TESTIMONY OF JOHN ECHEVERRIA
SUBMITTED TO THE HOUSE TRANSPORTATION COMMITTEE
APRIL 14, 2025

On March 26, 2025, I had the opportunity to present oral testimony to the Committee expressing the opinion that addition of trespass claims to the current Vermont Right to Farm legislation would frequently and routinely give rise to valid claims that the State of Vermont has unconstitutionally taken private property rights. I explained that the addition of trespass, which by definition involves a physical entry onto the property of another, would support claims that the government, by immunizing trespassers from liability for their trespasses, would support claims that the legislature has physically taken private property in *per se* violation of the U.S. and Vermont Constitutions. Because my position on this issue has been contested, I thought it might be useful to the Committee if I put in writing my position with respect to the takings problem raised by S. 45.

Following my testimony. Mr. Steve Collier, the General Counsel of the Vermont Agency of Agriculture, generously described my testimony as "compelling," while noting the absence of specific precedent holding that trespass provisions included in right to farm legislation have been held to be takings. Mr. Michael O'Grady, of the Office of Legislative Counsel, responded to my testimony by staring that one legal test for whether a taking has occurred is, "has the government physically invaded the land and taken possession of the land?" Applying that test, he stated, without elaboration, "I don't see that situation here." I respectfully submit that Mr. O'Grady has misstated the relevant test for identifying a potential physical taking in this context and therefore drawn an incorrect conclusion about the likelihood of takings liability.

<u>An Overview of Constitutional Takings Doctrine.</u>

The U.S. Supreme Court has recognized that government regulations and other types of government actions restricting the use of private property may result in takings of property rights. The Court has instructed that in determining whether a use restriction effects a taking, courts should generally apply a multi-factor balancing test focused on the economic impact of the use restriction, the extent of

the restriction's interference with investment-backed expectations, and the character of the government action. *See Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978). For the rare situation where a restriction on use is so severe that it destroys the economic value of a property, the Court has established a categorical takings rule that almost invariably leads to the conclusion that the use restriction effects a taking. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992).

By contrast, the Supreme Court has established a very different, much more expansive test for so-called "physical takings." In the recent case of *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021), the Supreme Court stated that when the government *physically* takes private property, "the Takings Clause imposes a clear and categorical obligation to provide the owner with Just Compensation." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021). The Court explained in *Cedar Point* that government can cause a physical taking in *three* different ways. First, the Court said, "[t]he government commits a physical taking when it uses its power of eminent domain to formally condemn private property." *Id*. Second, it effects a physical taking "when the government physically takes possession of property without acquiring title to it." *Id*. And thirdly, and of most direct relevance to the takings/trespass issue, "the government effects a taking when it occupies property." *Id*.

It is noteworthy that the test identified by Mr. O'Grady does not appear in the *Cedar Nursery* case, the most recent comprehensive explanation of physical takings doctrine by the Supreme Court. Furthermore, the tests identified in the *Cedar Nursery* case are not consistent with the test articulated by Mr. O'Grady. Finally, I have been unable to identify any other reported judicial decision containing the test articulated by Mr. O'Grady.

The constitutional protection against government occupations of private property adopted by the Supreme Court is rooted in the longstanding recognition that "the power to exclude" is "one of the most treasured strands in an owner's bundle of property rights." *Loretto v. Teleprompter Manhattan CATV,* 458 U.S. 419, 435 (1982). *See also Cedar Point Nursery,* 594 U.S. at 150 (observing that "we have stated that the right to exclude is 'universally held to be a fundamental element of the property right,' and is 'one of the most essential sticks in the bundle

of rights that are commonly characterized as property'"), quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179–180 (1979).

The Supreme Court has provided considerable guidance on the scope of the rule that physical occupations are categorical takings of private property. The Court has recognized that government effects a physical taking not only when government itself occupies property, but also when government enacts a law or adopts a regulation authorizing third parties to occupy private property without owner permission. *See, e.g., Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). In addition, the Supreme Court has made clear that physical occupations are categorical takings "whether [they are] permanent or temporary," *Cedar Point Nursery*, 594 U.S. at 153, and "even if they are intermittent as opposed to permanent." *Id*.

Over the years, the U.S. Supreme Court has identified various different types of government actions or government-authorized actions that have produced physical occupation takings, including government airplanes flying through the private airspace above private land, *see United States v. Causby*. 328 U.S. 256 (1946); government permission to the public to use boats on a private lake, *see Kaiser Aetna v. United States*, 444 U.S. 164 (1979); a state law allowing cable companies to install wires on the exterior of a privately-owned apartment building, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); and a state agency order permitting the public to pass across private oceanfront property. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987). In a 2024 decision, the Vermont Supreme Court summarized these cases by stating "[t]he upshot of this line of precedent is that government-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation." *In re DJK, LLC WW & WS Permit*, 323 A.3d 911, 922 (Vt. 2024), quoting *Cedar Point Nursery*, 594 U.S. at 152.

