No. 16-16402

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KATHERINE A. CHMIELEWSKI and PAUL CHMIELEWSKI,
as Personal Representatives of the Estate of Chester Chmielewski,

Appellees,

v.

CITY OF ST. PETE BEACH,

Appellant.

On Appeal from the United States District Court
for the Middle District of Florida
Honorable James D. Whittemore, District Judge

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

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Katherine A. Chmielewski and Paul Chmielewski,
as Personal Representatives of the Estate of Chester Chmielewski
v. City of St. Pete Beach

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 to 26.1-3, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public. Amicus Curiae also certifies that the following persons may have an interest in the outcome of this case or appeal:

1. Albee, Scott of Fulmer LeRoy & Albee, PLLC (Trial Counsel for Appellant, City)

2. Brannock & Humphries (Counsel for Appellees, Chmielewskis)

3. Breemer, J. David (Counsel for Amicus Curiae Pacific Legal Foundation)

4. Broad and Cassel (Counsel for Appellees, Chmielewskis)

5. Bryant Miller Olive, P.A. (Former Counsel for City of St. Pete Beach)

6. Campbell, Hon. Pamela A.M. (Pinellas County Circuit Judge)

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9. Chmielewski, Katherine (Appellee)

10. Chmielewski, Paul, as personal representative of Estate of Chester Chmielewski (Appellee)

11. Churuti, Susan H. (Former Counsel for City of St. Pete Beach)

12. City of St. Pete Beach (Appellant)

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39. Winegardner, Jennifer (Counsel for Appellees, Chmielewskis)

40. Zimmet, Alan S. (Former Counsel for City of St. Pete Beach)

CHRISTINA M. MARTIN
J. DAVID BREEMER
Pacific Legal Foundation

By: /s/ CHRISTINA M. MARTIN
CHRISTINA M. MARTIN

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure and the Eleventh Circuit Rules, Pacific Legal Foundation (PLF) respectfully requests leave to file the attached amicus curiae brief in support of plaintiffs Katherine A. Chmielewski and Paul Chmielewski, as Personal Representatives of the Estate of Chester Chmielewski. The Chmielewskis (Appellees) consent to this motion for leave to file an amicus brief; the City of St. Pete Beach (Appellant) does not consent.

PLF is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property, individual liberty, and economic freedom. Founded over 40 years ago, PLF is the most experienced legal organization of its kind. PLF maintains offices in Florida, California, Washington, Hawaii, and the District of Columbia.

PLF attorneys have participated as lead counsel in many landmark United States Supreme Court cases in defense of the right of individuals to make reasonable use of their property, and the corollary right to obtain just compensation when that right is infringed. *See, e.g.*, *Murr v. Wisconsin*, 136 S. Ct. 890 (2016) (granting cert.) (Case No. 15-214), *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). PLF attorneys have also litigated in many state and federal courts, including in the Florida courts, in cases dealing with takings and unwarranted seizures of

beachfront property. *See, e.g.*, *Severance v. Patterson*, 566 F.3d 490, 501 (5th Cir. 2009), certified question answered, 370 S.W.3d 705 (Tex. 2012); *Sansotta v. Town of Nags Head*, 724 F.3d 533 (4th Cir. 2013); *Trepanier v. County of Volusia*, 965 So. 2d 276 (Fla. 5th DCA 2007); *Goodwin v. Walton County*, No. 3:16-cv-00364-MCR-CJK, (N.D. Fla. pending). PLF attorneys accordingly have specialized expertise and experience in constitutional property rights law, including the law relevant to Fourth Amendment seizure and Florida takings claims.

The proposed amicus brief will assist the Court by providing a unique viewpoint and expertise on the question of whether the Fourth Amendment to the United States Constitution and the Florida Takings Clause protect homeowners when the government authorizes or encourages trespassing on private residential property. Specifically, the proposed amicus brief will provide an overview of federal and state takings and Fourth Amendment jurisprudence to demonstrate that beachfront property owners enjoy constitutional protection from the government giving the public a right of access to their property.

PLF and its supporters believe that this case is of significant importance and has far-reaching implications for traditional property rights. PLF further believes that its perspective and litigation experience will provide an additional and useful viewpoint in this case. For these reasons, PLF respectfully requests leave to participate in this action as amicus curiae and to file the attached brief.

