TESTIMONY OF JOHN ECHEVERRIA
BEFORE THE SENATE TRANSPORTATION COMMITTEE
APRIL 4, 2025

My name is John Echeverria. Thank you for the opportunity to testify in opposition to S. 4.

Ten years ago, my wife Carin Pratt and I bought a farm on the Strafford-Tunbridge border, known locally as the Dodge Farm after the former longtime owners. We bought this beautiful farm, which was seriously threatened with subdivision, for our own use and enjoyment, to conserve the land and its traditional farming and forestry activities, to restore and preserve the historic farmstead, and to support public recreation.

One of the first things we did after we bought the farm was to contact the Upper Valley Land Trust to arrange a donation of a conservation easement protecting 99% of the property. We also told the Tri-Town Travelers that snowmachines are welcome on our private fields and in our private woods on the Dodge Farm. Today we encourage the public to use the property for snowmachining, hunting, hiking, skiing, snow shoeing and horseback riding. Private trails on the Dodge Farm appear twice in the *Tunbridge Walks* book.

Unfortunately, for nearly three years we have been in a legal dispute with the Town of Tunbridge about whether we have the right to determine whether and how to maintain two legal trails crossing the Dodge Farm or if the Town holds this authority.

I will make three points about S. 4 and offer one comment relating to legislative timing.

First, S. 4 would dramatically change Vermont law and seriously interfere with the ability of Vermonters to manage their private property. Today, based on our reading of the law, Title 19 of the Vermont statutes clearly denies municipalities the authority to maintain and repair legal trails crossing private land. The statute mandates that towns maintain class 1, 2, and 3 roads; grants towns discretionary authority to maintain class 4 roads; and then conspicuously omits any mention of town authority to maintain or repair legal trails. The towns' lack of authority to maintain legal trails is also demonstrated by the fact that **the legislature once did grant towns the authority to maintain legal trails, but in 1986 the legislature eliminated this authority**. Because towns lack the authority to maintain legal trails, the owners of the lands crossed by legal trails necessarily hold the right to determine whether and how to maintain legal trails crossing their land.

In accordance with the legislature's decision to not confer trail maintenance authority on towns, **the Town of Tunbridge, over the nearly 40 years since the Town first created legal trails, has never – I repeat never -- maintained the legal trails in the town**. Instead, in accordance with Vermont statute, Tunbridge landowners have made all the decisions about whether and how to maintain the legal trails.

Tunbridge landowners exercising their authority to decide whether and how to maintain legal trials have actively maintained some of the trails, either by themselves or by giving permission to volunteers to do so. Landowners have periodically cleared legal trails of fallen trees or corrected erosion. When a culvert on the Baptist Hill Trail on the Dodge Farm became clogged, the snowmachine club asked for and received our permission to fix it, with no involvement whatsoever by the Town.

At the same time, landowners in Tunbridge have exercised their authority over legal trail maintenance by deciding **not to maintain** some

trail segments. For many years probably decades before we arrived on the scene, the Dodges did not maintain a portion of the Baptist Hill Trail that cuts through the cow pasture on the Dodge Farm, and we have continued this practice. In another part of Tunbridge, the late Euclid Farnham and his widow Priscilla have for many years **not maintained** a legal trail that passes through (literally) the ruins of their old barn and runs down their narrow driveway. And, more recently, we have decided to cease maintaining a portion of the Orchard Trail passing through the Dodge Farm farmstead, which traditionally has been used for walking, but which the Town now proposes to open to bicycles, including e-bikes.

There is nothing strange or unusual about the fact that under Vermont law some legal trails may be regulated for certain activities but may not be maintained. Class 4 roads are legally open to the public for all highway uses. But towns are under no obligation to maintain class 4 roads and some towns choose not to maintain class 4 roads. The situation is the same with legal trails, which are not part of the town highway systems, except that the decision whether or not to maintain the trails rests with the landowners.

My wife and I have been publicly criticized for exercising our legal right to decide whether and how to maintain legal trails on our land. But we have acted in accordance with state law and in the same fashion that landowners with legal trails in Tunbridge have acted for as long as legal trails have existed in the town.

