NOT SO SWEET: SUGARCANE BURNING, FLORIDA'S RIGHT-TO-FARM ACT, AND UNCONSTITUTIONAL TAKINGS

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INTRODUCTION

Every October through April, clouds of black ash, dust, and smoke loom over the Florida Everglades and rain down from the sky. This is Florida's sugarcane harvest season.[2] These clouds are known in the Everglades by the ominous nickname "black snow."[3] Every year, black snow settles on property in and around the Everglades Agricultural Area south of Lake Okeechobee.[4] This area is home to the Everglades' largest industry and one of Florida's most important crops—sugarcane.[5] Prior to the sugarcane harvest, farmers burn their plants to remove unproductive outer leaves so they can more easily extract sucrose from the sugarcane stalk.[6] The smoke and ash produced by this burning have been linked to asthma, chronic bronchitis, and sinus problems, as well as increased risks of cardiovascular disease and lung cancer.[7] However, nearby residents who experience these harms have little recourse at law to protect themselves or their property.[8] This is due to Florida's recently amended Right-to-Farm Act (RTFA).[9] In their most basic form, right-to-farm acts bar nuisance lawsuits against agricultural

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[2]. Lulu Ramadan, *NASA Partners With Academics to Study Cane Burning Air Pollution in the Glades*, PALM BEACH POST (July 21, 2021), https://www.palmbeachpost.com/story/news/local/2021/07/21/nasa-partners-academics-study-cane-burning-pollution-glades/8038391002/ [https://perma.cc/WKW4-XL4K].

[3]. Nano Riley, *Burning Sugarcane in Florida is Making People Sick. Could 'Green Harvesting' Change the Game?*, CIVIL EATS (July 15, 2019), https://civileats.com/2019/07/15/burning-sugarcane-in-florida-is-making-people-sick-could-green-harvesting-change-the-game/ [https://perma.cc/9KWB-HQLA].

[4]. Sundial, *Sugarcane Burning in Palm Beach County, Miami Private School In-Person Classes, Children's Mental Health*, WLRN (Aug. 27, 2020), https://www.wlrn.org/2020-08-27/sugarcane-burning-in-palm-beach-county-miami-private-school-in-person-classes-childrens-mental-health [https://perma.cc/G3CC-JXD2] (reporting that students will wear bags over their heads on their way to school to avoid breathing in smoke).

[5]. *Id.* (reporting that around 25% of the nation's sugarcane crop comes from Palm Beach County).

[6]. Gilda Di Carli, *Fire Drill*, GRIST (Aug. 19, 2020), https://grist.org/justice/the-glades-florida-sugarcane-burn/ [https://perma.cc/69M2-C4UX] ("Before harvesting, leaves around the cane are ignited and burnt off like newspaper, revealing the sugar-rich stalks . . . .").

[7]. Riley, *supra* note 2 (linking the product of sugarcane burning to asthma, bronchitis, and sinus problems); Ramadan, *supra* note 1 (reporting that the products of sugarcane have been shown to be carcinogenic).

[8]. Coffie v. Fla. Crystals Corp., 460 F. Supp. 3d 1297, 1307 (S.D. Fla. 2020) (finding that class claims alleging preharvest burning constitutes trespass and nuisance were barred by RTFA).

[9]. *Id.* Throughout this Note, the term "RTFA" will refer only to the newly amended Right-to-Farm Act passed in Florida. *See infra* note 10.

operations.[10] While every state has a right-to-farm law, Florida's is uniquely strong because it bars all claims against farmers by landowners arising in "nuisance, negligence, trespass, personal injury, strict liability, or other tort," so long as that claim arises from "interference with reasonable use and enjoyment of land, including, but not limited to, noise, smoke, odors, dust, fumes, particle emissions, or vibration."[11] Essentially, agricultural operators can harm their neighbors' property and health with impunity.

Property owners would be able to seek relief if Florida's RTFA was found unconstitutional under the Supreme Court's recent decision in *Cedar Point Nursery v. Hassid*.[12] In *Cedar Point*, an agricultural employer challenged a 1975 California regulation that allowed union organizers to access agricultural employers' property to solicit support for unionization.[13] The Court held that the regulation constituted a *per se* physical taking in violation of the Fifth and Fourteenth Amendments.[14] The Court found that by barring agricultural operators from bringing trespass claims against union organizers, the California regulation had "taken" landowners' right to exclude.[15] Essentially, the Court found that the regulation improperly appropriated a right of access to agricultural employers' property and therefore effected an unconstitutional taking.[16]

The *Cedar Point* decision has been touted as opening a new chapter in American property law in which property rights will be more vigorously protected against government encroachment.[17]

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[10]. Lisa Bramen, *What Is the "Right to Farm" and Who Has It?*, SMITHSONIAN MAG. (April 6, 2011), https://www.smithsonianmag.com/arts-culture/what-is-the-right-to-farm-and-who-has-it-175894596/ [https://perma.cc/5LGE-QYP3] (defining "right to farm" laws as statutes "which protect farmers from being considered a nuisance").

[11]. FLA. STAT. § 823.14(3)(f) (2022).

[12]. 141 S. Ct. 2063 (2021).

[13]. *Id.*; *see also Cedar Point Nursery v. Hassid*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/cedar-point-nursery-v-hassid/ [https://perma.cc/BZ6N-YXQ9] (summarizing the proceedings, orders, and holding).

[14]. *Cedar Point Nursery*, 141 S. Ct. at 2066.

[15]. *Id.* at 2072.

[16]. *Id.*

[17]. Sam Spiegelman & Gregory C. Sisk, Cedar Point*: Lockean Property and the Search for A Lost Liberalism*, 2020–2021 CATO SUP. CT. REV. 165, 181 (2021) ("[T]here is much in Chief Justice John Roberts's opinion in *Cedar Point* for property-rights advocates to celebrate."); Sarah Haddon, *Property Rights: Fiercely Contested, Strongly Guarded, and Continually Defended. How the Supreme Court's Decision in* Cedar Point *Emphasized the Court's Devotion to Private Property Rights*, 71 AM. U.L. REV. 350, 376 (2021) (discussing the Court's jurisprudence leading to *Cedar Point* and arguing that *Cedar Point* is the result of "the Court's continuous efforts to protect private property rights . . . ."); Jeremy P.

However, this discourse principally refers to government encroachments in the form of regulations designed to protect workers and the public.[18] The Court's decision in *Cedar Point* is a "rightward lurch" that prioritizes the right of farmers to hire workers without government oversight over the workers' right to protection from exploitation.[19] This decision has the potential to entrench the power of agricultural property owners. However, it may also provide a means to challenge laws that interfere with the right to enjoy and occupy land in service of the right to farm it—essentially, it may allow individuals to assert their property rights against more powerful interests. This Note presents an argument for how the *Cedar Point* decision could be utilized by the individuals negatively impacted by sugarcane burning to assert their property rights and put an end to the harmful practice of sugarcane burning in the Florida Everglades.

The Supreme Court's decision in *Cedar Point* suggests that Florida's RTFA could be found to effect a *per se* taking by barring trespass claims against agricultural operations by property owners and tenants. Part I of this Note discusses the Everglades and how sugarcane production has shaped the region. Part II provides an overview of right-to-farm laws and the Supreme Court's takings jurisprudence and explores how the *Cedar Point* decision departs from traditional understandings of Takings law. Part III applies the implications of *Cedar Point* to Florida's recently amended RTFA and

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Hopkins, *Hurdles to Just Compensation*, 10 BRIGHAM-KANNER PROP. RTS. CONF. J. 177, 178 (2021) (noting that "[f]ar too often, the pursuit of the perceived collective good stamps out the fundamental rights of the individuals standing in its path" and citing *Cedar Point* as the Supreme Court's response to this phenomenon that protects fundamental property rights).

[18]. Cristina M. Rodriguez, *Regime Change*, 135 HARV. L. REV. 1, 125 (2020) (classifying *Cedar Point* as a decision that "relies on constitutional rights . . . to limit regulatory power generally and its use more specifically to protect unions and other laws and institutions that might facilitate economic redistribution"); Ross Slaughter, *Property Owners Win Big in Cedar Point Nursery v. Hassid*, ON LABOR (June 23, 2021), https://onlabor.org/property-owners-win-big-in-cedar-point-nursery-v-hassid/ [https://perma.cc/A4XE-WZE8] (noting that the Court's decision "calls into question a whole host of government regulations designed to protect workers and the public").

[19]. Slaughter, *supra* note 17; Scott A. Budow, *How the Roberts Court Has Changed Labor and Employment Law*, 2021 U. ILL. L. REV. 281, 295–96 (noting that the decision *Cedar Point* "undoubtably favors agricultural employers" and that agricultural workers are already difficult to unionize, so this decision "makes it more difficult to unionize an already challenging sector"); Vincent Martin Bonventre, *Supremely Divided: Court's Conservative Bent Continues*, 93 N.Y. ST. B.J. 6, 9 (2021) (highlighting Justice Barrett's vote and thus the Court's decision in *Cedar Point* invalidating a law that encourages union recruitment as evidence of the Court's conservative shift).

argues that this state statute effects an unconstitutional taking under the Fifth and Fourteenth Amendments.

I. The Everglades

A. History of the Everglades

Although the Everglades passed from Spanish to American sovereignty in 1821,[20] South Florida was not seriously developed for agriculture until the early 20th century.[21] The area's watery environment was not considered conducive to agricultural productivity and was largely abandoned until the area was drained.[22] The wetland was then transformed for "agricultural-industrial interests" due to the political efforts of Florida's sugar producers and refiners.[23] After the region was developed for agriculture, demand for labor increased.[24] Initially, sugar growers relied on Black sharecroppers in Florida to work the fields.[25] Eventually, as the sugar harvest season required labor in the winter months when farmers from other areas in the South would otherwise be idle, the harvest came to rely on migrant labor.[26]

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[20]. Treaty of Amity, Settlement and Limits, U.S.-Spain, Feb. 22, 1819, 8 Stat. 252 (ratified Feb. 22, 1821) (also known as the Adams-Onis Treaty of 1819).

[21]. GAIL M. HOLLANDER, RAISING CANE IN THE 'GLADES: THE GLOBAL SUGAR TRADE AND THE TRANSFORMATION OF FLORIDA 26 (2008) [hereinafter RAISING CANE] ("[W]hile Florida was home to the oldest European city in North America (St. Augustine), the state remained relatively undeveloped.").

[22]. *Id.* at 62 (describing how the Everglades were transformed from wetlands to an "agro-industrial complex for sugarcane at great environmental and monetary cost"); Katherine Mohr, *How Sweet It Isn't: Big Sugar Power Politics and the Fate of the Florida Everglades*, 7 FLA. A & M U. L. REV. 329, 332 (2012) ("As the state was developing, the one of a kind environment of south Florida was seen as valuable, but not in its natural state."); Jerrell H. Shofner, *The Legacy of Racial Slavery: Free Enterprise and Forced Labor in Florida in the 1940s*, 47 J. S. HIST. 411, 414 (1998) ("Drainage of the Everglades . . . opened thousands of acres of rick muck land by the 1920s.").

[23]. Mohr, *supra* note 21, at 334.

[24]. DAVID MCCALLY, THE EVERGLADES: AN ENVIRONMENTAL HISTORY 155–56 (1999) (describing the consolidation of large agricultural operations, which increased demand for labor).

[25]. *Id.* at 156 ("To attract sufficient workers, the district's farmers appealed to [B]lack sharecroppers from neighboring districts and states . . . .").

[26]. MCCALLY, *supra* note 23; Gail M. Hollander, *'Subject to Control': Shifting Geographies of Race and Labour in US Sugar Agroindustry, 1930-1950*, 13 CULTURAL GEOGRAPHIES 266, 276 (2006) [hereinafter *Subject to Control*] ("Black sharecroppers from the northern parts of the South were recruited during the slack periods of their agricultural cycle to work. . . during the peak of cane cutting.").

Work on the sugar plantations was grueling.[27] When cutting cane by hand, cutters must stoop low and cut the plant as close to the ground as possible, and then rise up to chop off the leaves.[28] This constant stooping and rising is painful for workers' backs, and the plant itself has sharp leaves that would often harm cane cutters.[29] In addition to the difficulty of harvest, the employment practices of the growers exploited cutters by trapping them in a cycle of indebtedness that made it nearly impossible to escape the sugar plantations.[30] Many growers that began recruiting labor from out of state would dock workers' pay against the cost of their transportation.[31] They would then hold workers against their will until they had worked off this debt.[32] Additionally, growers would charge laborers to use the tools needed to cut cane.[33] Many of the workers who came to cut cane were destitute and would borrow money from the growers only to become trapped in debt.[34]

Due to these conditions, many field workers began avoiding employment on the sugar plantations. A common belief emerged in local Black communities that work on the sugar fields was "no better than the chain gang" and that certain growers were running "slave camps."[35] Growers would forcibly return cutters to plantations if they attempted to leave during harvest season.[36] Growers would also beat

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27. MCCALLY, *supra* note 23, at 156 ("The grueling nature of the work . . . made the cane fields a destination that knowledgeable field laborers carefully avoided.").

28. *Id.* at 165.

29. *Id.*

30. Shofner, *supra* note 21, at 415 (noting that "complaints from more than thirty [cutters] revealed a pattern of false promises, holding persons by force to labor in payment of debts" and more).

31. *Id.* (describing how workers would be promised free transportation and after arriving in Florida were told that their wages would be less than half of those promised and that they would be charged for transportation).

32. *Id.* at 415–16 ("Workers were informed in graphic terms that they could not leave until they had worked off their debts.").

