NOS. 20-1447, 20-1466

IN THE COURT OF APPEALS
FOR THE SIXTH JUDICIAL CIRCUIT
CINCINNATI, OHIO

F.P. DEVELOPMENT, LLC, a Michigan Corporation,
Plaintiff-Appellee/Cross-Appellant,

v.

CHARTER TOWNSHIP OF CANTON, MICHIGAN,
a Michigan Municipal Corporation,
***Defendant-Appellant/Cross-Appellee*.**

On Appeal from the Eastern District of Michigan
Cause No. 2:18-cv-13690

FOURTH BRIEF OF APPELLEE/CROSS-APPELLANT F.P. DEVELOPMENT, LLC

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

F.P. raised six constitutional challenges to the Tree Ordinance in district court. F.P. prevailed on two of these claims— (1) that the Tree Ordinance is an unconstitutional exaction under *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and (2) that the Tree Ordinance is an as applied taking under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). F.P. did not prevail on its four remaining constitutional claims. Canton appealed the district court's judgment on F.P.'s *Dolan* and *Penn Central* claims, and F.P. cross-appealed on the four remaining constitutional claims.

The most efficient way to resolve this case would be to affirm the district court's holding on F.P.'s *Dolan* and *Penn Central* claims and vacate the other holdings below, which were unnecessarily reached because the case was fully resolved by the *Dolan* and *Penn Central* claims. Nothing in Canton's response calls that conclusion into question. Under the local rules, this brief must be limited to the claims raised in F.P.'s cross-appeal. LR 28.1 (c)(4).

To the extent this Court decides to reach F.P.'s cross-appeal, this Court should find that the Tree Ordinance is a *per se* taking, an unconstitutional seizure, and an excessive fine under the Eighth Amendment. Canton's arguments on those issues in its response brief are based on misstatements of law and fact or are foreclosed by

precedent cited in F.P.'s opening brief that Canton, inexplicably, does not address or distinguish.

ARGUMENT

I. CANTON'S RESPONSE IS LARGELY BASED ON MISCHARACTERIZATIONS OF THE LAW AND THE FACTS.

As an initial matter, almost all of Canton's arguments are based on at least one of three separate mischaracterizations of law or fact. Specifically, Canton falsely claims that: (1) the Tree Ordinance does not regulate what property owners may do with their trees; (2) mitigation payments under the ordinance are based on a site-specific analysis of the impact of tree removal; and (3) Canton is suffering from a "shortage of trees" that justifies the draconian regulations contained in the Tree Ordinance. Each of these unfounded assertions is refuted by the text of the Tree Ordinance or the undisputed facts in the record.

A. Under the Tree Ordinance, F.P. does not have the right to do whatever it wants with its trees.

First, Canton claims that the Tree Ordinance does not prohibit the removal of trees and that F.P. may use its trees however it wants. Doc. 66, p. 5, 7, 8, 11, 15. This claim is demonstrably false.

The Ordinance states that removal of trees is prohibited unless (1) Canton grants the property owner permission to remove the trees, *and* (2) the property owner compensates Canton by planting replacement trees or paying a set amount into the

tree fund.[1] Failure to meet these two requirements is punishable by fines and up to 90-days in jail. Dep. of J. Goulet, ECF No. 35-3, Page ID 761.

This plain-text reading of the Ordinance is confirmed by Canton's actions in this case. When F.P. removed trees from the property to abate a nuisance, Canton immediately issued F.P. notice of violation and a stop work order threatening both civil and criminal penalties. Notice of Violation, ECF No. 35-6, Page ID 779-81. Canton then filed suit in district court demanding that F.P. pay $47,898. Canton's Counter-Complaint, ECF No. 13, Page ID 95.

Canton repeatedly claims that neither the Tree Ordinance's restrictions nor Canton's aggressive enforcement of those restrictions in this case constitutes a regulation of F.P.'s property. *See*, *e.g.*, Doc. 66, p. 5, 7, 8, 11, 15. According to Canton, F.P. may "choose" to remove any trees it wants, provided that it compensates Canton by planting trees elsewhere or paying into the tree fund. *Id*. But this "choice" is no different than the "choice" that was given to American colonists that triggered the "Pine Tree Rebellion" (discussed in both F.P. and

[1] The removal of any regulated tree on "on any property without first obtaining a tree removal permit shall be prohibited." Canton Code of Ordinances, Art. 5A.05(A) "Whenever a tree removal permit is issued…such trees shall be relocated or replaced by the permit grantee." Canton Code of Ordinances, Art. 5A.08(A); see also 5A.08(B) (referring to non-landmark trees). If the tree cannot be replaced onsite or offsite, "the permit grantee shall…[p]ay monies into the township tree fund for tree replacement within the township. These monies shall be equal to the per-tree amount representing the current market value for the tree replacement that would have been otherwise required." *Id*. at 5A.08(E)(1).

