Nos. 24-12896 (lead) & 24-12895

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SHAWN BUENDING, ROBERT DOHMEN, THOMAS K. BROWN,
HARRY S. FIELDS, WENDY FIELDS, SHAWN MOORE, AND DAGMAR MOORE,

Plaintiffs-Appellants,

v.

TOWN OF REDINGTON BEACH, FLORIDA, a Florida municipal corporation,

Defendant-Appellee.

PAMELA GREACEN, ARTHUR L. BUSER, JR.,

Plaintiffs-Appellants,

v.

TOWN OF REDINGTON BEACH, FLORIDA, a Florida municipal corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
No. 8:19-cv-01473-VMC-NHA & 8:20-cv-02568-VMC-TGW

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF CONSOLIDATED APPELLANTS PAMELA GREACEN AND ARTHUR L. BUSER, JR., AND SHAWN BUENDING, ROBERT DOHMEN, THOMAS K. BROWN, HARRY S. FIELDS, WENDY FIELDS, SHAWN MOORE, AND DAGMAR MOORE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 through 26.1-3, Pacific Legal Foundation adopts the Certificate of Interested Persons submitted in Appellants' Opening Brief (filed March 17, 2025). Pacific Legal Foundation adds the following attorneys, persons, associations of persons, firms, partnerships, or corporations that may have an interest in the outcome of this case:

Pacific Legal Foundation, proposed amicus curiae

J. David Breemer: Counsel for Pacific Legal Foundation

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation certifies that it has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

Dated: March 21, 2025. /s/ J. David Breemer
J. DAVID BREEMER

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STATEMENT OF THE ISSUE

Whether the Town of Redington Beach ("Town") effected an unconstitutional taking of private property by enacting an ordinance authorizing the public and government to invade and use private beach land?

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pursuant to Federal Rule of Appellate Procedure 29(a), and its motion for leave to file a brief amicus curiae, Pacific Legal Foundation ("PLF") conditionally submits this amicus brief in support of Appellants ("Property Owners" or "Owners"). The brief generally urges this Court to reverse the District Court's judgment that Appellee Town of Redington Beach ("Town") has established that a "background principle" of customary public use of private beaches exists in the Town, so as to justify the Town taking private beaches, without just compensation, pursuant to an ordinance.

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[1] PLF affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than PLF, its supporters, or its counsel made a monetary contribution to its preparation or submission.

Founded in 1973, PLF is a nonprofit, tax-exempt corporation organized under the laws of the state of California for the purpose of engaging in litigation in matters affecting the public interest. PLF is the most experienced and successful public-interest legal organization litigating in defense of constitutionally protected private property rights. PLF attorneys have served as lead counsel in many Supreme Court cases involving the constitutional right to own and use private property and to obtain just compensation when the government interferes with those rights. *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021); *Pakdel v. City & Cnty. of San Francisco*, 594 U.S. 474 (2021); *Knick v. Twp. of Scott, Pa.*, 588 U.S. 180 (2019); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013).

PLF attorneys have particular litigation experience on the issue of customary public beach access in Florida. *See, e.g.*, *Goodwin v. Walton Cnty. Fla.*, No. 3:16-cv-364/MCR/CJK, 2018 WL 11413298 (N.D. Fla. Mar. 6, 2018); *Trepanier v. County of Volusia*, 965 So. 2d 276 (Fla. 5th DCA 2007).

PLF's advocacy for constitutional principles and broad property rights experience provides the Court with a unique and important

perspective that will assist it in deciding whether the district court appropriately found that the Town did not cause an unconstitutional taking by enacting an Ordinance granting the public and government a broad right of access to private land.

FACTUAL BACKGROUND

A. Legal and factual background

The Town of Redington Beach is a small, primarily residential community on the Florida Gulf coast.

The Plaintiffs-Appellants Property Owners own valuable, residentially developed beachfront lots within the Town.[2] The titles to their properties extend seaward to the mean high-water line ("MHWL"). Their titles therefore include ownership of the dry sand beach areas lying between the MHWL and their homes. The beach areas seaward of the MHWL are controlled by the state of Florida, in trust, for public uses. But generally dry beach lands lying inland of the MHWL (areas sometimes

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[2] Shawn Buending and Robert Dohmen bought their home in 2018 for $8.35 million. Thomas Brown purchased his property in the Town in 2017. Wendy and Harry Fields purchased their property in 2004 for $1.7 million. Shawn and Dagmar Moore purchased their property in 2017 for $5.2 million.

called “dry beaches” or “dry sandy land”) are owned by private property owners like those in this case.