33. *Id.* at 415.

34. *Id.* Workers would arrive in Florida to learn that they owed money for transportation, cutting equipment, and an identification badge. *Id.* If they tried to leave before their debts were paid, they could be arrested by deputy sheriffs or company personnel and charged fines, which were added to their debts. *Id.* at 415–416.

35. MCCALLY, *supra* note 23, at 167 (quoting Letter from Willie Johnson to Doyle Carlton, Governor of Fla. (Apr. 7, 1930), *in* Carlton, GOVERNORS' PAPERS, Series 204, Box 20 (1930)); RAISING CANE, *supra* note 20, at 136.

36. Khalil Gibran Muhammad, *The Sugar That Saturates the American Diet has a Barbaric History as the 'White Gold' That Fueled Slavery*, N.Y. TIMES. (Aug. 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/sugar-slave-trade-slavery.html (on file with the *Columbia Human Rights Law Review*) (noting that while investigating, the F.B.I. found that workers attempting to escape would be captured on the highway or shot).

and intimidate cutters into working in these terrible conditions.[37] In 1942, the United States Sugar Company was indicted for peonage for these practices.[38] Although the charge was dismissed, many U.S. workers became unwilling to work for sugar growers, and labor shortages abounded.[39] To respond to this labor shortage, authorities used vagrancy laws to force Black people in the area to cut cane.[40] The towns of South Bay and Belle Glade were designated as Black towns subject to a curfew, which enabled authorities to round up "violators" and lease their labor to the sugar plantations.[41] Labor shortages were further exacerbated by the Second World War.[42]

In response to the lack of domestic workers willing to cut cane, the federal government began a labor importation program where field workers were brought from the Caribbean on H-2 visas.[43] This program was facilitated by Public Law 45, which removed federal oversight and relaxed labor restrictions related to minimum wage, housing conditions, and unionization activities.[44] This law was known as the "Peonage Law."[45] Many of the workers brought to the United States through this program travelled from Barbados, Jamaica, and British Honduras.[46] Sugar growers continued their exploitative practices by withholding wages for forced expenses such as meals, administration of the H-2 visa program, transportation, and

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[37]. The F.B.I. investigation of U.S. Sugar's labor practices included interviews from laborers that revealed deplorable conditions and an atmosphere of fear and violence. Workers testified that they were told that if they tried to leave during harvest season, they would be shot. Numerous men also testified that they had been beaten or seen others beaten by company employees. Shofner, *supra* note 20, at 416.

[38]. RAISING CANE, *supra* note 20, at 136 ("In November 1942 a two-count indictment alleging violations of workers' Thirteenth Amendment rights was brought against [U.S. Sugar], M.E. Von Mach (personnel director) and three other employees in federal district court in Tampa.").

[39]. *Id.* at 137.

[40]. During an FBI investigation of labor practices in Florida, around twenty individuals testified that the sheriff had arrested them for vagrancy and "put them to work on his own farm until they had worked out fines that he had informally imposed." Shofner, *supra* note 21, at 417.

[41]. RAISING CANE, *supra* note 20, at 138.

[42]. *Subject to Control*, *supra* note 25, at 280 (noting that the wage differences between white and Black workers "set the stage for a massive outmigration of southern [B]lack labour to northern factories at the start of the Second World War, and for a subsequent labour crisis").

[43]. *Id.* at 285 ("Through the H-2 worker programme, the Florida sugar industry was able to secure for decades a steady supply of [B]lack field labour from the former slave plantation economies of the Caribbean.").

[44]. *Id.* at 284.

[45]. *Id.*

[46]. *Id.*

"enforced savings."[47] Workers who protested were sent back to their home countries and replaced.[48] This labor importation program continued until the mechanization of U.S. sugar harvesting beginning around 1995.[49] Many current residents of the Everglades Agricultural Area are Caribbean immigrants who came to the United States to cut cane before widespread mechanization.[50]

B. The Everglades Today

Florida is the nation's largest producer of sugarcane, and the crop has contributed to the economic prosperity of the state.[51] However, this prosperity has not extended to the communities that surround sugarcane fields. Most of the commercial sugarcane industry is located in South Florida around the southern tip of Lake Okeechobee, which encompasses the Everglades Agricultural Area.[52] While most of the fieldwork has been mechanized, cane planting still requires manual labor.[53] Sugar growers employ both men and women, many of whom are Haitian or Mexican immigrants.[54] Until at least 2012, prisoners of the "Glades Work Camp" were also enlisted to work the sugarcane fields as part of work release programs.[55] Even though

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[47]. MCCALLY, *supra* note 23, at 170. Instead of paying workers their full wages in cash, sugar growers would hold 23% of each worker's pay in a savings account. In the event that a worker was found in violation of their contract, the employer would be able to dip into that account to repay the worker's "debts." *Id.*

[48]. *Id.* (discussing how Florida's sugar companies had an "unlimited number of workers" and that this "ready pool of replacement workers" made protests "relatively harmless").

[49]. *Id.* at 157.

[50]. Riley, *supra* note 2.

[51]. *Florida Leads Nation in Production of Sugarcane*, FLA. FARM BUREAU (Dec. 10, 2018), https://www.floridafarmbureau.org/news/florida-leads-nation-in-production-of-sugarcane/ [https://perma.cc/6J6Y-HCBT]; Ryan Weston, *Sugarcane farmers play important role in Florida's economy*, TALLAHASSEE DEMOCRAT (Apr. 16, 2016), https://www.tallahassee.com/story/opinion/2016/04/16/sugarcane-farmers-play-important-role-floridas-economy/83095274/ [https://perma.cc/Z8FU-NC8G] (defending critiques of "Big Sugar" by "so-called 'defenders of the environment'" because of the "economic stability sugarcane farming has brought South Florida").

[52]. FLA. FARM BUREAU, *supra* note 50.

[53]. RAISING CANE, *supra* note 20 at 18.

[54]. *Id.* at 260.

[55]. Mark Ovaska, *The Way Out*, N.Y. TIMES (Feb. 2, 2013), https://www.nytimes.com/slideshow/2013/02/02/opinion/sunday/20120203_EXPOSURES/s/20120203_EXPOSURES-slide-WMFD.html (on file with the *Columbia Human Rights Law Review*). Those prison labor programs that force incarcerated people to work are a clear descendent of slavery. Indeed, they benefit from the loophole created by the Thirteenth Amendment. Andrea C. Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869 (2012) (arguing for the prohibition of enslaving incarcerated people). *See generally* Ben Conarck, *Work Forced: A Century Later, Unpaid Prison Labor Continues to Power Florida*, THE FLA. TIMES-UNION (May 25, 2019), https://www.jacksonville.com/story/

sugarcane growing demands manual labor, unemployment in the Everglades can sometimes run four to five times higher than in the rest of Palm Beach County.[56] In March 2021, the town of Belle Glade had one of the highest unemployment rates in the country—48%.[57] In 2015, residents of Pahokee even considered dissolving the town due to the municipality's dire financial condition.[58] The economic conditions of the region have made life in the Everglades difficult.[59]

Despite the depressed economic opportunities of the region, the area still prides itself on "its agricultural and small-town roots."[60] Family ranchers and farmers rely on sugarcane to supplement their other agricultural activities and often contract with the larger sugar corporations to grind their sugarcane crop.[61]

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special/special-sections/2019/05/25/work-forced-century-later-unpaid-prison-labor-continues-to-power-florida/5061563007/ [https://perma.cc/8AP4-SDHT] (discussing the harsh conditions incarcerated persons face in Florida labor camps).

[56]. Tory Dunnan, *Newfound Focus on Finding Jobs in Glades*, WPTV WEST PALM BEACH (Jan. 13, 2022), https://www.wptv.com/news/national/two-americas/newfound-focus-on-finding-jobs-in-glades [https://perma.cc/3S3P-UERG].

[57]. Sabirah Rayford, *New Manufacturing Facility Will Bring Hundreds of Jobs to Belle Glade*, WPTV WEST PALM BEACH (Mar. 11, 2021), https://www.wptv.com/rebound/new-manufacturing-facility-will-bring-hundreds-of-jobs-to-belle-glade [https://perma.cc/5AAC-DHKV].

[58]. Eliot Kleinberg, *Dissolution Talk Once Again a Song on the Jukebox in Pahokee*, PALM BEACH POST (Aug. 21, 2015), https://web.archive.org/web/20180213195737/http://www.mypalmbeachpost.com/news/local/dissolution-talk-once-again-song-the-jukebox-pahokee/YtJkpsLVQvaZUxYb4KJFJJ/ [https://perma.cc/E8XA-ZMDJ]. The limited opportunities in the Everglades have also fostered a deeply entrenched football culture. Since the mid-1980s, the towns of Belle Glade and Pahokee have sent at least 60 players to the NFL. Ovaska, *supra* note 53. Football is seen as a means to "escape from a place where prison or early death are real and likely outcomes." Bryan Mealer, *The Way Out*, N.Y. TIMES (Feb. 2, 2013), https://www.nytimes.com/2013/02/03/opinion/sunday/football-as-a-way-out-of-poverty.html (on file with the *Columbia Human Rights Law Review*).

[59]. In the 1980s, the town of Belle Glade gained national attention as one of the epicenters of the AIDS epidemic. Jon Nordheimer, *Poverty-Scarred Town Now Stricken by AIDS*, N.Y. TIMES (May 2, 1985), https://www.nytimes.com/1985/05/02/us/poverty-scarred-town-now-stricken-by-aids.html (on file with the *Columbia Human Rights Law Review*). National headlines speculated that the virus had gained a foothold in the town because of overcrowding, poor sanitation, malnutrition, and drug use. *Id*. By 1996, Belle Glade had the highest cumulative per capita incidence of AIDS in the United States. Clyde B. Mccoy et al., *Sex, Drugs, and the Spread of HIV/AIDS in Belle Glade, Florida*, 10 MED. ANTHROPOLOGY Q. 83, 83–93 (1996).

[60]. *About Our History*, BELLE GLADE, FLORIDA, https://www.bellegladegov.com/community/page/about-our-history [https://perma.cc/P25W-5ZSD].

[61]. RAISING CANE, *supra* note 20, at 260.

C. Sugarcane Production

Sugarcane itself is a perennial grass that thrives in tropical and semitropical climates.[62] The plant consists of a stalk and a leafy exterior.[63] Sugarcane producers are able to extract sucrose from the plant which, when processed, becomes sugar.[64] Sucrose can be extracted from approximately 75–80% of the sugarcane plant, with the most productive component being the stalk.[65] The leafy outer portion of the plant is less productive and is referred to as "trash."[66] The trash is typically removed from the plant before the stalk is crushed to extract sucrose.[67] Removal of the trash can occur in several ways. In Florida, farmers burn fields to remove the trash prior to harvest.[68] Sugarcane producers will burn the plant, which strips the outer layer of trash and leaves the stalk intact for processing.[69]

Outside of the United States, other sugar-producing countries have largely abandoned the practice of burning after studies emerged showing its negative public health impacts.[70] Instead of burning the trash, mechanical harvesters can collect the leafy exterior of the cane plant.[71] This material can then be sold for fuel pellets, to generate electricity, or to make biochar, mulch, or ethanol.[72] It can also be left

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[62]. Economic Research Service, *U.S. Sugar Production*, U.S.D.A. (Oct. 19, 2021), https://www.ers.usda.gov/topics/crops/sugar-sweeteners/background [https://perma.cc/5YP8-PZL3].

[63]. Ben Legendre, *Louisiana Sugarcane Burning*, LA. STATE UNIV. AGRIC. CTR., https://www.lsuagcenter.com/NR/rdonlyres/C3F0AE0A-FC91-48EA-BC50-53B3CD22214B/3294/pub2820sugarburn2.pdf [https://perma.cc/7B8R-PR97].

[64]. *Id*.

[65]. Kaitlyn Bourg, *The World is Made of Sugar and Smoke: Protecting Louisiana's Residents Against the Intrusions of Sugarcane Burning*, 8 LA. STATE UNIV. J. ENERGY L. & RESOURCES 473, 476 (2020).

[66]. Legendre, *supra* note 62.

[67]. Willy H. Verheye, *Growth and Production of Sugarcane*, *in* SOILS, PLANT GROWTH AND CROP PRODUCTION 208 (Willy H. Verheye, ed., 2010).

[68]. Paul Tullis, *The Burning Problem of America's Sugar Cane Growers*, BLOOMBERG (Mar. 28, 2020), https://www.bloomberg.com/news/features/2020-03-28/america-s-sugar-cane-growers-have-a-burning-problem [https://perma.cc/7B8R-PR97].

[69]. *Id.*

[70]. *Id.*; Di Carli, *supra* note 5 (reporting that, in response to the hazardous effects of sugarcane burn emissions on human health, "most other states and countries that employ the method are working to phase it out in favor of mechanical harvesting processes").

[71]. Tullis, *supra* note 67.

[72]. Riley, *supra* note 2; Nadia Sussman, *Burning Sugar Cane Pollutes Communities of Color in Florida. Brazil Shows There's Another Way.*, PROPUBLICA (Dec. 29, 2021, 12:00 PM), https://www.propublica.org/article/burning-sugar-cane-pollutes-communities-of-color-in-florida-brazil-shows-theres-another-way [https://perma.cc/JCB5-8V3F] (burning is still permitted until 2031 in certain areas that have been designated as too steep to harvest by machine).

behind on the field while the stalk is transported for processing.[73] In 2002, the Brazilian government passed a law to gradually eliminate pre-harvest burning,[74] and by 2017 most harvesting occurred without burning.[75] This change occurred after public pressure mounted following the release of several studies that showed the health impacts of breathing in smoke and ash from sugarcane burning.[76]

In Florida, none of these mitigation techniques are widely used.[77] Instead, most burns in Florida occur on the open field before the cane has been cut.[78] This is done to reduce the amount of trash that is harvested and transported with the stalk for processing.[79] With these open field burns, harmful ash and smoke are free to float wherever the wind will carry it.