Canton's prior briefing in this Court). Doc. 53, p. 27-28; Doc. 66, p. 5. They could remove any trees they wanted, if they paid the fine to the Crown.

Any alleged "choice" under the Tree Ordinance is likewise indistinguishable from the "choice" that was deemed a taking by the Supreme Court in *Horne v. Dep't of Agric.*, 576 U.S. 351 (2015) (discussed *infra*). In that case, the farmers could have "chosen" to use as many of their raisins as they wanted, provided that they paid "market value" to the federal government. *Id*. at 370. The Court recognized the statute at issue not only regulated the farmers' property rights, but constituted a *per se* taking. *Id*. at 362.

The "choice" alleged by Canton is a red herring. Although an individual may theoretically choose to violate an unconstitutional law and pay a penalty for the violation, the possibility of making such a choice does not make an otherwise unconstitutional law constitutional. *See Gardner v. Broderick*, 392 U.S. 273, 277 (1968) (noting that "a lawyer could not constitutionally be confronted with Hobson's choice between self-incrimination and forfeiting his means of livelihood.").

B. Contrary to Canton's assertions, mitigation under the Tree Ordinance is required without any consideration of, or reference to, site-specific impacts.

Canton points to Canton Code of Ordinances, Art. 5A.05(F) to argue that site-specific evidence can be considered in determining the amount of mitigation required under the Tree Ordinance. Doc. 66, p. 18-19. The argument was rightly

rejected by the district court. *F.P. Dev., LLC v. Charter Twp. of Canton*, 456 F.Supp.3d 879, 893-94 (E.D. Mich. 2020). As the court recognized, Art. 5A.05(F) has nothing to do with the mitigation requirements challenged by F.P. *Id*. Instead, Art. 5A.05 lays out the procedure required when Canton seeks to place additional restrictions on tree removal, beyond the mitigation required by Art. 5A.08. See, Art. 5A.05(E).

For example, Art. 5A.05(F)(4) requires that property owners also establish as a precondition of removal that the proposed removal is "necessary for the location of a structure or site improvement and [that] no reasonable or prudent alternative location for such structure or improvement can be had without causing undue hardship." Canton argues that such additional requirements (beyond mitigation) are assessed based on site-specific factors such as the "effect on the quality of the area." Art. 5A.05(F)(2). But those considerations do not impact on the base-level mitigation requirements of Art. 5A.08. Canton's representative made this clear, agreeing that the requirements of Art. 5A.05 are *in addition* to the mitigation requirements of Art. 5A.08[2], and that the separate, pre-set mitigation requirements must be met, no matter what. Dep. of J. Goulet, ECF No. 40-1, Page ID 910-914.

[2] Dep. of J. Goulet, ECF No. 40-1, Page ID 915 (Q: "So let me try and clarify what I'm asking here. To get a tree removal permit you have to satisfy these criteria and either pay into the tree fund or replace the trees, correct?" A: "Right.")

Any assertion here to the contrary contradicts Canton's prior testimony and the plain language of Art. 5A.08 and should be rejected.[3]

C. Canton's allegation regarding an alleged "shortage of trees" in Canton contradicts its prior testimony and is irrelevant.

Canton raises the claim that the ordinance is necessary because Canton is suffering from a "shortage of trees." Doc. 66, p 22. The sole basis of this claim is deposition testimony from Canton's landscape architect, Leigh Thurston. *Id*. But Canton strenuously objected to *any* discussion of a shortage of trees after Ms. Thurston made her statement regarding shortage, noting that "[t]he issue of a shortage of trees has not been presented as an issue in this case." Dep. of L. Thurston, ECF No. 36-2, Page ID. 823. Ms. Thurston then explained that she had no "objective metric" for determining a "shortage," other than the fact that Canton "wants to improve [its] community with more trees." *Id*. at 823-24. Canton cannot have it both ways. A shortage of trees either is or is not at issue here, and Canton should not be permitted to contradict its prior position during deposition.