Under Florida law, the public may acquire a right to use privately owned dry beach lands under the doctrine of “custom,” if the government proves that a group of people have engaged in a specific “ancient” activity on a specific area of private land, and that such a practice or custom is “uninterrupt[ed],” “free from dispute,” and “reasonable.” *City of Dayton Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974). The government bears the burden to prove the existence of a customary public right on a private beach by establishing all the aforementioned elements of custom in court. *Trepanier*, 965 So. 2d at 289.

In 2018, after the Property Owners acquired their lots, the Town enacted a law, Ordinance No. 2018-03 (the “Ordinance”), which purports to declare a “customary” right of public and government access to private dry beaches in the Town, including on the Property Owners’ lots. The Ordinance specifically claims to “recognize[] and protect[]” the public’s “long-standing customary use of the dry sand areas of all of the beaches in the [T]own for recreational purposes.” Ordinance No. 2018-03 (“Ordinance”) § 1.

The Ordinance defines the "dry sand area of the beach" as the area between the mean high-water line and first line of vegetation. *Id.* Declaring that "[t]he public's long-standing customary use of the dry sand areas of all of the beaches in the [T]own for recreational purposes is hereby recognized and protected," the Ordinance prohibits anyone from "interfer[ing] with the right of the public at large . . . to utilize the dry sand areas of the beach that are owned by private entities" for recreational purposes. *Id.*

The Ordinance lists some specific "recreational" activities that it authorizes on dry beaches, whether private or publicly owned. Permitted use includes walking on the beach, sitting on the sand on a beach chair, towel, or blanket, using a beach umbrella, sunbathing, picnicking, fishing, placing surfing or fishing equipment on the sand for personal use, and building certain sand creations. Ordinance § (1)(d).

The Ordinance also designates "a fifteen (15) foot buffer zone located seaward from the toe of the dune or from any privately-owned permanent habitable structure" located on or adjacent to the beach, which the public may generally not utilize. Ordinance § (1)(c). The Ordinance states that this 15-foot buffer zone is an "accommodation" to

property owners, not a denial of the public customary rights on the area. Importantly, the buffer zone does "not apply to emergency service workers, . . . nor to *other governmental personnel exercising lawful duties* . . . ." *Id.* (emphasis added). Government agents and entities may accordingly enter and occupy private dry beach lands located within 15 feet of private beach homes.

B. Procedure

In 2019, the Property Owners sued the Town, alleging, in part, that the enactment and enforcement of the Ordinance amounted to an unconstitutional taking of the Owners' property rights, in violation of the U.S. and Florida Constitutions. The District Court initially granted judgment in favor of the Property Owners, concluding that the public did not have customary use rights over private dry beaches within the Town, and thus, that the Ordinance constituted an unconstitutional taking of property.

On appeal, this Court reversed, concluding that material fact issues remained as to whether customary public rights exist on dry beaches in the Town under Florida law. This Court therefore remanded the case for further proceedings.

The District Court subsequently held a bench trial on the issue of custom. On August 12, 2024, it issued conclusions of law and findings of fact. The court found that the Town had established all the factual elements needed to prove that the public had access rights on private dry beaches under the doctrine of custom. The court therefore held that the Town's Ordinance did not effect a taking of the Property Owners' dry sand beach lands.

The Property Owners appealed.

SUMMARY OF THE ARGUMENT

When the government passes a law that authorizes the public and/or the government to invade private parcels without compensation, a per se taking of private property instantly and automatically results. *Cedar Point*, 594 U.S. at 152, 155–58. The only general exception is when the government proves that its law simply reiterates preexisting "background principles" of property law. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029–31 (1992).

By authorizing a public and governmental invasion of private parcels without compensation, effectively taking an easement on the land, the Ordinance effects a per se taking of the Property Owners'

property interests. First, the Ordinance causes a per se taking by authorizing members of the public to invade and use the Property Owners' privately owned dry beaches for recreational purposes, at their discretion. The Town argues that this imposition merely implements traditional background principles of Florida's law of custom. But it has failed to establish this defense.

