No. 23–1922

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CLEMENTE PROPERTIES, INC.; 21 IN RIGHT, INC.; ROBERTO CLEMENTE, JR.; LUIS ROBERTO CLEMENTE; ROBERTO ENRIQUE CLEMENTE,
Plaintiffs-Appellants,

v.

HON. PEDRO R. PIERLUISI-URRUTIA, GOVERNOR OF PUERTO RICO, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY AND AS REPRESENTATIVE OF THE COMMONWEALTH OF PUERTO RICO; THE COMMONWEALTH OF PUERTO RICO; EILEEN M. VÉLEZ-VEGA, SECRETARY OF THE DEPARTMENT OF TRANSPORTATION AND PUBLIC WORKS, IN HER OFFICIAL AND INDIVIDUAL CAPACITY; FRANCISCO PARÉS ALICEA, SECRETARY OF THE DEPARTMENT OF THE TREASURY, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY; RAY J. QUIOÑES-VÁZQUEZ, SECRETARY OF THE DEPARTMENT OF SPORTS AND RECREATION, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY; PUERTO RICO CONVENTION CENTER DISTRICT AUTHORITY,
Defendants-Appellees,

JOHN DOE; CONJUGAL PARTNERSHIP DOE-VELEZ; JANE DOE; CONJUGAL PARTNERSHIP QUINONES-DOE,
Defendants.

On Appeal from the United States District Court for the District of Puerto Rico Case No. 1:22-cv-22-1373

***AMICUS CURIAE* BRIEF OF THE PUERTO RICO INSTITUTE FOR ECONOMIC LIBERTY IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, *amicus curiae*, the Puerto Rico Institute for Economic Liberty ("ILE" for its Spanish acronym) states that it is a nonprofit corporation that has no parent companies, subsidiaries, or affiliates. Nor does amicus issue shares to the public, and no publicly traded corporation owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE[1]

The Puerto Rico Institute for Economic Liberty, or ILE for its Spanish acronym, is a non-partisan public policy foundation dedicated to advancing the principles of individual liberties, the rule of law, private property rights, and limited government. ILE's mission includes identifying and removing public sector barriers to provide opportunities and enable all Puerto Rico residents to prosper under a free market-based system that allows them to achieve their goals, eliminate dependency, and live the kind of lives they value.

This case is of interest to *amicus* because of the ramifications of greenlighting this seemingly unassuming government action that in fact deprives the Clementes of fundamental property rights protected under the Takings Clause of the Fifth Amendment. After all, private property is inseparable from economic liberty.

[1] ILE has moved for leave to file this brief. *See* Fed. R. App. P 29(b)(2). Other than Defendant-Appellee Puerto Rico Convention District Authority, which has yet to confirm its consent, all other parties have assented to the filing of this brief. Moreover, no counsel for a party authored this brief in whole or in part, and no person other than *amicus* and its counsel has made a monetary contribution to the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

SUMMARY OF ARGUMENT

Nobody disputes that the Clementes are the legitimate owners of the Roberto Clemente trademark. Nor is there a dispute that, as the District Court assumed, the Clementes had no local remedy to redress their takings claims. And yet the District Court's holding and rationale deprives them of fundamental property rights under the Constitution. This Court should reverse.

First, this Court should hold that state sovereign immunity isn't a shield with which the government can elude its constitutional obligation to provide just compensation when it takes someone's property. The District Court's contrary interpretation of the Takings Clause runs head-on into entrenched fundamental rights. So applying state sovereign immunity to the federal Constitution, as the District Court did here, offends the Constitution's mandate of safeguarding the fundamental property rights irrespective of a State's (or territory's) political impulses. This retains considerably more bite here because of the remedial nature of the Constitution's Takings Clause.

