No. 25-1426

In the Supreme Court of the United States

CLEMENTE PROPERTIES, INC., ET AL.,
Petitioners,
v.
PEDRO R. PIERLUISI-URRUTIA, ET AL.,
Respondents.

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

BRIEF FOR THE BUCKEYE INSTITUTE AS AMICUS CURIAE SUPPORTING PETITIONERS

David C. Tryon
Counsel of Record
Jay R. Carson
Alex M. Certo
J. Simon Peter Mizner
THE BUCKEYE INSTITUTE
88 East Broad Street, Suite 1300
Columbus, OH 43215
(614) 224-4422
D.Tryon@BuckeyeInstitute.org

QUESTIONS PRESENTED

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTEREST OF AMICUS CURIAE[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute also files lawsuits and submits amicus briefs to fulfill its mission.

Related to this case, The Buckeye Institute has a particular interest in protecting property rights. It has filed amicus briefs with this Court, and other courts across the country, providing its expert analysis of the right to exclude, see, *e.g.,* Amici Curiae Brief of The Buckeye Institute et al. in Support of Petitioners, *GHP Management Corp.* v. *City of Los Angeles, California*, 145 S. Ct. 2615 (2025) (No. 24-435), the history of the Takings Clause, see, *e.g.,* Brief of Amici Curiae The Buckeye Institute et al. in Support of Petitioner, *Sheetz* v. *County of El Dorado, California*, 601 U.S. 267 (2024) (No. 22-1074), and state protections of property rights, see, *e.g.,* Amicus Curiae Brief of The Buckeye Institute in Support of Appellants and Jurisdiction, *Craig* v. *Cromes*, No. 2026-0138 (Ohio Feb. 23, 2026).

---

[1] As required by Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from amicus curiae made any monetary contribution toward the preparation or submission of this brief. Counsel timely provided the notice required by Rule 37.2.

The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. section 501(c)(3).

SUMMARY OF THE ARGUMENT

"The government exists to protect property; property does not exist to support the government. '[O]ne of the most certain tests of the character and value of the government' is 'the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property." *Pung* v. *Isabella Cnty., Michigan*, 146 S. Ct. 1964, 1981 (2026) (quoting *Monongahela Nav. Co.* v. *United States*, 148 U.S. 312, 324 (1893)). The Framers did not discover this truth but were beneficiaries of a long line of thinkers like Thomas Aquinas, John Locke, William Blackstone, and others who recognized the value of property. See Thomas Aquinas, *Summa Theologica* pt. II-II, q. 66, art. 2 (1274); John Locke, *Second Treatise of Government* ch. 5 (1689); 2 William Blackstone, *Commentaries on the Laws of England* ch. 1 (1766).

The case before the Court will determine if intellectual property, trademarks specifically, is protected as property under the Fifth Amendment's Takings Clause. Based on longstanding protections of intellectual property, arising from the Lockean theory of labor, the court should treat Puerto Rico's appropriation and monetization of Roberto Clemente's name, image, and likeness in the same manner it treats the physical appropriation of property. The Framers would have understood the Fifth Amendment to include intangible property like intellectual property—and likely would have treated it on par with physical property—based on how intellectual property was recognized in pre-America Britain. Although statutory protections for intellectual property developed slowly over time, the common law recognized individuals' right to their intellectual property. So much so that Congress was given the constitutional power to secure the exclusive use of it to the creator. See U.S. Const. art. I, § 8, cl. 8. Throughout American history, various courts have acknowledged intellectual property rights. But the treatment of government appropriation of one's intangible property rights in one's name, image, and likeness (NIL) has remained a jurisprudential lacuna.

In today's attention economy, where value lies in attracting clicks, likes, and engagement, intellectual property like NIL often proves more valuable than the earth, sod, and forests did to the Founding generation. Anyone from a common person to an international celebrity can monetize their public persona. The NCAA has seen name, image, and likeness deals reshape college sports. And newly minted internet "influencers" and podcasters make their living based on their identity. Indeed, for some, their most valuable asset is themselves—which, in legal terms, is most comparable to a trademark. Not recognizing that intangible property, like trademark, is worthy of the same level of Fifth Amendment protection as tangible property would leave multi-billion-dollar industries without legal protection and would permit the government to misappropriate *anyone's* likeness without pause.