In particular, the Town has failed to show, as it must, that the public use rights the Ordinance imposes on the Property Owners' residential beach lots are "reasonable" burdens. *Trepanier*, 965 So. 2d at 289. The Ordinance drastically interferes with the Owners' fundamental right to exclude non-owners by allowing uncontrolled public access. The law also destroys the Owners' reasonable expectation of exclusivity, which they held when purchasing property prior to the Ordinance.

Moreover, the public burdens the Ordinance imposes on private property are locationally uncertain and unstable and will inevitably shift farther inland onto additional areas of private land over time, as erosion moves the dune-line boundary of the public's customary use area landward. *See id.* at 292–93. The Ordinance's grant of an ever-expanding right in the general public to invade and occupy private beachfront lots

is not reasonable and not a valid custom. The "background principles" takings exception is thus inapplicable to the Ordinance and its public access mandate causes an unconstitutional taking.

Even if the Ordinance's public use provisions are not a taking, a separate provision in the Ordinance takes property by granting private property access to *government* agents. Ordinance § (1)(c). This effectively gives the government an easement on the Property Owners' land, and that is an unconstitutional taking. *Cedar Point*, 594 U.S. at 148 ("the government likewise effects a physical taking when it occupies property"); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002) (A per se taking occurs when "the government occupies the property for its own purposes, even though that use is temporary.").

The Town has not claimed and cannot claim that the provision giving the government itself a broad access right on private lots is an ancient "custom." Therefore, even if the Town were able to prove that the public access/recreation portions of its Ordinance are not a taking because they implement long-standing, state customary law principles (it cannot do so), the portion of the Ordinance authorizing government

access to the Property Owners' lots is a taking. *See, e.g.*, *Hendler v. United States*, 952 F.2d 1364, 1378 (Fed. Cir. 1991).

ARGUMENT

I. The Town has failed to prove that the authorization of public use on the Property Owners' land is a reasonable burden on property rights

A. Authorization of access to private land is a per se taking

The Takings Clause of the Fifth Amendment prohibits uncompensated takings of private property. U.S. Const. amend. V. A per se "taking" occurs when government action results in a physical invasion of private property. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–39 (2005). Indeed, a physical invasion or occupation of property constitutes a taking without regard for the public purpose for the invasion, its size, or its duration. *Cedar Point*, 594 U.S. at 152–53.

Perhaps the most obvious example of a per se, physical taking arises when the government invades private property for its own use. *Tahoe-Sierra*, 535 U.S. at 322. But such a taking also occurs when the government enacts a law or regulation that authorizes third parties, such as members of the public, to enter and use private land. *Cedar Point*, 594 U.S. at 149–50; *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 833 (1987);

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

Authorization of public access to private land is sometimes characterized as the taking of an "easement," *Cedar Point*, 594 U.S. at 150–51. But whether the authorization of access is conceived of as a taking of an easement, or a physical invasion or occupation of property, granting non-owners the right to access private land automatically causes an unconstitutional taking. *Id.*; *Nollan*, 483 U.S. at 834 ("requiring uncompensated conveyance of the [access] easement outright would violate the Fourteenth Amendment"); *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979).

Indeed, it is not necessary that people actually invade property before a law authorizing that action causes a taking. *Cedar Point*, 594 U.S. at 150–51. The government's act of granting a *right* to invade property immediately takes an easement in the land and interferes with the underlying owner's protected property interests. *Id.* at 152 (a taking occurred because the challenged "regulation appropriates a right to physically invade the growers' property" and because the government "appropriated *a right* of access to the growers' property") (emphasis

added); *Kaiser Aetna*, 444 U.S. at 180 (A taking occurs "even if the Government physically invades only an easement in property."); *Chmielewski v. City of St. Pete Beach*, 890 F.3d 942, 950–51 (11th Cir. 2018) (government authorization of public use of private coastal land caused a taking).

