No. 25-1426

In the Supreme Court of the United States

CLEMENTE PROPERTIES, INC., ET AL.,
Petitioners,
v.
PEDRO R. PIERLUISI-URRUTIA,
GOVERNOR OF PUERTO RICO, ET AL.,
Respondents.

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

BRIEF OF THE INSTITUTO DE LIBERTAD ECONÓMICA PARA PUERTO RICO AND MANHATTAN INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Puerto Rico took the trademark of baseball legend Roberto Clemente to generate roughly $15 million in revenue. The Fifth Amendment protects property "without any distinction between different types." *Horne v. Dep't of Agric.*, 576 U.S. 350, 358 (2015). But the First Circuit refused to apply *per se* principles that would ordinarily apply to an appropriation of a property right—all because the Clementes are seeking redress for a taking of their intangible property rights. The lower court endowed Puerto Rico with the sovereign immunity of the states and held that the Lanham Act did not properly abrogate that immunity—even though "it is difficult to see how the same inherent sovereign immunity that the States enjoy in federal court would apply to Puerto Rico." *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339, 354 (2023) (Thomas, J., dissenting). Accordingly, the questions presented are:

1. Whether the Fifth Amendment exempts intangible property from the *per se* rules that govern takings of tangible property.

2. Whether Puerto Rico enjoys any form of immunity from suit in federal court and, if so, whether the Lanham Act abrogates that immunity.

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INTEREST OF *AMICI CURIAE*[1]

The Instituto de Libertad Económica para Puerto Rico (ILE), also known as the Puerto Rico Institute for Economic Liberty, is a nonpartisan public policy foundation dedicated to advancing individual liberty, the rule of law, property rights, and limited, accountable government. ILE's mission includes identifying and removing public-sector barriers so all Puerto Ricans can prosper under a free-market-based system, achieve their goals, and live the kind of lives they value.

The Manhattan Institute (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate ideas that foster greater economic choice and individual responsibility. MI has long sponsored scholarship and filed briefs defending constitutional protections for private property and economic liberty as foundations of a free society.

Amici share a conviction that secure property rights are inseparable from economic liberty, and that constitutional limits on government appropriation of private value must be real rather than nominal. The decision below withdraws the Constitution's categorical protection from an entire class of property: the intangible assets in which much modern economic value resides. And it does so in Puerto Rico, where confidence in the security of property is essential to the island's economic growth. *Amici* supply the historical and property-theory context to demonstrate that the First Circuit's tangible/intangible line is a modern invention, not part of our constitutional inheritance.

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[1] Counsel for all parties received timely notice of *amici*'s intent to file this brief. No counsel for any party authored any part of this brief, and no person or entity other than *amici* made a monetary contribution to fund its preparation or submission.

SUMMARY OF ARGUMENT

The Fifth Amendment protects "private property." It does not say "physical property," and nobody in the founding generation would have read it that way. Blackstone devoted a chapter of his *Commentaries* to the rights of things to "incorporeal hereditaments"—franchises, ways, commons, and other rights that cannot be seen or touched, yet were property in the fullest sense. 2 William Blackstone, *Commentaries* *20. Madison defined the term the same way: property "in its larger and juster meaning . . . embraces every thing to which a man may attach a value and have a right," and even in its narrow sense it denotes dominion exercised "in exclusion of every other individual." James Madison, *Property*, Nat'l Gazette (Mar. 29, 1792). When the Founders constitutionalized "private property," incorporeal property was ordinary property.

The first century of American takings law honored that understanding. Governments condemned toll franchises, contract rights, easements, and even corporate stock—but only as property, through eminent domain, upon just compensation. This Court dismissed the supposed line between corporeal property and franchises as "a refinement which has no foundation in reason," *W. River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 533 (1848), and later confirmed that the government "may retake" a franchise "as it may take other private property, for public uses, upon the payment of just compensation," *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 341 (1893). Nineteenth-century state courts repeatedly applied the same principle. The historical question was never whether the thing taken could be touched but, rather, whether a vested property right had been appropriated.

