

No. 20-107

IN THE
Supreme Court of the United States

CEDAR POINT NURSERY AND FOWLER PACKING
COMPANY, INC.,
Petitioners,
v.

VICTORIA HASSID, IN HER OFFICIAL CAPACITY AS CHAIR
OF THE AGRICULTURAL LABOR RELATIONS BOARD,
ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF OF AMICUS CURIAE
NEW ENGLAND LEGAL FOUNDATION
IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT.....	2
ARGUMENT	3
I. In Neither <i>Portsmouth Harbor</i> Nor <i>Causby</i> Did The Taking Depend On The Economic Harm Caused By The Government; In Both, The Servitude Was Treated As Directly Physically Imposed And As Per Se	3
II. <i>Kaiser Aetna</i> Was Not Decided As A <i>Penn Central</i> Regulatory Taking; The Easement Was Treated As An Imposed Physical Invasion.....	11
CONCLUSION.....	16

TABLE OF AUTHORITIES

<i>Andrus v. Allard</i> , 444 U.S. 51 (1979)	13, 14
<i>Cedar Point Nursery v. Shiroma</i> , 923 F.3d 524 (2019)	11
<i>Cedar Point Nursery v. Shiroma</i> , 956 F.3d 1162 (2020)	4, 9, 10
<i>First English Evangelical Lutheran Church of Glendale v. Los Angeles County</i> , 482 U.S. 304 (1987)	10
<i>Kaiser Aetna v. United States</i> , 444 U.S. 164 (1979)	11-16
<i>Lucas v. South Carolina Coastal Council</i> , 505 U.S. 1003 (1992)	11, 12, 13, 15
<i>Peabody v. United States</i> , 231 U.S. 530 (1913)	5, 6
<i>Penn Central Transportation Co. v. New York City</i> , 438 U.S. 104 (1978)	3, 11, 14, 15, 16
<i>Pennsylvania Coal Co. v. Mahon</i> , 260 U.S. 393 (1922)	15
<i>Portsmouth Harbor Land and Hotel Co. v. United States</i> , 260 U.S. 327 (1922)	3-10

<i>Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency</i> , 535 U.S. 302 (2002)	10-11
<i>United States v. Causby</i> , 328 U.S. 256 (1946).....	9-11
<i>United States v. Miller</i> , 317 U.S. 369 (1943)	14, 15
<i>United States ex rel. TVA v. Powelson</i> , 319 U.S. 266 (1943)	14, 15

INTEREST OF AMICUS CURIAE¹

The New England Legal Foundation (NELF) is a nonprofit, nonpartisan, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England and the nation, protecting the free-enterprise system, and defending individual economic rights and the rights of private property. In fulfillment of its mission, NELF has filed numerous amicus briefs in this Court in a great variety of cases.

NELF appears as an amicus in the present case because a core part of its mission has long been the defense of private property rights, and many of NELF's briefs in this Court have dealt with takings issues. NELF's interest in this case specifically lies in the important issues of takings law raised by the Petitioners in the Question Presented. As the Petition explained, the answer this Court gives to that question will have ramifications in many areas of governmental regulation. Pet. at 27-31. How the Court decides this case will also delineate more clearly the scope of the right to exclude, which is a

¹ Pursuant to Supreme Court Rule 37.6, NELF states that no party or counsel for a party authored this brief in whole or in part and that no person or entity, other than NELF, made any monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.3(a), NELF has obtained the consent of all parties. On December 2, 2019 Petitioners filed a blanket consent to the filing of amicus briefs in support of either or neither party, and by email dated December 21, 2020, the Deputy Solicitor General of California granted the consent of the Respondents to the filing of this brief.

cardinal attribute of private ownership. Hopefully, too, the Court's interpretations of its own past decisions will clarify the proper understanding of those decisions, which are now frequently points of marked contention between litigants, as the briefing in this case illustrates.

For these reasons, NELF has filed this brief to assist the Court by providing an explication of three of its relevant past decisions.

SUMMARY OF THE ARGUMENT

As this case has illuminated, there exist considerable differences in the views taken of this Court's past takings decisions. Any reliance on the following three cases in order to establish that the claims here must be analyzed as regulatory takings would be mistaken. In none of them did the holding turn on a multifactor analysis in which extent of economic injury played the dominant role.

A close examination of *Portsmouth Harbor Land and Hotel Co. v. United States*, 260 U.S. 327 (1922), reveals that the Court focused exclusively on the physical character of the government's actions in firing coastal artillery and on whether these actions could be seen to imply an intention physically to subordinate private property interests to the public interest, i.e., to take an easement. The decision did not consider or weigh the extent of any harms suffered by the claimant.