Last (but certainly not least), this Court should hold that the Clementes plausibly pleaded a takings claim, thus disavowing the

District Court's erroneous reasoning that no violation could have occurred because the Clementes did not lose the entire value of their trademark. For that dangerous logic would provide carte blanche for governments to infringe on property rights merely if the property retains *some* value. That can't be right. Strong property rules, after all, create economic utility—fundamental to entrenched common-law rules of ownership. And that is "the most important guaranty of freedom, not only for those who own property, but scarcely less for those who do not." 8 F.A. Hayek, *The Road to Serfdom* 136 (1944).

And the "Takings Clause sets 'a simple, per se rule: The government must pay for what it takes.'" *O'Connor v. Eubanks*, 83 F.4th 1018, 1024 (6th Cir. 2023) (Thapar, J., concurring) (citation omitted). The District Court's contrary holding offends the Constitution's guarantee of just compensation for government infringement of property rights, which many rightfully say are "the most basic of human rights and an essential foundation for other human rights." Milton Friedman and Rose D. Friedman, *Two Lucky People Memoirs*, 605 (1998). This Court should thus reverse.

ARGUMENT

I. Even if Puerto Rico Had Sovereign Immunity, It Must Fall to Just Compensation.

It bears mentioning at the outset that amicus takes no position on whether the Commonwealth of Puerto Rico is entitled to the same type of sovereign immunity enjoyed by the States. *Cf. Pamel Corp. v. Puerto Rico Highway Authority*, 621 F.2d 33, 36 (1st Cir. 1980) (declining to "reach th[e] [Eleventh Amendment] immunity issue"). But even if sovereign immunity applied, it is kneecapped by *Knick v. Township of Scott's*, 588 U.S. 180 (2019) logic.

Knick held that "a government violates the Takings Clause when it takes property without compensation, and that a property owner may bring a Fifth Amendment claim under § 1983 at that time." *Id.* at 202. It also ruled that, "because the violation is complete at the time of the taking, pursuit of a remedy in federal court need not await any subsequent state action." *Id.* It thus overruled past precedent that a plaintiff could not bring a federal takings claim in federal court until a state court had denied her claim for just compensation under state law.

Although the District Court conceded that this Court "has not dwelled on this thorny subject," it nonetheless followed "the consensus

among most federal courts of appeals … to allow state governments to mount sovereign immunity defenses as to takings claims." Add. 54 (citations omitted). But that can't be right. And, for the reasons laid out below, this Court can and should break from the pack.

First, the collection of circuit cases cited by the District Court predates *Knick*. *Allen v. Cooper*, which goes unmentioned by the District Court, found "that no other court has attempted to thoroughly consider the relevance of *Knick's* reasoning to state sovereign immunity . . . ." 555 F.Supp.3d 226, 238 (E.D.N.C. 2021). No other post-*Knick* case, the *Allen* court further held, has made it "doubt its conclusion [—that state sovereign immunity would not bar a takings claim—] that *Knick* would have reached the same result had it involved a State." *Id.* This Court should follow this commonsensical logic here.

Second, the district court's reliance on *Puma Energy Caribe LLC v. Puerto Rico*, No. 20-1591, 2021 WL 4314234, at *1 n. 3 (D.P.R. Sept. 22. 2021), was misplaced. That court, in a footnote full of dicta, gratuitously responded to a remark from a plaintiff that "intend[ed] to seek appellate review of Puerto Rico's sovereign immunity, from a Takings Clause claim, in light of . . . *Knick* . . . ." *Id.* But even worse, the court ventured on and

offered an advisory opinion on how it "fails to see how *Knick* . . . would aid them in their quest as it does not discuss Eleventh Amendment immunity nor its interplay with the self-executing just compensation clause of the Fifth Amendment." *Id.* The short of it is that *Puma Energy Caribe's* footnote cannot bear the weight that the District Court loaded upon it.

In contrast, *Allen*—a well-reasoned and thoughtful decision—offers the beacon by which this Court should steer:

> [T]he Court finds it necessary to consider the reasoning of the Supreme Court in *Knick*. After considering the main points the Supreme Court relied upon in *Knick*, the Court finds that *Knick* would have reached the same conclusion had it involved a taking by a state government rather than a township.