DATED: April 12, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that the foregoing brief complies with Rule 27(d).

/s/ CHRISTINA M. MARTIN
CHRISTINA M. MARTIN

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ CHRISTINA M. MARTIN
CHRISTINA M. MARTIN

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DISCLOSURE PER RULE 29,
FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), Amicus Curiae states:

(A) The amicus curiae brief was authored by attorneys of Pacific Legal Foundation, and no portion was authored by counsel for any party;

(B) Funding for preparation of the amicus curiae brief was provided by Pacific Legal Foundation, and no party or party's counsel contributed money that was intended to fund preparing or submitting the amicus curiae brief;

(C) No person, other than Amicus Curiae Pacific Legal Foundation, contributed money that was intended to fund preparing or submitting the amicus curiae brief.

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

U.S. Constitution

Page

State Constitution

Statute

Rules of Court

Miscellaneous

INTEREST OF AMICUS CURIAE

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pending). PLF attorneys accordingly have specialized expertise and experience in constitutional property rights law, including the law relevant to Florida takings claims.

STATEMENT OF THE ISSUES

1. Whether the government effects a taking without just compensation when it authorizes the public to trespass on a private beach.

2. Whether the government effects an unwarranted seizure in violation of the Fourth Amendment when it authorizes the public to trespass on a private beach.

INTRODUCTION

In recent years, many local and state governments have employed several methods in an attempt to take access to private beaches without paying for the right or the attendant invasion of privacy. Governments have imposed easements on private land, declared private land public, declared a right of custom where none existed, and attempted to expand the public trust doctrine beyond its limit. *See, e.g.*, *Severance*, 370 S.W.3d at 710 (rejecting state's claimed right of custom and "rolling easement" on private beach); *Town of Nags Head v. Toloczko*, No. 2:11-CV-1-D, 2014 WL 4219516, at *3 (E.D.N.C. Aug. 18, 2014) (rejecting town's argument that it had public trust rights to private beach); *Goodwin*, No. 3:16-cv-00364-MCR-CJK (N.D. Fla., pending) (county passed ordinance declaring right of public custom on private beaches across county). Fortunately, courts have resisted these efforts. *See, e.g.*, *Severance*, 370 S.W.3d at 710; *Toloczko*, 2014 WL 4219516, at *3.

This case similarly asks whether government may authorize and encourage the public to use private property and invade privacy without paying compensation and damages. While the facts are different, the case is fundamentally the same: the government is once again looking for ways to take and seize private property without buying it or getting a warrant. This Court, too, should resist this effort and protect the fundamental rights at issue here.

SUMMARY OF THE ARGUMENT

The Florida Constitution's Takings Clause requires that government pay compensation when it causes physical invasions onto private property. *Storer Cable T.V. of Florida, Inc. v. Summerwinds Apartments Assocs., Ltd.*, 493 So. 2d 417, 419–20 (Fla. 1986). Physical invasions—no matter how minimal—infringe on one of the most important property rights: the right to exclude non-owners. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). The government may not evade strict physical takings liability by asserting that an invasion (and the associated denial of the right to exclude) is only temporary or intermittent. *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 519 (2012); *Nollan*, 483 U.S. at 832. The granting or exercise of a right to invade property is akin to an easement, and an easement demands compensation. *Id.*, at 831–32; *see also Preseault v. United States*, 100 F.3d 1525, 1531 (Fed. Cir. 1996).

Similarly, the Fourth Amendment to the U.S. Constitution protects property around the home from unreasonable searches and seizures. *Oliver v. United States*, 466 U.S. 170, 176, 180 (1984). When government causes the public to trespass into the area around the home, it violates the unreasonable seizure protections of the Fourth Amendment and must pay damages for violation of this constitutional right. *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006).

Here, the trial court rightly found that the City of St. Pete Beach (City) violated both the Takings Clause and the Fourth Amendment when it caused the public to invade Chester and Katherine Chmielewski's property.[1] *See* Doc. 141, p. 2. The City made public access available to the Chmielewskis' property. *See id.* at 5; Doc. 65, p. 2, n.3. As clearly planned and anticipated by the City, *id.*, the public began to regularly trespass onto the Chmielewskis' beach, their private sidewalk located only feet from their home, and along the sides of their home to walk from the arts center parking lot to the beach. *See, e.g.*, Trial Transcript Day 1, Doc. 185, pp. 198–9; Trial Transcript Day 2 Doc. 186, p. 48–9, 208–9, 213, 238–9, 249.