Similarly, in *United States v. Causby*, 328 U.S. 256 (1946), in which the Court explicitly declared it would follow the "philosophy of *Portsmouth Harbor*," the Court considered whether direct airspace invasions made by military aircraft were an exercise of such dominion and control over the land below

that an easement of flight had been imposed on private property by the government.

Finally, in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Court rejected the argument that background legal principles created a navigational servitude that would allow the public free access to private property. The Court ruled that the government would have to pay for the public easement it claimed because such access would be a physical invasion and a direct appropriation of a property interest, much like the taking of an entire fee interest by eminent domain.

ARGUMENT

I. In Neither *Portsmouth Harbor* Nor *Causby* Did The Taking Depend On The Economic Harm Caused By The Government; In Both The Servitude Was Treated As Directly Physically Imposed And As Per Se.

In their Brief in Opposition (BIO), the Respondents argued that *Portsmouth Harbor Land and Hotel Co. v. United States*, 260 U.S. 327 (1922), established that “only if the invasions substantially impaired the plaintiffs’ use of their property” could a taking be found. BIO at 15. They clearly intend to steer the Court into viewing this case under the *Penn Central* multifactor test applicable to a regulatory taking. *See id.* at 12 (claims subject to “multi-factor regulatory” analysis, but Petitioners chose not to assert *Penn Central* claims). *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). In support of their view, they quote selectively from *Portsmouth Harbor*, a pre-*Penn Central* case. Judge Paez, in his concurrence with the denial of en banc review, seems to take

substantially the same position and quotes the same passage from *Portsmouth Harbor*.

The Respondents' supporting citation to *Portsmouth Harbor* contains a parenthetical that reads as follows: "if 'the Government . . . fire[s] projectiles directly across' property, 'with the result of depriving the owner of its profitable use,' compensation would be required." BIO at 15 n.7 (quoting *Portsmouth Harbor*) (original alterations). Judge Paez, for his part, described *Portsmouth Harbor's* inquiry as "limited" to finding a taking "when the intrusion 'result[ed] in depriving the owner of its profitable use[.]'" *Cedar Point Nursery v. Shiroma*, 956 F.3d 1162, 1163 (9th Cir. 2020) (quoting *Portsmouth Harbor*) (failure to note alteration of "of" to "in" and emphasis original to concurrence).

Both uses of the quotation are highly misleading, however. The taking analysis found in *Portsmouth Harbor* focused solely on whether an intention to take by physical invasion could be attributed to the government from the acts of its officers. Both the majority opinion, written by Justice Holmes, and the dissent of Justice Brandeis agreed that extent of harm was irrelevant to the takings question in that case.

The *Portsmouth Harbor* passage in question is itself a quotation from a related case dealing with the same long-running dispute. The quotation reads in its entirety as follows:

'If the Government had installed its battery, not simply as a means of defense in war, but with the purpose

and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made.’

Portsmouth Harbor, 260 U.S. at 329 (quoting *Peabody v. United States*, 231 U.S. 530, 538 (1913)).

Conspicuous by its absence from the Brief in Opposition and Judge Paez’s concurrence is any reference to the installation of the guns having “the *purpose and effect of subordinating* the strip of land . . . to the right and privilege of the Government to fire projectiles directly across it . . . whenever it saw fit, in time of peace” (emphasis added). Contra Judge Paez, so far from being “limited” to economic harms, the taking inquiry of both *Peabody* and *Portsmouth Harbor* dwelt entirely on the question of the government’s intention to “subordinat[e]” private property rights physically to the public interest by installing and then firing the large coastal guns “whenever it saw fit.”

In the related *Peabody* case, for example, immediately after the passage later quoted in *Portsmouth Harbor*, the Court wrote in 1913:

[T]he question remains whether it satisfactorily appears that the servitude has been imposed; that is, whether

enough is shown to establish an *intention* on the part of the government to impose it. The suit must rest upon contract, as the government has not consented to be sued for torts, even though committed by its officers in the discharge of their official duties . . . and a contract to pay, in the present case, cannot be implied unless there has been *an actual appropriation of property* That there is any *intention* to repeat it [i.e., the firing of the guns] does not appear, but rather is negatived. . . . We deem the facts found to be too slender a basis for a decision that the property of the claimants has been *actually appropriated*, and that the government has thus impliedly agreed to pay for it.

