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

BRIEF *AMICUS CURIAE* OF AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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Question Presented

California law forces agricultural businesses to allow labor organizers onto their property three times a day for 120 days each year. The regulation provides no mechanism for compensation. A divided panel below held that, although the regulation takes an uncompensated easement, it does not effect a *per se* physical taking of private property because it does not allow "24 hours a day, 365 days a year" occupation. As an eight-judge dissent from denial of rehearing en banc noted, the panel "decision not only contradicts Supreme Court precedent but also causes a conflict split."

The question presented is whether the uncompensated appropriation of an easement that is limited in time effects a *per se* physical taking under the Fifth Amendment.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae American Farm Bureau Federation (AFBF)[1] is a voluntary general farm organization formed in 1919 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. Through its state and county Farm Bureau organizations, AFBF represents about six million member families in all 50 States and Puerto Rico.

The most recent data from the U.S. Department of Agriculture's Economic Research Service (November 2018), which uses U.S. Department of Commerce and Bureau of Economic Analysis statistics to evaluate total full and part-time employment on farms, estimates there are approximately 1.35 million farmworkers in the United States. AFBF's members employ many of these farmworkers. Jobs are often seasonal and transitory. Often, workers do not reside on members' farms or ranches, and either way can generally be accessible to union organizers before and after work, and on nonwork days.

Farm Bureau's members have a strong interest in protecting their right to exclude trespassers from

[1] All counsel of record for the parties in this case received timely notice of, and provided written consent to, the filing of this brief. No party or counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution towards the preparation or submission. No person other than amici, their members or counsel made a monetary contribution towards the preparation or submission of this brief.

their lands, and to thereby establish a safe and undisturbed work environment for themselves and their employees. The regulation challenged in this case purports to impose an access easement on agricultural businesses for the benefit of union activists. Such regulations threaten AFBF members' efforts to safeguard their workplaces against unauthorized intrusions. For that reason, AFBF strongly supports the petition.

SUMMARY OF THE ARGUMENT

A California regulation confers "the right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support." Cal. Code Regs. tit. 8, § 20900(e) (hereinafter, "Access Regulation"). The Access Regulation has no end date, and defines when and how an organizer may exercise his right to enter and recruit on private property. Union organizers may use an agricultural employer's property for union activities for up to four 30-day periods in a calendar year, and for one hour before the start of work, one hour after the completion of work, and one hour during employees' lunch break. *Id.* § 20900(e)(1). Two agricultural employers challenged the Access Regulation as a *per se* taking of private property without compensation, in violation of the Takings Clause of the Fifth Amendment to the United States Constitution.[2] App. G13—G15.

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[2] The petitioners allege that the Access Regulation unconstitutionally appropriates an easement without just compensation. G-13; *see also* U.S. Const. amends. V (Takings Clause), XIV (incorporating the Takings Clause against state

A panel of the Ninth Circuit concluded that the petitioners did not state a *per se* taking claim. App A-22. Among other things, the panel reasoned that "the sole property right affected by the regulation is the right to exclude"—purportedly leaving intact the other "strand[s]' from the 'bundle' of property rights," including the rights to possess, use, and dispose of the burdened property. App. A-18 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). The panel also found the limitation on the frequency of use of the easement to preclude a *per se* taking under *Loretto*. App. A14-17.

The panel decision creates a circuit split over important federal questions concerning takings law.

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and local governments). But the Access Regulation also likely violates the Public Use Clause of the Takings Clause. *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 231-32 (2003) (underscoring the Takings Clause's two separate requirements that a taking be for a public use and be justly compensated). If the government "fails to meet the 'public use' requirement," then "that is the end of the inquiry," and "[n]o amount of compensation can authorize such action." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). The Public Use Clause bars a taking of private property for a private use or purpose. As the United States Supreme Court has explained: "[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to B." *Kelo v. City of New London*, 545 U.S. 469, 477 (2005). If a taking is designed simply "to benefit a particular class of identifiable individuals," then the taking is not for a "public use" consistent with the Public Use Clause and is therefore unconstitutional. *Id.* at 478. Here, the Access Regulation is designed to benefit a particular class of identifiable individuals—union organizers—to promote their private purpose of recruiting workers. There is no discernible public use or public purpose for the easement. Thus, the regulation likely violates, not just the Just Compensation Clause, but the Public Use Clause as well.