This case is an ideal vehicle to clarify that if the government appropriates a private party's trademark for public use, it owes compensation to the owner just as surely as if it had seized his land or crops. Otherwise, trademark holders' right to exclude others from appropriating their reputation is toothless.

ARGUMENT

I. The Court should grant certiorari to effectuate the original meaning of the Takings Clause.

Regulatory takings jurisprudence is a web of multi-factor balancing tests that make it difficult to predict how any single takings case will be resolved. See, *e.g.*, *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922); *Penn Cent. Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978); *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003 (1992). But the law regarding compensation for physical takings is as straightforward as the Takings Clause's unadorned language: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The First Circuit held that while the Takings Clause protects intangible property, trademark infringement by the government is not governed by the same principles as physical takings. Pet. App. 63A–64A. The court also claimed that "a trademark owner's right to exclude is less robust when compared to other forms of property – and even when compared to other forms of intellectual property." Pet. App. 62A (citing *Boston Athletic Ass'n* v. *Sullivan*, 867 F.2d 22, 35 (1st Cir. 1989)). As set forth below, however, the right to exclude others from the use of one's name—the right to prevent others from passing off their own opinions, decisions, or priorities with the holder of the right—is much closer to the uncompensated per se physical takings prohibited in *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139 (2021). This is because the sole value of the trademarked property arises from the right to exclude others from its use.

The Court should clarify the law to hold that a government taking of a trademark based on a person's name, image, and likeness is a per se taking analogous to a physical appropriation, rather than a regulatory taking.

Puerto Rico used Roberto Clemente's trademark to make over $15 million, and his family never saw a penny. Pet. Br. at 1. Even worse, Puerto Rico appropriated Clemente's reputation and the reputation of his family to advocate for policies and programs that the family opposed. But this Court has held that the government "by ipse dixit may not transform private property into public property without compensation, even for a limited duration." *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980). "This suggests that the Constitution contemplates some core meaning for property that states cannot alter . . . . After all, if the states had unfettered authority to revise the understanding of property they could eliminate all ownership rights and circumvent the constitutional protection of property." James W. Ely, Jr., *Property Rights in American History* 0 (2008). Without constitutional protections for trademarks, any state, territory, or the Federal Government could steal from citizens and companies without any recourse for the property owner.

II. Because the value of name, image, and likeness is derived from the right to exclude, the Fifth Amendment's Takings Clause should be construed to treat intangible property the same as tangible property.

At the founding, real property was the preeminent form of property. See Ely, *supra*, at 0. Private property was the "cornerstone of a free society." *Id.* But ownership, without rights and protections, is useless. As one scholar opined, the Founders' polestar "was their belief in the necessity of securing property rights." Stuart Bruchey, *Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 Wis. L. Rev. 1135, 1136 (1980).

The First Circuit's view contravenes the historical view that intellectual property receives the same protections as real property and chattels. *Vidal* v. *Elster*, 602 U.S. 286, 301 (2024) (quoting *Brown Chem. Co.* v. *Meyer*, 139 U.S. 540, 544 (1891) ("A man's name is his own propery [sic], and he has the same right to its use and enjoyment as he has to that of any other species of property."). Although tangible and intangible property are different, "[h]istorically speaking, the evolution of [protections for intangible property] did proceed by analogy to physical objects, notwithstanding the one huge difference that no form of intellectual property can be reduced to possession." Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 Stan. L. Rev. 455, 457 (2010). Looking through a historical lens sheds light on this dichotomy further.

Long before James Madison, John Locke, or William Blackstone preached the importance of private property, the Romans recognized the same. As Blackstone explained, Roman law acknowledged intellectual property rights long before modern courts developed. Blackstone, *supra*, at 406. Although some property rights are derived from the creative act, other times the *idea* that led to a creation superseded the manual labor required. *Id*. For example, when a scribe wrote with another man's materials, the material's owner owned the finished writing. *Id*. The scribe was "the mere mechanical operation of [the] writing," at the material owner's behest. *Id*. But "in works of genius and invention, such as a picture painted on another man's canvas, the same law gave the canvas to the painter." *Id*. These Roman laws treated the thinker's rights as superior to the doer's, demonstrating their appreciation for intangible property.