231 U.S. at 538-540 (emphasis added). Note that any taking was seen to turn on the government's intention to assert de facto superior rights over private property by firing its coastal guns at will invasively over the property. If such facts were shown, the Court said, the government would have made "an actual appropriation of property."

For the same reasons, when the takings claim came before the Court again in 1922 in *Portsmouth Harbor*, the Court again focused on what intention could be read into the government's overt, physical acts, and not on the extent of harm. As Justice Holmes wrote in the sentence immediately preceding his insertion of the *Peabody* quotation, "[t]here is no doubt that a *serious loss* has been inflicted upon the claimant, . . . and . . . it is decided that that and the previously existing elements of actual harm do *not*

create a cause of action.” *Portsmouth Harbor*, 260 U.S. at 329 (emphasis added).

After reviewing the new facts that had emerged since the Court’s last decision on the dispute, Justice Holmes wrote that the Court now viewed a taking as adequately pled:

[E]ven when the *intent* thus to make use of the claimants’ property is not admitted [by the United States], while a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove it [i.e., intent]. . . . As we have said the *intent and the overt acts* are alleged as is also the conclusion that the United States has taken the land. That we take to be stated as a conclusion of fact and not of law, and as intended to allege the actual import of the foregoing acts. In our opinion the specific facts set forth would warrant a finding that a servitude has been imposed.

Id. at 329-30 (emphasis added). Significantly, the new facts were that the government had replaced the old guns with “heavy coast defence [sic] guns,” once again fired its guns at will in peacetime, and had established a fire-control station to service the artillery. *Id.* at 329. These acts could be seen to imply an intention to “subordinat[e] the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it, ” *id.* at 329, and hence physically to “impose[]” an implied easement of fire, *id.* at 330.

Should any doubts remain that the taking claim in *Portsmouth Harbor* turned not on economic injury but rather on an intention of the government to act in such a way as physically to subordinate private property rights to the public interest, Justice Brandeis's dissent should eliminate them. He began by stating his points of agreement with the majority.

I agree that, in time of peace, the United States has not the unlimited right to shoot from a battery over adjoining private property, *even if no physical damage is done to it thereby*; that a single shot so fired [i.e., fired in time of peace and without damage to private property] may, in connection with other conceivable facts, justify a court in finding that the government took, by eminent domain, the land or an easement therein; and that such taking, if made under circumstances which give rise to a contract implied in fact to pay compensation, will entitle the owner to sue in the Court of Claims.

Id. at 330-31 (emphasis added).

As Justice Brandeis explained in the remainder of his dissent, the “conceivable facts” and “circumstances” he speaks of revolved around the requirement that the claimants plead adequately the government's intention to take by its overt, physical actions.

It is said that the petition alleges, in general terms, a taking and intention to take by the United States; that this allegation alone, although general, is an

allegation of all the facts necessary to give a cause of action; and that the specification in detail of the facts relied upon may be treated as surplusage. To this contention there are several answers.

Id. at 336. In the end, he concluded that the claimants could not plead adequately the government's intention, either an avowed intention or one implied by the authorized acts of its officers. *See id.* at 337 ("The facts stated show, as indicated above, not only an absence of taking and of intention to take the claimants' property, but also an absence of authority to do so in those who did the acts relied upon [i.e., installing and firing new guns].").

Hence, contrary to the Respondents and Judge Paez, both the majority and the dissent in *Portsmouth Harbor* agreed that whether an easement had been taken turned on whether the government had an intention, or "abiding purpose," *id.* at 330, to fire guns in order physically to "subordinat[e] the strip of [private] land . . . to the right and privilege of the Government," *id.* at 329. The physically invasive character of the practice firing of the big coastal guns, although occurring only sporadically, was the determinant. Impaired economic use of the hotel played no role in deciding the question.

Alongside *Portsmouth Harbor*, the Respondents cite *United States v. Causby*, 328 U.S. 256 (1946). *See* BIO at 14-15. Judge Paez does so as well, stating that *Causby* applied the "same basic principle" found in *Portsmouth Harbor*. *Cedar Point*, 956 F.3d at 1163. In the eyes of both Judge Paez and the Respondents that principle is that takings

were found in those two cases only because the “physical invasions substantially impaired the plaintiffs’ use of their property.” BIO at 15; see *Cedar Point*, 956 F.3d at 1163 (“loss . . . complete”; “severe negative effects”).