The decision ignores and is in direct conflict with key takings precedents of this Court, which acknowledge robust protections of private property rights against government appropriations. If the panel's decision is allowed to stand, agricultural employers—and property owners generally—can expect to see a dramatic increase in government-imposed easements authorizing third parties to engage in substantial "time-limited" occupation and use of their properties.

The Court's review is needed to resolve the conflicts and confusions created by the Ninth Circuit's decision.

ARGUMENT

A. The Panel Decision Conflicts with This Court's Precedents Establishing That Permanent Physical Occupations, Even When Periodic or Intermittent, "Chop" Through the "Bundle of Rights" and Effect *Per Se* Takings

In its takings cases, the Court has sometimes invoked the "bundle of rights" metaphor to describe property ownership.[3] *See, e.g., Tahoe-Sierra Pres.*

[3] The "bundle of rights" metaphor "suggests that the bundle is malleable (i.e., that private actors, courts, and lawmakers may add or remove sticks, and that the bundle structures relations among persons, only secondarily and incidentally involving a thing)." Anna di Robilant, Property: A Bundle of Sticks or a Tree?, 66 Vand. L. Rev. 869, 871 (2013). Scholarly criticism of the "bundle of rights" approach to property abound. "Under the influence of Marx, some modern theorists prefer to define 'property' . . . not as the right over 'things' but as 'relations among persons in respect to things.' . . . But such a definition is hardly satisfactory . . . ." Richard Pipes, PROPERTY AND FREEDOM xv-xvi

Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 327 (2002). In that description, a landowner has a bundle of "strands" or "sticks," each of which represents an attribute of ownership: the right to possess, the right to use, the right to dispose, and the right to exclude. *Id.*; *see also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) ("[O]ur 'takings' jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property."); *Bounds v. Superior Court*, 229 Cal. App. 4th 468, 479 (2014) (describing the traditional "strands").

In *Loretto*, the Court held that "a permanent physical occupation of another's property"—"perhaps the most serious invasion of an owner's property interests"—"chops through the bundle, taking a slice of every strand" and thereby gives rise to a *per se* taking. *Loretto*, 458 U.S. at 435 (emphasis added). In that case, state law provided that a landowner must permit a cable television company to install its cable facilities on the landlord's property. The Court concluded that the law eliminated all "strands" in the landlord's "bundle of rights": "the owner has no right to possess the occupied space himself," "has no power to exclude the occupier from possession and use of the space," and has no ability to "control the use of the

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(1999) (internal citations omitted). The "bundle of rights" metaphor can be seen as a means of unjustly facilitating government appropriations of property without just compensation. *See, e.g.*, Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 Ariz. L. Rev. 371, 393 (2003) (arguing for an "integrated theory of property" that rejects the fragmentation of property rights inherent in the "bundle of rights" approach).

[occupied] property." *Id.* at 435-36. The Court noted that the appropriation is even more objectionable when "a *stranger* directly invades and occupies the owner's property." *Id.* at 436.

The cable facilities in *Loretto* physically occupied space—continuously—on the landlord's property. Thus, it was easy to see how the facilities destroyed the landlord's right to possess, use, and dispose of the occupied area. But what about intermittent or periodic invasions or occupations? The Ninth Circuit in this case found that such an invasion or occupation at most affects only "one strand"—the right to exclude—and therefore cannot be a *per se* taking. Ap. A-18. But the panel's holding conflicts with *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), which extended *Loretto* to intermittent, periodic, or otherwise "time-limited" invasions or occupations.