A trademark is such a right. Its value is the legally protected power to control commercial association—to license the mark, to exclude unauthorized users, and thereby to preserve the goodwill the mark embodies. For a mark, the right to exclude unauthorized commercial uses is not incidental to the property; it is the practical core of the property right. Puerto Rico is alleged to have appropriated exactly that. It enacted laws placing the Roberto Clemente mark on government-issued license plates and registration tags, charged motorists for them, and routed roughly $15 million into a government fund—over the owners' objection and without paying a cent. Pet. 6–7. Under this Court's precedents, government appropriation of property triggers a *per se* duty to compensate. *See*, *e.g.*, *Horne v. Dep't of Agric.*, 576 U.S. 350, 358 (2015); *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021).

The court below exempted intangible property from that rule. *Amici* do not ask this Court to extend the Takings Clause to new forms of property; the historical rule already covered incorporeal property. Our request is to reject a modern, atextual carve-out that strips old protections from modern forms of property.

This Court's review is more urgent because the Commonwealth insists that it cannot be made to pay at all. The court below held that Puerto Rico enjoys the same sovereign immunity as do the states, and that the Lanham Act does not abrogate it—and it avoided deciding whether immunity defeats the takings claim. Pet. i, 25. If that decision stands, governments will be able to appropriate and monetize trademarks, then interpose immunity against every damages remedy. That would reduce property rights to mere formalities—which alone makes this petition certworthy.

ARGUMENT

I. PUERTO RICO TOOK THE CORE PROPERTY RIGHT IN THE CLEMENTE MARK: THE RIGHT TO EXCLUDE

The threshold takings rule asks whether a vested property right has been appropriated. Answering that question here requires a precise understanding of what a trademark is and what Puerto Rico allegedly did. The court below treated the mark as if it were a mere sign whose use by others leaves the owner undisturbed, while the complaint describes a government program built on that sign's legal exclusivity.

A trademark is not merely a word, name, or image. It's a legally protected relationship between a mark and its owner: the exclusive right to use the mark in commerce, the right to license that use on the owner's terms, and the right to exclude everyone else—all in service of the goodwill the mark embodies. That right long predates the Lanham Act. The common law recognized the right to adopt and use a mark to distinguish one's goods "to the exclusion of use by all other persons." *Trade-Mark Cases*, 100 U.S. 82, 92 (1879). Trademarks "were protected at common law and in equity at the time of the founding of our country." *Matal v. Tam*, 582 U.S. 218, 224 (2017). And trademark protection has always run to goodwill: the mark is the vessel, while the goodwill is the cargo. *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 413 (1916); *see also generally* Adam Mossoff, *Trademark as a Property Right*, 107 Ky. L.J. 1 (2018).

Because exclusivity is the point of a trademark, exclusivity *is* the property. "If the law will not protect one's claim of right to exclude others from using an alleged trademark, then he does not own a 'trademark,' for that which all are free to use cannot be a trademark." *In re Deister Concentrator Co.*, 289 F.2d 496, 501 n.5 (C.C.P.A. 1961). This Court has put the point in constitutional terms. "The hallmark of a protected property interest is the right to exclude others." *College Savings Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 673 (1999). That's why the Lanham Act's infringement provisions protect "property": the owner of a mark "can exclude others from using" it. *Id.* (citing *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 185–86 (1988) ("Trademark law, like contract law, confers private rights, which are themselves rights of exclusion.")). And the property does not stop at the mark itself: "The assets of a business (including its good will) unquestionably are property." *Id.* at 675. Nor is paying for such value novel. When the government's temporary wartime seizure of a laundry kept its owner from exploiting the customer "trade routes" the business had built, this Court required compensation for the lost going-concern value. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 11–16 (1949).

Goodwill is where this case's stakes are most concrete. The Roberto Clemente mark is valuable because of what the name means—a standard of excellence on the field and humanitarian service off it—and because the family has spent decades protecting that meaning: registering the mark, licensing it selectively, and policing unauthorized uses. Pet. 5–6. The mark trades on trust; the public assumes that what bears the name carries the family's authorization. When the Commonwealth of Puerto Rico put the name on a mandatory fee, and issued vehicle permits listing the charge beside a "Roberto Clemente Fund" unaffiliated with the family, Pet. 7, it spent that trust as if it were its own.

Unauthorized use of such a mark—by the government or anyone else—doesn't merely copy a word. It appropriates and degrades the association the owners built.

