No. 20-107

IN THE
Supreme Court of the United States

CEDAR POINT NURSERY
AND FOWLER PACKING COMPANY, INC.
Petitioners,

v.

VICTORIA HASSID, IN HER OFFICIAL CAPACITY AS CHAIR OF THE AGRICULTURAL LABOR RELATIONS BOARD; ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF PELICAN INSTITUTE FOR PUBLIC POLICY IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Pelican Institute[1] is a nonpartisan research and educational organization—a think tank—and the leading voice for free markets in Louisiana. The Institute's mission is to conduct research and analysis that advances sound policies based on free enterprise, individual liberty, and constitutionally limited government.

SUMMARY OF THE ARGUMENT

Takings claimants have faced a difficult road in their quest for compensation over the last four decades. Thirty-five years ago, this Court ruled that a plaintiff seeking to assert a Takings Claim under the Fifth Amendment to the Constitution needed to jump through two procedural hoops before bringing their claim to federal court. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 186 (1985). No other federally protected right had this precondition to federal litigation attached. Later, Justice Rehnquist lamented that the Fifth Amendment, "as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, [is] relegated to the status of a poor relation." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994). Last year this Court took a major step in restoring "takings claims to the full-fledged

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[1] Pursuant to this Court's Rule 37.3(a), this amicus brief is filed with the consent of the parties. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than Amicus Curiae, its members, or its counsel made a monetary contribution to fund the preparation and submission of this brief.

constitutional status the Framers intended when they included the [Takings] Clause among the other protections in the Bill of Rights." *Knick v. Twp of Scott, Pa.*, 139 S.Ct. 2162 (2019).

Despite this uneven treatment, one class of takings claimants has enjoyed consistency from the courts: Those for whom the right to exclude others from their private property is at the heart of their complaint. "[N]o other right has been singled out for such extravagant endorsement by the Court." Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 735 (1998). The fundamental right of a private property owner to exclude those who would interfere with the quiet enjoyment of their property is one constant that emerged from cases rooted in the Fifth Amendment's Takings Clause. This Court should grant Petitioners' request for certiorari and affirm their right to exclude the government from interfering with their privately owned property.

ARGUMENT

I. THE RIGHT TO EXCLUDE THE GOVERNMENT FROM ONE'S PRIVATE PROPERTY IS FUNDAMENTAL AND LONG-ESTABLISHED

A. The Right to Exclude Has Ancient Roots

The idea of the right to exclude might begin with the concept of the usufruct, or the right to exclude others from the use of a resource. Yale professor Robert Ellickson, who studies comparative property rights in land, concluded that human groups living in the Fertile Crescent 10,000 years ago were able to establish permanent settlements, cultivate crops, and domesticate animals because they established property rights that incentivized community mem-

bers to engage in farming and animal husbandry activities. Robert C. Ellickson, *Property in Land*, 102 Yale L.J. 1315, 1364 (1993).

Roman property law was premised on an individual's dominion over an asset or resources. Jonathan Klick & Gideon Parchomovsky, *The Value of the Right to Exclude: An Empirical Assessment*, 165 U. Pa. L. Rev. 917, 919 (2017). The right to exclude was not explicitly recognized under Roman law, but its existence was implied. *Id.* at 924.

Hugo Grotius, a Dutch jurist and theologian who wrote during the Enlightenment, placed the right to exclude at the heart of property ownership. He described ownership of a thing as something that belongs to a party that cannot be enjoyed in the same way by someone else. Klick, *supra,* at 924.

Indigenous families living in Southern New England during the colonial period also recognized a time-limited usufructuary right to exclude. Families enjoyed the exclusive right to plant fields on the land on which their wigwam stood. Their understanding of ownership was the right to use the land to produce crops; users did not prevent others from trespassing or gathering nonagricultural food from the land, nor did they derive rent from it. Merrill, *supra,* at 746 (quoting William Cronon, *Changes in the Land: Indians, Colonists, and the Ecology of New England* (1983)).

This brings us to the 18th Century and William Blackstone. No history of the idea of the right to exclude would be complete without discussing property as "that sole and despotic dominion, which one man claims and exercises over the external things of

the world, in total exclusion of the right to any other individual in the universe." *Commentaries on the Laws of England 2* (1766). Though the idea of the right to exclude had been around far longer than 1766, it was Blackstone's formulation that inspired our Founders and framed the concept for U.S. Courts. Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. Pa. L. Rev. 1, 2 (1996).