Specifically, the governmental authorization of an access right or easement on private land strips the property owner of their right to exclude non-owners. *Nollan*, 483 U.S. at 831–32; *Cedar Point*, 594 U.S. at 150 ("Given the central importance to property ownership of the right to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation."); *Kaiser Aetna*, 444 U.S. at 176; *id.* at 179–80 ("[T]he 'right to exclude,' so universally held to be a fundamental element of the property right, . . . cannot [be] take[n] without compensation.") (footnote omitted); *Nollan*, 483 U.S. at 831–32; *Hendler*, 952 F.2d at 1378.

B. The narrow, "background principles" takings defense and Florida's doctrine of custom

1. Background principles, rules, and burdens

There are few exceptions to the per se takings rules described above. The government may avoid liability for a per se taking if the law authorizing an invasion and taking of property simply implements "longstanding," "pre-existing" background property rules inherent in the property owner's title. *Lucas*, 505 U.S. at 1029, 1031 (To be constitutional without compensation, a limitation on private property that otherwise causes a taking "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."); *Cedar Point*, 594 U.S. at 160.

It is the government's burden to prove that an imposition on private property merely reflects a pre-existing "background principle" of state property law. *Lucas*, 505 U.S. at 1031 (noting that the government "must identify background principles of . . . property law" that restrict the owner's rights); *Goertz v. City of Kirkland, Wash.*, 641 F. Supp. 3d 990, 1000 (W.D. Wash. 2022) ("Defendants . . . bear the burden of establishing that [the challenged] restrictions are a background principle of state property law."); *Cebe Farms, Inc. v. United States*, 116 Fed. Cl. 179, 196

(2014); *Lucas v. S.C. Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992) (state supreme court holds, on remand, that the government "has not persuaded us that any common law basis exists by which it could restrain Lucas's desired use of his land; nor has our research uncovered any such common law principle").

2. The doctrine of custom as a Florida property principle

A law that simply enforces a pre-existing easement on private property that arises under common law may qualify as a "background principle" that evades takings liability. *Lucas*, 505 U.S. at 1029. Under Florida law, an easement may sometimes exist on property under the doctrine of "custom." This doctrine derives from the English legal tradition.

Under that tradition, "particular customs" or practices which people engage in on particular areas may warrant legal recognition if the practice meets certain factual predicates. 1 Blackstone, *Commentaries on the Laws of England* at *74. One asserting a right of use on private property under "custom" bears the burden to prove that a custom exists, and that it is "ancient, reasonable, without interruption and free from dispute." *Tona-Rama*, 294 So. 2d at 78; *see also*, Blackstone, *supra*, at

*76; *Trepanier*, 965 So. 2d at 289 (citing David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 1996 Colum. L. Rev. 1375).

Here, to show that its Ordinance authorizing public use of the Property Owners' lots simply implements pre-existing, background principles of customary law, the Town must prove the public rights authorized by the law meet all the elements of custom. *Trepanier*, 965 So. 2d at 290; *Bell v. Town of Wells*, 557 A.2d 168, 179 (Me. 1989). Importantly, the Town must assert and prove customary rights with specificity. *See* Bederman, *supra*, at 1389–91. It is not enough to assert a generalized public right of "recreation," when that may encompass many different public practices. *Millichamp v. Johnson* (C.P. 1746) (Eng.), *quoted in annotation to Bell v. Wardell*, 125 Eng. Rep. 1131, 1133–34 n.*b* (C.P. 1740) (rejecting an alleged custom to "play rural sports or games"); *see also* Emory Washburn, *A Treatise on the American Law of Easements and Servitudes* 140 (4th ed. Boston: Little, Brown & Co., 1885) ("The objection is in prescribing for 'any' rural sports without defining them."). Rather, the Town must certainly identify each alleged customary

practice, and then satisfy all the elements of custom with respect to that specific activity. *Id.*

The Town thus faces an uphill battle in trying to cast the activities the Ordinance authorizes on private land as a mere recitation of state background principles. The Town must "run the table" on the customary elements for each public right authorized on private land. The failure to prove a single element of custom means the subject activity is not a recognized customary right. This in turn negates the Town's "background principle" defense. *See generally*, David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis) Use of Investment-Backed Expectations*, 36 Val. U. L. Rev. 339, 371–72 (2002) ("[W]hile custom may indeed be a background principle as a general matter, it is critical that courts comply with specific and certain criteria when relying on customary rights as a takings exception. . . . If [custom] remains unrestrained by those traditional bonds, this 'background principle' could completely swallow important and historical private rights in land, including the fundamental right to exclude others from private property.").