This Court's treatment of trade secrets, the closest intangible analogue, removes any remaining doubt. *Ruckelshaus v. Monsanto Co.* held that trade secrets are property protected by the Takings Clause despite their "intangible nature," 467 U.S. 986, 1003–04 (1984), because American law's conception of property "extends beyond land and tangible goods and includes the products of an individual's 'labour and invention.'" *Id.* at 1002–03 (quoting 2 William. Blackstone, *Commentaries* *405, and citing John Locke, *The Second Treatise of Civil Government* (1690) ch. 5). The citation to Locke was no ornament. Indeed, it grounded the right to exclude in the reason the right exists: a person's property in the fruits of his own labor. And *Monsanto* located the constitutional injury exactly where trademark owners feel it. "With respect to a trade secret, the right to exclude others is central to the very definition of the property interest," and the "economic value of that property right lies in the competitive advantage" that exclusivity confers—so government-sanctioned use by others destroys the property even though the underlying information "retain[s] usefulness" for the owner. *Id.* at 1011. For land, the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *see also* Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730 (1998) (the right to exclude is "the sine qua non" of property). For a mark and its goodwill, the right to exclude unauthorized commercial uses is not merely one stick in the bundle but the practical core of the property right.

Now consider what the complaint alleges Puerto Rico did with that asset. In 2021, the Commonwealth enacted two joint resolutions. The first required every driver acquiring a new license plate to pay an additional $21 for a plate bearing Roberto Clemente's image and name, his number (21), and the words "anniversary" and "3,000 hits." Pet. 6; App. 6a. The second added a mandatory $5 surcharge for a registration tag bearing the same mark. Pet. 6; App. 6a. The proceeds flowed to a "Roberto Clemente Sports District Fund" administered by the Commonwealth's Treasury Department for the exclusive use of its Department of Sports and Recreation. Pet. 7; App. 6a–7a. The Clemente family, whose decades of stewardship and licensing are why the registered mark retains its extraordinary association with excellence and generosity, told the governor that it had never authorized this use. He signed the resolutions anyway. Pet. 6–7. The program allegedly generated about $15 million, none of which went to the mark's owners. Pet. i, 7.

That's a far cry from regulation; it's appropriation. After all, the threshold step in takings analysis is "discerning whether government is 'appropriating private property' or merely regulating its use": use restrictions are weighed under *Penn Central*'s regulatory-takings analysis, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), but appropriation triggers "a simple, *per se* rule: The government must pay for what it takes." *Cedar Point*, 594 U.S. at 148. To "appropriate" is to "tak[e] as one's own." *Id.* at 158. Puerto Rico never restricted the Clementes' use of their mark, but instead used the mark itself, affixing it to its own products, setting a price for it, collecting payment from the public, and keeping the revenue. The compulsion ran in both directions: the owners were never asked, and the public was given no choice. Indeed, both resolutions made the charges mandatory. Pet. 6. A government that seizes a warehouse of branded goods and sells them could not call that regulation. *See Horne*, 576 U.S. at 361 (contrasting "government acquisitions of property" with "regulations"). The analysis should be no different when the government skips the warehouse and takes the brand.

The court below resisted that conclusion on the ground that physical intrusion "ousts" an owner in a way infringement does not. App. 58a. That reasoning misconceives the nature of the property at issue. A trademark owner's entire position is exclusivity—the assurance that the mark signals the owner's authorization and endorsement. When the government itself issues the branded product and charges the public for it, the owner is ousted from the only position a mark confers: control over commercial association. That the Clementes could still use the name proves nothing. *Monsanto*'s data likewise "retain[ed] usefulness" after the government allowed others to use them, 467 U.S. at 1011, while the pond in *Kaiser Aetna* remained a marina after the public was let in, 444 U.S. at 176. In each case the taking consisted of the destruction of exclusivity—the "right to exclude" being "so universally held to be a fundamental element of the property right" that its appropriation "falls within this category of interests that the Government cannot take without compensation." *Kaiser Aetna*, 444 U.S. at 179–80; *see Cedar Point*, 594 U.S. at 149 ("Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place."). For land, losing exclusivity diminishes the asset. For a mark, however, it *destroys* the asset.

A past member of the court below saw this long ago. Confining "*per se* takings analysis to cases involving real property," the late Judge Selya wrote, draws "a crude boundary with no compelling basis in the law"; he found "no principled reason to refrain from extending *per se* takings analysis to alleged takings" of intangible property. *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 51 (1st Cir. 2002) (en banc) (Selya, J., concurring). *Monsanto* itself, he observed, "mirror[ed] a *per se* takings analysis." *Id.* at 51 n.26. Indeed, the *Monsanto* Court's analysis turned on the destruction of the core right to exclude, not on open-ended balancing of traditional factors. *See Monsanto*, 467 U.S. at 1011–12.