Moreover, any "shortage of trees" is neither dispositive nor even relevant to F.P.'s claims. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005)

[3] Indeed, Canton's official was asked numerous hypotheticals and repeatedly confirmed that site specific impacts have no relevance to the amount of mitigation required. Dep. of J. Goulet, ECF No. 35-3, Page ID 749-52, 753- 755. Canton's other designated witness likewise confirmed that site-specific factors have no bearing on the mitigation amounts. Dep. of L. Thurston, ECF No. 35-10, Page ID 801-02.

(observing that the "Takings Clause presupposes that the government has acted in pursuit of a valid public purpose" and "expressly requires compensation" in those circumstances.); *see also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (opining that a "strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.")

II. CANTON'S ATTEMPTS TO DISTINGUISH *LORETTO* FAIL.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), the Court held that a law forbidding a property owner from removing a pre-existing cable box from her property was a *per se* taking because it mandated that an unwanted object remain on her property for public benefit. As explained in F.P.'s opening brief, the Tree Ordinance creates a *per se* taking under *Loretto* because it mandates that F.P. maintain unwanted objects—trees—on the property for public benefit.

Canton attempts to distinguish *Loretto* by noting that no Canton agent "physically intruded" onto F.P.'s property. Doc. 66, p. 7-8. But there was no physical intrusion by government agents in *Loretto* either. The law challenged in *Loretto* simply forbade the owner from removing a cable box that was present on the property prior to purchase. Indeed, this Court has rejected narrow interpretations of

Loretto that require "agents" of the government to be "literally occupying" the property. *Montgomery v. Carter Cty.*, 226 F.3d 758, 766 (6th Cir. 2000).

Tellingly, Canton does not cite a single case supporting its proposed limitation on *Loretto*. Indeed, the fact that *Loretto* itself contradicts Canton's theory was raised in F.P.'s opening brief and Canton does not address the argument. Doc. 53, p. 58.

III. CANTON'S ATTEMPTS TO DISTINGUISH *HORNE* FAIL.

As explained in F.P.'s opening brief, the Tree Ordinance creates a *per se* taking of F.P.'s trees under *Horne v. Dep't of Agric.*, 576 U.S. 351 (2015), because the ordinance effectively grants the government constructive possession of F.P.'s trees. In *Horne*, the challenged law required the plaintiffs to set aside a portion of their raisin crop and then pay the government the "market value" of any portion of the set-aside raisins that the plaintiffs sold or destroyed. *Id*. at 370. The Court found this arrangement "g[ave] rise to a taking as clearly 'as if the Government held full title and ownership.'" *Id*. at 362. Similarly, the Tree Ordinance mandates that F.P. set aside trees and pay the government "market value" for any trees it sells or destroys. This constitutes a *per se* taking.

Canton raises two arguments in response. First, as discussed *supra*, Canton claims that F.P. has a choice not present in *Horne*, because the ordinance sometimes allows removal of trees if the property owner pays into the tree fund. But, as discussed above, that is the same choice faced by the farmers in *Horne—i.e.*, leave

an asset on your property for public benefit or utilize the asset and pay the government market value. Like the farmers in *Horne*, F.P. chose to use the asset it owned, and the government demanded the asset's market value. There is no distinction.

Second, Canton claims that, unlike the raisins in *Horne*, F.P.'s trees were not physically taken for public use. Doc. 66, p. 6. But Canton mischaracterizes *Horne*. The raisins in *Horne* were never actually carried away by government agents but remained on the Hornes' property. The government simply demanded payment of the raisins' market value when the Hornes refused to set them aside. *Horne*, 576 U.S. 351, 356. Similarly, the trees in this case remained on F.P.'s property, but F.P. could not use them or sell them unless F.P. replaced the trees or paid Canton their market value. Just as the Hornes did not set aside the raisins, F.P. did not set aside the trees. The government in *Horne* demanded payment, as does Canton here. Accordingly, Canton's attempt to distinguish *Horne* fails.

IV. CANTON'S RESPONSE TO F.P.'S FOURTH AMENDMENT CLAIM IS MERITLESS.

An ordinance regulating private property constitutes a Fourth Amendment seizure when it creates a "meaningful interference with property" that is either not justified or not compensated. *Severance v. Patterson*, 566 F.3d 490, 503–04 (5th Cir. 2009). As explained in F.P.'s opening brief, the Tree Ordinance creates a meaningful interference with F.P.'s property interest by preventing F.P. from felling,

moving, or otherwise utilizing its trees. This interference is unreasonable because Canton concedes that there is no evidence that the removal of trees injured F.P.'s neighbors. Dep. of L. Thurston, ECF No. 26-4, Page ID 373-78. And this interference is uncompensated because Canton denies that it owes F.P. compensation. Dep. of J. Goulet, ECF No. 26-3, Page ID 358. In its response, Canton makes no attempt to refute these claims. Instead, Canton raises three arguments alleging that the Fourth Amendment should not apply. As explained below, these arguments are contrary to binding precedent.