B. The Ancient Idea of the Right to Exclude Others from One's Private Property is Considered Fundamental in Modern Takings Jurisprudence

The Fifth Amendment of the U.S. Constitution provides, in pertinent part, "nor shall private property be taken for public use, without just compensation." Throughout the late 19th and early 20th centuries, the right to exclude was present in the background of Supreme Court decisions, almost taken for granted. This Court acknowledged in 1897, "in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen." *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 236 (1897). Justice Brandeis wrote in 1918, "[a]n essential element of individual private property is the legal right to exclude others from enjoying it." *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J. dissenting).

Today, the right to exclude is front and center in landmark Fifth Amendment takings jurisprudence. Along with a William Blackstone reference, it is practically a requirement for a law review article, brief, or court decision on the topic to refer to the

right to exclude others as "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *Dolan,* 512 U.S. at 384; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1044 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987). This Court has consistently held that the right to exclude is fundamental to the right of private property and that physical invasion, whether permanent or temporary, is a violation of that right. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Nollan*, 483 U.S. at 832.

Exploration of this Court's treatment of the right to exclude over the last forty years begins with *Kaiser Aetna v. U.S.* Petitioner converted at its expense a private pond into a marina with access to the bay, intended for use by fee-paying members of the community. *Kaiser Aetna*, 444 U.S. at 167-168. The U.S. government sought pursuant to the Commerce Clause a navigational servitude that would allow the public access to the marina. *Id.* at 168-169. This Court considered whether the grant of public access to a navigable waterway is a taking. *Id.* at 169. The Justices confirmed that the right to exclude is "so universally held to be a fundamental element of the property right" it cannot be taken by the government without compensation. *Kaiser Aetna*, 444 U.S. at 179. Kaiser Aetna enjoyed the right to exclude all but its customers from using the marina. If the government wished to provide public access to the privately owned and maintained Hawaii Kai Marina, it would need to pay for it.

Next, this Court heard *PruneYard Shopping Center v. Robbins*, a case in which the right to exclude clashed with the free speech guarantees of the U.S. and California Constitutions. The public was not only invited, but expected to shop or socialize at one of the sixty-five shops, ten restaurants, or the movie theater at the PruneYard Shopping Center. *PruneYard Shopping Center v. Robbins,* 447 U.S. 74, 77 (1980). These facts were determinative in this narrow ruling as this Court considered whether the shopping center's policy banning expressive activity unrelated to commerce was permissible under the U.S. and California Constitutions. *Id*. at 76-77. This Court found that curtailing the shopping center owner's right to exclude did not infringe on his property rights. The signature gatherers the shopping center owners sought to ban were orderly and not intrusive, and their presence did not diminish the property's value or use as a shopping center. *Id*. at 83-84.

Further, shopping center management could place time, place, and manner restrictions on the campaigners to reduce their interference with the shoppers. *Id.* Although their right to exclude was diminished, PruneYard's operators could still exercise some control by setting the terms by which the campaigners could collect signatures on their property.

Three years later, this Court considered whether a physical invasion as seemingly insignificant as a cable television cable installation constitutes a taking. The Court held that a permanent physical occupation authorized by the government is a taking, no matter how small the invasion or how great the

public good. *Loretto,* 458 U.S. at 426. Importantly, the Court distinguished the character of the invasion with the one at issue in *PruneYard*. In *PruneYard*, the owner of the shopping center could have placed time, place, and manner restrictions on the campaigners. The fact that Jean Loretto had no such opportunity is "a special kind of injury." *Loretto,* 458 U.S at 436. "To require that the owner permit another to exercise complete dominion adds insult to injury…since the owner may have no control over the timing, extent, or nature of the invasion." *Id.*

The right to exclude returned to the fore five years later in *Nollan v. California Coastal Commission*. The California Coastal Commission conditioned James and Marilyn Nollan's building permit on their granting a public easement across their property. The Commission reasoned that a new building on the Nollans' property would be psychologically damaging to the public, who could not see a stretch of coastline they had a right to use. *Nollan,* 483 U.S. at 828. Justice Scalia gave the Fifth Amendment its due, writing, "we view the…property clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." *Id.* at 841. In finding that the California Coastal Commission's actions amounted to a taking this Court reiterated, "[w]e have repeatedly held that, as to property reserved by its owner for private use, the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 831. Notably, the Court acknowledged that the proposed easement amounted to a "permanent physical occupation…even though no particular individual is

permitted to station himself permanently on the premises." *Nollan,* 483 U.S. at 832.