Nor is this the "isolated instance[] of infringement" the panel suggested might stand differently from "infringement that prevented the trademark owner from exercising their right to exclude." App. 62a n.32; Pet. 24. It was a legislated, year-long program that placed the mark on every new license plate in Puerto Rico and priced it by statute. If a government-run, government-priced, government-collected commercialization of a registered trademark does not prevent the owner from exercising his right to exclude, nothing does.

Of course, nothing in this argument gives trademark owners a right to control public discussion, criticism, commentary, parody, or nominal use of a name or mark. Petitioners seek compensation for alleged government appropriation of a registered mark for a revenue-generating program, not a veto over speech about Roberto Clemente. The line *amici* urge is the same line this Court's takings cases draw: regulation and expression are one thing; appropriation of a private property right for public use is another.

On the complaint's allegations, Puerto Rico appropriated the core property right in the Clemente mark and monetized it. Under the historical rule and this Court's modern precedents alike, that states a *per se* taking. The Court need not decide that every governmental trademark infringement is a taking; it need hold only that when a government appropriates a mark for its own commercial program, the Fifth Amendment's ordinary rule applies. The contrary holding below rests entirely on a tangible/intangible line that the law has never drawn.

II. THE FIRST CIRCUIT'S TANGIBLE/INTANGIBLE DIVIDE HAS NO BASIS IN TAKINGS JURISPRUDENCE

The court below accepted that "the Takings Clause protects intangible property as well as tangible property." App. 63a. Yet it confined this Court's *per se* takings principles to physical property, reasoning that those cases turn on "the unique nature of a property owner's rights over physical property and of any physical possession or intrusion onto such property, which ousts the property owner of their rights in a way that infringement of intangible property does not." App. 58a. On that view, government appropriation of intangible property can never be a categorical taking; the owner is remitted to ad hoc balancing, however complete the taking. App. 63a–64a. That distinction is absent from the Fifth Amendment's text. It also contradicts takings jurisprudence going back to the founding.

Start with the text: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The operative words are "private property," without qualification—not just land or things. And to the founding generation, "property" comfortably included what could not be touched. Blackstone opened his book on property, *Of the Rights of Things*, by defining it as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 William Blackstone, *Commentaries* *2. Yet the same book devoted a chapter to "incorporeal hereditaments": franchises, ways, commons, and other rights that exist only in legal contemplation, but pass, descend, and are protected precisely as land is. *Id.* at *20. The essence of property was exclusion, not tangibility. Madison agreed on both counts: property "in its larger and juster meaning . . . embraces every thing to which a man may attach a value and have a right," and even in its narrow sense it is dominion held "in exclusion of every other individual." James Madison, *Property*, Nat'l Gazette (Mar. 29, 1792). A Constitution written against that backdrop did not silently demote incorporeal property to second-class status.

Early practice confirms the point. The paradigmatic incorporeal asset of the early Republic was the "franchise": the exclusive right to operate a toll bridge, a ferry, or a turnpike. A franchise was often worth far more than the timber and stone that came with it, and governments frequently wanted it. The pattern repeated for decades: legislatures wanted new bridges and railroads where exclusive franchises stood, but owners invoked their charters. Courts split the difference the Constitution prescribes: the public may take, but the owner must be paid.

This Court settled the federal rule in *W. River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848). There, Vermont condemned a company's exclusive bridge franchise; the company argued that, although government could "appropriate for public uses property which is corporeal," it had no comparable power over a franchise. *Id*. at 533. The Court rejected "[t]he distinction thus attempted" as "a refinement which has no foundation in reason." *Id.* "A franchise is property, and nothing more; it is incorporeal property." *Id.* at 534. It could thus be taken for public use exactly as land could be, through eminent domain with just compensation.