C. The Town has not proven that the public rights imposed on the Property Owners' titles are "reasonable"

At a minimum,[3] the Town has failed to prove that the public burdens its Ordinance imposes on private property satisfy the "reasonableness" criteria for recognition of a customary right. As a result, its custom defense fails.

In the law of custom, the test of "reasonableness" requires a court to consider the impact of an asserted public custom on private property rights. Callies & Breemer, *supra*, at 370 ("English cases from Blackstone's time . . . , and those soon after, measure the reasonableness of a custom by gauging its impact on private property rights.); *Mercer v. Denne*, 2 Ch. 534 (1904), *aff'd*, 2 Ch. 538 (Eng. C.A. 1905) (considering custom "so long as they do not thereby throw an unreasonable burden on the landowner"); *Hall v. Nottingham*, 1 Ex. D 1, 3 (1875) (Eng.) (Kelly, C.B.) (noting concern that the custom could "have the effect of taking away from the owner . . . the whole use and enjoyment of his property"). Indeed, "one of the most common bases for declaring a custom

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[3] Amicus agrees with the Property Owners that the Town has failed to prove that the rights authorized by the Ordinance meet *any* of the elements of custom, but chooses to focus its briefing on the criteria of "reasonableness."

unreasonable—and these outnumber the reasonable cases by a fair margin—is that the custom had an unusually burdensome effect on the land over, or upon which, it is exercised." Callies & Breemer, *supra*, at 370.

For multiple reasons, the Town has not demonstrated that the public burdens its Ordinance imposes on the Property Owners' land are "reasonable." First, the Ordinance imposes severe burdens on the most important ownership right in their bundle of property interests; namely, the right to exclude unwanted people from their property and the corollary right to control any authorized access. *Private* property is so only if the owner may keep the public out. *Cedar Point*, 594 U.S. at 149–50. Without the right to exclude others, property is not private; it is public.

When the government converts property that is private in title into property that is public in reality, it foists substantial safety, maintenance, and liability burdens onto the owners for the public good. Here, the Ordinance imposes no limits on when, how often, or how long the public may remain on the Owners' property. Town law allows the public to drink alcoholic beverages on the private dry sand beaches

subject to the Ordinance. The Owners are left to pick up the trash and the liability risk. Imposing such a broad public access burden on the Property Owners' sandy backyards is not reasonable. *Horne v. Dep't of Agric.*, 576 U.S. 350, 361 (2015) ("people . . . do not expect their property . . . to be actually occupied" by others).

Indeed, the Property Owners purchased their property, including the dry sand area of their lots, before the Town enacted the Ordinance, and before it ever attempted to judicially prove that customary public rights exist. The Property Owners accordingly had a reasonable expectation of privately enjoying their beachfront lots. *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) ("[T]he regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those [property] expectations."). The Ordinance drastically interferes with the Property Owners' legitimate expectations of holding and owning *private* dry beach property by allowing anyone, from anywhere, to enter their property and remain for an indefinite duration.

Moreover, the reach of the Ordinance and the burdens it foists on private property will expand and increase over time. This is because the

boundary of the beach area subject to the Ordinance's public customary rights—the dune or vegetation line—is *migratory* and prone to shift farther inland due to natural forces. The Ordinance authorizes public and governmental access between the mean high tide line and the more landward dune or vegetation line. But these dunes are not fixed; they are highly susceptible to landward shifts caused by erosion, wave action, and sea-level rise.

When natural forces push the dune and vegetation inland along Town shores, the public access rights the Ordinance authorizes will also shift farther inland, covering new areas of private property. *Severance v. Patterson*, 370 S.W.3d 705, 724 (Tex. 2012). No one knows exactly how far inland the Ordinance will reach over time. The only certainty is that the invasive public and governmental access rights it authorizes will expand inland and, thus, onto more private lots, as nature changes the beach profile. *See* Rebecca Lindsey, NOAA, *Climate Change: Global Sea Level* (Aug. 22, 2023), https://www.climate.gov/news-features/understanding-climate/climate-change-global-sea-level#:~:text=In%20some%20regions%2C%20the%20increases,higher%20than%20the%20national%20average (NOAA report finds: "In

the western Gulf of America (formerly Gulf of Mexico), for example, sea level rise is likely to be about 16–18 inches higher than 2020 levels by 2050—almost a ½ foot higher than the national average.").