Allen, 555 F.Supp.3d at 235. Although the District Court did not mention *Allen*, the latter's thoughtful and meticulous reading of the tension between a state's sovereignty and the Fifth Amendment's Takings Clause is the right approach.

Finally, the Takings Clause is "self-executing." *Knick*, 588 U.S. at 192 ("Because of 'the self-executing character' of the Takings Clause 'with respect to compensation,' a property owner has a constitutional claim for just compensation at the time of the taking." (quoting *First English*

Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal., 482 U.S. 304, 315 (1987))); *see also, e.g.*, *Devillier v. State*, 63 F.4th 416, 436 (5th Cir. 2023) (Oldham, J., dissenting from the denial of rehearing en banc) (reminding that the "Court affirmed the self-executing nature of the Fifth Amendment['s Taking Clause] again and again throughout the twentieth century") (collecting caselaw), vacated and remanded by *DeVillier v. Texas*, 601 U.S. 285 (2024).

For these reasons, this Court should hold that state sovereign immunity isn't a shield with which the government can elude its constitutional obligation to provide just compensation. A contrary interpretation of the Takings Clause—that the government may take property whenever it wishes without paying a dime—offends entrenched fundamental rights.

II. Trademarks Are Protected Under the Takings Clause, and, Irrespective Whether They Lost The Entire Value of Their Trademark, The Clementes Pleaded Plausible Claims

The District Court "acknowledged that . . . the question whether a trademark is the type of private property protected by the Takings Clause . . . is debatable and far from settled." Add. 51 (cleaned up). But a trademark's protection under the Taking's Clause is a logical extension

of decadelong caselaw recognizing that intellectual property is protected by the Takings Clause.

The Supreme Court, after all, has recognized that other forms of intellectual property are protected by the Takings Clause. See *Horne v. Dep't of Agric.*, 576 U.S. 350, 359–60 (2015) (patents); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (trade secrets); *see also, e.g., CCC Info. Servs., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 74 (2d Cir. 1994) ("depriv[ing] the copyright owner of its property would raise very substantial problems under the Takings Clause of the Constitution"). The same could and should be written in the trademark context.

Indeed, James Madison and company defined private property rights capaciously enough to place direct and indirect violations—whether of tangible or intangible property, like trademarks—within the aegis of what finally developed into the Takings Clause. Madison made it clear that property, "[i]n its larger and juster meaning . . . embraces everything to which a man may attach a value and have right." Speech Proposing the Bill of Rights (June 8, 1789), *in* 12 James Madison, *The Papers of James Madison* 201 (Hobson et al. eds., 1979).

And John Locke, whose philosophy informed the Founding Fathers, similarly commented that "the power of the [s]ociety . . . can never be suppose[d] to extend farther than the common good but is obliged to secure every ones Property." John Locke, S*econd Treatise, in Two Treatises of Government* §131 (1689). That, in short, was the properly understood relationship between public and private rights under common law. Of course, "Madison, the chief architect of the Takings Clause, was deeply influenced by Locke." Jeffrey M. Gaba*, John Locke and the Meaning of the Takings Clause*, 72 Mo. L. Rev. 525, 526 (2007).

So viewed, this Court should uphold the Constitution and dispel any controversy that trademarks are not worthy of protection under the Takings Clause.

Moving from the general to the specific, in dismissing their claims of trademark taking, the District Court reasoned that "neither Puerto Rico Joint Resolutions No. 16 nor Act 67-2022 seem to deprive Plaintiffs of any use of their trademarks, much less "'all economically beneficial use' of the property." Add. 55–56 (citation omitted). According to the district court's logic, then, just because the Clementes "remain free to use their trademarks as they wish," *id.* at 56, the government can do

whatever it pleases with their trademark, including, as the Clementes plausibly allege here, extracting value from it without just compensation.

But the District Court erred by, in effect, adopting the stance that lessens individual freedom. Applying the correct standard, this Court should hold that the Clementes need not lose the entire value—or a portion of the value for that matter—of their trademark to plead plausible trademark-takings claims.