A. The "open fields" doctrine does not apply to seizures.

The district court erred when it adopted Canton's argument that seizures cannot occur in "open fields" and therefore that the seizure of F.P.'s trees does not implicate the Fourth Amendment. As explained in F.P.'s opening brief, this contradicts Sixth Circuit precedent. The open fields doctrine addresses searches, not seizures. *United States v. Rapanos*, 115 F.3d 367, 373-74 (6th Cir. 1997)). The doctrine is derived from the "reasonable expectation of privacy" standard, which addresses whether a Fourth Amendment search has occurred. *See Oliver v. United States*, 466 U.S. 170, 181 (1984) (holding no expectation of privacy in open fields). But unlike searches, the existence of a seizure does not turn on whether privacy has been invaded, but on whether there has been a "meaningful interference" with an interest in property. *Soldal v. Cook Cty.*, 506 U.S. 56, 63 (1992); *Lavan v. City of*

Los Angeles, 693 F.3d 1022, 1028 (9th Cir. 2012). Thus, this Court has repeatedly made clear that the open fields doctrine "permits only visual inspections (as opposed to seizures) of property." *Rapanos*, 115 F.3d at 373 (citing *Allinder v. Ohio*, 808 F.2d 1180, 1185 (6th Cir. 1987)).

Under Canton's discredited theory, it could permanently seize a pile of lumber or even a tractor from F.P.'s property without implicating the Fourth Amendment at all, provided that the seized item was not within the curtilage of a residential dwelling. As explained in F.P.'s opening brief, such a theory has been rightly rejected by this Court. *Id.* Canton, tellingly, does not even attempt to address the distinction between searches and seizures in its response.

B. The Fourth Amendment is not limited to seizures made for the purpose of evidence collection.

Canton also argues that the Fourth Amendment is not implicated because the "alleged seizure of property was not to preserve evidence of wrongdoing." Doc. 66, p. 12. That argument is flat-out wrong. As the Supreme Court has explained, the reason the government "effectuate[s] a seizure is wholly irrelevant to the threshold question whether the [Fourth] Amendment applies." *Soldal v. Cook Cty.*, 506 U.S. 56, 69 (1992). "[T]he right against unreasonable seizures would be no less transgressed if the seizure … was undertaken to collect evidence, verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no

reason at all." *Id*. Canton's unsupported and artificial limitation on the Fourth Amendment should be rejected.

C. The existence of a potential takings claim does not preclude the application of the Fourth Amendment.

Canton goes on to wrongly claim that, because the Tree Ordinance regulates property, and that Canton was not engaged in collecting evidence, F.P.'s claims must be evaluated solely under the Takings Clause. Doc. 66, p. 11-12. But multiple courts have applied the Fourth Amendment seizure standard to government regulations that implicated a taking. *See, e.g.*, *Severance*, 566 F.3d at 503–04, (public easement was a potential seizure); *Presley v. City of Charlottesville*, 464 F.3d 480, 487 (4th Cir. 2006) (anti-fencing ordinance was a seizure of private property). Both of those courts expressly rejected the government's argument that a Fourth Amendment seizure claim was foreclosed simply because the plaintiffs may have also been able to bring a takings claim on the same facts. *Severance*, 566 F.3d at 501; *Presley*, 464 F.3d at 485-486 (noting that "the Supreme Court firmly—and unanimously—rejected that view…"). This Court agrees. *See, Brown v. Metro. Gov't of Nashville & Davidson Cty.*, No.11-5339, 2012 U.S. App. LEXIS 14553, at *11 (6th Cir. 2012) (unpublished opinion) ("a Fourth Amendment claim is not subsumed under a takings claim."); *see also*, *Pearson v. Grand Blanc*, 961 F.2d 1211, 1215 (6th Cir. 1992)

(rejecting the argument that a "taking theory subsumes all other theories in zoning cases.")

The applicability of one constitutional amendment, does not "pre-empt[] the guarantees of another." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 (1993). As the Supreme Court has explained, "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Soldal*, 506 U.S. at 70. "Where such multiple violations are alleged, [the Court is] not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, [it] examine[s] each constitutional provision in turn." *Id*. F.P. is not required to "to forfeit one constitutionally protected right as the price for exercising another." *Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08, (1977).