S. 4 would dramatically change the law by conferring on towns new authority to enter onto private property for the purpose of maintaining and repairing legal trails. This change in the law would seriously interfere with the ability of Tunbridge landowners to live and work on their property. For example, repairing and opening up the Baptist Hill Trail for recreation would literally destroy the viability of

the grazing operation on the Dodge Farm. Likewise, it would seriously undermine the Farnhams' ability to use and enjoy their farmhouse.

I am most familiar with Tunbridge, but there are many other communities in Vermont where landowners, in accordance with current law, determine whether and how to maintain legal trails. Stripping landowners of this well-established legal right would cause serious disruption to properties, businesses and personal lives.

I am aware that the Vermont League of the Cities and Towns presented testimony to the Committee in support of S. 4 which painted a very different picture of how legal trials are currently being managed in Vermont, based in part on a VLCT town survey. However, I found it impossible to reconcile the statements in the VLCT testimony with the version of the VLCT's survey report which I have, which indicates that many towns, like Tunbridge, follow current law and play no role in trail maintenance. I am attaching to this testimony a letter to VLCT about its testimony; I have previously provided a copy of the VLCT survey report directly to the Committee.

Second, S. 4 would take private property rights from hundreds of property owners across the State of Vermont in violation of the United States and Vermont Constitutions. Apart from the practical harms S. 4 would inflict on landowners, S. 4 would result in an unconstitutional "taking" of Vermonters' private property rights by granting town officials a new authority **to physically invade private land** for the purpose of conducting trail maintenance.

Under current law, towns cannot enter onto private lands to perform trail maintenance because they lack the statutory authority to do so. S. 4 would authorize towns to enter private property at times of their choosing for the purpose of doing trail maintenance. This is a straightforward unconstitutional taking of private property rights.

The U.S. Supreme Court has stated that "the right to exclude" is one of the "most treasured" aspects of private property ownership. The Court also has said that an unwelcome physical invasion of private land by government is unconstitutional regardless of whether it is temporary or permanent, continuous or intermittent. And a government invasion of private property to achieve some particular purpose is a taking even if the government already has the authority to enter the property for some other purpose. I have described the constitutional problem with S.4 in greater detail in a memorandum addressed to the Senate Transportation Committee attached to this testimony.

I hope and trust, especially in this difficult period in our Nation's history, when constitutional rights are hanging by a thread in Washington, D.C. and across the country, the Vermont legislature will strive to avoid enacting legislation that would violate constitutionally protected private property rights.

Third, S. 4 would undermine the landowner goodwill that is crucial to Vermont's recreational trails system and ultimately threaten the existence of the system itself. There are reportedly about 8,000 miles of recreational trails open to the public in Vermont. Approximately 75% of these miles are entirely on private land. As many have recognized, private landowners who make their land available for public recreation **deserve support** from the public and the State of Vermont. Beyond that, it is a **practical necessity to support landowners in order to preserve landowner goodwill** and ensure the continued existence of the trail system.

S. 4 goes in the wrong direction by attacking the private property rights of many landowners who have legal trails on their land -- but who also grant the public recreational access to their private property. More generally, if S. 4 were enacted, and private

landowners came to understand that State officials and recreation advocates were willing to undermine private property rights to promote recreation, landowners across Vermont would think twice about continuing to allow public access to their private land and setting themselves up as targets for the next possible property rights grab. In sum, S. 4 would threaten the entire system of recreational trails in Vermont by undermining the tradition of respect for and cooperation with landowners that the system depends on.

Finally, this year is not the right year to proceed with S. 4.