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[73]. Tullis, *supra* note 67.

[74]. Brazil is the world's largest producer of sugarcane, farming twenty times as much land as in the United States, and has largely phased out the use of burns. Sussman, *supra* note 71. In 2018, over 630 million metric tons of sugarcane were grown in Brazil. Richard Kemeny, *In Brazil, a Sugarcane Rush Poses a New Threat to the Amazon Rainforest*, SIERRA (June 10, 2020), https://www.sierraclub.org/sierra/brazil-sugarcane-rush-poses-new-threat-amazon-rainforest [https://perma.cc/6BK4-5DWN].

[75]. Sussman, *supra* note 71 (reporting that pre-harvest burning is still permitted until 2031 in certain areas that have been designated as too steep to harvest by machine).

[76]. Maria Leticia de Souza Paraiso & Nelson Gouveia, *Health Risks Due to Pre-harvesting Sugarcane Burning in São Paulo State, Brazil*, 18 REVISTA BRASILEIRA DE EPIDEMIOLOGIA 691, 693 (2015); *see also* Marcos A. Arbex et al., *Assessment of the Effects of Sugar Cane Plantation Burning on Daily Counts of Inhalation Therapy*, 50 J. AIR & WASTE MGMT. ASS'N 1745, 1748 (2000) (evaluating the association between sugar cane plantation burning and hospital visits in the state of São Paulo and finding "a significant association between the amount of smoke particles collected in a town surrounded by sugar cane plantations . . . and the number of patients that need inhalation therapy for acute respiratory distresses"); Marcos Abdo Arbex et al., *Air Pollution From Biomass Burning and Asthma Hospital Admissions in a Sugar Cane Plantation Area in Brazil*, 61 J. EPIDEMIOLOGY AND CMTY. HEALTH 395, 395, 399 (2006) (evaluating the association between suspended particles generated from sugar cane burning and hospital admission due to asthma, finding that "the cities where sugar cane is harvested pay a high toll in terms of public health" and recommending that preharvest sugar cane burning be banned).

[77]. Ryan Nebeker, *What You Need to Know About Sugarcane Burning*, FOODPRINT (Oct. 27, 2021), https://foodprint.org/blog/sugarcane-burning/ [https://perma.cc/8XLV-9WRF] ("The practice of burning sugarcane fields has been largely discontinued throughout the world because of concerns about air pollution, but farmers still do it in Florida's main sugar-producing region known as the Glades.").

[78]. STOP SUGAR BURNING, http://stopsugarburning.org [https://perma.cc/4BVR-Y3HC].

[79]. Legendre, *supra* note 62.

Sugarcane producers in Florida are resistant to green harvesting for two main reasons.[80] First, they contend that mechanical removal is so laborious and time consuming that sugarcane farming will no longer be profitable if they cannot burn.[81] Second, they argue that leaving the trash on the field will deteriorate soil conditions and decrease future yields.[82] However, some studies have found that leaving trash on the field makes little difference for future productivity.[83] Leaving trash behind in Australia has even been shown to reduce soil erosion and herbicide runoff.[84] The sugar industry also consistently argues that the burns do not negatively affect the surrounding communities.[85] When residents point to the rates of asthma in the children who live in the area, producers argue that these experiences are anecdotal and do not prove that the burns negatively impact the communities in which they occur.[86] However, residents of the area maintain that sugarcane burning disrupts everyday life and negatively impacts health.[87]

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[80]. Even though sugar producers claim that the burns are safe, this important element of the harvest is conspicuously absent from information on the Florida Crystals website, the lead defendant from the *Coffie* class action. The website emphasizes the sustainability of sugarcane and contains a section that claims a commitment to reducing waste. The website contains a page detailing the company's waste reduction efforts. That page notes that the company uses "every possible bit of [the] crop . . . creating a process that results in no sugarcane waste." This page walks the reader through the extraction process with no mention of pre-harvest burning. *We're Committed to Reducing Waste*, FLA. CRYSTALS CORP., https://www.floridacrystals.com/why-florida-crystals/sustainability [https://perma.cc/4BVR-Y3HC].

[81]. Legendre, *supra* note 62.

[82]. Sussman, *supra* note 71 (quoting a spokesperson from Florida Crystals stating that sugarcane harvesting in Brazil could not be compared to South Florida because of differences in farming practices, soil, weather, and regulations); Specialty Crop Industry, *Pre-Harvest Sugarcane Burns Necessary and Safe*, AGNET MEDIA (Sept. 10, 2020), https://specialtycropindustry.com/pre-harvest-sugarcane-burns-u-s/ [https://perma.cc/D5YY-PSMB] (asserting that vegetation left on the field may cause young shoots to suffer frost damage and delayed growth and may reduce the "available soil nitrogen to the crop").

[83]. Sussman, *supra* note 71 (reporting that the trash left behind on the field in Brazil now forms a protective blanket and enriches the soil).

[84]. OECD, *Sugarcane (*Saccharum *spp.)*, *in* SAFETY ASSESSMENT OF TRANSGENIC ORGANISMS IN THE ENVIRONMENT 67, 84 (2016).

[85]. Specialty Crop Industry, *supra* note 81.

[86]. *Id.*

[87]. *See, e.g.*, Robert Mitchell, *End This Injustice of Sugarcane Burning*, PALM BEACH POST (Feb. 12, 2022, 7:00 AM), https://www.palmbeachpost.com/story/opinion/2022/02/12/commentary-end-burning-sugarcane-now/6734007001/ [https://perma.cc/55W8-RSL5] ("For six to eight months of the year, smoke and ash rain down on us . . . . We call it 'black snow.' . . . It comes as no surprise that asthma is a part of life here.").

1. Sugarcane Burning Negatively Impacts Human Health

The practice of sugarcane burning is harmful to the health of those who breathe its smoke and live under its clouds of ash.[88] This harm is inflicted disproportionately on communities of color.[89] In the Everglades region of Florida, the burns create smoke plumes that mainly impact three communities—Belle Glade, Pahokee, and South Bay.[90] Many residents of these communities choose to stay inside during harvest season to avoid breathing in smoke and ash as much as possible.[91] Those who can seal off their homes completely will do so, and others press air conditioner filters against windows in an attempt to keep smoke and ash out of their homes.[92] Children with asthma (of which there are many in the Glades) will often be kept home from school during burn season.[93] When children do go to school, teachers will often cancel recess or are forced to send children home when they have asthma attacks.[94] On one particularly horrible

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[88]. *Toxic Air Pollution*, STOP SUGAR BURNING, http://stopsugarburning.org/the-burning-problem/#environmental [https://perma.cc/K7AT-ZX7X] (noting that research has linked exposure to sugarcane burning emissions to asthma, bronchitis, COPD, cancer, kidney disease, cardiac disease, preterm births, low birth weights, and high infant mortality rates in pregnant mothers).

[89]. Sussman, *supra* note 71 ("The harvesting practice helps produce more than half of America's cane sugar, but it sends smoke and ash into largely low-income communities of color in the state's heartland."); Mitchell, *supra* note 86 ("Regulations in place emphasize protections for wealthy coastal communities when the winds blow east but fail to offer the same protection for our communities, largely of color, living in and around the Everglades Agricultural Area. As a result, our communities face increased air pollution, health risks and economic stress.").

[90]. Mitchell, *supra* note 86.

[91]. Lulu Ramadan, Ash Ngu, & Maya Miller, *The Smoke Comes Every Year. Sugar Companies Say the Air is Safe.*, PROPUBLICA (July 8, 2021), https://projects.propublica.org/black-snow/ [https://perma.cc/8VMM-6J2M] [hereinafter *The Smoke*].

[92]. *Id.*

[93]. Dan Sweeney, *Sugar Companies Hit With Federal Class-Action Lawsuit Over Health Effects of Cane Field Burns*, S. FLA. SUN-SENTINEL (June 4, 2019, 5:45 PM), https://www.sun-sentinel.com/local/palm-beach/fl-ne-sugar-cane-burn-lawsuit-biden-abruzzo-20190604-6rjj2mkr2va5zmggky43duieky-story.html (on file with the *Columbia Human Rights Law Review*) (describing how the overall hospitalization rate for asthma in Florida is 142.2 out of 100,000; in Palm Beach County, it is 700 out of 100,000); Rebecca Bratspies, *Struggling to Breathe: Asthma, Pollution, and the Fight for Environmental Justice*, THE APPEAL (Dec. 3, 2020), https://theappeal.org/the-lab/report/struggling-to-breathe-asthma-pollution-and-the-fight-for-environmental-justice/ [https://perma.cc/4MJY-BYKN] (discussing how the disease burden for asthma has fallen primarily on non-white children, and noting that the percentage of Black children suffering from asthma is more than double that of white children).

[94]. *The Smoke*, *supra* note 90.

day in 2008, fourteen elementary school children in South Bay were treated for respiratory problems.[95] Of those fourteen children, five already suffered from asthma and needed to be hospitalized.[96] Some residents of these communities with serious health issues have received recommendations from their doctors to leave the Everglades to protect their health from the harmful impact of the sugarcane burning.[97] During burn season, healthcare providers see a 35% increase in hospital visits related to respiratory issues.[98]

In addition to anecdotal evidence from residents, scientific evidence shows that the smoke and ash released by sugarcane burns have negative health effects.[99] The burns release particulate matter ($PM_{2.5}$ and PM_{10}) and polycyclic aromatic hydrocarbons (PAHs).[100] These pollutants have been shown to cause chronic bronchitis and sinus problems and to exacerbate existing health issues such as

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[95]. Staff Reports, Digest, S. FLA. SUN-SENTINEL (Feb. 7, 2008, 12:00 AM), https://www.sun-sentinel.com/news/fl-xpm-2008-02-07-0802070453-story.html (on file with the *Columbia Human Rights Law Review*).

[96]. *Id*.

[97]. *The Smoke*, *supra* note 90; Becky Sawtelle, *Bird's Eye View of Controlled Sugarcane Burn*, CBS12 NEWS (July 14, 2021), https://cbs12.com/news/local/birds-eye-view-of-sugar-cane-burn [https://perma.cc/B99E-JR63] (interviewing lead attorney on the *Coffie* class-action, who commented that doctors receive patients in the Glades at the start of harvest season because they are preparing for the respiratory issues they will have for the next six months).

[98]. Nebeker, *supra* note 76 ("Local health care providers are also well aware of the effects of the 'black snow' and see a 35 percent uptick in respiratory-related hospital visits when cane is burning.").

[99]. Ramadan, *supra* note 1; Alexandre C. Nicolella & Walter Belluzzo, *The Effect of Reducing the Pre-harvest Burning of Sugar Cane on Respiratory Health in Brazil*, 20 ENV'T & DEV. ECON. 127 (2014); Carmen Martínez-Valenzuela et. al., *Cytogenetic Biomonitoring of Occupationally Exposed Workers to Ashes From Burning of Sugar Cane in Ahome, Sinaloa, México*, 40 ENV'T TOXICOLOGY & PHARMACOLOGY 397 (2015) (concluding that exposure to the ash from sugar cane burns can induce DNA damage).

[100]. Ramadan, *supra* note 1; Lulu Ramadan, *"A Complete Failure of the State": Authorities Didn't Heed Researchers' Calls to Study Health Effects of Burning Sugar Cane*, PROPUBLICA (Aug. 19, 2021), [hereinafter *Failure of the State*] (reporting an estimate that "cane burning was responsible for more than half the PAHs in the air in Palm Beach County"); Henrique César Santejo Silveira et al., *Emissions Generated by Sugarcane Burning Promote Genotoxicity in Rural Workers: A Case Study in Barretos, Brazil*, 12 ENV'T HEALTH 1, 2 (2013) (study assessing health effects of release of "fine and ultrafine particulate matter (PM10 and PM2.5)" released from sugar cane burns on rural workers in Brazil).

asthma and chronic obstructive pulmonary disease (COPD).[101] Excessive exposure to $PM_{2.5}$ can lead to respiratory distress, asthma, heart disease, cancer, and death.[102] Additionally, $PM_{2.5}$ has been linked to increased risk of lung, skin, and bladder cancer, as well as cardiovascular disease.[103] Exposure to $PM_{2.5}$ is the leading environmental cause of human mortality in the United States.[104]

These serious health effects have led many other sugar-producing countries around the world to phase out the practice of sugarcane burning.[105] Countries like Brazil have largely abandoned field burning in favor of green harvesting.[106] However, in the United States, sugarcane burning persists. Sugarcane growers in the United States argue that the burns do not negatively impact air quality, noting that the air quality does not frequently exceed the National Ambient Air Quality Standards (NAAQS).[107] However, NAAQS

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[101]. Ramadan, *supra* note 1; Sean H. Ling & Stephan F. van Eeden, *Particulate Matter Air Pollution Exposure: Role in the Development and Exacerbation of Chronic Obstructive Pulmonary Disease*, 4 INT'L J. CHRONIC OBSTRUCTIVE PULMONARY DISEASE 233, 233 (2009) ("Strong epidemiological evidence suggests that exposure to particulate matter (PM) air pollution causes exacerbations of pre-existing lung conditions, such as, chronic obstructive pulmonary disease (COPD) resulting in increased morbidity and mortality."); Hajime Takizawa, *Impacts of Particulate Air Pollution on Asthma: Current Understanding and Future Perspectives*, 9 RECENT PATS. ON INFLAMMATION & ALLERGY DRUG DISCOVERY 128, 128 (2015) ("Epidemiological and toxicological studies have strongly suggested a causative relationship between fine particulate air pollution and increased incidence as well as exacerbations of asthma, and other respiratory disorders.").