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893), made the rule unmistakable. When the United States condemned a navigation company's lock and dam, Congress directed that the company's franchise to collect tolls be excluded from the compensation award. This Court refused to give that direction effect. "The franchise is a vested right," the Court explained, so the government "may retake it, as it may take other private property, for public uses, upon the payment of just compensation." *Id.* at 341. The owner was entitled to the full value of what was taken—franchise included—and the legislature could not pare down the award by carving out the incorporeal component. *Id.* at 344–45. The point was both structural and substantive: what counts as just compensation is a judicial question, and a legislature free to excise the incorporeal share of value from the award could hollow out the guarantee at will.

The same principle protected other intangibles. A patent, this Court held in 1882, "cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser." *James v. Campbell*, 104 U.S.

356, 358 (1882); *see generally* Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. Rev. 689 (2007) (collecting 19th-century authority securing patents under the Takings Clause). *James* does not stand alone. Contract rights received the same protection: "Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States," such that rights arising out of them "are protected by the Fifth Amendment." *Lynch v. United States*, 292 U.S. 571, 579 (1934). So did liens: the court below itself acknowledged—with a "but see"—that *Armstrong* found a taking where the government worked the "total destruction . . . of all value of these liens." App. 64a (quoting *Armstrong v. United States*, 364 U.S. 40, 48 (1960)); *accord Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 594–95, 601–02 (1935) (holding that statutory abrogation of a mortgagee's rights in its security effected a taking). And so, twice, did intangible interest income. *Webb's Fabulous Pharmacies, Inc. v. Beckwith* held that a county's appropriation of the interest earned on a private fund deposited in court "was a taking violative of the Fifth and Fourteenth Amendments," because "a State, by *ipse dixit*, may not transform private property into public property without compensation." 449 U.S. 155, 164 (1980). *Brown v. Legal Found. of Washington* then treated the confiscation of clients' interest income as "akin to the occupation of a small amount of rooftop space in *Loretto* [*v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)]"—a *per se* taking—because that approach was "more consistent with the reasoning in our *Phillips* opinion than *Penn Central*'s ad hoc analysis." 538 U.S. 216, 235 (2003).

State courts, the primary expositors of eminent-domain law in the 19th century, treated the question as settled. New Hampshire held that a turnpike franchise, an incorporeal hereditament, stood on the same constitutional footing as the soil itself and could be taken only upon compensation. *Backus v. Lebanon*, 11 N.H. 19, 23 (1840); *see also Crosby v. Hanover*, 36 N.H. 404, 419–20 (1858) (treating corporate franchises and easements like tangible estates for takings purposes). Connecticut held that an exclusive toll-bridge franchise was property the legislature could impair in favor of a competing railroad only through the eminent-domain power and upon compensation. *Enfield Toll Bridge Co. v. Hartford & N.H.R. Co.*, 17 Conn. 40, 60–61 (1845); *Enfield Toll Bridge Co. v. Hartford & N.H.R. Co.*, 17 Conn. 454, 462–63 (1846). New Jersey applied the same rule to shares of corporate stock—property about as intangible as property gets. *Black v. Delaware & Raritan Canal Co.*, 24 N.J. Eq. 455, 470 (1873). Pennsylvania said the same of franchises. *In re Twenty-Second St. Opening*, 102 Pa. 108, 115 (1883); *Philadelphia & Gray's Ferry Passenger Ry. Co.'s Appeal*, 102 Pa. 123, 129 (1883). These were not grudging or isolated holdings, but the working law of eminent domain. Whether the asset was a bridge franchise, a turnpike, corporate stock, or an easement, its incorporeal character changed nothing about the constitutional analysis. The category of asset identified only what had to be valued and paid for.

Across a century of cases, the constitutional inquiry was uniform—but it was never tactile. Courts asked whether a vested property right had been appropriated for public use, not whether the sheriff could carry the thing away. The court below inverted that inquiry. It faulted petitioners for identifying no cases "in which invasions of intangible property rights were treated as physical takings," and took that silence to "support[] preservation of the division between physical and non-physical takings." App. 63a–64a. But the 19th century drew no such division because it had nothing to divide. The separate category of "regulatory" takings did not even emerge until *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Earlier, every taking was—in the modern vocabulary—a direct appropriation. The old cases show that direct appropriations of incorporeal property sat comfortably within the categorical compensation rule. Reading the modern taxonomy backwards to strip incorporeal property of its historical protection gets the sequence backwards. And the demand for precedent answers itself. When this Court looked for historical confirmation that appropriation triggers categorical compensation, it invoked a case about a patent, property no one can touch. *Horne*, 576 U.S. at 359 (citing *James*, 104 U.S. at 358). Patents, contracts, liens, interest: the cases the First Circuit could not find are all there in the U.S. Reports.