First, the legislature should follow its traditional policy of not attempting to amend a statute, the correct interpretation of which is under consideration in a pending court case. We filed suit in the Tunbridge case in June 2022, nearly three years ago, seeking judicial confirmation of our reading of Title 19. In the last legislative session, a bill similar to S. 4 was introduced in the House (H. 370). I understand that that bill did not move in part based on the legislature's policy against legislating on statutory questions pending before the courts. Since then, our case has gone to the Supreme Court and we now, finally, are waiting for a decision on the merits from the Superior Court. At this point, there is no good reason not to wait to learn how the courts interpret the statute. Indeed, for the legislature to proceed with this bill now would create a serious risk of wasting the time and effort of the judiciary and/or the legislature.

Second, the legislature should follow its traditional policy because it could do a better job of legislating after the Court issues its decision in the case. However the case comes out, Judge Dickson Corbett will publish an opinion analyzing in detail the numerous sections of Title 19 at issue in the case. The Court's decision will be

helpful to the legislature in making well-informed choices about what if any changes to make to different provisions of Title 19.

Finally, the legislature should consider waiting so that better information can be gathered about legal trails. If the legislature had more information about legal trails across the state, the legislature could better understand how S. 4 or other potential legislation would affect property owners and outdoor recreation, as well as constitutionally protected property rights. The testimony the Committee has received about the VLCT town survey is problematic for the reason I have stated. In addition, VLCT presented no information about the legal trails in **the three-quarters of the towns** with legal trails that did not respond to its survey. Formation of a study committee to fill this and other information gaps would be more sensible than the enactment of S. 4 this year.

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Thank you again for the opportunity to testify. I will be happy to answer any questions you may have.

John Echeverria
232 Justin Morrill Memorial Highway
Strafford, Vermont 05072
February 23, 2025

VIA EMAIL AND REGULAR MAIL

Josh Hanford
Director, Intergovernmental Affairs
Vermont League of Cities and Towns
89 Main Street
Montpelier, VT 05602

Re: S. 4 Testimony

Dear Mr. Hanford,

I am writing regarding your testimony on S. 4 before the Senate Committee on Transportation on February 18, 2025. Your testimony inaccurately described the results of a VLCT survey of municipalities regarding legal trails, compounded one serious error in the VLCT survey report, and failed to explain why you think the survey results can justify stripping property owners of their legal right to determine whether and how to maintain legal trails crossing their private lands. I base these comments on my review of the VLCT survey report submitted as an exhibit to a motion filed by the Town of Tunbridge on November 15, 2024, in the pending litigation between me and my wife and the town.

As you know, there are 247 municipalities in the State of Vermont. According to data compiled from town highway mileage maps by the Vermont Agency of Transportation, 157 of these municipalities (64%) have at least one legal trail.

The League states in its survey report that it sent a survey questionnaire to the 157 municipalities with at least one legal trail. According to the copy of the report I have, 42 municipalities responded to the survey. (In your testimony before the Committee you stated that 45 municipalities responded to the League's survey questionnaire; I cannot explain this discrepancy.) 42 is 27% of 157, meaning that 73% of municipalities in Vermont with at least one legal trail did *not* respond to the League's survey. Thus, for all the survey data show, many if not most of these communities may be respecting the existing statutory

limits on municipal authority and not attempting to maintain trails crossing private lands. Certainly, that is the case with the Town of Tunbridge, which did not respond to the survey and has acknowledged in the ongoing legal case that it has *never* conducted trail maintenance since legal trails were established in the town nearly 40 years ago.

You stated in your testimony that 44 of the 45 municipalities responding to the survey are "actively maintaining" legal trails in the municipalities, but that statement is not supported by the survey report. The questionnaire posed the following question: "What kinds of maintenance work are performed on legal trails? Whether by the municipality or other organizations?" By my count, at least a dozen municipalities, and perhaps as many as half of the municipalities, responded to the survey by saying they do not maintain legal trails (or they are unaware whether maintenance is being conducted), stating: "None at this time;" "None;" "No maintenance performed;" "Unsure;" "Maintained by others;" "None;" "None;" "None;" "Braintree does not conduct any maintenance work to trails;" "No maintenance currently;" "Very little is done by the municipality;" "None. The Town doesn't conduct any maintenance;" "The town does not maintain these trails or bridges;" "No maintenance work is done except by private landowners living on trail or by VAST in very limited sections. The Town does no maintenance;" "Little maintenance performed;" "Unknown, but none formally." Thus, contrary to your testimony that virtually every municipality responding to the survey is conducting maintenance of legal trails, a very substantial number of the limited set of municipalities responding to the survey explicitly stated that they do *not* maintain legal trails.