Importantly for present purposes, the U.S. Supreme Court has also repeatedly recognized that government flooding or government-authorized flooding of private property is a *per se* physical occupation taking. In *Pumpelly v. Green Bay Company*, 80 U.S. 166 (1871), one of the Supreme Court's earliest takings cases, the Court held that a farmer presented a valid taking claim when a private company, acting with permission from the State of Wisconsin, built a dam

that created a reservoir flooding the farmer's land. More recently, in *Arkansas Game & Fish Commission v. United States,* 568 U.S. 23 (2012), the Supreme Court held that the United States could be held liable for a taking for adopting a modified operations plan for an Army Corp of Engineers dam which resulted in periodic seasonal flooding of downstream property over a period eight years.

In the *Cedar Point* case, the Supreme Court identified three narrow exceptions to the categorical takings rule for physical occupations. First, the Court said that certain "isolated physical invasions [] not undertaken pursuant to a granted right of access," could be trespasses without necessarily rising to the level of a constitutional taking. 594 U.S. at 159-160. The Court used two examples to illustrate the narrow scope of this exception. First, citing a hypothetical scenario invented by a federal appeals court judge, see *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991) (Plager, J.), the Court said that a government employee who parked a government truck by the side of the road on private property to eat his lunch would not be committing an unconstitutional taking on behalf of the government. Second, the Supreme Court pointed to an older Court precedent, *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922), in which the Court explained that the firing of military guns over a neighboring property two times over the course of two and one half years did not establish a taking, but more persistent firing of the guns over the property could establish a taking.

Second, the Court explained that "government-authorized physical invasions will not amount to takings" if "they are consistent with longstanding background restrictions on property rights." 594 U.S. at 160. Background restrictions on property rights can serve as defenses to takings claims based on either use restrictions or physical takings. *See Lucas* v. *South Carolina Coastal Council,* 505 U.S. at 1028-1029 (stating that the government does not take a property interest when it merely asserts a "pre-existing limitation upon the landowner's title"). In the context of physical occupation takings claims, the *Cedar Point* case explains, one relevant background restriction is the common law privilege that "allow[s] individuals to enter property in the event of public or private necessity." 594 U.S. at 160-161, citing Restatement (Second) of Torts § 196 (1964) (entry to avert an imminent public disaster); § 197 (entry in an emergency situation to avert serious harm to a person, land, or chattels). The *Cedar Point* case states that another

background restriction applicable to physical occupations is the privilege held by law enforcement officers to enter onto private property to execute an arrest or search warrant. *Id*.

Third, the Supreme Court said a government occupation of private property will not be a taking if it is imposed as a condition of the government's grant of some kind of benefit (such as a discretionary permit), provided the government could have declined to grant the benefit without effecting a taking and the condition serves the same police-power objective that would have been served by denial of the benefit. 594 U.S. at 161, citing *Dolan v. City of Tigard*, 512 U.S. 374, 384, 393 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987).[1]

Enactment of S. 45 Would Routinely Result in Physical-Occupation Takings.

As I explained in my oral testimony, given the rules governing physical takings claims laid out by the U.S. Supreme Court, the inclusion of trespass in Vermont's Right to Farm legislation would result in frequent, routine unconstitutional violations of private property rights and generate potentially extensive takings litigation against the State.

As I have described above, takings doctrine draws a sharp line between claims based on use restrictions and claims based on physical occupations. Claims based on use restrictions are generally evaluated using a complex balancing test and, in practice, generally (but not always) fail. By contrast, claims based on

[1] The Vermont Supreme Court generally interprets the Vermont "Takings Clause," Vt. Const. ch.1, art. 2, in accordance with the U.S. Supreme Court's interpretations of the federal Takings Clause, U.S. Const. amend. V. However, the Vermont Supreme Court recently explained in *Gladchun v. Eramo*, 217 Vt. 481, 490 (2023), that "the Vermont Constitution vigorously protects private-property ownership," and that "Vermont's unique character and history" supports "a robust commitment to private-property ownership." Thus, the Vermont Supreme Court might interpret the Vermont Takings Clause as providing more protection for private property rights than the federal Takings Clause in some contexts. However, the U.S. Supreme Court's precedents interpreting the federal Takings Clause are sufficient to demonstrate that amending the Vermont Right to Farm legislation to include trespass would routinely result in unconstitutional takings.

physical occupations are generally held to be *per se* or automatic takings and generally succeed.

Applying this framework to right to farm legislation, granting immunity from nuisance claims restricts landowners' use of their property by limiting their ability to seek relief in court to stop activities that interfere with their use and enjoyment of their land. Accordingly, takings claims based on the nuisance provisions in right to farm legislation should generally be evaluated using the multi-factor balancing test applicable to use restrictions. And under that test, the takings claims will generally fail. In 1998, in *Bormann v. Board of Supervisors*, 584 N.W.2d 309 (Iowa), the Iowa Supreme Court ruled that the nuisance immunity provision in the Iowa right to farm law was an unconstitutional taking. In my view, the *Bormann* case was wrongly decided because the Iowa Court failed to apply the deferential balancing test which applies to claims based on use restrictions. Other state supreme courts have agreed and not followed *Bormann*.