The result is a City-sponsored invasion of the Chmielewskis' property, including their curtilage. Their constitutionally protected right to exclude or deny access to their land was destroyed. This is a taking that requires compensation. *Nollan*,

[1] This brief uses "Chmielewskis" to refer collectively to Katherine Chmielewski and Chester Chmielewski, and Chester's successor in interest, the Estate of Chester Chmielewski.

483 U.S. at 831. It is also a "seizure" within the meaning of the Fourth Amendment. Moreover, since the seizure occurred without notice, compensation and outside normal state processes, like eminent domain, it is unreasonable and therefore unconstitutional. *Severance*, 566 F.3d at 502. As such, it warrants damages under 42 U.S.C. § 1983.

The trial court's decision should be affirmed.

ARGUMENT

I

THE GOVERNMENT MUST PAY JUST COMPENSATION WHEN IT AUTHORIZES MEMBERS OF THE PUBLIC TO TRESPASS ON A PRIVATE BEACH

A. Florida Takings Law

The Takings Clause of the Florida Constitution provides, "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner . . . ." Fla. Const. Art. X, § 6(a). The Takings Clause prohibits the government from taking private property for a public use without paying for it. *Storer Cable T.V. of Florida, Inc.*, 493 So. 2d at 419–20. To determine whether government actions limiting *the use of property* cause a taking, courts often apply a multi-factored balancing test that looks to the economic impact, character of the action, and investment-backed expectations. *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104,

124 (1978).[2] But actions that physically invade property are *per se* takings, regardless of those factors. *Loretto*, 458 U.S. at 426; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002).

Courts deem a physical invasion to constitute a *per se* taking, in part because the "power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." *Loretto*, 458 U.S. at 435. "[A]n owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property" because it allows another to exercise dominion over his property. *Id*. at 436.

Unconstitutional physical occupations of property may be most obvious when the government "directly appropriates private property for its own use." *Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. at 324. But such direct appropriation is not necessary to give rise to a physical taking. Such a taking may also occur when the government authorizes third parties to use private property. *Nollan*, 483 U.S. at 832 (a physical occupation occurs "where individuals are given a permanent and

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[2] To determine whether a taking occurs under the Florida Constitution, courts routinely rely on precedent interpreting the takings clause in the Fifth Amendment to the U.S. Constitution. *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So. 3d 1220, 1222 (Fla. 2011), *rev'd on other grounds*, 133 S. Ct. 2586 (2013) (Courts "interpret[] the takings clause of the Fifth Amendment and the takings clause of the Florida Constitution coextensively."); *see, e.g.*, *Storer Cable T.V. of Florida, Inc.*, 493 So. 2d at 419–20 (interpreting physical invasion takings under Florida Constitution by relying on federal precedent).

continuous right to pass to and fro, so that the real property may continuously be traversed"). Such access is equivalent to an easement, and "if the Government physically invades only an easement in property, it must nonetheless pay just compensation." *Kaiser Aetna v. U. S.*, 444 U.S. 164, 180 (1979); *Preseault v. I.C.C.*, 494 U.S. 1, 24 (1990) (same).

When government is liable for a physical invasion constituting an easement, it must ordinarily pay "the difference between the value of the property before and after the Government's easement was imposed." *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 632 (1961); *Otay Mesa Prop., L.P. v. United States*, 670 F.3d 1358, 1363–64 (Fed. Cir. 2012). In contrast, if it takes fee simple title, it must pay "the market value of the property at the time of the taking contemporaneously paid in money." *Olson v. United States*, 292 U.S. 246, 255 (1934). This compensation requirement thereby "prevent[s] government from forcing an individual to bear burdens that should be carried by the public as a whole." *Koontz*, 77 So. 3d at 1226, *rev'd on other grounds*, 133 S. Ct. 2586 (2013) (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

B. The Government Must Compensate the Chmielewskis for Taking a Public Easement on Their Land

The Chmielewskis own fee simple title to a beachfront home in St. Pete Beach that they purchased in 1972. Feb. 26, 2016 Order, Doc. 141 at 5. They also own the property extending from their home, across a long dune, and dry, sandy beach, down to the mean high water line of the Gulf of Mexico. *Id*. While the State owns the ribbon of shoreline "under navigable waters, within the boundaries of the state . . . . below mean high water lines," Fla. Const. art. X, § 11, the land lying inland to the mean high water line, including the dry beach area, is generally private property. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 707 (2010). Accordingly, fee-simple private property owners—like the Chmielewskis—maintain a right to exclude the public from their property. *See* Fla. Att'y Gen. Op. 2002-38, at 5 (2002).