As to the error in the survey report compounded by your testimony., the survey report states the number of legal trails in the Town of Strafford is "10." This is plainly mistaken; the Strafford mileage map identifies a single legal trail in the town, which is 0.45 miles in length. In your testimony you refer to 10.45 miles of legal trails In Strafford. The source of this figure is a mystery, but it too is plainly incorrect. Thus, your testimony greatly exaggerates the significance of the legal trails issue as it relates to Strafford. I am not familiar with the other municipalities you highlight in your testimony and therefore I cannot comment on the accuracy of your estimates of the mileage of legal trails in the other municipalities.

The example of Strafford is telling because it illustrates that, at least in some communities, the mileage of recreational trails created through voluntary partnerships with private landowners far exceeds the mileage of legal trails. According to the town website, the Strafford Trail System consists of 26 miles of trails, "most" of which are located on

private lands with landowner permission. The 0.45 mile legal trail segment in Strafford has been incorporated into the Town's voluntary trail system, meaning that the legal trail segment would be essentially useless for recreational purposes but for the physical trail's continuation on each end onto private lands as a result of grants of landowner permission. Legislative action designed to assert exclusive town control over the 0.45 mile of legal trail in Strafford would be pointless for the purpose of promoting recreation and might well undermine Strafford's successful trails system by alienating the landowners whose voluntary generosity makes the trail system possible.

Finally, your testimony fails to explain what you believe to be the significance of the number of towns that you assert currently are (and are not) attempting to exercise maintenance authority on the legal trails in their communities. The pending legal question in the court case is whether municipalities have the authority to determine whether and how to maintain legal trails crossing private lands under Vermont law. If municipalities lack this authority under state statute, as we believe to be the case, municipalities cannot properly claim the ability to manufacture trail maintenance authority by unilaterally acting in excess of their statutory authority.

I am copying members of the Senate Transporatation Committee and cosponsors of S. 4 on this letter.

Sincerely,

John Echeverria

Cc: Senate Transportation Committee
Cosponsors of S. 4

MEMORANDUM

To Senate Transportation Committee
From John Echeverria
Date: March 7, 2025
Re: S. 4 Would Result in Unconstitutional Takings of Private Property

This memorandum explains why S. 4 would result in unconstitutional takings (or expropriations) of private property under the U.S. and Vermont Constitutions.[1] Given that there are over 500 miles of legal trails in Vermont, S. 4 would likely result in takings of private property rights from hundreds of Vermont landowners.

The Basics of Constitutional Takings Doctrine.

The U.S. Supreme Court has recognized that government regulations and other types of government action restricting the use of private property may result in takings of property rights. The Supreme 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 the property, the Supreme 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 U.S. Supreme Court has established a very different standard for so-called "physical takings." 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 Supreme Court has said that

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[1] The "Takings Clause" of the U.S. Constitution states: "Nor shall private property be taken for public use, without just compensation." U.S. Const. V. The Takings Clause of the Vermont Constitution states: "That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money." Vt. Const. ch.1, art. 2. The Vermont Supreme Court generally interprets the Vermont Takings Clause in accord with U.S. Supreme Court precedent interpreting the federal Takings Clause. However, the Vermont Supreme Court 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. However, the U.S. Supreme Court's precedents interpreting the federal Takings Clause are sufficient to demonstrate that S. 4 would result in an unconstitutional taking.

government can effect a physical taking in several different ways. First, "[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 lastly, and of most direct relevance to the unconstitutionality of S. 4, "the government effects a taking when it occupies property." *Id.*

The constitutional protection against government occupations of private property 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); *Echeverria v. Town of Tunbridge*, 325 A.3d 98, 105 (Vt. 2024) (observing that "[o]ne of the main rights attaching to property is the right to exclude others"), quoting *State v. Wood*, 148 Vt. 479, 486 (1987), in turn quoting *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978).