Canton points to *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) for the proposition that this Court may not evaluate claims under the Fourth Amendment if the Fifth Amendment also applies. That case says nothing of the kind. *James Daniel Good* involved a challenge to a forfeiture of real property. After Good was convicted on drug charges, the government initiated forfeiture proceedings against his property claiming that the home had been used in furtherance of a crime. The plaintiff challenged the forfeiture under both the due process clause and the seizure provision of the Fourth Amendment. The government argued that

because the seizure involved a forfeiture due to criminal activity, the Fourth Amendment provided the only remedy available, and the Court should not analyze the seizure under the due process clause as well. The Court rejected this approach, explaining that even though "the Fourth Amendment places limits on the Government's power to seize property for purposes of forfeiture, it does not provide the sole measure of constitutional protection that must be afforded property owners in forfeiture proceedings." *James Daniel Good*, 510 U.S. at 52. Accordingly, "even assuming that the Fourth Amendment were satisfied in this case, it remains for us to determine whether the seizure complied with our well-settled jurisprudence under the Due Process Clause." *Id*. Similarly, the fact that the Tree Ordinance violates the takings clause does not immunize it from challenge under the Fourth Amendment.

V. CANTON FAILS TO REFUTE F.P.'S ARGUMENT IN THE ALTERNATIVE THAT THE TREE MITIGATION PAYMENTS ARE AN EXCESSIVE FINE

Canton demanded $47,898 in penalties from F.P. because F.P. removed a narrow strip of vegetation from its own property to clean a ditch that was clogged and causing flooding. This removal did not negatively impact anyone. As explained in F.P.'s opening brief, these penalties—whatever Canton labels them—are grossly excessive and therefore violate the Excessive Fines Clause of the Eighth Amendment.

Canton raises several arguments in response. First, Canton argues that the tree payments cannot be fines because they are not part of Canton's criminal ordinances. Doc. 66, p. 13. But the Supreme Court has repeatedly made clear that the Eighth Amendment applies to civil as well as criminal fines. *See, e.g.*, *Hudson v. United States*, 522 U.S. 93, 103 (1997) ("The Eighth Amendment protects against excessive civil fines.").

Second, Canton argues that because its municipal code contains a separate criminal fine for violating local ordinances that would be applicable here, any civil tree payments cannot, by definition, be considered fines. Doc. 66, p. 13. But the fact that Canton has separate criminal fines for the same conduct does not mean that Canton's civil fines escape Eighth Amendment review. To the contrary, one of the primary methods courts use to determine whether a civil fine is excessive is to compare it to the criminal fines the government has for the same conduct. *See*, *United States v. Bajakajian*, 524 U.S. 321, 340 (1998); *United States v. Ely*, 468 F.3d 399, 403 (6th Cir. 2006). Under Canton's discredited view, such analysis would be impossible, because Canton contends the very existence of a criminal fine for the same conduct exempts any civil fine that may exist from Eighth Amendment scrutiny. The argument is meritless on its face.

Third, Canton claims that, because the penalties under the Tree Ordinance may be paid in kind by planting trees elsewhere, the penalties are not fines for Eighth

Amendment purposes. Doc. 66, p. 14. But the Supreme Court has made clear that the Eighth Amendment applies to payments "whether in cash or in kind." *Timbs v. Indiana*, 139 S.Ct. 682, 687 (2019). Indeed, "for the Eighth Amendment to limit cash fines while permitting limitless in-kind assessments would make little sense, altering only the form [of the abuse of government power] that led to the provision of the English Bill of Rights, from which our Excessive Fines Clause directly derives." *Austin v. United States*, 509 U.S. 602, 624 (1993) (Scalia, J. concurring).

Fourth, Canton argues that the tree penalties cannot be a fine because they are purely remedial—*i.e.*, Canton effectively claims that F.P. took trees from Canton when F.P. cut trees down on its own property, so F.P. must replace them. Doc. 66, p. 17-18. The problem with this analysis is that Canton never owned the trees. The trees belong to F.P.