In *Nollan*, the property owner challenged a state-imposed easement that required him to allow the public to pass and repass across his yard, which abutted the beach. *Id.* at 831-32. The easement resulted in only periodic and fleeting invasions by members of the public. *Id.* at 832 ("[N]o individual is permitted to station himself permanently upon the premises."). Indeed, the easement would sometimes go completely unused, with no occupation by anyone or anything—even for long periods of time. *Id.* at 854 (Brennan, J., dissenting) (""[T]he high-tide line shifts throughout the year, moving up to and beyond the seawall, so that public passage for a portion of the year would either be impossible or would not occur on appellant's property.") Nevertheless, the Court held that the easement effected a permanent physical

occupation constituting a *per se* taking, because "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Id.* at 832 (emphasis). In other words, while the ***right*** held by members of the public was permanent and continuous, because the easement had no end-date, the ***physical occupations*** that occurred on the owner's land were not; they were periodic or intermittent, and even non-existent for periods of time.

Much like the cable facilities in *Loretto*, the easement in *Nollan* "chopped" through the owner's "bundle of rights." Applying the analysis in *Loretto*, it becomes evident that the *Nollan* owner had no right to exclusively possess or use the space permanently burdened by the easement and physically occupied by members of the public as they walked through his backyard. Nor did the owner have the right to exclude occupiers from possession and use of the space they traversed.

Consistent with *Loretto* and *Nollan*, that same analysis should apply to the Access Regulation, which permanently[4] mandates that owners allow perfect strangers—union activists—to periodically occupy their properties (for up to three hours a day, 120 days a year). When unionizers do so, the agricultural landowner loses the right to possess and use the occupied areas, as well as the right to freely dispose of

[4] The regulation has no end date and is, in that sense, permanent. The Ninth Circuit seemed to agree on this point. App. A-17.

and exclude the ambulant occupiers from such areas. The easement represents a permanent physical occupation of the kind invalidated as an unlawful *per se* taking in *Nollan*. *Nollan*, 483 U.S. at 841-42.

Finally, it should be noted that it is not at all clear that the easement created by the Access Regulation ***must*** cut across all "strands" of the "bundle of rights" in order to be deemed a *per se* taking. In fact, the Court's takings cases suggest that the elimination of just one "strand"—e.g., the "fundamental" right to exclude—is sufficient. *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979), Again, in this sense, the panel's decision to the contrary raises another potential conflict with the Court's well-established takings precedents.

In *Lucas*, the Court held that a law depriving an owner of one "strand" in the "bundle of rights"—the right to use—effected a *per se* taking. *Lucas*, 505 U.S. at 1030. In *Lucas*, a property owner challenged a state law barring all economically beneficial use of his land. *Id.* at 1008-09. The law did not destroy the other "strands" in the owner's "bundle of rights." He still retained exclusive possession of the property, had the right to exclude others from it, and could dispose of the land. Nevertheless, the Court found a *per se* taking based on the elimination of the right to use.

Similarly, in *Kaiser Aetna*, 444 U.S. 164, the Court found that "the Government's attempt to create a public right of access to the improved pond" of a private party eliminated one "strand"—the right to exclude—in a way that effected a categorical taking. *Id.* at 179-80. That the owner still had the right to

possess, use, and dispose of the property did not preclude the finding of a taking. *Id.* at 167-69.[5]

Lastly, in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court considered whether appropriation of easements for public storm-drainage improvements and a pedestrian/bicycle pathway effected a *per se* taking. *Id.* at 380. The Court answered in the affirmative, because the appropriation meant "the loss of [the owner's] ability to exclude others"—"one of the most essential sticks in the bundle of rights." *Id.* at 393 (quoting *Kaiser Aetna*, 444 U.S. at 176).

Despite these examples, a number of the Court's opinions contain language to the effect that elimination of one "strand" is not a taking. That language appears to be attributable to *Andrus v. Allard*, 444 U.S. 51, 66-67 (1979), in which the Court remarked in dicta that "the destruction of one strand of the bundle is not a taking." In *Andrus*, a law barring the commercial sale of eagle feathers was challenged as a taking. The Court rejected the claim, because the law merely restricted one way in which personal property could be disposed of, not because the law eliminated just one "strand" in the "bundle of rights." *Id.*; *Tahoe-Sierra Pres. Council*, 535 U.S. at 327 (invoking *Andrus* for the proposition that "the destruction of one strand of the bundle is not a

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[5] One could even argue that the easement imposed in *Nollan* eliminated just one "strand"—namely, the right to exclude members of the public from the owner's backyard. The owner arguably retained the right to possess, use, and dispose of his land, including the area burdened by the access easement. Nevertheless, as in *Lucas*, the Court found that the appropriation of the easement was a *per se* taking consistent with *Loretto*.

taking"); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 480 (1987) (same); *Loretto*, 458 U.S. at 435-46 (same); *Murr v. Wisconsin*, 137 S. Ct. 1933, 1952 (2017) (Roberts, C.J., dissenting) (same); *Dolan*, 512 U.S. at 401 (Stevens, J., dissenting) (same).