This Court recently applied the same method to reject other evasions of the Takings Clause. In *Tyler v. Hennepin County*, the Court explained that government may not "'sidestep the Takings Clause by disavowing traditional property interests' in assets it wishes to appropriate." 598 U.S. 631, 638 (2023) (quoting *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167 (1998)). And in *Sheetz v. County of El Dorado*, this Court unanimously rejected a categorical exception to ordinary takings rules because "[n]othing in constitutional text, history, or precedent" supported it. 601 U.S. 267, 276 (2024). The exception adopted below has the same defect.

This Court's recent decisions confirm the historical rule rather than confine it. *Horne* rejected the notion that "personal property was any less protected against physical appropriation than real property," 576 U.S. at 359 (citing *James*, 104 U.S. at 358), because the Takings Clause protects "private property" "without any distinction between different types," *id.* at 358. *Cedar Point* likewise grounded the categorical rule in "the central importance to property ownership of the right to exclude," 594 U.S. at 150, a feature that intangible property does not merely share but exemplifies. And in *Tyler*, the Court unanimously held that a homeowner stated a takings claim against the county that kept the surplus equity from the tax sale of her home—value no hand can hold. 598 U.S. at 637–39.

A raisin, a patent, home equity, a franchise, a mark: what unites them is not their mass but their status as vested private property. The First Circuit's carve-out for property that cannot be seen or handled is not a restoration of the original understanding. At best, it's a modern exception grafted onto an old rule. And it shouldn't harden into circuit law without this Court's review.[2]

[2] Although the issue here is different, Puerto Rico's constitutional history counsels particular caution before accepting atextual exceptions. *See*, *e.g.*, *United States v. Vaello Madero*, 596 U.S. 159, 184 (2022) (Gorsuch, J., concurring) (criticizing the Insular Cases as having "no home in our Constitution or its original understanding"); *id.* at 194 n.4 (Sotomayor, J., dissenting) (agreeing with Justice Gorsuch that it "is past time to acknowledge the gravity" of the Insular Cases' error).

III. THE DECISION BELOW CREATES A DANGEROUS LOOPHOLE FOR MODERN PROPERTY

The question presented here matters far beyond one family and one mark. In the modern economy, value has migrated from things to rights: brands and the goodwill behind them, licenses and franchises, trade secrets, data, commercial identity. For many enterprises—and for many families—the most valuable thing they own cannot be touched. Modern property is often invisible, but not imaginary. *Cf*. Bad Bunny, *El Apagón*, on *Un Verano Sin Ti* (Rimas Ent. 2022) ("Lo que me pertenece a mí" [That which belongs to me]). The Framers could not have imagined a trademark portfolio, but they knew exactly what it was to own something no hand could hold—and they protected it.

The decision below tells governments that invisible property is exactly the property to take. Raisins, access easements, and marina ponds enjoy categorical protection: appropriate them, and pay. But appropriate a mark, a trade secret, or the goodwill of a going concern, and (in the First Circuit) the owner is remitted to an after-the-fact balancing test "that allows government to destroy much in value and pay nothing in return." Pet. 2. A government that wants a celebrated name for its own revenue program need not negotiate a license. It can just legislate one for itself, as Puerto Rico did here. The cheaper intangible property is to take, the more of it will be taken—and the lower court's rule makes the most valuable modern assets the cheapest.

Nor will the exposure stay confined to celebrity names. Governments have obvious appetites for valuable marks and goodwill: university brands, sports insignia, publicity rights, proprietary datasets, the customer goodwill of regulated firms. And governments are market participants: they run lotteries, utilities, tourism campaigns, and merchandise programs that trade on names and symbols. A rule that the Fifth Amendment's categorical protections stop where intangibility begins is an open invitation to acquire by statute what should be acquired by license. Because the First Circuit's logic extends to trade secrets, goodwill, and intellectual property generally, the exception will not stay confined to trademarks either.

That signal is especially costly in a place like Puerto Rico, which is in dire need of investment. Brands, licenses, and goodwill are precisely the assets that entrepreneurs and creators build first. A legal regime in which the government may legislate itself a revenue stream from a private mark—and answer, at most, in an after-the-fact balancing proceeding—raises the price of building anything intangible. Far from mere luxuries of developed economies, secure property rights are how economies develop.