[102]. Charles K. Wirks, Impacts of Sugar Cane Agricultural Fires on Air Quality in Southern Florida: Modeling Particulate Matter with the HYSPLIT Atmospheric Dispersion Model (2019) (M.A. Thesis, Florida State University) (on file with the *Columbia Human Rights Law Review*).

[103]. JESSICA L. MCCARTY, BURNING CANE: ASSESSMENT OF CURRENT AIR QUALITY MONITORING DURING SUGARCANE HARVEST IN THE EVERGLADES AGRICULTURAL AREA 8 (2021), https://drive.google.com/file/d/1Zdzl0K6JigQSeaCYIlXU-gzZY8FpYQma/view [https://perma.cc/EUM6-68KB]; Ramadan, *supra* note 1.

[104]. Christopher W. Tessum et al., *$PM_{2.5}$ Polluters Disproportionately and Systematically Affect People of Color in the United States*, SCI. ADVANCES (Apr. 28, 2021), at 1.

[105]. *Brazil Sugarcane Mills Agree to End Burning by '17*, REUTERS (Oct. 22, 2007, 1:24 PM), https://www.reuters.com/article/environment-brazil-cane-harvest-dc/brazil-sugarcane-mills-agree-to-end-burning-by-17-idUSN2245768620071022 [https://perma.cc/L58G-YJAB].

[106]. *Id.*

[107]. Sawtelle, *supra* note 96 (reporting that a spokesperson for U.S. Sugar Corp stated that the "air quality in the Glades is in compliance with the Clean Air Act . . . ."); Hannah Morse, *Glades Residents Drop Cane Burning Lawsuit Against Sugar Growers*, PALM BEACH POST (Feb. 25, 2022, 7:10 PM), https://www.palmbeachpost.com/story/news/local/2022/02/26/glades-residents-drop-sugarcane-burning-lawsuit-against-sugar-growers/6944816001/

compliance is an inadequate indicator of the air quality in the Everglades during burn season. NAAQS are set by the EPA pursuant to the Clean Air Act (CAA), and compliance is evaluated based on 24-hour and annual averages.[108] By evaluating NAAQS compliance on a 24-hour and annual basis, the findings warp the reality of air quality in the Everglades during burn season.[109] Annual evaluation averages the harvest season, where burns occur almost every day, with growing season, when no burns occur.[110] This leads to an inaccurate evaluation of the air to which Everglades residents are exposed during harvest season.[111] When air quality is appraised based on a 24-hour average, the evaluation will not consider spikes of air pollutants due to burns that last a short period of time.[112] Most sugarcane burns last less than an hour and result in large spikes of pollutants that are released in a smoke and ash plume.[113] The EPA has found that exposure to high levels of $PM_{2.5}$ that lasts less than one hour can impair heart function, promote clot formation, and increase blood pressure.[114] Therefore, CAA compliance is unlikely to give an accurate picture of air quality experienced by residents who live near sugarcane fields.

2. Sugarcane Burns in the Everglades Agricultural Area Have Discriminatory Impacts

Although sugar producers argue that sugarcane burning does not lead to decreased air quality or negative health impacts, it is clear that sugarcane burns are undesirable and should be subject to restriction. However, the restrictions imposed by the Florida Forest Service (FFS) are not applied equitably.

FFS restrictions largely protect the white and affluent communities to the east of the Everglades Agricultural Area to the

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[https://perma.cc/8X3P-X2YZ] (reporting that a spokesperson for U.S. Sugar Corp stated, "We believed the science, data, and regulations that support our work every day would show that the air quality in the Glades is 'good'—the highest quality under federal regulations").

[108]. *The Smoke*, *supra* note 90 ("[F]ederal regulators rely on 24-hour and annual averages to track a type of particulate matter . . . that is emitted by cane burning.").

[109]. *Id.* ("These averages sometimes obscure short-term pollution, a defining feature of Florida's harvesting process.").

[110]. *Id.* ("Nearly every day during the winter and spring, sugar companies set fire to dozens of cane fields across western Palm Beach County.").

[111]. *Id.* .

[112]. *Id.*

[113]. *Id.*

[114]. Review of the National Ambient Air Quality Standards for Particulate Matter, 85 Fed. Reg. 24094, 24110 (proposed Apr. 30, 2020) (to be codified at 40 C.F.R. 24094).

detriment of communities of color and low-income communities.[115] Before a sugarcane farmer can burn their crop, they must request a burn authorization from FFS, which evaluates whether to issue a burn authorization based on the projected wind conditions at the time of the proposed burn. [116] When analyzing whether to authorize a burn, the FFS creates a plume model to show where the ash and smoke will likely travel.[117] If the plume model shows that the plume will interact with "sensitive areas," like hospitals or busy roadways, then the authorization is generally denied.[118] In 1991, after receiving several complaints about the impacts of sugarcane burning from residents of towns east of Lake Okeechobee, the FFS changed its policy to generally deny permits when it appears that smoke and ash will drift east.[119] Therefore, burn authorizations are more often approved when the smoke will drift west, into what is known as the "Hazard Zone."[120]

The communities that lay to the east of Lake Okeechobee are generally whiter and more affluent, while the Hazard Zone is made up of several communities with a high percentage of Black residents and high rates of poverty.[121] For example, the per capita income from

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[115]. Nebeker, *supra* note 76.

[116]. Specialty Crop Industry, *supra* note 81; *see also* FLA. STAT. ANN. § 590.02(10) ("[T]he Florida Forest Service has exclusive authority to require and issue authorizations for broadcast burning and agricultural and silvicultural pile burning.").

[117]. *The Smoke*, *supra* note 90 (noting that burn permit data contains a location and a modeled smoke plume for each authorized burn). The Florida Forest Service maintains a tool where the public can view the sugarcane burns and their ash plumes on any given day. Florida Forest Service, *Sugarcane Burn Tracking Tool*, fireinfo.fdacs.gov/fmis.dataviewer (last visited Sept. 21, 2022).

[118]. Wirks, *supra* note 101. A representative of U.S. Sugar in September 2020 reassured residents that schools are protected because "farmers do not apply for permits near schools during the school week." Specialty Crop Industry, *supra* note 81. However, in August 2020, it was reported that the Palm Beach County School District leases land adjacent to the Rosenwald Elementary School in South Bay to U.S. Sugar for use as a sugarcane field. Di Carli, *supra* note 5 (reporting sugarcane burns occurring during the school day, despite a claim by U.S. Sugar that 'internal protocols' prevent burning during school hours).

[119]. *The Smoke*, *supra* note 90.

[120]. Coffie v. Fla. Crystals Corp., No. 19-80730-CIV-SMITH, U.S. Dist. LEXIS 124642, at *6 (S.D. Fla. July 2, 2021) ("Under current regulations promulgated by the State of Florida, the FFS denies permits if winds are projected to blow toward eastern Palm Beach County and eastern Martin County but issues permits when the winds blow toward the Hazard Zone.").

[121]. *Environmental Injustice*, STOP SUGAR BURNING, http://stopsugarburning.org/the-burning-problem/#environmental [https://perma.cc/83UG-48VE]; *Economics*, STOP SUGAR BURNING, http://stopsugarburning.org/the-burning-problem/ [https://perma.cc/83UG-48VE] ("In 2020, Belle Glade was ranked Florida's poorest overall city with Pahokee ranked second, and South Bay in a list [of] Florida's top 10 poorest cities based off of statewide poverty, median household income, and unemployment rates.").

2016–2020 in Belle Glade, one of the cities in the Hazard Zone, was $16,264.[122] In contrast, the town of Palm Beach, which is east of Lake Okeechobee, had a per capita income of $193,662 during that same time period.[123] Those people who live the closest to the sugarcane fields live in predominately lower-income Black and Hispanic communities and do not have the same time or resources to advocate for clean air as white, wealthier communities in the area.[124]

Even so, the residents of the Everglades have organized a grassroots environmental justice campaign called "Stop the Burn," which advocates for replacing pre-harvest sugarcane burning with "modern, sustainable, burn-free green harvesting."[125] This campaign, which began in 2015, continues to this day and is organized by those residents directly impacted by pre-harvest sugar field burning.[126] In addition to this campaign, the residents of the Hazard Zone were involved in a class action suit against sugarcane growers to address the health impacts of sugarcane burning.[127] The class action included, *inter alia*, allegations of nuisance, trespass, and battery.[128] The class members also claimed that the physical invasion of their property by smoke and ash constituted a taking.[129] However, their claims were largely precluded by Florida's recently amended RTFA and dismissed.[130] Florida's RTFA bars claims against agricultural

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[122]. *Quick Facts: Belle Glade City, Florida*, U.S. CENSUS BUREAU (2020), https://www.census.gov/quickfacts/fact/dashboard/bellegladecityflorida/PST045219 [https://perma.cc/9DLG-QYHW] (measured in 2020 dollars).

[123]. *Quick Facts: Palm Beach Town, Florida*, U.S. CENSUS BUREAU (2020), https://www.census.gov/quickfacts/fact/table/palmbeachtownflorida,bellegladecityflorida/PST045221 [https://perma.cc/MD2L-9367] (measured in 2020 dollars).

[124]. Nebeker, *supra* note 76; *Failure of the State*, *supra* note 98 (reporting a study finding "higher concentrations of particulate matter . . . in Belle Glade during cane-burning season than in Delray Beach, a wealthier coastal town nearly 40 miles away . . . . Outside of the harvest season, the two communities had similar pollution levels").

[125]. STOP SUGAR BURNING, *supra* note 77.

[126]. *Our Campaign*, STOP THE BURN, http://stopsugarburning.org/stop-the-burn/#ourcampaign [https://perma.cc/Z8MP-ARQQ].

[127]. Sweeney, *supra* note 92; Coffie v. Fla. Crystals Corp., No. 19-80730-CIV-SMITH, 2021 U.S. Dist. LEXIS 124642 (S.D. Fla. July 2, 2021).

[128]. First Amended Class Action Complaint at 34–35, Coffie v. Fla. Crystals Corp., No. 9:19-cv-80730-RS-MM (S.D. Fla. Aug. 28, 2019); Third Amended Class Action Complaint at 121, Coffie v. Fla. Crystals Corp., No. 9:19-cv-80730-RS-MM (S.D. Fla. Nov. 12, 2020).

[129]. Third Amended Class Action Complaint at 117, Coffie v. Fla. Crystals Corp., No. 9:19-cv-80730-RS-MM (S.D. Fla. Nov. 12, 2020) ("This physical invasion . . . authorized by the FFS is a takings for which [plaintiff class members] are entitled to just compensation.").

[130]. The court found that Plaintiff class members' battery claims were barred by RTFA. Plaintiff's nuisance and trespass claims were dismissed for the same reason earlier in the litigation. Coffie, 2021 U.S. Dist. LEXIS 124642, at *23–24.

operations except under specific circumstances.[131] The plaintiffs dropped the case without settlement within a year of this dismissal.[132]

II. Right-to-Farm Laws and Takings

A. Florida's Newly Amended Right-to-Farm Act

Every state in the country has a right-to-farm law, the primary purpose of which is to limit nuisance claims brought against agricultural operations.[133] These laws are generally passed as part of an attempt to preserve an agricultural way of life in response to an alleged expansion of nonagricultural uses of land into agricultural areas.[134] The narrative surrounding the passage of right-to-farm laws is of "city folk" moving into the countryside, filing nuisance lawsuits against their new neighbors, and disrupting farmers' way of life.[135]

It is arguable that the "farmers' way of life" has already been significantly disrupted by forces far beyond the control of city people moving to the countryside. Instead, that disruption has occurred due to a significant shift in how agriculture is done in this country.[136] Proponents of right-to-farm laws erroneously describe farmers as less

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[131]. FLA. STAT. § 823.14(4)(a) (2022). A farm operation may not be able to claim the protections of RTFA if it leaves out human waste, garbage, or dead animals; has malfunctioning septic tanks, keeps diseased animals in a manner not in compliance with disease control programs, or contains unsanitary slaughtering operations, among other exceptions. *Id.*

[132]. Morse, *supra* note 106.

[133]. Nat'l Agric. L. Ctr. Staff, *States' Right-To-Farm Statutes*, NAT'L AGRIC. L. CTR., https://nationalaglawcenter.org/state-compilations/right-to-farm/ [https://perma.cc/7DDY-Z9UQ]; *see, e.g.*, *Right to Farm Act*, AMERICAN LEGISLATIVE EXCHANGE COUNCIL, (January 28, 2013), https://www.alec.org/model-policy/right-to-farm-act/ [https://perma.cc/2XLA-USJC] (describing a model statute off of which some states mirrored their right-to-farm acts).

[134]. Nat'l L. Ctr. Staff, *supra* note 131 ("[R]ight-to-farm laws . . . seek to protect . . . farmers and ranchers from nuisance lawsuits filed by individuals who move into a rural area where normal farming operations exist, and who later use nuisance actions to attempt to stop those ongoing operations.").

[135]. David I. Stanish, *Will the Takings Clause Eclipse Idaho's Right-To-Burn Act?*, 40 IDAHO L. REV. 723 (2004); Terrence J. Centner, *Governments and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87, 90 (2006).