Later, Locke contributed his views on intangible property, particularly when the thinker and doer are the same person. In Locke's view, one who creates gives a part of himself to the creation, and, thus, the creator has a natural right to possess the thing he created while excluding others. Locke, *supra*, at § 44 ("[T]hough the things of nature are given in common, yet man, by being . . . proprietor of his own person, and the actions or labour [sic] of it, . . . when invention and arts had improved the conveniencies [sic] of life, was perfectly his own, and did not belong in common to others."). In other words, labor "gave a right of property, wherever any one was pleased to employ it," so the labor drives ownership. *Id.* at § 45.

And William Blackstone, though his view may be considered softer than Locke's, also offers support for intellectual property's protection. Blackstone, too, acknowledged "another species of property, which, being grounded on labor and invention, is more property reducible to the head of occupancy." Blackstone, *supra*, at ch. 26; see also *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1003 (1984).

Locke's and Blackstone's views were informed by English law, where trademark protection was multifaceted, offering both protection to property owners and the public. Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 Notre Dame L. Rev. 1839, 1850 (2007). On one hand, trademarks allowed owners of lost goods to "demonstrate ownership of physical goods, much in the way that ranchers use cattle brands to identify their cattle." *Id.* at 1849 (citations omitted). On the other hand, "[m]arks also were quite important to the operation of the guild system in medieval England." *Id.* at 1850. As the guilds developed reputations, they used trademarks to distinguish one guild's product from another. *Id.* Guilds used trademarks "for the purpose of developing and maintaining the collective goodwill of the guild" with the public and were not particularly motivated by protecting consumers. *Id.* Still, consumers benefited from distinguishing between guilds with varying reputations based on trademarks. Additionally, British common law recognized an author's right to copyright. The Federalist No. 43 (James Madison).

Madison echoed John Locke's understanding that intellectual property belongs to its creator or inventor.

The Federalist No. 43 (James Madison); Locke, *supra*, at §§ 44–45. Intellectual property receives its own clause in the Constitution: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. art. I, § 8, cl. 8. James Madison argued that “[t]he utility of this power will scarcely be questioned.” The Federalist No. 43, at 243 (James Madison) (Fall River Press ed., 2021). Drawing on this history, Madison reasoned that “[t]he right to useful inventions seems with equal reason to belong to the inventors.” The Federalist No. 43, at 243 (James Madison) (Fall River Press ed., 2021).

The Intellectual Property Clause is entirely consistent with the Fifth Amendment. The Intellectual Property Clause shows that the Framers recognized the value and importance of protecting patents and copyrights from civil infringement. And the Intellectual Property Clause expressly recognizes that the value of intangible property arises from the author or creator’s ability to exclude others’ use of that property. Meanwhile, the Fifth Amendment protects intellectual property holders from government infringement. Taken together, the two clauses create a comprehensive scheme that protects intellectual property from governmental and private intrusion.

Turning to NIL, Locke’s view on the labor theory of property fits hand in glove with the Constitution’s recognition of the value of the intangible intellectual property. More importantly, the idea that one acquires property rights through one’s labor applies even more to the right to protect one’s own name, image, and likeness. Common law allowed "a person to obtain a trademark containing his own name." *Vidal*, 602 U.S. at 302. And "English courts recognized that selling a product under another person's name could be actionable fraud." *Id.* at 303. So too here.

Trademarks have an even greater claim to the status of "property" than other intellectual property since, by its very nature, a trademark is used to signal ownership to others. See Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to A Premature Obituary*, 62 Stan. L. Rev. 455, 480 (2010) (quoting The Lanham Act, 15 U.S.C.A. § 1114) ("[T]he exclusive control of the mark is widely understood as a means to prevent the use of a mark that 'is likely to cause confusion, or to cause mistake, or to deceive.'"). This Court summed it up well:

> The right to adopt and use a symbol or a device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of use by all other persons, has been long recognized by the common law and the chancery courts of England and of this country, and by the statutes of some of the States. . . . This exclusive right was not created by the act of Congress, and does not now depend upon it for its enforcement.

In re Trade-Mark Cases, 100 U.S. 82, 92 (1879).