Here, the trial court found that the City "*authorized*" the public to invade the Chmielewskis' property. Feb. 26, 2016 Order, Doc. 141, p. 5, 10–1. This finding is alone enough to find the City liable for a physical taking. *Nollan*, 483 U.S. at 832. The City's actions impose a de facto public access easement on the Chmielewskis' property. That is a classic, *per se* physical taking, which must be compensated. *Kaiser Aetna*, 444 U.S. at 180; *Preseault*, 494 U.S. at 24.

The City seeks to escape this logic by arguing that the invasions by the public onto the Chmielewskis' property are not permanent. *See* Initial Brief of Appellant at 26–7. But the contention is without merit. A physical occupation need not be permanent or continuous for it to constitute a *per se* taking. *Hendler v. United States*, 952 F.2d 1364, 1377–78 (Fed. Cir. 1991); *Arkansas Game & Fish Comm'n*, 133 S. Ct. at 519. In *Nollan*, the Supreme Court held that the government could not take an easement for the public to cross a privately owned beach parcel without paying for it. 483 U.S. at 831. Even though "no particular person [wa]s permitted to station himself permanently upon the premises," the taking of "a permanent and continuous right to pass to and fro" across privately owned beach property constitutes a "permanent physical occupation" and *per se* taking. *Id*. at 831–32. Indeed, even less frequent trespassing can create an easement that effects a *per se* taking. *See, e.g.*, *Hendler*, 952 F.2d at 1377–78 ("temporally intermittent" trespassing took an easement); *Otay Mesa Prop.*, 670 F.3d at 1363–64 (same).

Here, the City authorized the public to cross and use the Chmielewskis' private property at will. *See Nollan*, 483 U.S. at 828. Public beach goers not only pass to and fro across the Chmielewskis' property, they recreate on their beach for hours. *See, e.g.*, Feb. 26, 2016 Order, Doc. 141 at 1; Trial Transcript Day 2, Doc. 186, at 258–60 (describing public use of the beach). Indeed, with apparent sanction from the City, the public has held drinking parties, weddings, and tournaments on the Chmielewskis'

land. Feb. 26, 2016 Order, Doc. 141 at 5; Trial Transcript Day 2, Doc. 186, at 20, 258–61. This intense physical invasion by strangers, as a result of government action, constitutes a *per se* taking of an easement on their property. *See Nollan*, 483 U.S. at 831–32.[3]

C. The City Authorized the Taking

The City also claims that it cannot be held responsible for trespassing by members of the public, because the City never "authorized, licensed, or required the public to invade Plaintiffs' beach parcel." *See* Initial Brief of Appellant at 28. But the evidence shows the opposite. The City rezoned the Chmielewskis' private property as a public park and cleared the previously blocked path from the arts center to the Chmielewskis' private sidewalk. Trial Transcript Day 1, Doc. 185 at 37, 81–2; Trial Transcript Day 2, Doc. 186 at 247, 249. It also added parking and held events that convinced members of the public that it was, indeed, a public park. *Id*.; Feb. 26, 2016 Order, Doc. 141 at 5. The trial court found as a fact that the City authorized the public's invasion. *Id.*

[3] Even if the *per se* test for some reason did not apply, the government's interference with the Chmielewskis' ability to enjoy their property would still constitute a taking. Government also effects a taking when an ordinance deprives an owner of "a reasonable use and enjoyment of his own property." *Ehinger v. State ex rel. Gottesman*, 2 So. 2d 357, 359-60 (Fla. 1941); *see also United States v. Causby*, 328 U.S. 256, 268 (1946).