Once again, the right to exclude was affirmed as central to private property ownership in *Lucas*. South Carolina's Beach Management Act prohibited David Lucas from building on lots he owned, rendering his property useless. *Lucas*, 505 U.S at 1008-1009. This Court held that the Beach Management Act effected a taking. The regulation compelled the property owner to suffer a physical invasion "no matter how minute the intrusion and no matter how weighty the public purpose behind it." *Id.* at 1015. The court required compensation for this taking. *Id.* To put a fine point on the right to exclude, the Court reached back to Justice Holmes' warning in *Pennsylvania Coal* that the logical end of restricting a private property owner from excluding the government is the end of private property. "If…the uses of private property were subject to unbridled, uncompensated qualification under the police power, the natural tendency of human nature would be to extend the qualification more and more until at last private property disappears." *Id.* at 1014 (*citing Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415(1922)).

Florence Dolan's right to exclude the public from an easement across her private property was the dispute at the center of *Dolan v. City of Tigard.* 512 U.S. at 379-380. A permit that would allow Ms. Dolan to expand her hardware store was conditioned on the grant of an easement for a public greenway for pedestrians and cyclists. *Id.* The City of Tigard argued that *PruneYard* applied in this situation because Ms. Dolan's store was open to the public. *Id.* at 393. The Court rejected this argument because

Ms. Dolan could not place time, place, or manner restrictions on the public use of a recreational greenway, regardless of how the greenway's use interfered with her store. *Dolan* 512 U.S. at 394. Instead, Ms. Dolan "would lose all rights to regulate the time in which the public entered into the Greenway…[her] right to exclude would not be regulated, it would be eviscerated." *Id.*

This history of the right to exclude brings us to 2019 and the *Knick* decision. *Knick* is celebrated because it did away with the *Williamson County* state court litigation requirement for Fifth Amendment takings claimants. *Knick,* 139 S.Ct. at 2167. However, Ms. Knick found herself before this Court in the first place because she wished to exclude the public from her private property. A Scott Township, Pa. ordinance passed in 2012 defined cemeteries as places on private or public property where human remains are buried. It also required cemeteries to be open to the public during daylight hours. *Id*. at 2168. Ms. Knick's 90-acre farm where she lived and grazed animals was considered a cemetery per the ordinance because grave markers designating the final resting places of her neighbors' ancestors were found in a small graveyard on the property. *Id*. She argued that the town ordinance resulted in a taking of property and because of her advocacy she is now able to take her complaint directly to a federal court to seek compensation. *Id*. at 2179.

The right to exclude is "as historically fundamental to the concept of private property as private property is to the concept of ownership." Jace C. Gatewood, *The Evolution of the Right to Exclude—More than a Property Right, a Privacy Right*, 32 Miss. C.L. Rev.

447, 449 (2014). It is no exaggeration to assert that the Fifth Amendment's Takings Clause is one reason for this country's political stability. Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 2002 Cato Sup. Ct. Rev. 5 (2002). Richard Epstein challenges us to imagine a world in which government bureaucrats disregarded the right to exclude. The Bill of Rights' other guarantees would be impossible to preserve if the government seized houses of worship, printing presses, or broadcast studios. Epstein, *supra*. Fortunately, this Court has consistently rejected these overtures and preserved the right to exclude as fundamental.

II. REQUIRING PETITIONERS TO GRANT UNIONS ACCESS TO THEIR PROPERTY ON THE UNION'S TERMS "EVISCERATES" THEIR RIGHT TO EXCLUDE

The right of landowners to exclude others from trespassing on their property has long been recognized as fundamental. Instead of affirming this right, the majority of the Ninth Circuit judges would allow the union organizers to dictate to the Petitioners the terms on which they will come onto their property and interrupt business operations.

Cedar Point Nursery and Fowler Packing Co. are places of business that are not generally open to the public. Judge Ikuta noted in his dissent that the union organizers intruded on Cedar Point's property during the end of the strawberry harvest and disrupted the time-sensitive work taking place there. *Cedar Point Nursery v. Shiroma*, 956 F.3d 1162, 1165 (9th Cir. 2020) (Ikuta, J. dissenting). Depriving

Petitioners of the right to prevent the union organizers from coming onto their property at a time that will significantly interrupt their business operations "eviscerates" their right to exclude. *Dolan*, 512 U.S. at 394.