To be clear about what *amici* ask: this is not a request to expand the Takings Clause to new kinds of property. We merely ask the Court to reject an atextual physical-property exception that strips old constitutional protection from the forms property now takes. A Constitution that protected the incorporeal franchise of a toll bridge in 1848 did not abandon the incorporeal goodwill of a name in 2026. The petition details the disarray the contrary view has produced among the First Circuit, the Federal Circuit, and the Texas Supreme Court. Pet. 12–17. *Amici* add only that the disarray is the predictable result of severing modern doctrine from its historical roots—and that restoring the historical rule resolves it. Whether the Fifth

Amendment's oldest guarantee reaches the economy's newest assets is a question of national importance. And it will not resolve itself.

IV. PUERTO RICO'S CLAIMED IMMUNITY MAKES REVIEW MORE URGENT

One feature of this case heightens the stakes. From its first action, the Commonwealth's position has been that it cannot be made to pay: "the only argument made regarding the takings claim in [Respondents'] initial motion [to dismiss] was that it was barred by sovereign immunity." App. 86a n.45; *see* Pet. 25. The First Circuit held that Puerto Rico enjoys state sovereign immunity and that the Lanham Act does not abrogate it, Pet. i, and it avoided deciding whether immunity can defeat a self-executing takings claim only because it first held that no *per se* taking occurred. Pet. 25.

Amici take no position here on the immunity question—whether Puerto Rico, a territory, shares the states' immunity at all, *see Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339, 346 & n.2 (2023) (reserving the question), or whether any such immunity has been validly abrogated. The petition addresses those questions, Pet. 26–33, but *amici*'s point is both remedial and narrow: left standing, the decision below threatens to close every avenue of monetary accountability for government appropriation of intangible property.

Consider the sequence. Congress's attempts to give intellectual-property owners damages remedies against states have repeatedly been held invalid. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (patents); *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Ex-*

pense Bd., 527 U.S. 666 (1999) (trademarks); *Allen v. Cooper*, 589 U.S. 248 (2020) (copyrights). Where statutes fall away, the Constitution's own guarantee remains: a property owner has "a Fifth Amendment entitlement to compensation as soon as the government takes his property without paying for it," *Knick v. Township of Scott*, 588 U.S. 180, 190 (2019), because of "the self-executing character of the constitutional provision with respect to compensation," *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (citation omitted). But the decision below denies that guarantee categorical force for intangible property. And the Commonwealth stands ready to interpose immunity against whatever survives. If both moves succeed, the owner of an appropriated trademark in the First Circuit holds a right without a remedy: no *per se* claim, no Lanham Act damages, and, on the Commonwealth's theory, no constitutional compensation. That can't be right. Prospective relief, after all, is no substitute: an injunction may stop tomorrow's use but it returns none of the value already taken—here, allegedly, eight figures of it.

DeVillier v. Texas, 601 U.S. 285 (2024), confirms how anomalous that position is. The Court there declined to decide whether the Takings Clause supplies its own cause of action only because Texas conceded that its inverse-condemnation action gave owners a vehicle for obtaining just compensation; the case "d[id] not present the circumstance in which a property owner has no cause of action to seek just compensation." *Id.* at 293. The Court saw no reason to "assume the States will refuse to honor the Constitution." *Id.* (citation omitted). Yet Puerto Rico's position would produce the very circumstance *DeVillier* found absent: an owner with a self-executing right to compensation and no cause of action through which to vindicate it. If the decision below stands, the First Circuit will sanction the circumstance *DeVillier* found to be absent: an owner holding a self-executing right to compensation with no way to vindicate it.

That's no stable resting place for a guarantee whose office is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Just compensation is how the Constitution makes governments internalize the cost of what they take; a government that can take without paying will take more. Here, the Commonwealth allegedly raised some $15 million from its own motorists on the strength of a name it did not own, routed the money to its own fund, and now maintains that no court can order it to pay the owners anything. Pet. i, 7, 25. Whether the Fifth Amendment tolerates that combination is a question worthy of this Court's review—and this case squarely presents it.

CONCLUSION

For the above reasons, and those stated in the petition, the Court should grant a writ of certiorari.

Respectfully submitted,

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