Even if the City had no intent to authorize public access on the Chmielewskis' land (it clearly did), that would not automatically exonerate it. *See, e.g.*, *Arkansas Game & Fish Comm'n*, 133 S. Ct. at 522–23 (flooding unintentionally caused by government constituted a taking). Indeed, "when the government uses its own property in such a way that it destroys private property, it has taken that property." *Stop the Beach Renourishment*, 560 U.S. at 713. If the City had not intended to take the property, it was still reasonably foreseeable—particularly after the quiet title action—that its use of the arts center property and other actions would result in an invasion of the Chmielewskis' property, causing a taking. *Cf. Arkansas Game & Fish Comm'n*, 133 S. Ct. at 522–23 (intent is irrelevant where a taking is a foreseeable result of government action).

D. The Government Must Pay Compensation When It Converts Neighbors' Right of Access into a Public Right of Access

The City also implies that no taking could occur here, because other property owners in the Chmielewskis' subdivision already had a right to recreational use of their beach. *See* Initial Brief of Appellants at 33 ("In contrast, here, Plaintiffs' beach parcel has always been accessible and useable by not only Plaintiffs but also other Subdivision owners, their family, friends, and guests."). In other words, the government suggests that property owners cannot claim a taking from a government-authorized influx of people onto private land, because a few other people already have

an independent, pre-existing right to enter the land. This is baseless. Indeed, this Court rejected that very argument in *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600, 605 (11th Cir. 1992). There, a cable company claimed that the legislature granted it a right to access and use pre-existing utility easements for other services, without compensation. *Id*. at 603. In rejecting this "free rider" argument, this Court analogized the issue in *Nollan*:

> The government could not force a beachfront property owner to provide an easement in favor of the general public so that all could access the owner's beach. *See Nollan*, 483 U.S. at 831, 107 S. Ct. at 3145. Could the government instead legislate that if the beachfront owner allowed his neighbors to cross his beach, he must also allow the public at large to cross?

This Court said "no," holding that government would effect a taking without just compensation if it attempted to expand an easement to include additional parties. *Id*. at 605.

The same analysis applies here. Even if certain people have a limited (and controlled) right to access the Chmielewskis' land, the City's extension of access rights to the entire general public creates a new easement, or vastly expands an existing one. Both require compensation. *Id*. at 605; *Nollan*, 483 U.S. at 831.

II

THE CITY ALSO UNREASONABLY SEIZED THE CHMIELEWSKIS' LAND, IN VIOLATION OF THE FOURTH AMENDMENT

Contrary to the City's position, its actions against the Chmielewskis' land also gives rise to a Fourth Amendment violation. Specifically, in authorizing the ongoing, public invasion of the area immediately around the Chmielewskis' home, the City not only caused a *per se* unconstitutional taking of the property, it also seized protected property. Feb. 26, 2016 Order, Doc. 141 at 5. Since the seizure occurred without proper procedures, or compensation, it was unreasonable, and thus, violated the Fourth Amendment. *See Severance*, 566 F.3d at 502; *Soldal v. Cook County*, 506 U.S. 56, 66, 71 (1992) (in the absence of consent, a warrant, probable cause, or judicial authority, a seizure is unreasonable).

A. Fourth Amendment Law

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Government seizes property when it causes "some meaningful interference with an individual's possessory interests in that property." *Soldal*, 506 U.S. at 61 (1992); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Severance*, 566 F.3d at 501.

The Fourth Amendment's protections against unreasonable searches and seizures clearly protect the home and curtilage—the property surrounding a home. *Oliver*, 466 U.S. at 180 ("[C]urtilage . . . has been considered part of the home itself for Fourth Amendment purposes"); *Presley*, 464 F.3d at 483; *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 52 (1993) (Fourth Amendment applies to the entire seizure of a four-acre parcel of land with a house). The extent of protected curtilage varies with the circumstances. *United States v. Hatch*, 931 F.2d 1478, 1480–81 (11th Cir. 1991) ("There is not . . . any fixed distance at which curtilage ends.").

In considering whether an area is curtilage, courts often consider four factors: the proximity of the area to the home, whether the area is within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area. *United States v. Dunn*, 480 U.S. 294, 301 (1987). These factors are only "useful analytical tools," and do not provide a "finely tuned formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage questions." *Id*. The question is often ultimately one of "reasonable expectations." *Hatch*, 931 F.2d at 1481. Ordinarily, a seizure of property is *"per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." *United States v. Place*, 462 U.S. 696, 701 (1983).