This Court reiterated in *PruneYard* that the California Constitution makes clear that the shopping center could impose permissible time, place, and manner restrictions on the campaigners. *PruneYard Shopping Center*, 447 U.S. at 83. This solution was a compromise between the constitution's free speech guarantees and the shopping center owner's right to exclude. *Id.* at 78-79, 82. In the instant case, the access regulation, Cal. code regs. tit. 8, § 20900, allows the union to determine the time, place, and manner of their recruitment efforts at Petitioners' farms.

The access regulation provides that the union organizers may not access the property for more than four, thirty-day periods per year; the 30-day period starts with the filing and service of notice. Cal. code regs. tit. 8, § 20900(e)(1)(A)-(B). The number of organizers is limited to two organizers per work crew, and if there are work crews with more than thirty members, one additional organizer is allowed. *Id.* at § 20900(e)(4)(A). Organizers may enter the property for purposes of soliciting workers one hour before the start of work, one hour after work, and during lunch. *Id.* at § 20900(e)(3)(A)-(B). The regulation does not provide that the union give any advance notice of its visit to the site; service on the employer is sufficient. *Id.* at § 20900(e)(1)(B).

Union organizers showed up at Cedar Point Nursery at a time that would cause maximum disruption—

at the end of the strawberry harvest. *Cedar Point Nursery,* 956. F.3d at 1165. The nursery would presumably be at its busiest harvesting a perishable crop and would have the most seasonal workers present. At a time any other business would choose to exclude the union organizers, Petitioners are forced to welcome them.

This Court held in *PruneYard* that free speech, reasonably exercised, is guaranteed by the California and U.S. Constitutions, even on privately owned property, when the property is open to the public and functions as a public forum. *PruneYard Shopping Center*, 447 U.S. at 83-84. Importantly, the Prune-Yard Shopping Center was designed in such a way that the 25,000 daily visitors had many places to gather and socialize. *Id*. at 77.

Subsequent California state court decisions addressing speech activities at places of business look at whether the business has areas designed for the public to mingle or congregate in determining whether the business owner can rightfully exclude those who interrupt business operations. Instructive rulings from California courts recognize the right of businesses open to the public, but not meant for gathering or congregating, to exclude those who interrupt their operations.

In *Donahue Schreiber Realty Co., v. Nu Creations Outreach*, a California appellate court upheld restrictions the Fig Garden Village Shopping Center placed on Nu Creations Outreach's ability to solicit donations from customers at the shopping center. 232 Cal. App. 4th 1171, 1175, 181 Cal. Rptr. 3d 577, 580 (2014). The trial court held, and the appellate court affirmed, that the solicitors were interfering

with business activities at the shopping center; namely, interfering with the flow of traffic in and out of stores, discouraging customers from shopping, and eroding the goodwill of customers and tenants. *Donahue Schreiber Realty Co.,* 232 Cal. App. 4th at 1178. It was permissible to restrict the Nu Creations Outreach solicitors to designated areas that could be considered a public forum. *Id*. at 1175. Other areas of the shopping center functioned as entrances and exits and were not places where the public assembled. *Id*. at 1183.

Likewise, in *Ralph's Grocery Co. v. Victory Consultants, Inc.*, a California appellate court upheld a grocery store's right to exclude campaigners who interfered with the store's business operations. The court found that the purpose of Ralph's Grocery was to sell food to customers, not for mingling. 17 Cal. App. 5th 245, 249–50, 225 Cal. Rptr. 3d 305, 308 (2017), *as modified* (Nov. 6, 2017). The entrance and exit to the store were for customers to come and go as they shopped, not to congregate. Soliciting signatures and passing out handbills interfered with the business of selling groceries. *Id.* at 259.

Cases recognizing a business's right to exclude those who would disrupt operations all allow the business to devise restrictions so that those they choose to allow onto their property do so on their terms. Petitioners here are deprived of that right. Instead, they are expected to accommodate union organizers at a time they will be the most disruptive. The access regulation is a command to "include" that ignores the Petitioners' long-recognized right to "exclude". Petitioners are unable to regulate the time in which the union representatives enter their properties, "regardless of any interference it might pose"

with their growing operations. Their "right to exclude would not be regulated, it would be eviscerated." *Dolan*, 512 U.S. at 394.

CONCLUSION

This Court should grant Petitioners' request for certiorari and affirm their right to exclude the government from interfering with their privately owned property.

DATED: August 31, 2020

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