As we have shown, that view of *Portsmouth Harbor* does not withstand scrutiny. While some of the language used in *Causby* might lend credence to their view, the better angels of *Causby* understood clearly the “philosophy of *Portsmouth Harbor*.” *Causby*, 328 U.S. at 262-63. That “philosophy” focused on those physical acts of the government that represent “a definite exercise of complete dominion and control over the surface of the land” from the air (via artillery shells in *Portsmouth Harbor* and via flights of heavy military aircraft in *Causby*). *Id.* at 262. See *Portsmouth Harbor*, 260 U.S. at 329 (artillery fire as physical acts “subordinating the strip of land between the battery and the sea to the right and privilege of the Government”).

Hence, as in *Portsmouth Harbor*, it was the character of the government’s action as a “direct invasion,” *Causby*, 328 U.S. at 265-66, that determined the question whether there was a taking. In *Causby*, as in *Portsmouth Harbor*, the government’s actions were such that “a servitude ha[d] been imposed upon the land” physically. *Id.* at 267, 262 (“easement of flight”). Later cases of this Court have seemed to similarly eschew any minimum quantum of damages as a needed element in the physical taking of an easement. See *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 329–30 (1987) (“diminution of value inquiry is unique to regulatory takings”) (contrasting to *Causby* et al.); *Tahoe-Sierra*

Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 322 (2002) (when government “physically takes possession of an interest in property . . . , it has a categorical duty to compensate for that share no matter how small”) (citing *Causby et al.*); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (in easement case, observing “(at least with regard to permanent [physical] invasions), no matter how minute the intrusion, . . . we have required compensation”) (citing *Causby et al.*).

In short, these two pre-*Penn Central* cases cannot be impressed into the service of the Respondents’ defense. They support the Petitioners’ physical invasion theory.

II. *Kaiser Aetna* Was Not Decided As A *Penn Central* Regulatory Taking; The Easement Resulted From An Imposed Physical Invasion.

The Respondents’ reliance on *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), is equally misplaced. Like the Ninth Circuit, they contend that *Kaiser Aetna* illustrates that the facts of the present case require the use of “a multi-factor regulatory takings analysis under *Penn Central*.” BIO at 12; see also *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 533-34 & n.8 (9th Cir. 2019) (strongly intimating same). In fact, *Kaiser Aetna* was clearly not a *Penn Central* case.

In *Kaiser Aetna*, the United States brought an action against the owners of a marina. The government asserted that the changes that the owners had made to a shallow, landlocked pond in order to create the marina had made it subject to a

navigable servitude. *Kaiser Aetna*, 444 U.S. at 165. The reason given was that the newly fashioned marina was connected to the nearby bay, which was deemed to be part of the navigable waters of the United States. *Id.* at 165-66, 168. “Thus,” so the government contended, “the public acquired a right of access to what was once petitioners’ private pond.” *Id.* at 166; *see also id.* at 168, 170. In the government’s view, a servitude could be obtained without cost to the public because it was, supposedly, the creation of background legal principles governing such waters. *See, e.g., Lucas*, 505 U.S. at 1028-29 (“we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the land owner’s title”) (emphasis omitted). The owners denied the existence of a background servitude and claimed that the government was engaged in an uncompensated taking.

This Court prefaced its ruling with an important caveat. It reminded the government that “navigable waters of the United States” was a term whose meaning varies according to the legal question being asked. *Kaiser Aetna*, 444 U.S. at 170-71. The Court noted that while the concept may define the scope of the federal government’s power to regulate, including its power to regulate the pond, “it does not follow that the pond is also subject to a public right of access,” even were it to contain navigable waters. *Id.* at 172-73. This important categorical distinction between regulation and physical taking underlies much of the reasoning of the case.

Not surprisingly, then, when explaining why it was ruling against the government, the Court noted that the public access that the government was trying to obtain went “so far beyond ordinary

regulation as to amount to a taking.” *Id.* at 178. First, it pointed out that a navigational servitude may be found only when waters “in their natural condition are in fact capable of supporting public navigation” and that in *Kaiser Aetna*, “prior to its improvement, Kuapa Pond was incapable of being used as a continuous highway for the purpose of navigation in interstate commerce.” *Id.* at 175, 178. Second, it observed that under the law of Hawai’i the pond had always been considered to be private property. *Id.* at 179. In effect the Court was saying that the United States could not obtain the desired servitude *gratis*, i.e., on the basis of background legal principles of interstate commerce; if it wanted to impose the servitude, it would have to pay for it. *See id.* at 180. *See also Lucas*, 505 U.S. at 1029 (citing *Kaiser Aetna*).