B. The City Seized the Chmielewskis' Curtilage

Here, application of the relevant factors shows that the City caused repeated invasions by members of the public into the Chmielewskis' curtilage. *See, e.g.*, Trial Transcript Day 1, Doc. 185, pp. 198–9; Trial Transcript Day 2 Doc. 186, pp. 48–9, 208–9, 213, 238–9, 249. The evidence shows that members of the public walked from the Suntan Arts Center parking lot, to the Chmielewskis' home, entered the enclosure around their home, and passed along the immediate sides of their home, and into their backyard, to get to the beach. *See, e.g.*, *id*. The space between the Chmielewskis' home and their neighbors' homes is narrow. *See* Supp. App. at 6, 9. The area used by the public to get to the back of the house is even narrower. *Id*.

The back of the Chmielewskis' one-story home. Supp. App. at 9

In short, people were authorized and encouraged to go from the Suntan Arts Center to the beach, walk right next to the Chmielewskis' home and into their backyard. *See, e.g.*, Trial Transcript Day 1, Doc. 185, p. 198; Trial Transcript Day 2, Doc. 186, pp. 186–7, 208. This clearly effects curtilage. *Powell v. State*, 120 So. 3d 577, 585 (Fla.

Dist. Ct. App. 2013), *on reh'g* (Aug. 1, 2013) ("To our knowledge, no court has held that an area within arm's length of a home's window is anything other than within the curtilage."); *Florida v. Jardines*, 133 S. Ct. 1409, 1414–15 (2013) (quoting *Oliver*, 466 U.S., at 182, n.12, 104 S. Ct. 1735) ("The front porch is the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends."); *United States v. Seidel*, 794 F. Supp. 1098, 1103 (S.D. Fla. 1992) (To exclude this small area would be "tantamount to finding that no portion of [the] property is curtilage.").

Additional evidence demonstrates that the area from the back of the home to the sand dunes was similarly intimate and thus also curtilage. *See, e.g.*, Trial Transcript Day 2, Doc. 186, p. 48. Before the City opened up the area, the Chmielewskis' backyard was blocked off from the public with natural barriers, creating a private, intimate space. *Id*. at 47 ("We had that sidewalk [on the beachside] of our house, but nobody walked down that sidewalk because it was closed off. There was overgrowth at both sides of the sidewalk on the south and north end of Block M, so people couldn't even pass."). The sidewalk, which runs only feet from behind their home, *see* Supp. App. at 6, was barricaded off from other sidewalks for many years by overgrown plants, until the City cleared it off. *See* Order, Doc. 141 at 5–7; Trial Transcript Day 2 at 81–2. Moreover, the sand dune acts as a natural barrier, making it so that people seaward of the plant-covered dune could not see the Chmielewskis'

at their picture window, or on their back patio, walkway, or much of their backyard. *See, e.g.*, Trial Transcript Day 2, pp. 225–26.

Before the public seized use of their property, members of the Chmielewski family used to sunbathe privately on the patio behind the home. Trial Transcript Day 2, Doc. 186, p. 48. After the public invaded, they not only felt uncomfortable on their patio, they felt uncomfortable leaving the blinds on their picture window open, because those passing by now looked inside. *Id*. at 48–9, 209–10. As a result, when telling people to stay of their property didn't stem the tide, they closed their blinds and stopped maintaining their trail to the beach in hopes of discouraging the public from invading their land and their privacy in their home. *Id*. at 101, 270–1. The Chmielewskis had a reasonable and established expectation of privacy in the invaded property, and as a result, all of it should be considered curtilage, subject to the Fourth Amendment's protections. *Brock v. United States*, 223 F.2d 681, 685 (5th Cir. 1955) ("Whatever quibbles there may be as to where the curtilage begins and ends, clear it is that standing on a man's premises and looking in his bedroom window is a violation of his 'right to be let alone' as guaranteed by the Fourth Amendment . . . ").