The panel's application of the "bundle of rights" framework to the Access Regulation highlights some basic confusions, as well as actual and potential conflicts with the Court's precedents. Those confusions and conflicts merit review.

B. The Court Should Clarify That An Appropriated Easement Effects a *Per Se* Taking, Regardless of the Frequency or Intermittency of the Easement's Use

The panel found that the easement created by the Access Regulation does not constitute a "permanent . . . occupation." App. A-16. The panel did not dispute that the easement or regulation itself is permanent, neither of which has an end-date. App. A-17. Instead, the panel focused on the fact that the unionizers' *use* of the easement is not "continuous," but "unpredictabl[e]" and intermittent. App. A-17—A-18.

The decision exploits significant unclarity in the Court's takings jurisprudence with respect to the constitutional distinction (if any) between "permanent" and "temporary" appropriations, occupations, and invasions, particularly as those concepts apply to easements. As Judge Ikuta keenly observed in her dissent from the Ninth Circuit's denial

of rehearing, "[t]he word 'permanent' has carried a variety of different meanings in takings jurisdiction, and its meaning has changed over time." App. E-30. The variability over the years in the meaning and import of the "permanence" concept has sown much confusion—a problem that would benefit from the Court's review in this case. *See, e.g.*, *Hendler v. United States*, 952 F.2d 1364, 1376-77 (Fed. Cir. 1991) (describing the confusion surrounding references to "temporary" versus "permanent" takings).

Setting aside the unresolved debate over "permanent" versus "temporary" occupations or invasions, easements are unique property interests that are, by their very nature, limited in their use. Even so, they are uncontestably *compensable* property interests. If appropriated by government, the easement—whatever the time-limitations on its use—triggers compensation. *Nollan* recognized that salient fact. By denying that a periodically or intermittently used easement can be a *per se* taking, the panel decision is at odds with *Nollan*.

Under California law, "[a]n easement is an interest in the land of another, which entitles the owner of the easement to a limited use or enjoyment of the other's land." *Main Street Plaza v. Cartwright & Main, LLC*, 194 Cal. App. 4th 1044, 1053 (2011) (internal citation and quotation marks omitted). An easement "represent[s] only a nonpossessory right to use another's property." *Kazi v. State Farm Fire & Casualty Co.*, 24 Cal. 4th 871, 881 (2001). It is characterized by "restricted, partial, or intermittent use of another's property," and involves "primarily the privilege of *doing* a certain *act* on, or to the detriment

of" said property. *Mesnick v. Caton*, 183 Cal. App. 3d 1248, 1261 (1986) (emphasis in original).[6]

An easement's limited scope and effect are defined by the terms of the instrument that created it. Cal. Civ. Code § 806; *see also Union Pacific Railroad Co. v. Santa Fe Pacific Pipelines, Inc.*, 231 Cal. App. 4th 134, 164 (2014). Thus, easements can be of temporary or permanent duration. *Surfrider Foundation v. Martins Beach 1, LLC*, 14 Cal. App. 5th 238, 274 (2017) (discussing "temporary easements"). And they can vary in terms of the frequency with which the easement holder may use the burdened property. *See, e.g.*, *City of Malibu v. California Coastal Comm'n*, 128 Cal. App. 4th 897, 907 n.2 (2005) (describing California Coastal Commission-approved public-access easement, limited to "sunrise to sunset").[7]

Those durational and "frequency of use" limitations do not make an easement any less of a "property interest" in the landowner's property. *Redevelopment Agency v. Tobriner*, 215 Cal. App. 3d 1087, 1091 (1989). Further, because easements are a species of property right, and their appropriation by

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[6] The hallmarks of an easement, including the fact that it consists of a limited use, are not unique to California law. *See, e.g.*, 4 Powell on Real Property § 34.02 (2020) (reporting that the First Restatement of Property § 540 cites six factors defining an "easement," including that it is "an interest of a 'limited use or enjoyment" and is nonpossessory).