In the pivotal passage of the decision, the Court reasoned as follows:

In this case, we hold that the “right to exclude,” so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners’ private property; rather, the imposition of the navigational servitude in this context will result in an *actual physical invasion* of the privately owned marina. Compare *Andrus v. Allard*, 444 U.S. 51 at 65-66, 100 S.Ct. 318, at 326-327,

62 L.Ed.2d 210 [1979], with the traditional taking of fee interests in *United States ex rel. TVA v. Powelson*, 319 U.S. 266, 63 S.Ct. 1047, 87 L.Ed. 1390 (1943), and in *United States v. Miller*, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1943). And even if the Government *physically invades only an easement* in property, it must nonetheless pay just compensation. See *United States v. Causby*, 328 U.S. 256, 265, 66 S.Ct. 1062, 1067, 90 L.Ed. 1206 (1946); *Portsmouth Co. v. United States*, 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287 (1922).

Kaiser Aetna, 444 U.S. at 179-180 (emphasis added).

The citations given in that passage, which twice mentions physical invasions, are decisive as to what kind of taking analysis underlies *Kaiser Aetna*. The Court says that a taking would occur because there would be “an actual physical invasion” if public access were appropriated, and its contrast of *Allard* with *Powelson* and *Miller* shows that the Court meant what it said.

Allard was issued only one week before *Kaiser Aetna* and was explicitly decided based on *Penn Central*, which had itself been decided only 18 months earlier. See *Allard*, 444 U.S. at 65-66 (citing *Penn Central* and applying its approach). Significantly, *Allard* disavowed any physical seizure or invasion. See *id.* at 65 (“The regulations challenged here do not compel the *surrender* of the artifacts, and there is *no physical invasion* or restraint upon them.”) (emphasis added). Right there, *Allard* and *Penn Central* should be seen to be

inapplicable to *Kaiser Aetna* and to the “actual physical invasion” the Court found would occur in the “context” of that case. *Kaiser Aetna*, 444 U.S. at 180.

The other two cases of the contrast drawn by the Court, *Powelson* and *Miller*, were decided decades before *Penn Central* and, like *Kaiser Aetna*, both involved actual physical invasion of private land. See *Powelson*, 319 U.S. at 268 (“This case arises out of condemnation by the United States on behalf of the Tennessee Valley Authority of about 12,000 acres of land in North Carolina[.]”); *Miller*, 317 U.S. at 88 (“The United States condemned a strip across the respondents’ lands for tracks of the Central Pacific Railroad[.]”).

It is at this point in *Kaiser Aetna* that the Court cinched its reasoning about the navigational servitude, saying that “even if the Government *physically invades* only an *easement* in property, it must nonetheless pay just compensation.” 444 U.S. at 180 (emphasis added). Tellingly, as support it cited *Portsmouth Harbor* and *Causby*, two cases which concerned the physical imposition of an easement. See *supra* pp. 3-11.

While *Kaiser Aetna* at one point (444 U.S. at 174-75) acknowledges the takings law principles “recently pointed out” in *Penn Central* and says later (*id.* at 178) that the public access claimed by the government is a taking “under the logic” of *Penn Central*’s progenitor, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), *Kaiser Aetna* clearly was not decided on the basis of a *Penn Central* multifactor regulatory takings analysis. It was decided on the principle that a permanent physical invasion is a taking. See *Lucas*, 505 U.S. at 1029.

Despite occasional wording that might suggest otherwise to the Respondents, that was clearly the Court's own view, as may be seen by its contrasting one *Penn Central* case which involved "no physical invasion" with four cases involving physical invasions not unlike that it found in *Kaiser Aetna* itself.

CONCLUSION

For the reasons given above, and contrary to the Respondents' arguments, the Court should decline to find that physical invasions like those alleged here should be analyzed as regulatory takings on the authority of the three cases examined in this brief.

Respectfully submitted,
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PROOF OF SERVICE

I, Rita L. Hemenway of Bateman & Slade, Inc., hereby declare that on this sixth day of January 2021, I have served three (3) true copies of the Brief of Amicus Curiae New England Legal Foundation in Support of Petitioner by priority mail, postage prepaid, addressed as follows:

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Signed under the pains and penalties of perjury,

Rita L. Hemenway

Rita L. Hemenway

NOTARIZED BY:

George D. Bateman

George D. Bateman

My Commission Expires: May 30, 2025

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WORD COUNT CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 4,005 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 6, 2021.

Rita L. Hemenway

Rita L. Hemenway

NOTARIZED BY:

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My Commission Expires: May 30, 2025