On the other hand, if the Vermont Right to Farm legislation were extended to trespass, the legislation would routinely result in unconstitutional takings under the rules governing physical occupations. A trespass is not merely an interference with the neighbor's use of his or her land, as with a nuisance, but an actual physical occupation – by persons, or by material things – of the land of another. One obvious type of physical occupation that can arise in the agricultural context is farming activity that results in flooding of neighbor's land. In the Aerie Point case, Judge Teachout found that the installation of subsurface drainage resulted in a persistent increase in the volume and velocity of water flowing onto the neighbor's' land. This was a straightforward trespass and amending the right to farm legislation to bar this type of trespass claim on these kinds of facts would clearly result in an unconstitutional taking of private property. If the Right to Farm legislation were changed to bar landowners in similar situations in the future from pursuing a trespass action, the landowners would be forced to suffer a physical occupation of their property and be subjected to unconstitutional takings of their private property.

The U.S. Supreme Court has adopted a common-sense approach for evaluating whether a government authorization of an occupation effects a taking: whether, prior to the action alleged to effect the taking, the owner had the right to

exclude the government and third parties from the property, and then the government took action to eliminate that right. For example, in *Cedar Point Nursery,* involving a takings challenge to a California regulation granting union organizers a right of access to raisin growers' processing facilities, the Supreme Court said there was a taking because, "without the access regulation, the growers would have had the right under California law to exclude union organizers from their property," but then "the access regulation took that right from them." 594 U.S. at 155. *See also Darby Development Company, Inc. v. United States*, 112 F4th 1017, 1034 (Fed Cir. 2014) (ruling that landlords stated a physical occupation taking claim based on a government order declaring a nationwide moratorium on evictions during the covid pandemic because, "absent the Order, they could have evicted (or 'excluded' from their property) at least some non-rent-paying tenants," and they "alleged that the Order, by removing their ability to evict non-rent-paying tenants, resulted in government-authorized invasion, occupation, or appropriation of their property") (internal quotations omitted

Applying this analysis to the *Aerie Point* case and other similar cases in the future, it is apparent why amending the Right to Farm legislation to include trespass would result in an unconstitutional taking. Under current law, property owners subjected to persistent flooding as a result of neighboring farming activities can sue to protect their property by asserting a trespass claim, as the plaintiffs did in the Aerie Point case, If trespass were added to the Right to Farm legislation, the legislature would take away the neighbors' "right to exclude" and unconstitutionally violate their private property rights.

Trespass issues might arise in other contexts. For example, a farmer might store agricultural equipment on a neighbor's land or build a new fence encroaching on the neighbor's land and devote the neighbor's land to the farmer's agricultural use. The literal language of S. 45 as passed by the Senate suggests that the farmer could be exempt from trespass liability in these circumstances as well.

If the Right to Farm legislation were amended to include trespass, neighbors subjected to unconstitutional occupation of their properties would have the option, if they had the financial resources to do so, to sue the State of Vermont for financial compensation, on the ground that implementation of the right to farm law violated their private property rights. After the landowners spent a lot of money

on lawyers, and the Attorney General's office spent a great deal of time and effort defending against the claim, landowners would likely receive large (but difficult to predict in advance) financial payments from the State. Ultimately, the taxpayers would end up paying the tab for the legislature's decision to create a right to farm regime that routinely violates the private property rights of landowners.

Commonly, perhaps in the majority of cases, landowners subject to flooding and other actions resulting in physical occupations of their private property would lack the financial resources to defend their constitutional rights in court. Neighbors could complain to farmers about the physical invasions of their property, but farmers could point to the trespass immunity in the Right to Farm legislation as justification for continuing their practices. The neighbors would be effectively powerless to protect their land. Vermonters would suffer actual constitutional violations of their private property rights, but they could do nothing about it. Setting aside the constitutional dimensions of this issue, amending the Right to Farm legislation to include trespass would fundamentally change the rules governing neighborly relations among Vermont landowners.

As Steve Collier has observed, there appear to be no reported cases specifically holding that trespass provisions in Right to Farm legislation in other states have resulted in physical takings. But this is hardly surprising given that apparently only two states in the Nation have taken the unusual step of adding trespass to their right to farm legislation. The more important point is that the general doctrine governing physical occupations, and the precedents applying this doctrine to various different kinds of occupations, including occupations by flooding, support the conclusion that adding trespass to Vermont's right to farm legislation would subject landowners to unconstitutional takings of private property in the future.

As discussed, the Supreme Court's *Cedar Point* decision recognizes that certain isolated trespasses will not rise to the level of unconstitutional occupation of private property. But every significant, persistent trespass of private land that might give rise to actual litigation would almost certainly represent an unconstitutional taking. Thus, amending the Right to Fram legislation to include trespass would routinely – and as a practical matter consistently – violate private property rights.