[136]. By the year 1998, only about 3.6% of American farms were accounting for over 56% of total farm production value. J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 331 (2000).

powerful and in need of legislation to protect themselves and their way of life.[137] The reality is starkly different.

This is especially true for sugarcane producers. As of 2021, most sugarcane in Florida is produced by a few large companies.[138] These companies—"Big Sugar"—wield significant influence in Washington, D.C. and the state capital of Tallahassee.[139] Two of these companies, U.S. Sugar and Florida Crystals, each individually outspent every other company on lobbying at the state level in 2018 and 2019.[140] Big Sugar employs more than twelve thousand workers every year during harvest season and is the largest industry in the Everglades.[141] The influence these companies wield is reflected in the treatment that the sugar industry receives from federal and state governments.[142] Due to import barriers on sugar and tariff-rate quotes, U.S. sugar prices are consistently more expensive than elsewhere in the world.[143] In fact, these policies cost U.S. consumers about $2 billion every year.[144] While the sugar tariff was initially implemented as a revenue-raising measure in 1789, the U.S. sugar

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[137]. *Id.* at 331 ("[F]arms are so widely distributed in the nation that few federal, state, or local politicians can escape pressure from farm constituencies, and in farming areas, politicians are dominated by them.").

[138]. Verheye, *supra* note 66 at 3.

[139]. Joshua Zumbrun, *Sugar's Sweet Deal*, FORBES (2008), http://www.forbes.com/2008/06/27/florida-sugar-crist-biz-beltway-cx_jz_0630 sugar.html [https://perma.cc/6BRU-D6ED] (discussing the announcement that the state of Florida would buy out U.S. Sugar for $1.75 billion in 2008 as unsurprising given that "[s]ugar is one of the most political influential businesses in America"); Justin Villamil, *These Sugar Barons Built an $8 Billion Fortune With Washington's Help*, BLOOMBERG (Aug. 9, 2017), https://www.bloomberg.com/news/articles/2017-08-09/sugar-barons-amass-8-billio n-fortune-by-mastering-u-s-politics [https://perma.cc/M7RE-EDHV] (describing the Farjul brothers, who control Florida Crystals Corp., as "among the most effective political donors in America"). The Farjul brothers have historically given to both Democrats and Republicans in roughly equal numbers. *Id.*

[140]. *The Smoke*, *supra* note 90.

[141]. *Id.*

[142]. Mohr, *supra* note 21, at 338 ("Sugar has been a protected crop since 1789, when the first sugar tariff was enacted . . . ."). Sugar subsidies operate through a system of loans and quotas that decrease the risk for sugar processers. Essentially, the government grants processors loans for the harvest, and after the harvest, if "they've been able to sell their sugar for more than the cost of the loan, they pay off the loan and pocket the profit." Zumbrun, *supra* note 137. Alternatively, if "their crop is worth less than the loan, they can keep the money and just give the government their sugar." *Id.*

[143]. Economic Research Service, *supra* note 61.

[144]. Hannah O. Brown et al., *United by Cane: Part One*, THE MARJORIE (Mar. 26, 2019), https://spark.adobe.com/page/p0K0ZZZNt5L73/?ref=https %3A%2F%2Fthemarjorie.org%2F&embed_type=overlay&context=lightbox-expand [https://perma.cc/QBK2-G568]. These sugar subsidies have been widely criticized as "goug[ing] consumers and export[ing] U.S. jobs . . . by artificially sustaining a U.S. domestic sugar price that is, at times, double or triple the world market price." Katherine E. Monahan, *U.S. Sugar Policy: Domestic and International Repercussions of Sour Law*, 15 HASTINGS INTL. & COMP. L. REV. 325, 326–27 (1992).

program is no longer a significant source of revenue.[145] At this point, it appears that the objective of U.S. sugar policy is to "guarantee an enhanced income for domestic producers and processors."[146]

It is this same influence that has resulted in Florida's uniquely strong RTFA.[147] In July 2021, Florida's new RTFA amendment went into effect.[148] This amendment makes it even more difficult for landowners to sue agricultural operations that are a nuisance to their land or cause them other types of harm.[149] This act bars claims that arise from interference with use and enjoyment of land, whether those claims arise in nuisance or any other tort, when those claims are brought against any agricultural operation that has been active for one or more years and was not a nuisance on its established date of operation.[150] What is unique about this amendment, however, is that it blocks far more than nuisance claims.[151] The new language of the act bars all claims arising from "interference with reasonable use and enjoyment of land" regardless of what form those claims take.[152] This includes any claims made in negligence, trespass, personal injury, strict liability, or any other tort.[153] In addition, the act bars claims by landowners who sue *before* the farm operation has been operating for a year, but whose property is more than half a mile from the activity or structure alleged to be a nuisance.[154] In the case of sugarcane burning, the activity at issue causes harm on property much farther than half a mile.[155] An average

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145. Monahan, *supra* note 144, at 328.

146. *Id.*

147. Steve Davies, *Florida Right-to-Farm Law Expands Protections From Lawsuits*, AGRI-PULSE (May 12, 2021), https://www.agri-pulse.com/articles/15836-florida-right-to-farm-law-expands-protections-from-lawsuits [**https://perma.cc/AMC6-VF36]** (discussing opponents of the bill describing Florida's RTFA as targeted at preventing legal actions against sugar companies and their practice of pre-harvest burning).

148. Kitt Tovar Jensen, *Florida's Amended Right to Farm Law Goes Into Effect July 1*, AG DOCKET: IOWA STATE UNIV. CTR. FOR AGRIC. L. AND TAX'N (July 1, 2021), https://www.calt.iastate.edu/blogpost/florida's-amended-right-farm-law-goes-effect-july-1 [https://perma.cc/7QFW-GY4E].

149. Davies, *supra* note 147 ("Florida has expanded its right-to-farm law by making it more difficult for residents to sue over the impacts of agricultural operations, adding a slew of conditions designed to discourage lawsuits.").

150. FLA. STAT. § 823.14(4)(a) (2022).

151. FLA. STAT. § 823.14(3)(f) (2022); Davies, *supra* note 147 ("All states have right-to-farm statutes, but Florida's new law goes farther.").

152. *Id.*

153. *Id.*

154. FLA. STAT. § 823.14(4)(d) (2022).

155. Di Carli, *supra* note 5.

of twenty-five burns occur every day during harvest season;[156] this geographic limitation prohibits many individuals affected by sugarcane burning from asserting their property rights.

The law permits plaintiffs who live sufficiently close to the alleged nuisance to bring suit regarding an agricultural activity that has been in operation for less than a year.[157] However, many big sugarcane producers have burned their sugarcane fields for years.[158] Therefore, even with this one-year allowance, sugarcane producers are largely insulated from liability. Thus, Florida's RTFA, while allegedly designed to protect farming operations from "city residents moving to the country," does not provide protection for people whose families may have lived on their land longer than the agricultural operation has been in existence.[159] Many residents of the Everglades have lived there for generations, long before the modern sugarcane corporations turned to mechanization.[160] For example, Kina Phillips is a South Bay activist who helps lead the "Stop the Burn Campaign."[161] Ms. Phillips is a longtime resident of the Everglades.[162] Seven generations of her family have grown up in the city of Belle Glade, yet due to Florida's RTFA, she has no recourse to halt the burning practices which have forced her five-year-old son to use a breathing machine during harvest season.[163]

Right-to-farm laws are touted as a way to protect existing ways of life from outsiders who wish to use their newfound influence

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[156]. *The Smoke*, *supra* note 90.

[157]. FLA. STAT. § 823.14(4)(a) (2022) ("No farm operation which has been in operation for 1 year or more since its established date of operation and which was not a nuisance at the time of its established date of operation shall be a public or private nuisance . . . .").

[158]. Associated Press, *Sugarcane Burning Lawsuit Dropped by Florida Residents*, U.S. NEWS (Feb. 25, 2022), https://www.usnews.com/news/best-states/florida/articles/2022-02-25/sugarcane-burning-lawsuit-dropped-by-florida-residents (on file with the *Columbia Human Rights Law Review*) ("For generations, Florida's sugarcane farmers have legally set fire to their fields prior to the harvest . . . .").

[159]. Siena Chrisman, *How the Right to Farm Became the Right to Harm*, FOODPRINT. (Aug. 5, 2019), https://foodprint.org/blog/right-to-farm-right-to-harm-film/ [https://perma.cc/LC32-74AW].

[160]. Riley, *supra* note 2 (noting that many residents of the area are descendants of Caribbean immigrants who came to the United States to cut sugarcane by hand).

[161]. *Id.*; *Our Campaign*, STOP THE BURN, http://stopsugarburning.org [https://perma.cc/4BVR-Y3HC] (identifying Kina Phillips as a member of the leadership team).

[162]. Riley, *supra* note 2.

[163]. *Id.*

as landowners to transform the countryside.[164] However, the power differential between the Everglades residents, who suffer high rates of poverty, and the sugar industry, which has an annual income of about $800 million a year, is stark.[165] Far from wishing to push sugar out of the Everglades, many residents simply wish for the producers to transition to green harvesting.[166] While potentially more expensive, this shift would improve air quality and create jobs.[167] Instead of making this shift, Florida's sugarcane growers have chosen to use their wealth and influence to insulate themselves from liability for the harm their practices create.

B. Overview of Takings

Right-to-farm laws have been challenged across the country by those who wish to protect themselves and their property from the negative externalities of agriculture.[168] The Fifth Amendment prohibits the taking of private property for public use without just compensation, and the Fourteenth Amendment extends this prohibition to actions taken by state governments.[169] Takings jurisprudence has recognized two types of government actions which constitute takings: regulatory takings and *per se* takings.[170] In order to analyze the application of the Supreme Court's *Cedar Point* decision to Florida's RTFA, this Note will first provide an overview of takings jurisprudence leading up to *Cedar Point*.

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[164]. The Nat'l Agric. L. Ctr. Staff, *supra* note 133 ("[R]ight-to-farm laws . . . seek to protect . . . farmers and ranchers from nuisance lawsuits filed by individuals who move into a rural area . . . .").

[165]. *Sugar Cane, Rice, and Sod*, PALM BEACH CNTY., https://discover.pbcgov.org/coextension/agriculture/pages/sugarcane.aspx [https://perma.cc/BR8V-47HV]. The family behind Florida Crystal Corp., the Fanjuls, shared an estimated net worth of $8.2 billion as of 2017. Villamil, *supra* note 139.

[166]. *Green Harvesting Solution*, STOP SUGAR BURNING, http://stopsugarburning.org/green-harvesting-solution [https://perma.cc/H4HX-ZJ3W].

[167]. *Id.* ("Big Sugar has the resources to create new green jobs and contribute to a new era of prosperity for the Glades.").

[168]. Nyamekye Daniel, *Courts of Appeals Upholds North Carolina's Right to Farm Law*, THE CENTER SQUARE: N.C. (Dec. 23, 2021), https://www.thecentersquare.com/north_carolina/courts-of-appeals-upholds-north-carolinas-right-to-farm-law/article_a70b0498-642c-11ec-b9f8-1bc609e8a232.html [https://perma.cc/KL7L-CNU7]; Lindsey v. DeGroot, 898 N.E.2d 1251, 1258–59 (Ind. Ct. App. 2009) (finding against plaintiffs who alleged that the Indiana Right-to-Farm Act was unconstitutional).

[169]. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021).

[170]. *Id.* at 2071–72.

The Fifth Amendment to the Constitution, made applicable to the states through the Fourteenth Amendment, forbids the taking of private property for public use without just compensation.[171] In its most straightforward application, the Takings Clause requires compensation for the exercise of eminent domain.[172] Traditionally, there are two categories of government action that automatically constitute a taking.[173] These *per se* rules apply (1) where there has been a permanent physical invasion of property, or (2) where a regulation completely deprives an owner of all economically viable use of their property.[174]

The first *per se* rule is that a permanent physical invasion of land is a taking, even if the land that is invaded or occupied is relatively insubstantial.[175] That rule was first laid down in *Loretto v. Teleprompter Manhattan CATV Corp.*[176] In *Loretto*, the Supreme Court found that a New York law requiring landlords to permit a cable TV company to install cables on their property was a taking.[177] Even though the physical occupation of the cables was minor, the permanence of the invasion implicated the landowner's right to exclude—considered by the Court to be "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[178] The Court found that a permanent physical occupation authorized by a government is a taking regardless of the public interests that it may serve.[179]

The second *per se* rule is that a government action that deprives an owner of all economically viable use of their property is a taking.[180] This rule was handed down by the Court in *Lucas v. South Carolina Coastal Council*.[181] In *Lucas*, the plaintiff bought land on the South Carolina coast on which he planned to build a residential

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171. U.S. CONST. amend. V.

172. Rebecca Hansen, Comment, *Can Procedure Take?: The Judicial Takings Doctrine and Court Procedure*, 88 U. CHI. L. REV. 1875, 1881 (2021).

173. Lee Anne Fennell, *Escape Room: Implicit Takings After* Cedar Point Nursery, 17 DUKE J. CONST. L. & PUB. POL'Y 1, 6 (2022).

174. *Id.*

175. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 430 (1982) (finding that "permanent occupations of land . . . are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land.").

176. *Id.*

177. *Id.* at 438.

178. *Id.* at 433 (citing Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

179. *Loretto*, 458 U.S. at 426 ("[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.").

180. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

181. *Id.*

development.[182] However, subsequent to his purchase, the South Carolina legislature enacted a building restriction designed to protect the coastal zone.[183] This restriction barred the plaintiff from erecting any permanent habitable structures on his land and rendered the land "valueless."[184] The Court found that this regulation, viewed from the landowner's perspective, was the equivalent of a physical appropriation.[185] As a result of this case, a regulation that denies a property owner of all economically beneficial or productive uses of land is a taking *per se*.[186] In order to constitute a taking, these uses must have been previously permissible under the relevant property and nuisance principles. Essentially, it must be shown that common-law principles would not have prevented the proposed use of the land with which the government action interferes.[187]

Prior to *Cedar Point*, if an alleged taking did not fit within these two *per se* rules, the action was evaluated for whether it constituted a "regulatory taking."[188] A regulatory taking occurs when a regulation or other government action is functionally equivalent to eminent domain but does not fall within one of the *per se* categories discussed above.[189] Regulatory takings jurisprudence traces its origins to *Pennsylvania Coal Co. v. Mahon*.[190] In *Pennsylvania Coal*, the Court found that while property may be regulated to a certain extent, when the regulation goes "too far" it will be recognized as a taking.[191] In order to determine whether a regulation goes "too far", courts have engaged in an ad hoc, factual inquiry that balances three factors

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[182]. *Id.* at 1006–07 ("David H. Lucas paid $975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes.").

[183]. *Id.* at 1007 ("[T]he South Carolina Legislature [subsequently] enacted the Beachfront Management Act . . . which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels.").

[184]. *Id.* at 1007.

[185]. *Id.* at 1017.

[186]. *Id.* at 1019.

[187]. *Id.* at 1029–30.

[188]. Fennell, *supra* note 173 at 7 ("If the . . . *per se* rules didn't provide an answer, the alleged taking would be assessed under the three-factor test established in *Penn Central Transportation v. City of New York* . . . .").

[189]. Hansen, *supra* note 171, at 1881.

[190]. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). The plaintiffs in *Mahon* were the owners of a deed for a house which expressly reserved the right to mine under their property and granted that right to a nearby coal company. After they had been granted this deed, the Pennsylvania legislature adopted a piece of legislation that forbade the mining of coal in such a way as to cause subsidence of any structure used as a human habitation. The Supreme Court then found that the legislature had impermissibly given the homeowners the right to something they did not pay for, by taking it from the mining company. *Id.*

[191]. *Id.* at 415.

identified in *Penn Central Transportation Co. v. New York City*.[192] These factors are the economic impact of the regulation on a particular owner, the protection of "reasonable" or "distinct" investment-backed expectations, and the character of the government action.[193] The application of this test is an ad hoc, factual inquiry.[194] A land use regulation will generally not constitute a taking if it substantially advances a legitimate state interest, does not deny an owner the economically viable use of their land, nor impose "an unduly harsh impact upon the owner's use of their property."[195]

1. Takings Challenges to Right-to-Farm Laws

Most scholarship considering whether right-to-farm acts are unconstitutional takings evaluate the relevant law under a regulatory takings framework.[196] One of the most successful challenges to a state's right-to-farm legislation was a *per se* takings claim.[197] This controversy arose in Iowa state court in *Bormann v. Bd. of Supervisors*.[198] *Bormann* was decided by the Iowa Supreme Court, and its precedential value has arguably weakened over the years.[199] While not binding on a takings challenge that would be brought to

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192. 438 U.S. 104 (1978).

193. *Id.*

194. *Id.* at 124.

195. Stanish, *supra* note 135, at 747.

196. The following pieces of scholarship consider whether a particular right-to-farm law could be considered a regulatory taking: Centner, *supra* note 133; Jennifer L. Beidel, *Pennsylvania's Right-To-Farm Law: A Relief For Farmers or an Unconstitutional Taking?*, 110 PENN ST. L. REV. 163 (2005); Stanish, *supra* note 135; Jason Jordan, *A Pig in the Parlor or Food on the Table: Is Texas's Right to Farm Act an Unconstitutional Mechanism to Perpetuate Nuisances or Sound Public Policy Ensuring Sustainable Growth?*, 42 TEX. TECH. L. REV. 943 (2010); Lisa N. Thomas, *Forgiving Nuisance & Trespass: Is Oregon's Right-to-Farm Law Constitutional?*, 16 J. ENV'T L. & LITIG. 445 (2001).

197. Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 313 (Iowa 1998).

198. *Id.*

199. *Bormann* was decided in 1998, and was clarified by the Iowa Supreme Court in a subsequent case called *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004). *Gacke* addressed an Iowa statute that was passed the year after *Bormann* was decided that granted nuisance immunity specifically to animal feeding operations. *Gacke*, 684 N.W.2d, at 170. In *Gacke*, the Iowa Supreme Court set out a three-part test to evaluate whether a statutory immunity from nuisance liability constituted a taking under *Bormann*. Todd Dorman, *Iowa Supreme Court Goes Hog Wild on Property Rights*, THE GAZETTE (July 7, 2022), https://www.thegazette.com/staff-columnists/iowa-supreme-court-goes-hog-wild-on-property-rights/ [https://perma.cc/6R44-4C59]. However, in summer 2022, the Iowa Supreme Court reversed course and overruled *Gacke* in another animal feeding operation case called *Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67 (Iowa 2022). In *Garrison*, the Court declined to apply the *Gacke* test and instead applied rational basis review to evaluate whether a taking had occurred. While *Bormann* has not been explicitly overruled, this development will make it much more difficult to mount a challenge to right-to-farm laws in Iowa.

any Florida legislation, it is still an instructive piece of case law that can give insight into what makes a successful right-to-farm act challenge. Prior to *Bormann*, Iowa's Right-to-Farm Act protected agricultural operators from lawsuits when those operators were located in an "agricultural area."[200] In *Bormann*, several individuals applied for their land and the land owned by their neighbors to be designated as an "agricultural area."[201] This application was approved by the Kossuth County Board of Supervisors and immediately challenged by the new agricultural area's neighbors.[202] One of these challenges alleged that the nuisance immunity associated with the approval of the agricultural area constituted a taking of property without just compensation in violation of the federal and state constitutions.[203] This amounted to a facial challenge of the Iowa Right-to-Farm Act because the plaintiffs did not make any allegation of actual nuisance.[204] To recover for a *per se* taking, the plaintiff(s) needed to show that a property right, recognized by Iowa law, was infringed.[205] Under Iowa state law, the right to maintain a nuisance constitutes an easement.[206] The Court determined that the Iowa Right-to-Farm Act created an easement in affected property in favor of the property that created the nuisance.[207] Therefore, the Court found that the easement constituted a *per se* taking of private property for public use without the payment of just compensation.[208]

C. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021)

If there was any analytical clarity on the difference between *per se* and regulatory takings, it was undermined by the Supreme Court's decision in *Cedar Point Nursery v. Hassid*.[209] In *Cedar Point*, the Supreme Court found that a 1975 California regulation granting a right of access to nonowners constituted a *per se* physical taking.[210] The state's Agricultural Labor Relations Board promulgated this regulation and allowed labor organizers a "right to take access" to an agricultural employer's property in order to solicit support for

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200. *Bormann*, 484 N.W.2d at 311.
201. *Id.*
202. *Id.* at 312.
203. *Id.* at 313.
204. *Id.*
205. *Id.* at 315.
206. Churchill v. Burlington Water Co., 62 N.W. 646, 647 (1895).
207. *Bormann*, 484 N.W.2d at 321.
208. *Id.*
209. 141 S. Ct. 2063 (2021).
210. *Id.* at 2080.

unionization.[211] That right to access allowed union organizers to enter agricultural employers' property for up to three hours a day, 120 days per year.[212] After union organizers were denied access to a Northern California strawberry grower's land, they accused the grower of unfair labor practices.[213] The grower responded by filing suit against the Agricultural Labor Relations Board, arguing that the regulation was an unconstitutional taking of property forbidden by the Fifth and Fourteenth Amendments.[214] At the lower courts, both the Eastern District of California and the Ninth Circuit considered the regulation under the balancing test of *Penn Central*, used to evaluate whether something is a regulatory taking.[215]

On appeal, the Supreme Court declined to apply this test and found that the regulation should have been considered for whether it was a *per se* taking as a physical appropriation of property.[216] The Court found that a government action "that physically appropriates property is no less a physical taking because it arises from a regulation."[217] Therefore, when determining whether to evaluate an action as either a regulatory or *per se* taking, the relevant inquiry is "whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property."[218] Where property has been physically taken, the government action will be evaluated under a *per se* framework. If the action is a restriction of the property owner's ability to use the property, it will be evaluated under a regulatory takings framework. The type of government action is therefore not as relevant as the action's effect.

Cedar Point also departed from the Court's previous rulings by finding that a temporary physical invasion could be sufficient to support a *per se* takings claim.[219] In *Loretto*, discussed previously, the Court implied that the *per se* physical takings rule would not apply to temporary physical invasions.[220] However, in *Cedar Point*, the Court

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[211]. *Id.* at 2069.
[212]. *Id.* at 2069.
[213]. *Id.* at 2070.
[214]. *Id.*
[215]. *Id.*
[216]. *Id.* at 2072.
[217]. *Id.*
[218]. *Id.*
[219]. *Id.* at 2074.
[220]. Daniel R. Mandelker & Michael Allan Wolf, 1 Land Use Law § 2.03 (LexisNexis Matthew Bender, 6th ed. 2021); Loretto v. Teleprompter Manhattan Catv Corp., 458 U.S. 419, 428 (1982) ("[T]his Court has consistently distinguished between . . . cases involving a permanent physical invasion on the one hand, and cases involving a more temporary invasion.").

found that the distinguishing between temporary and permanent intrusions was an inadequate way to determine whether constitutional rights had been violated.[221] The Court determined that there was no logical place to draw the line for how long a physical invasion must occur before a taking has been effected.[222] Prior to *Cedar Point*, a government action that could be considered a taking would be subjected to the *Penn Central* test if it lasted for 364 days, but would be considered a categorical taking if it lasted for 365.[223] However, the *Cedar Point* Court found that just because the right to take access granted by the California regulation was only exercised from "time to time," it was not "any less a physical taking."[224] In this way, the Court reframed the issue of distinguishing between regulatory takings and *per se* takings. The relevant inquiry under *Cedar Point* is about whether a property right has been abrogated, rather than how long each abrogation lasts.[225]

The Court was careful to maintain the distinction between simple trespass and unconstitutional takings.[226] The elimination of the permanence requirement for takings may suggest that the line between these two types of claims has become ambiguous.[227] However, the Court held that isolated physical invasions will be analyzed as trespasses rather than takings.[228] Instead, it is only where an invasion is taken "pursuant to a granted right of access," and sufficient in number and duration, that it will be considered a taking.[229] It was left to the lower courts to determine when repeated trespasses are "sufficient" to be considered a taking.[230]

Lastly, the Court in *Cedar Point* found that a particular government action need not appropriate an easement as defined by state law in order to "take" a constitutionally protected property interest.[231] While the Court continued to recognize that the property

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[221]. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074–75 (2021).
[222]. *Id.* at 2074.
[223]. *Id.*
[224]. *Id.* at 2075.
[225]. *Id.*
[226]. *Id.* at 2078 ("[O]ur holding does nothing to efface the distinction between trespass and takings.").
[227]. *Id.* at 2088. The dissenting opinion, authored by Justice Breyer, queries, "[W]here should one draw the line between trespass and takings?" *Id.*
[228]. *Id.* at 2078.
[229]. *Id.*
[230]. *Id.* (discussing the difference between trespass and takings, and finding that lowers have been properly able to distinguish between individual torts and appropriations of a property right).
[231]. *Id.* at 2075.

interests protected by the Takings Clause are creatures of state law, it found that takings liability can attach even if the appropriation of a property right manifests in a form that is a "slight mismatch from state easement law."[232] The protected property right being "taken" must still be a product of state law, but need not fit into the formal categories of easement, fee simple, or leasehold.[233] The Court instead uses what it calls an "intuitive approach" to determine whether a physical taking has occurred.[234] The Court considers that without the access regulation at issue, the growers would have had the right under California law to exclude union organizers from their property.[235] The Court also follows what it calls its "traditional rule": "Because the government appropriated a right to invade, compensation [is] due."[236]

III. Applying *Cedar Point* to Florida's RTFA

This Note suggests that a facial challenge to Florida's RTFA could be more successful under the Court's recent decision in *Cedar Point*. Florida residents may use the *Cedar Point* framework to challenge Florida's RTFA as unconstitutional and pave the way for successful trespass or nuisance actions to eliminate harmful sugarcane burning practices. Under *Cedar Point*, barring Florida residents from bringing trespass and nuisance actions against agricultural operations constitutes a taking of residents' right to exclude and violates both the Florida and Federal Constitutions. Florida's Constitution prohibits the taking of private property "except for a public purpose and with full compensation."[237] The Florida Supreme Court has explicitly provided that the Takings Clause of the Fifth Amendment under the Federal Constitution and the Takings Clause of the Florida Constitution should be interpreted to have the same scope and limitations.[238]

The *Coffie* class action discussed previously alleged that the burns which cause particulate matter and "black snow" to enter

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[232]. *Id.* at 2076.
[233]. *Id.*
[234]. *Id.*
[235]. *Id.*
[236]. *Id.*
[237]. FLA. CONST. art. X, § 6(a).
[238]. St. Johns River Water Mgmt. Dist. v. Koontz, 77 So. 3d 1220, 1222 (Fla. 2011), *rev'd on other grounds*, 570 U.S. 595 (2013); *see also* Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp., 640 So. 2d 54, 58 (Fla. 1994) (wherein the Florida Supreme Court noted they had struck down a statutory provision under the Takings Clause of both the state and federal constitutions, without distinguishing between the two clauses).

plaintiffs' property constituted takings.[239] This claim was dismissed because the plaintiffs did not sufficiently prove that the burns were perpetrated under "color of state law" under the nexus/joint action test.[240] Under this test, to prove a taking by an act of a private party, a plaintiff must show that the private party's action was compelled by state law.[241] The plaintiffs in the *Coffie* class action alleged that the *individual* burns, which spread smoke and ash on the plaintiffs' properties, were takings and that the government acted by approving each burn by the Florida Forest Service.[242] However, the District Court found that the plaintiffs failed to show that the Florida Forest Service was sufficiently involved in the decisions to burn sugarcane or in the process of that burning, and therefore the burns did not constitute state action.[243]

Alternatively, if plaintiffs relied on *Cedar Point*'s relaxation of the permanence requirements for *per se* takings, they could avoid the state action issue that caused the *Coffie* class action's takings claim to fail. In *Cedar Point* there was also no state action—except at the level of the California law which authorized intrusion. As in *Cedar Point*, Florida's RTFA itself is a state action. Under the precedent laid down by the Court in *Cedar Point*, Florida's RTFA clearly violates both the Florida and Federal Constitutions.