To be sure, Canton does not want F.P. to remove trees, so it has made it very costly for F.P. to do so by mandating tree replacement payments. But that is not a system based on remediation—it is a system based on deterrence. The purpose of this payment system is, by Canton's own admission, to encourage compliance with Tree Ordinance and to deter property owners from removing trees without replacement. Dep. of J. Goulet, ECF No. 26-3, Page ID 361-62 (compliance); *id.*, at 354 (deterrence). But when the government demands payment to deter activity that it does not like on private property, that is not remedial—it is a fine. *See, Bajakajian*,

524 U.S. at 329 ("Deterrence…has traditionally been viewed as a goal of punishment").

Indeed, even assuming the Tree Ordinance served "some remedial purpose [in addition to deterrence] the Government's argument must fail." *Austin v. United States*, 509 U.S. 602, 621 (1993). A "civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id*. (emphasis added); *WCI, Inc. v. Ohio Dep't of Pub. Safety*, 774 F. App'x 959, 967 (6th Cir. 2019) ("even if only intended partially as a punishment, and partially for other reasons—the protections of the Eighth Amendment apply.") Canton's attempt to avoid review under the Eighth Amendment therefore fails.

Finally, Canton claims that the tree penalties are not fines but a "user fee for abatement of an ordinance violation." Doc. 66, p. 14. Canton bases this claim on *Shoemaker v. City of Howell*, 795 F.3d 553 (6th Cir. 2015). But *Shoemaker* did not involve an Eighth Amendment claim and is wholly irrelevant here. In *Shoemaker*, a property owner failed to mow his grass as required by local ordinance and the tall grass became a public nuisance. *Id*. at 556. After the property owner repeatedly refused to act, the city mowed the grass and demanded that the property owner pay for the service. *Id*. The property owner argued that this violated procedural and substantive due process because he allegedly was not given adequate notice and a

hearing before the bill for cutting the grass was attached to his property. *Id*. The Court rejected these claims because, contrary to his allegations, Shoemaker had received multiple notices and chose not to avail himself of the procedural challenges that were available to him under local ordinances and state law. *Id*. at 563.

It is unclear from its briefing why Canton believes that a due process case where the Eighth Amendment was not raised, argued, or even implicated has any relevance here. *See Waters v. Churchill*, 511 U.S. 661, 678 (1994) ("Cases cannot be read as foreclosing an argument that they never dealt with."); *Brecht v. Abrahamson*, 507 U.S. 619, 631, (1993) (explaining that an opinion is not binding precedent on an issue "never squarely addressed"). But assuming *arguendo* that *Shoemaker* could apply, the facts are easily distinguishable. In *Shoemaker* the city was forced to expend public resources to abate a nuisance on private property. The city therefore sought compensation from the property owner for the resources *it* expended abating that unlawful nuisance. By contrast, F.P. did not create a public nuisance by removing vegetation on its property, and the Township has not expended any resources for abatement. To the contrary, F.P.'s removal of vegetation to deal with drainage issues likely benefited neighbors. *Shoemaker* is therefore irrelevant.

CONCLUSION

For the forgoing reasons and those presented in F.P.'s opening brief, this Court should (1) affirm the district court's judgment that the Tree Ordinance is an unconstitutional exaction; (2) affirm the district court's judgment that the Tree Ordinance is a regulatory taking under *Penn Central*; (3) reverse the district court's judgment that the Tree Ordinance is not a *per se* taking under *Horne*; (4) reverse the district court's judgment that the Tree Ordinance is not per se taking under *Loretto*; (5) reverse the district court's judgment that the Tree Ordinance is not an unreasonable seizure under the Fourth Amendment; and (6) reverse the district court's judgment that payments sought by Canton were not excessive fines under the Eighth Amendment.

In the alternative, should this Court simply affirm on the regulatory takings or exactions claim without reaching F.P.'s cross-claims, this Court should nonetheless vacate the district court's judgment on the *per se* takings, seizure, and Eighth Amendment claims to prevent those unnecessary judgments from having *res judicata* effects. *See Camreta v. Greene*, 563 U.S. 692, 715, (2011) (Breyer and Sotomayor, concurring); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 335 (1980) (noting past practice of finding jurisdiction for the limited purpose of vacating prejudicial portions of a lower court judgment when the appellant is otherwise a prevailing party); *Electrical Fittings Corp. v. Thomas & Betts Co*., 307

U.S. 241, 242 (1939) (same).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), the undersigned hereby certifies that this brief complies with the type-volume limitation found at Fed. R. App. P. 32(a)(7)(B). It contains 4,619 words and has been prepared in Microsoft Word, using a proportionally spaced type-face using Times New Roman in 14-point font.

/s/Chance Weldon
CHANCE WELDON

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was electronically filed on February 3, 2021, with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter, who are registered with the CM/ECF system.

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