III. Taking the Clemente Family's intangible property right in Roberto Clemente's name, image, and likeness is more akin to a physical appropriation of real property than a regulatory taking.

The intangible property in this case is not merely a trademark associated with corporate goodwill or product quality. The intangible property in this case is a man's reputation, acquired through years of effort and decades of charitable work. Nothing could be more Lockean than recognizing the right of a man—and subsequently his family—to protect his own good name earned through a lifetime of labor. The value of Clemente's name and reputation is, in fact, burnished by the circumstances of his death. He died while on a philanthropic mission to aid those affected by a natural disaster. Even more than Locke's view that one acquires rights in real property by improving it, Clemente took the raw material given to him as a poor boy in Puerto Rico and, through his effort and good works, made the name legendary.

Puerto Rico's appropriation of Clemente's name, image, and likeness to raise tax dollars and association of Clemente's goodwill with a government project diminishes the value of his name, image, and likeness just as the physical presence of uninvited union organizers in *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139 (2021). As the Court explained in *Cedar Point Nursery*, a physical taking can occur when a "government physically takes possession of property without acquiring title to it." *Id.* at 147–48 (citing *United States* v. *Pewee Coal Co.*, 341 U.S. 114, 115–117 (1951) (plurality opinion)). "Whenever a regulation results in a physical appropriation of property," for the benefit of the government or someone else, "a per se taking has occurred." *Id.* at 149.

Drawing on this Court's discussion in *Vidal*, what Puerto Rico did to the Clementes is like the trader who uses another man's name on his product. "Even in the absence of fraud, it would be difficult, if not impossible, to square such a right to trademark another person's name with our established understanding that '[a] person may have a right in his own name as a trade-mark, as against a person of a different name.'" *Vidal*, 602 U.S. at 303 (quoting *Gilman* v. *Hunnewell*, 122 Mass. 139, 148 (1877)). The Court has explained that even absent any statutory remedy, a trademark owner is entitled to compensation for violation of the owner's "property right" including "compensation for past infringement." *In re Trade-Mark Cases*, 100 U.S. at 92. And "[j]ust compensation ordinarily requires paying the owner the fair market value of his property." *Pung* v. *Isabella Cnty., Michigan*, 146 S. Ct. 1964, 1976 (2026) (Thomas, J., concurring). While the measure of fair market value in government taking of intangible property is not before the Court at this time, the Court should recognize that Petitioner is entitled to the fair market value of the usage of the Petitioner's NIL when it comes time to value that usage.

In an economy based increasingly on attention and information, the ability to monetize one's name, image, and likeness plays the role that fertile fields did for early settlers. In recent years, name, image, and likeness deals and similar agreements have allowed anyone from college athletes to super-star sports figures and hobby-bakers to celebrity chefs to commodify and monetize their public persona. *E.g.*, Marcus Collins, *NIL: The Creative Disruption Reshaping Both College Sports And Culture*, Forbes (Jan. 23, 2026) https://tinyurl.com/2kcfz6a7; compare Chloe (@chloebluffcakes) TikTok, https://www.tiktok.com/@chloebluffcakes (cookie baking account with 435,000 followers) with *Gordon Ramsay's Hell's Kitchen*, Gordon Ramsay Restaurants, https://www.gordonramsayrestaurants.com/en/us/hells-kitchen, (last visited July 23, 2026). These deals, like trademarks, allow individuals to make money for being themselves.

The "influencer" market has exploded in recent years. The influencer economy is valued at approximately $45 billion and is expected to grow to over $116 billion by 2033. *Influencer Marketing Platform Market (2026 - 2033)*, Grand View Research, https://tinyurl.com/w4ukz5bf (last visited July 21, 2026). The content creator economy was estimated to be worth $250 billion in 2024 and is expected to grow to about $500 billion by 2027. Danielle Chemtob, *Forbes Daily: The $250 Billion Influencer Economy Is Booming*, Forbes (Oct. 28, 2024), https://tinyurl.com/2cwzw2vb. A website called Cameo allows individuals to pay for personalized videos from celebrities and influencers alike. Examples of people that users can request videos from include businessman and Shark Tank host Kevin O'Leary, aka Mr. Wonderful, and former NFL and MLB player Bo Jackson. *Browse Talent*, Cameo, https://tinyurl.com/zwfcakv4 (last visited July 28, 2026).