A. Florida's RTFA Interferes with Constitutionally Protected Property Rights

In order to constitute a taking, it must be shown that the government has appropriated a protected property right. The property interests protected by the Takings Clause are those "group of rights inhering in the citizens' relation to the physical thing, as the right to possess, use and dispose of it."[244] This group of rights is

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[239]. Coffie v. Fla. Crystals Corp., No. 19-80730-CIV-SMITH, 2021 U.S. Dist. LEXIS 124642, at 20 (S.D. Fla. July 2, 2021).

[240]. *Id.* at 22.

[241]. *Id.* at 21–22.

[242]. *Id.* at 20–21 ("Plaintiffs maintain that because FFS approves each burn permit, which includes establishing the burn's timing, generating burn maps to evaluate the expected results of the burns, and denying permits if winds are projected to blow in certain directions, FFS plays an active role in directing and encouraging the harmful conduct.").

[243]. *Id.* at 21–22. Plaintiffs argued that under the nexus/joint action test, FFS was a "joint participant" in the sugar cane burning through the permit process and application of state regulations. However, the District Court held that for this test to be satisfied, the state must compel the actions of the private party. *Id.*

[244]. United States v. General Motors Corp., 323 U.S. 373, 378 (1945).

created by state law.[245] Therefore, Florida law will determine whether there is a constitutionally protected right that is infringed by Florida's RTFA amendments.[246] However, as discussed earlier, the Court in *Cedar Point* held that while the protected property right being "taken" must be a product of state law, it need not fit into any particular formal category of property recognized by state law.[247] Therefore, in order to determine whether Florida's RTFA appropriates a protected property right, I will use the "intuitive approach" recommended by the Court.[248] Here, I will look at Florida eminent domain cases to determine whether the government has appropriated the right to invade in a way that offends the Constitution.

Florida eminent domain cases suggest that landowners have a right to light and air on their property, and that where an action results in a substantial loss or diminishment of those things, that action constitutes a compensable taking. Florida law recognizes "situations where a continuing trespass or nuisance ripens into a constitutional taking of property."[249] In *City of Jacksonville v. Schumann*, the Florida Supreme Court considered whether overwhelming sound waves and pollution from aircrafts that began after an airport expansion constituted a taking.[250] The court in *Schumann* found that fumes, smoke, and gas had physically invaded the plaintiffs' property and therefore constituted a taking.[251] The plaintiffs in *Schumann* were residential property owners who lived near the airport expansion and were subjected to noise pollution as well as exhaust fumes, fuel gasses, and heavy black smoke filled with dust and debris on their land.[252] The Court found that this interference abridged the plaintiffs' property rights and that the State could not deliberately trespass on and destroy a particular use

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[245]. Centner, *supra* note 135, at 90; *Cedar Point*, 141 S. Ct at 2076; Board of Regents of State Colleges v. Roth, 408 U.S 564 (1972) (finding that property rights are created by tradition, state common law, and state positive law).

[246]. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 133, 161 (finding that state law determines what constitutes a property right).

[247]. *Cedar Point*, 141 S. Ct. at 2076.

[248]. *Id.* at 2076.

[249]. Suarez v. City of Tampa, 987 So. 2d 681, 684 (Fla. Dist. Ct. App. 2008) (quoting State, Dep't of Health & Rehab. Servs. v. Scott, 418 So. 2d 1032, 1034 (Fla. Dist. Ct. App. 1982)).

[250]. City of Jacksonville v. Schumann, 167 So. 2d 95 (Fla. Dist. Ct. App.1964); *see also* Foster v. City of Gainesville, 579 So. 2d 774, 777 (Fla. Dist. Ct. Ap. 1991) (finding that increased noise, vibrations, and residue was sufficient to establish a prima facie case of inverse condemnation).

[251]. *Schumann*, 167 So. 2d at 103.

[252]. *Id.* at 97.

of the land without making restitution.[253] In the case of the Everglades Agricultural Area, residents are also subjected to black smoke, dust, and debris invading their land. Additionally, the government-approved burns have been slowly destroying the residential use of land in the Everglades.[254] Residents are forced to remain inside of their homes during burns and many have been told by their physicians that they have to move in order to protect their health.[255] Therefore, the burn events conducted by sugar harvesters and approved by the Florida Forest Service have ripened from continuing trespass and nuisance into a constitutional taking.

However, the Florida courts have not extended the reasoning in *Schumann* to find that *any* disruption in the use and enjoyment of property by government action constitutes a taking.[256] For example, in *Northcutt v. State Road Dep't*, the plaintiffs owned a home in an area where a new highway was built.[257] The Third District Court of Appeals of Florida distinguished this case from *Schumann* in two important ways. First, the court leaned on a public policy rationale for why proximity to residential areas was more important for roads than for airports.[258] Second, the plaintiffs in *Northcutt* complained of shockwaves, vibration, and noise.[259] The court found that the intensity of this disruption was less than experienced by the plaintiffs in *Schumann*, and that there was no physical invasion.[260] In *Schumann*, fumes, smoke, and gas physically entered the plaintiffs' property, while in *Northcutt*, no such physical manifestation occurred.[261] The disruption complained of by residents of the Everglades Agricultural Area falls into the category of physical invasions that the Court in *Schumann* held could rise to the level of a taking. The residents of the "Hazard Zone" are exposed to visible particulate matter, smoke, and ash.[262] After burn events, residents will sweep debris off of their porches, and big clumps of ash can be found floating in swimming pools during burn season.[263]

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[253]. *Id.* at 103–04.
[254]. *The Smoke*, *supra* note 90.
[255]. *The Smoke*, *supra* note 90; Sawtelle, *supra* note 96.
[256]. Northcutt v. State Rd. Dep't, 209 So. 2d 710 (Fla. 3rd Dist. App. 1968).
[257]. *Id.*
[258]. *Id.* at 711.
[259]. *Id.* at 710.
[260]. *Id.* at 712.
[261]. *Id.* at 711–12 ("It seems clear that there has been no 'physical' taking or actual 'appropriation' of the plaintiff's property under the laws of Florida.").
[262]. *Coffie*, 2021 U.S. Dist. LEXIS 124642, at *6–7.
[263]. *The Smoke*, *supra* note 90.

While the Third District Court in *Northcutt* declined to find a taking in a situation where there was no physical invasion, other courts have made clear that a physical invasion is not *required* to find a taking.[264] Instead, whether a physical invasion has occurred can help illuminate whether the disruption to the use and enjoyment of the land is intense enough to be "tantamount to an actual taking."[265] The Fourth District Court of Appeals of Florida clarified that a physical invasion is not required to constitute a taking in *Division of Administration, State Department of Transportation v. West Palm Beach Garden Club*.[266] In *Garden Club*, the State Department of Transportation exercised its power of eminent domain to take a portion of property within a city park for a highway.[267] The city responded that the highway would cause considerable noise, vibrations, and light disruption to the portions of the park not being converted to a highway, and that this disruption would constitute a taking.[268] The Department of Transportation argued that where land was not subject to physical invasion or trespass, no compensation was due.[269] However, the court disagreed.[270] The *Garden Club* court found that Florida law previously established that where interference is equivalent to an actual taking, "despite the absence of physical invasion or trespass, [that interference] has been held to be compensable and we think, properly so."[271] Therefore, even if it is found that the smoke and ash that invades the land of residents of the Everglades is not sufficient to be considered a trespass, it may still rise to the level of a taking if the damage to the use and enjoyment of their land is sufficiently substantial.

It could be argued that the disruption experienced by the residents of the Everglades is different in kind to that experienced by the plaintiffs in *Schumann.* In *Schumann*, the plaintiffs were exposed to sound waves, vibrations, and noise in addition to fumes, dust, and debris.[272] In the case of the Everglades, sugarcane burning does not create a serious noise problem or create shockwaves.[273] However,

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[264]. Div. of Admin., State Dep't of Transp. v. W. Palm Beach Garden Club, 352 So. 2d 1177 (Fla. Dist. Ct. App. 1977).
[265]. *Id.* at 1180.
[266]. *Id.*
[267]. *Id.* at 1178–79.
[268]. *Id.* at 1179.
[269]. *Id.* at 1180.
[270]. *Id.*
[271]. *Id.*
[272]. *Schumann*, 167 So.2d at 97.
[273]. *Coffie*, No. 19-80730-CIV-SMITH, 2021 U.S. Dist. LEXIS 124642 (where plaintiffs' claims were based on sugar cane burning spreading smoke, particulate matter, soot, and ash, not shockwaves or noise).

while it is useful to analogize to other inverse condemnation cases to evaluate what kinds of activities may be so disruptive as to substantially interfere with the use and enjoyment of land, the central inquiry of a takings analysis is *whether* that interference has occurred.[274] For example, the court in *Schumann* reaches its decision after a discussion of two landmark cases from the Supreme Court.[275] Those cases focus on the effect that the activity at issue had on the use of the claimant's land, and whether that activity "subtract[s] from the owner's full enjoyment of the property and … limit[s] his exploitation of it."[276]

The cases above demonstrate that the physical invasion of smoke, gases, and debris can violate a landowner's right to exclude, and that this right is central to property ownership in the state of Florida. However, the appropriation of the right to exclude is not the only indicator of an unconstitutional taking under Florida law.[277] In *City of Fort Lauderdale v. Hinton*, a Florida District Court of Appeals found that where the use of land is sufficiently disrupted by government action, the property owner's right to use and enjoy their land has been taken.[278] In *Hinton*, a family sued the City of Fort Lauderdale for dispersing ash and other contaminants throughout their community.[279] Because of the ash and other contaminants, the family was unable to open their windows, do gardening work, or participate in other outdoor activities, including letting their children play outside.[280] The court held that to support a takings claim the plaintiffs did not need to show that *all* beneficial use or value to their property was destroyed.[281] Instead, it was sufficient to demonstrate that there had been a "substantial" deprivation of the beneficial or productive use of their land.[282] Additionally, even though the ash contamination had occurred years before the complaint, the court held that a temporary deprivation can still constitute a taking.[283]

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[274]. *Schumann*, 167 So.2d at 101.

[275]. United States v. Causby, 328 U.S. 256 (1946); Griggs v. County of Allegheny, 369 U.S. 84 (1962).

[276]. *Schumann*, 167 So.2d at 101 (quoting *Causby*, 328 U.S. at 265).

[277]. *See* City of Fort Lauderdale v. Hinton, 276 So. 3d 319 (Fla. Dist. Ct. App. 2019) (finding that a taking exists where landowners' use of land is sufficiently disrupted).

[278]. *Hinton*, 276 So.3d at 319.

[279]. *Id.* at 321.

[280]. *Id.* at 327–28.

[281]. *Id.* at 326–27.

[282]. *Id.* at 327 (finding that the disruption of outdoor activities, having to keep windows closed, combined with diminished property values was sufficient to show a "substantial" deprivation).

[283]. *Id.*

The disruption experienced by the family in *Hinton* is almost perfectly analogous to that experienced by residents of the Hazard Zone. In *Hinton*, the family was discouraged from allowing their children to play outside because of fears of contamination.[284] In the case of the Everglades, children are kept inside during burn season because of fear that they will breathe in ash and other pollutants.[285] As in *Hinton*, homeowners in the Everglades must keep their windows closed to avoid contaminants drifting into their homes.[286] In the Everglades, the right to use their property is not *completely* destroyed because of the temporary nature of each burn. However, the court in *Hinton* emphasizes that the right to put your land to beneficial use is so central that a "substantial" and temporary deprivation may still constitute a taking.[287] Here, Everglades residents continue to live in their homes and communities and have therefore not been denied *all* use of their land. However, Florida's RTFA enables sugarcane growers to substantially interfere with the normal and expected benefits of homeownership. Clearly, Florida law values the right to use your land as you see fit, and a substantial interference with this right will constitute a taking.

