead, these factors were offered as "several factors" that were identified as having "particular significance."[39] And when it came to analyzing the

---

[35] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

[36] *Penn Central*, 438 U.S. 104.

[37] *Id*. at 124.

[38] *Id*.

[39] *Id*.

facts before it, the *Penn Central* court determined that no taking had occurred on the basis of only one of the three factors—economic impact. [40]

The Court did not question whether the city's goal of protecting historic sites, i.e., the character of the government action, was legitimate, nor did it analyze the means the Commission used to achieve that goal, i.e., the restriction's interference with reasonable, investment-backed expectations. So from the outset, the *Penn Central* taking standard has been honored in the breach.[41]

And more recently, in *Cedar Point*,[42] the Court's taking analysis of the owner's right to exclude others from its property treated the right to exclude as an intangible legal right, heavily reinforcing the conclusion that the *Penn Central* taking standard is ready for the historical dustbin. Emphasizing that the California regulation actively appropriated the owner's intangible "right to exclude[,]" there was no discussion of any of the other two *Penn Central* factors.[43] Likewise, in *Horne v. Department of Agriculture*,[44] the Court held that government cannot seize personal property (raisins) without per se just

---

[40] *Id*. at 137–138.

[41] *Id*.

[42] *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021).

[43] *Id*. at 158.

[44] *Horne v. Department of Agriculture*, 576 U.S. 350 (2015).

compensation.[45] Again, there was no balancing or testing of the taking claim under *Penn Central* in either of these recent decisions.

Here, too, prior to the passage of Puerto Rico's two resolutions authorizing it to use the Roberto Clemente trademark for its own purposes, the Clementes held the exclusive right to use that mark. Puerto Rico, for its own advantage, appropriated and destroyed what had once been their exclusive use right.

In *Ruckelshaus v. Monsanto Co.*,[46] the plaintiff sued the Environmental Protection Agency (EPA), alleging that the agency's disclosure of confidential material to the public revealed valuable trade secrets.[47] Although an intangible property right, the Court held that the federal government had "explicitly guaranteed to Monsanto and other registration applicants" under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) that its confidentiality and exclusive use of its trade secrets would be protected.[48] The Court therefore found a taking without regard to either of the other two *Penn Central* factors, finding that interference with investment-backed expectations was controlling: "[W]e find that the force of this factor is so overwhelming . . . that it

---

[45] *Id*. at 365–367.

[46] *Ruckelshaus*, 467 U.S. 986.

[47] *Id*. at 986.

[48] *Id*. at 1011.

disposes of the taking question regarding those data."[49]

In *Hodel v. Irving*,[50] a case involving the taking of Indian tribal members' right to devise property, the Court found a taking solely because the character of the government's actions was so intrusive.[51] Notably, neither of the other factors supported a taking: no investment-backed expectations were affected and the economic impact on the property was de minimis.[52]

Comparing the appropriation of interest to the physical occupation of the rooftop in *Loretto*,[53] the Court has also applied the per se taking test to cases involving the forced transfer of money (interest earned on a lawyer's IOLTA trust account) from private to public use.[54]

And the Court has used a per se analysis to determine that the elimination of a lien to secure payment is a taking: "Before the liens were destroyed,

---

[49] *Id*. at 1005.

[50] *Hodel*, 481 U.S. 704.

[51] *Id*. at 716 (finding a taking where "the character of the Government regulation here is extraordinary.").

[52] *Id*. at 715.

[53] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

[54] *Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 (2003) (citing *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Penn Cent. Transp. Co.*, 438 U.S. 104; and *Loretto*, 458 U.S. 419).

the lienholders admittedly had compensable property. Immediately afterwards, they had none."[55]

In *Lynch v. United States*,[56] the Court held that Congress cannot, without triggering the Fifth Amendment's Just Compensation Clause, repudiate contractual obligations of the United States.[57]

In *International Paper Co. v. United States*,[58] the Court found a per se taking of a contract to provide water to power the company's sawmill when the United States requisitioned all Niagara River hydropower for war production.[59]

In *Louisville Joint Stock Land Bank v. Radford*,[60] the Court held that a statute that deprived the bank of its pre-existing contract rights under a mortgage was a taking, without regard to the ad hoc, multi-factor test.[61]

---

[55] *Armstrong v. United States*, 364 U.S. 40, 48 (1960).

[56] *Lynch v. United States*, 292 U.S. 571 (1934).

[57] *Id*. at 579.

[58] *International Paper Co. v. United States*, 282 U.S. 399 (1931).

[59] *Id*. at 408.

[60] *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

[61] *Id*. at 589.

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*,[62] the Court held that a Florida statute authorizing the clerk of Court to transfer interest on an interpleader fund to the county, that should have been paid to the creditors, was a compensable taking, explaining that the Florida statute has the "practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry[,]"[63] emphasizing that:

> [A] State, by *ipse dixit*, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.[64]

The Federal Circuit likewise ignored two of the three *Penn Central* factors in *Yancey v. United States*,[65] a case in which a flock of healthy turkeys was destroyed for the stated purpose of protecting health, basing its decision solely on the character of the government's action: "Bluntly stated, the consequences of the Government's action cannot be ignored. Why should the Yanceys be forced to bear

---

[62] *Webb's Fabulous Pharmacies*, 449 U.S. 155.

[63] *Id*. at 164.

[64] *Id*.

[65] *Yancey*, 915 F.2d 1534.

their own losses when their turkeys were not diseased? The Yanceys' losses came about because of the Government's action."[66]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE S. EBNER
Counsel of Record
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Ave., NW
Washington, D.C. 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

NANCIE G. MARZULLA
MARZULLA LAW, LLC
1150 Connecticut Ave., NW
Suite 1050
Washington, DC 20036
(202) 822-6760
nancie@marzulla.com

July 2026

[66] *Id*. at 1542.