The "customary" rights scheme set up by the Ordinance unsettles contrary property titles and expectations for the foreseeable future, leading to increased conflict. That is not a reasonable encumbrance on property titles. *See Severance v. Patterson*, 566 F.3d 490 (5th Cir. 2012); *Severance v. Patterson*; 682 F.3d 360 (5th Cir. 2012) (concluding that a property owner stated an *unreasonable* seizure claim against a rule allowing a public beach area to shift inland onto private property with vegetation line changes).

The Court should conclude that the Town has not shown that the public rights authorized by the Ordinance on private land are ancient, reasonable customary rights. It should then hold that the Town has failed to prove that the Ordinance merely implements "background" state law principles. As a result, by authorizing public use of the Property Owners' private lots without just compensation, the Ordinance effects a per se taking. *Cedar Point*, 594 U.S. at 152 ("government-authorized invasions

of property—whether by plane, boat, cable, or beachcomber—are physical takings”).

II. The Ordinance causes a taking by authorizing the government to access the Property Owners’ land at its discretion

Even if the Town could show that the public rights the Ordinance authorizes on private property qualify as customary rights that do not cause a taking, the Ordinance still unconstitutionally takes property by authorizing the *government* to access the Property Owners’ dry beach lands.

As previously noted, a taking arises whenever the government gives its own agents a right to invade private property. *Cedar Point*, 594 U.S. at 152 (“government-authorized invasions of property . . . are physical takings requiring just compensation”); *id.* at 148 (the government affects “a physical taking when it occupies property”). Again, the granting of access strips the Property Owners of their right to exclude and takes an easement on their land. *Id.* at 150; *id.* at 158 (discussing the importance of the right to exclude and concluding that as a result, “appropriations of a right to invade are *per se* physical takings”); *see also Kaiser Aetna*, 444

U.S. at 180 (a taking occurs "even if the government physically invades only an easement in property").

Here, Section 1(c) of the Ordinance declares that "governmental personnel exercising lawful duties," Ordinance § 1(c), may enter and occupy private property lying within 15 feet of private homes. The Ordinance imposes no limits on how long "governmental personnel" can remain on private dry sand beach. It sets no limits on how many times the government can enter these private areas, or the manner (for instance, by the use of vehicles) by which they may invade. The Ordinance appears to give government officials unfettered discretion to decide when, how, and where they may enter and station themselves on private beach land.

Regardless of how governmental personnel actually exercise their new, Ordinance-conferred right to access private beach land, the Town's authorization of a right to invade private property is itself a taking. *Cedar Point*, 594 U.S. at 155–58. Due to the government access provision, the Property Owners no longer have the right to exclude government agents from their dry sandy backyards, or the right to control the time and manner of such access. What they have now is a servitude allowing

government personnel to come and leave as they wish. Such a burden on property rights is unconstitutional without just compensation. *Id.* at 155–56.

The Town does not and cannot contend that the authorization of government access on the Property Owners' land is an ancient "customary" right. Thus, there is no "background principles" defense to the government access provision. It too is a per se taking. *Cedar Point*, 594 U.S. at 155–58; *see also Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012).

CONCLUSION

The Court should reverse and remand for further proceedings on the appropriate remedy for the taking of private property affected by the Ordinance.

DATED: March 21, 2025.

Respectfully submitted,

/s/ J. David Breemer
J. DAVID BREEMER

Attorney for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and 11th Cir. R. 32-4, this document contains 4,544 words.

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DATED: March 21, 2025.

/s/ J. David Breemer
J. DAVID BREEMER

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I certify that service on the participants in the case registered with the Court's CM/ECF system will be accomplished by the appellate CM/ECF system.

The following will receive a service copy via first-class U.S. Mail:

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DATED: March 21, 2025.

/s/ J. David Breemer
J. DAVID BREEMER