While Florida law *has* recognized that a continuing trespass or nuisance can ripen into a taking of property, Florida courts have simply not recognized that the thing being "taken" is an easement.[288] In the past, this lack of clear fit between the right granted by a challenged state law and state easement law may have spelled demise for a takings challenge.[289] However, the Supreme Court in *Cedar Point* specifically addresses this issue.[290] In response to the dispute over whether the challenged law created an easement as defined by state law, the Supreme Court held that this question is not dispositive of a takings challenge.[291] The Court found that California could not "absolve itself of takings liability by appropriating the growers' right to exclude in a form that is a slight mismatch from

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[284]. *Id.* at 327–28.
[285]. *The Smoke*, *supra* note 90.
[286]. *Id.*
[287]. *Hinton*, 276 So.3d at 327–28.
[288]. Suarez v. City of Tampa, 987 So. 2d 681, 684 (Fla. Dist. Ct. App. 2008) (quoting State, Dep't of Health & Rehab. Servs. v. Scott, 418 So. 2d 1032, 1034 (Fla. Dist. Ct. App. 1982)).
[289]. Overgaard v. Rock County Bd. Of Comm'rs, 2003 WL 21744235, at *7 (D. Minn. July 25, 2003) (dismissing a challenge to Minnesota's Right-to-Farm Act because "no easement is created and the neighboring landowners are not deprived of any property rights" and therefore the law does not "result in a deprivation of a cognizable property interest").
[290]. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2076 (2021).
[291]. *Id.*

state easement law."[292] The appropriate inquiry was whether without the access regulation, the growers "would have had the right under California law to exclude union organizers from their property."[293] Without the access regulation, growers could have sued union organizers for trespass.[294] In the case of residents of the "Hazard Zone," without Florida's RTFA, residents would be able to bring suit against sugarcane operators for nuisance, trespass, or battery.[295]

B. After *Cedar Point*, Florida's RTFA Will Be Evaluated as a Physical *Per Se* Taking.

Florida's RTFA is facially unconstitutional because it impermissibly grants agricultural operators the right to invade the property of others without compensation. Prior to the Court's decision in *Cedar Point*, takings claims arising from a government's exercise of regulatory authority were often evaluated as regulatory takings and subjected to the *Penn Central* balancing test.[296] Additionally, those invasions that were temporary were not considered to rise to the level of a *per se* taking.[297] However, the Court's decision in *Cedar Point* found that when a right of access is granted, the fact that it is only exercised from "time to time" does not make it any less of a physical taking.[298] Therefore, those physical intrusions that are temporary but ongoing will now be evaluated under a *per se* takings inquiry.[299] Although invasions of smoke and ash are not continuous, they occur

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[292]. *Id.*

[293]. *Id.*

[294]. *Cedar Point*, 141 S. Ct. at 2076 ("[N]o one disputes that, without the access regulation, the growers would have had the right under California law to exclude union organizers from their property.").

[295]. In *Lee v. Florida Public Utilities Co.*, the Florida First District Court of Appeal found that noise and fumes from an electrical generating plant were sufficient to establish a prima facie case of nuisance and reversed a directed verdict in favor of the plant. 145 So. 2d 299, 301–02 (Fla. Dist. Ct. App. 1962). In *Nitram Chemicals, Inc. v. Parker*, the Florida Second District Court of Appeal upheld a jury verdict finding nuisance for noise, dust, and fumes that restricted the plaintiffs' use of their property. 200 So. 2d 220, 222 (Fla. Dist. Ct. App. 1967) (citing conditions that caused residents to "keep the windows closed . . . to stay inside . . . and caused some of them or their families to go for treatment of physical ailments"). In *Exxon Corp., U.S.A. v. Dunn*, the Florida First District Court of Appeal upheld a judgment finding that a "separation plant" causing noise, vibration, and sulfurous odors constituted a nuisance. 474 So. 2d 1269, 1270 (Fla. Dist. Ct. App. 1985).

[296]. Fennell, *supra* note 173, at 7.

[297]. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 430 (1982).

[298]. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2075 (2021).

[299]. *Id.*

regularly every year.[300] *Cedar Point* has subjected any action involving physical access "by the government or a third party . . . , no matter how brief" or any action that "allow[s] or require[s] any object owned by the government or a third party, no matter how small, to enter or remain on the property of the landowner" to a *per se* takings analysis.[301] Here, the State of Florida has granted agricultural operators the right to maintain a nuisance or trespass on their neighbors' land. By passing Florida's RTFA, Florida allows sugarcane producers to spread smoke, ash, and particulate matter on the property of landowners in the Everglades.[302] These physical intrusions may therefore be subjected to a *per se* takings analysis handed down by the Court in *Cedar Point*.

This analysis hinges on the "essential question" of "whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property."[303] The Court assesses physical appropriations "using a simple, *per se* rule: The government must pay for what it takes."[304] Here, Florida's RTFA has taken the right of Everglades residents to use their homes as they wish. These residents are unable to enjoy the benefits of their property—to create a comfortable home and keep themselves and their children healthy and safe.[305] While these rights do not take the form of a particular easement recognized by Florida law, a "slight mismatch from state easement law" will not allow the state to absolve itself from takings liability.[306] If the State has determined that it wishes to take the right of Everglades residents to enjoy property free from trespass or nuisance in service of agricultural interests, it must pay to do so.[307]

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300. STOP SUGAR BURNING, *supra* note 77 ("Pre-harvest sugar field burning is a toxic and outdated harvesting practice that takes place every year from October through May . . . .").

301. Fennell, *supra* note 173, at 13.

302. Davies, *supra* note 147.

303. *Cedar Point*, 141 S. Ct. at 2072.

304. *Id.* at 2071.

305. Robert Mitchell, *End the Injustice of Sugarcane Burning*, THE PALM BEACH POST (Feb. 12, 2022), https://www.palmbeachpost.com/story/opinion/2022/02/12/commentary-end-burning-sugarcane-now/6734007001/ [https://perma.cc/55W8-RSL5] (describing how sugarcane burns force "children indoors as they struggle to breathe"); *The Smoke*, *supra* note 90 (describing how Everglades residents will try to seal off their homes to keep smoke and ash out).

306. *Cedar Point*, 141 S. Ct. at 2076.

307. *Id.* at 2071 ("The government must pay for what it takes.").

CONCLUSION

This Note argues that Florida's RTFA constitutes a *per se* physical taking according to the Supreme Court's recent decision in *Cedar Point Nursery v. Hassid*.[308] In *Cedar Point*, the Court found that temporary invasions taken pursuant to a granted right of access constituted an impermissible appropriation of the right to invade.[309] Florida's RTFA clearly grants agricultural operators the right to invade and disrupt others' use of property. Florida's RTFA bars all claims from property owners and tenants arising from "any interference with reasonable use and enjoyment of land," regardless of whether those claims are brought in "nuisance, negligence, trespass, personal injury, strict liability, or other tort."[310] This Act was recently found to bar claims of property owners who are suing sugarcane growers for the preharvest burning of their crop, which litters ash, smoke, and harmful pollutants.[311] Because Florida's RTFA sanctions temporary physical invasions against property owners, it therefore constitutes an unconstitutional *per se* taking under the reasoning of *Cedar Point*.

The Court's decision in *Cedar Point* has been praised and criticized from opposing sides of the political spectrum.[312] The Court's opinion, penned by Chief Justice Roberts, takes a strong stance on the importance of constitutional protections for property owners.[313] The Court's opinion considers the philosophical importance of Takings Doctrine to the preservation of one of the fundamental rights that lies at the heart of the republic.[314] The Court highlights those Takings Clause cases which find that the right to invade cannot be appropriated by the government, and states that they "only reinforce

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[308]. 141 S. Ct. 2063 (2021).

[309]. *Id.* at 2075 ("What matters is not that the easement notionally ran round the clock, but that the government had taken a right to physically invade the Nollans' land. . . . [T]he fact that a right to take access is exercised only from time to time does not make it any less a physical taking.").

[310]. FLA. STAT. § 823.14(3)(f) (2022).

[311]. *Coffie*, 2021 U.S. Dist. LEXIS 124642, at *20.

[312]. Spiegelman & Sisk, *supra* note 16; Haddon, *supra* note 16; Hopkins, *supra* note 16; Rodriguez, *supra* note 17; Slaughter, *supra* note 17; Budow *supra* note 18; Bonventre, *supra* note 18.

[313]. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2078 (2021) ("With regard to the complexities of modern society, we think they only reinforce the importance of safeguarding the basic property rights that help preserve individual liberty, as the Founders explained.").

[314]. *Cedar Point*, 141 S. Ct. at 2071 (2021) ("The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom. . . . The Court's physical takings jurisprudence is as old as the Republic.") (internal quotations and citations omitted).

the importance of safeguarding the basic property rights that help preserve individual liberty, as the Founders explained."[315] However, the decision has also been decried for prioritizing property rights above the rights of workers.[316] Indeed, the disproportionate power that farm owners and agricultural employers wield over their workers is exactly why regulations like the California union access regulation at issue in *Cedar Point* are necessary.[317] The Court's decision appears to only entrench that profound imbalance by placing property rights over and above the rights of workers to health, safety, and association.[318] Commenters have noted that those most likely to suffer due to the implications of *Cedar Point* are consumers, workers, and tenants.[319] This ruling may invite a flurry of litigation challenging regulations designed to protect less powerful groups.[320]

Therefore, a challenge to Florida's RTFA presents an opportunity to use a conservative decision to further the progressive cause of environmental justice. The environmental justice movement has been the subject of significant study[321] and a popular political

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[315]. *Cedar Point*, 141 S. Ct. at 2078 (discussing cases such as *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), *United States v. Causby*, 328 U.S. 256 (1946), among others).

[316]. Slaughter, *supra* note 17.

[317]. Budow, *supra* note 18; Slaughter, *supra* note 17; Rodriguez, *supra* note 17.

[318]. Slaughter, *supra* note 17.

[319]. Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 162 (2021) (noting that the *Cedar Point* decision threatens laws that "mitigate the harms of workplace hierarchies" as well as laws prohibiting discrimination).

[320]. Jonathan Miller, *Supreme Court* Cedar Point *Decision Will Have Devastating Consequences For Ag Workers*, MEDIUM (Sept. 7, 2021), https://medium.com/the-public-magazine/supreme-court-cedar-point-decision-will-have-devastating-consequences-for-ag-workers-c68a607971ec [https://perma.cc/VV8N-CFRQ].

[321]. Searching for "environmental justice" on Westlaw returns 5,467 law review articles examining environmental justice in a variety of contexts. Jeanne Marie Zokovitch Paben, *Green Power & Environmental Justice-Does Green Discriminate?*, 46 TEX. TECH. L. REV. 1067 (2014) (examining environmental justice risks and consequences in the context of green energy production); Kayla Race, *A Perfect Storm: Environmental Justice and Air Quality Impacts of Offshore Oil and Gas Development in the Arctic Outer Continental Shelf*, 38 UCLA J. ENV'T. L. & POL'Y 105 (2020) (discussing the impact of offshore oil and gas development on air pollution and its effects on Native Alaskans); Clifford J. Villa, *Remaking Environmental Justice*, 66 LOY. L. REV. 469 (2020) (advocating for a definition of environmental justice that incorporates "vulnerability theory" to assist policy makers and community advocates in identifying those most at risk from environmental hazards).

talking point.[322] However, significant wins have been hard to achieve.[323] Environmental justice has grown out of the movements for civil rights and anti-toxics and has largely relied on the frameworks utilized by those movements.[324] But by relying on a traditional civil rights framework, environmental justice claims must overcome the high threshold necessary to find discriminatory intent.[325] Lawsuits that have alleged violations of civil rights statutes or that are based on "constitutional civil rights norms" have "not historically been successful in transforming environmental decision-making processes to take into account the social, political, and economic vulnerability of poor communities of color."[326] While courts have been watering down civil rights laws, they have been entrenching the protections of property rights, as demonstrated in *Cedar Point*. Therefore, this Note suggests that increasingly robust property protections may allow environmentally disadvantaged communities to assert their property rights. Homeowners and tenants in the Everglades have property interests, which should be entitled to the same protections afforded to agricultural landowners.[327] This presents the question of whether the Court is willing to truly endorse its own language in *Cedar Point* regarding the philosophical importance of protecting property interests. Essentially, the Court will be forced to determine whether the protections of property extend to individuals and small homeowners in addition to corporations and powerful interests, or

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[322]. *Remarks by Vice President Harris During a Meeting on Climate Change*, WHITEHOUSE.GOV (Oct. 25, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/10/25/remarks-by-vice-president-harris-during-a-meeting-on-climate-change/ [https://perma.cc/VP4H-HX4K] (speaking about environmental justice and noting that when she was the District Attorney of San Francisco, she "created one of the first-in-the-nation environmental justice units of any prosecutor's office. It's an issue I take very seriously . . . ."); Alexandria Ocasio-Cortez (@AOC), TWITTER (Dec. 7, 2018, 10:19 PM), https://twitter.com/aoc/status/1071242722864959488 [https://perma.cc/WQ7W-AXAD] ("Environmental justice isn't solely about climate change. Just look at: Flint water, Bronx air, Appalachian mining towns, Fed response to Hurricanes María+Katrina to see that economic and social inequity plays out everywhere – including air + water.") (format altered from original tweet).

[323]. Sheila R. Foster, *The Challenge of Environmental Justice*, 1 RUTGERS J. L. & URB. POL'Y 1, 4–5 (2004).

[324]. *Id.* at 4.

[325]. *Id.* at 10.

[326]. *Id.*

[327]. Neil D. Hamilton, *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. AGRIC. L. 103, 114 (1998) (noting the irony that the groups advocating for right-to-farm acts have been vocal proponents of efforts to protect property rights, so "[l]itigation that challenges the constitutionality of right-to-farm laws may place these groups in the uncomfortable position of having to reconcile what are irreconcilable political views").

whether the Court is only interested in protecting property rights when those rights uphold the existing distributions of wealth and power.