The U.S. 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, such as by building a project that floods private land, *see United States v. Cress,* 243 U.S. 316 (1917), but also when government enacts a law or adopts a regulation authorizing third parties to occupy private property without owner permission. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (government order allowing the public to pass through private beachfront property). In addition, the Supreme Court has made it 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.*

In the recent case of *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021), the Supreme Court identified three narrow exceptions to the categorical takings rule for physical occupations. First, the Court said that "trespasses," which the Court defined as "isolated physical invasions [] not undertaken pursuant to a granted right of access," are not takings. *Id.* at 159-160 (citing a "truckdriver parking on someone's vacant land to eat lunch," see *Hendler v. United States*, 952 F.2d 1364, 1377 (Fed. Cir. 1991), as "an example of a mere trespass").

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 Nursery* 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 Nursery* 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 that 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).

Enactment of S. 4 Would Result in a Physical Occupation Taking.

Based on the rules governing physical takings claims laid out by the U.S. Supreme Court, it is clear that the enactment of S. 4 would effect a categorical physical occupation taking. Vermont landowners whose properties are crossed by legal trails hold fee simple interests in the lands beneath the trail paths. S. 4 would authorize town officials, or persons to whom towns delegate their authority, to invade these private lands indefinitely for the purpose of conducting maintenance activities on the lands. The fact that the invasions would be intermittent does not alter the conclusion that the invasions would be unconstitutional takings.

The 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).

So too in this case: Vermont property owners can now bar town officials or their agents from entering onto their private lands subject to legal trails because Title 19 of the Vermont statutes does not confer authority on towns to maintain legal trails and, therefore, any such entry is unauthorized and unlawful. If S. 4 were enacted, municipalities would become empowered to enter and occupy private property for the purpose of doing trail maintenance. The result is an obvious physical occupation taking.

None of the three exceptions to the categorical liability rule for physical takings identified in *Cedar Point Nursery* applies. Municipal trail maintenance pursuant to a new, specific legislative authorization would obviously not be a "mere trespass." There is no relevant background restriction on Vermont property rights that gives municipal officials a privilege to invade private property to conduct maintenance and, in any event, since 1986, Vermont statutes have reflected the legislature's clear decision to deny municipalities the authority to maintain legal trails. And S. 4 does not purport to require property owners to accept a physical invasion of their land as a condition of receiving some benefit conferred on them by the State.

Finally, it is of no consequence for the purpose of the takings analysis that municipalities currently possess the legal authority to regulate public recreational activities on legal trails. Assuming this municipal authority is equivalent to an easement, the easement would be limited in scope. Conferring a new authority on municipalities to enter private lands subject to trails for the purpose of conducting trail maintenance would require the creation of an additional easement. *See Preseault v. United States*, 100 F.3d 1525, 1550 (Fed Cir. 1996) (ruling that federal legislation permitting use of railroad easements as recreational trails effected a taking, stating: "The taking of possession of the lands owned by the [plaintiffs] for use as a public trail was in effect a new easement for that new use, for which the landowners are entitled to compensation."); *Smiley First, LLC v. Department of Transportation*, 492 Mass. 103, 116 (2023) (ruling that easement condemned by Massachusetts transportation agency for relocation of railroad facilities displaced by road construction did not encompass project to construct test track and a new building for storage of railway vehicles, and therefore the new project involved an "additional taking" for which compensation was required); *Keokuk Junction Ry. Co. v. IES Industries, Inc.*, 618 N.W.2d 352 (Iowa 2000) (public easement acquired for highway construction purposes did not permit construction of electric power lines in the easement right-of-way without payment of additional compensation).

Conclusion

For the foregoing reasons, it is clear that S. 4 would effect an unconstitutional taking of private property rights. If you have any questions about this analysis, or if I can provide additional information that would be useful to you, please do not hesitate to contact me.