Similarly, podcasts continue to grow both in the number of shows and revenue. Roughly 4.58 million podcasts worldwide entertain 584.1 million listeners of all ages. *Podcasts Statistics 2026*, Podcasts Statistics, https://podcastatistics.com/ (last visited July 28, 2026). Those listeners have 4.58 million podcasts to choose from, with over 480,000 launching in 2026 along. *Id.* Revenue and advertisements from those shows create a $30 billion industry, as of 2024. *Id.* That number is expected to reach nearly $40 billion this year. *Id.*

Companies of all sizes have seized on the opportunity to get their products in front of curated audiences based on social media followings and public personas. See *What is influencer marketing?*, McKinsey & Company (April 10, 2023), https://tinyurl.com/38af9x7v. Companies are not just purchasing ad time or access to followers when they partner with influencers and podcasts; they are buying into a brand, the individual's brand. Since "[a]uthenticity is the basis of any successful influencer marketing campaign," *id.*, media personalities must stay true to that brand when pushing a product. Anything less is a recipe for disaster. That means the individual's greatest asset is himself or herself. Any unauthorized use of the individual's name, image, or likeness would afford an illicit windfall for the unauthorized user by allowing them to benefit from the influencer's apparent endorsement without paying for it.

A 2022 survey of over 2,000 brands discovered that 80% used influencer marketing. *Id.* It is also not just mega celebrities who benefit from these arrangements, as many companies sought to market with people who have social media accounts with less than 10,000 followers—a minuscule amount compared to the most popular accounts. *Id.* Although real property, and the ability to make one's livelihood from it, was plentiful in the early republic, more and more, one's public persona now serves as the same sort of economic engine and guarantor of liberty. Just as early landowners prized real property as a buttress against potential tyrants, see James Madison, *Property* (1972), *reprinted in* 14 *The Papers of James Madison* 266, 266–68 (Univ. Press of Va. 1977), the modern American equipped with an internet connection, the will to work, and ownership of his or her identity, can realize the same type of independence that Madison envisioned belonging to yeoman farmers. Thus, today, while land is still valuable, one's own persona can be a much more liquid asset, as it does not require the same capital necessary to own land. For Takings Clause purposes, a public persona should receive the same protection as real property.

IV. The government can still take intellectual property for public use, but only if it pays just compensation.

Treating trademarks as property for proposes of the Takings Clause affords trademark owners protections while still giving the government the ability to take. The Fifth Amendment, in no uncertain terms, outlines the requirements the government must meet to take property—the property must be used for a public purpose, and the owner must receive just compensation. U.S. Const. amend. V. If Puerto Rico wanted to use Roberto Clemente's trademark, it could have gone through the proper legal procedure to acquire that right.

Treating a trademark as property does not forbid government use outright, it merely puts the onus on the government to properly acquire the right to use the trademark. It creates no burden other than the one the Constitution imposes. The taking power, exclusive to the government, is already more power than any private party seeking to use a trademark has. Private parties must contract for trademark rights, which means either party can refuse to negotiate if they are not satisfied with the proposed deal. Allowing the government to use trademarks without paying just compensation creates a double standard that is beyond what the Constitution permits.

A double standard also creates unnecessary confusion. Commentators agree that "the goal of trademark law is--and always has been--to improve the quality of information in the marketplace." McKenna, *supra*, at 1844. Unfortunately for the Clementes, Puerto Rico's Roberto Clemente license plates did the exact opposite, and people wrongly believed that the Clementes profited from the license plates. Pet. App. 7A. Allowing the government to use trademarks for free, while requiring private parties to pay, only creates greater confusion to consumers and all others who view the products, which undermines all other trademark law.

CONCLUSION

Property of all kinds deserves protection. History and tradition support including intellectual property in the Fifth Amendment's protection of property. For that reason, the Court should grant the petition.

Respectfully submitted,

David C. Tryon
Counsel of Record
Jay R. Carson
Alex M. Certo
J. Simon Peter Mizner
THE BUCKEYE INSTITUTE
88 East Broad Street, Suite 1300
Columbus, OH 43215
(614) 224-4422
D.Tryon@BuckeyeInstitute.org

July 29, 2026