It should come as no surprise that the Framers generally agreed with the notion of conferring private-property rights absolute protection except when necessary for the so-called common good. *See generally* Ilya Somin, *The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain* 36–38 (2015) (so explaining). It is thus unsurprising that, in *Horne*, the Court upheld the longstanding "rule of treating direct appropriations of real and personal property alike." 576 U.S. at 361. True enough, the Court restricted its analysis to the facts of that case, which dealt with a physical seizure of personal property. But nothing in its reasoning rejects its application of per se takings to non-physical appropriations of personal property, which is what happened with the Clementes' trademark.

In a similar vein, protecting trademarks under the Takings Clause makes perfect sense. Trademarks, after all, demand the same fundamental attributes of ownership, which predate the Constitution and are rooted in common law. And trademarks, like all other property, imply dominion over all its aspects, mainly temporal and conceptual. In fact, it compels it. Blackstone, by parity of reasoning, defined the "right of property" as "that *sole and despotic dominion* which one [individual] claims and exercises . . . in total exclusion of the right of any other individual in the universe." William Blackstone, *Commentaries on the Laws of England* *2 (1768) (emphasis added).[2]

Not to be left out, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court held that a physical invasion of private property, no matter how trivial, is a per se taking. It thus stands to reason that the implication of the Court's holding in *Loretto* was that

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[2] As Professor Treanor reminds, "[e]ven with respect to physical seizures of property by the government, the compensation requirement was not generally recognized at the time of the framing of the Fifth Amendment." William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 785 (1995). So the Founding Father's principal invention—to require the government to pay just compensation even when operating under common-good necessity—added yet another layer of protection that did not exist under common law at that time.

all interferences with the fundamental characteristics of ownership—in *Loretto* and here, the right to exclude—are unconstitutional irrespective of their degree. *Cf.*, *e.g.*, *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 179 (1871) (noting that for government action to constitute taking "it is not necessary that the land should be absolutely taken").

The district court was thus wrong in holding that because the Clementes remain free to use their trademarks as they wish," *Add.* 56, the government may do whatever it pleases with them, including extracting value from them without just compensation. Instead, the rationale behind *Loretto* and *Horne* suggests that any governmental interference with any fundamental elements of ownership is a per se taking unless it deals with a nuisance or is otherwise offset through "average reciprocity advantage." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922) ("The exercise of [the police power without just compensation] has been held warranted in some cases by what we may call the average reciprocity of advantage."). Of course, no sort of reciprocity occurred here; the Clementes received nothing.

If the District Court had not so constrained *Loretto's* grasp, it would have recognized the Clementes' claims. This Court should take the

next commonsensical step and extend the *Loretto* doctrine to its logical end: prohibiting uncompensated takings that interfere with *any* fundamental attribute of ownership, including the right to exclude. Because the District Court held otherwise, this Court should reverse.

CONCLUION

For the reasons stated, and those offered by Plaintiffs-Appellants, this Court should reverse the District Court's dismissal of the Clemente Family's amended complaint and remand (with leave to amend, if necessary) for further proceedings.

Dated: March 31, 2024

Respectfully submitted,

/s/ Arturo V Bauermeister

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CERTIFICATE OF COMPLIANCE

This brief complies with type-volume limitations, because it is "no more than one-half the maximum length authorized by [the Federal Rules of Appellate Procedure] for a party's principal brief." Fed. R. App. P. 29(a)(5). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) & (6), because it was prepared in proportionally spaced 14-point Century Schoolbook typeface, using Microsoft® Word for Microsoft 365 MSO (Version 2404 Build 16.0.17531.20152) 64-bit.

Dated: May 31, 2024

<u>/s/ Arturo V. Bauermeister</u>
Arturo V. Bauermeister

CERTIFICATE OF SERVICE

I filed this brief via the Court's CM/ECF system on May 31, 2024, thereby electronically serving all counsel of record. I certify that the following counsel of record for the parties are registered as ECF Filers and that they will be served by the CM/ECF system:

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