C. The City Is Liable for the Seizure Caused by Authorizing the Public Invasion

The City-sponsored invasion of the Chmielewskis' protected curtilage, caused a "meaningful interference" with the Chmielewskis' possessory interests.[4] *See* Feb. 26, 2016 Order, Doc. 141 at 7; *Severance*, 566 F.3d at 501; *Soldal*, 506 U.S. at 61; *see also State of Texas v. Gonzales*, 388 F.2d 145 (5th Cir. 1968) (the Fourth Amendment is "'protection against arbitrary intrusions into the privacies of life' and that peering in the windows of a dwelling without probable cause to believe that a crime was being committed or had been committed therein was such an intrusion."). Here, by authorizing and encouraging the public to use the Chmielewskis' protected curtilage, the City significantly interfered with their interests in that property, particularly the right to exclude. *See* Trial Transcript Day 2, Doc. 186, p. 67–8 (testimony regarding City memo after the quiet title action that described City's intent to continue keeping the beach open to the public); *cf. Presley*, 464 F.3d at 485. Members of the public invaded all sides of the Chmielewskis' home and into their private beach. Feb. 26,

[4] Contrary to the City's claims, the government need not completely deprive a person of all interests in property to "seize" it for Fourth Amendment purposes. *See, e.g.*, *Severance*, 566 F.3d at 501; *Presley*, 464 F.3d at 487 (government need not completely deprive a property owner of all of her possessory interests to effect a seizure); *Place*, 462 U.S. at 705 ("The intrusion on possessory interests occasioned by a seizure of one's personal effects can vary both in its nature and extent."); *Pepper v. Village of Oak Park*, 430 F.3d 805, 809 (7th Cir. 2005) ("substantial damage to [a] couch" was a seizure); *United States v. Gray*, 484 F.2d 352, 356 (6th Cir. 1973) (temporarily removing rifles from a closet to copy down their serial numbers was a seizure).

2016 Order at 5, 7, n.4. This is a meaningful interference with an important possessory interest, and thus, a seizure of property within the meaning of the Fourth Amendment. *Presley*, 464 F.3d at 485; *Severance*, 566 F.3d at 502.

It is irrelevant that the City officials did not themselves come and physically take possession of the property. When a private person acts "as an agent of the Government or with the participation or knowledge of any governmental official," then those acts are attributed to the government, for Fourth Amendment purposes. *Jacobsen*, 466 U.S. at 113; *see also United States v. Mekjian*, 505 F.2d 1320, 1327 (1975) (Where government officials "stand by watching with approval as the search [by a private party] continues, federal authorities are clearly implicated in the search and it must comport with fourth amendment requirements."). Because the City authorized trespassing here, and because it knew its actions were causing the public to trespass, it is responsible for the invasion of constitutionally protected property and the seizure that results. *Jacobsen*, 466 U.S. at 113 (when a private person acts "as an agent of the Government or with the participation or knowledge of any governmental official," then those acts are attributed to the government); *see also Mekjian*, 505 F.2d at 1327.

D. The Seizure Was Unreasonable

The City's seizure is unconstitutional, because it was unreasonable. As noted earlier, the seizure of an easement over residential property is unreasonable unless first paid for or justified by state law. In *Severance*, 566 F.3d at 495, the state of Texas claimed an easement across Carol Severance's land after a hurricane moved the mean high water line inland toward her house. The state's claimed easement interfered with her right to repair her house and exclude the public from her property. *Id*. at 502. The Fifth Circuit held that the action was unreasonable, because state common law did not recognize a rolling easement under the circumstances. *Severance v. Patterson*, 682 F.3d 360 (5th Cir. 2012) (referring to its prior decision in *Severance*, 566 F.3d at 502).

Here, the City did not have a warrant or other justification to convert its unwarranted activity into a reasonable one. Contrary to the provisions of the quiet title settlement, the City unreasonably continued to authorize the general public to use the Chmielewskis' property. *See* Doc. 65 at 2, n.3. The City did not have a warrant to seize the property. *Cf. Audio Odyssey v. Brenton First Nat. Bank*, 286 F.3d 498, 500 (8th Cir. 2002) (seizure unreasonable where government interfered with leasehold estate). It did not institute condemnation proceedings to take the Chmielewskis' property. *See Severance*, 566 F.3d at 502. Nor did it offer the Chmielewskis a pre-deprivation hearing. *Cf. Soldal*, 506 U.S. at 61 (implying police should have "properly awaited the state court's judgment" in eviction hearing). The government

took no steps to legitimize its invasion of the Chmielewskis' property around their home. Accordingly, the City's seizure was unreasonable. *See Severance*, 566 F.3d at 502; *Place*, 462 U.S. at 701.

CONCLUSION

The trial court's decision should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that the foregoing brief complies with type-volume limitation of Rule 32(a)(7)(B), in that it contains 4,871 words.

/s/ CHRISTINA M. MARTIN
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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ CHRISTINA M. MARTIN
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