[7] All Commission-imposed public-access easements burdening private property in the coastal zone generally have "hours of operation"—a clear limitation on the frequency of the public's use of the easements. See California Coastal Commission, Public Access: Action Plan (June 1999), *available at* https://documents.coastal.ca.gov/assets/access/accesspl.pdf.

government is deemed an outright taking, government routinely uses eminent domain proceedings to condemn them. *Redevelopment Agency v. Tobriner*, 153 Cal. App. 3d 367, 370-72 (1984) (discussing condemnation of "parking easements"). It is little wonder that the Court in *Nollan* held that the appropriation of a public-access easement—even for periodic or intermittent use during most (though not all) of the year—constituted a *per se* taking. As one federal Circuit Court of Appeals has held, "[i]t is well established that the government may not take an easement without just compensation." *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1352 (Fed. Cir. 2003); *see also United States v. Dickinson*, 331 U.S. 745, 748 (1947) ("Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time.").

The panel sought to distinguish the easement in this case from *Nollan*. App. A-17. Quoting *Nollan*, 483 U.S. at 832, the panel reasoned that "the regulation does not grant union organizers a 'permanent and continuous right to pass to and fro' such that the [owner's] property 'may continuously be traversed.'" App. A-17. But the regulation *does* in fact grant organizers the permanent and continuous statutory ***right*** to access an owner's property. That is, as long as the Access Regulation is on the books, the right will exist. In that sense, the right is "permanent."

As alluded to above, what is noncontinuous or "temporary" is the ***occupancy*** or ***invasion*** of the property when unionizers exercise their statutory

right to access it. They may enter the owner's property for up to four 30-days periods in a calendar year, and for one hour before the start of work, one hour after the completion of work, and one hour during lunch. Code Regs. tit. 8, § 20900(e)(1). During those times, unionizers' occupation may be "temporary." And as in *Nollan*, there are many days on which no one exercises the statutory right at all, and the burdened property remains unoccupied. But under the Court's precedents, the temporariness of an otherwise significant occupation—of the kind at issue in *Nollan* and with respect to the Access Regulation here—does not make the government immune from a *per se* taking. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987) ("'Temporary' takings . . . are not different in kind from permanent takings, for which the Constitution clearly requires compensation."). Under *Nollan*, the easement effects a *per se* taking.

As to whether and how the issue of permanency affects a takings analysis of an appropriated easement, the panel decision conflicts not only with the Court's decision in *Nollan*, but with the decisions of Circuit Courts of Appeal. For example, in *Ridge Line,* 346 F.3d 1346, a property owner challenged the increased water runoff caused by the development of a Postal Service facility as a taking of a flowage easement by inverse condemnation. The Federal Circuit held that the owner had a viable takings claim, noting that an unauthorized "***occupation***" need not be "continuous." *Id.* at 1352 (emphasis added); *see also Hendler*, 952 F.2d at 1377 ("[T]he concept of permanent physical occupation does not require that

in every instance the occupation be exclusive, or continuous and uninterrupted.").

Finally, the source of the panel's confusion appears to be the lingering effects of *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). *PruneYard* involved the question whether a taking resulted from state constitutional provisions authorizing individuals to exercise their free-speech and petition rights on privately owned shopping centers *to which the public is invited*. *Id.* 76-77. The Court answered in the negative. Seven years later, the Court in *Nollan* underscored the extent to which *PruneYard* was limited to the unique facts of that case: The owner "had already opened his property to the general public," which is worlds apart from a state law authorizing third parties to enter—and, in the case of the Access Regulation, conduct business—on private property that is *closed* to the public. *Nollan*, 483 U.S. at 832 n.1.

PruneYard has become somewhat anachronistic and may be due for reconsideration in the context of this petition. In the time since the case was decided in 1980, the Court "has significantly expanded its interpretation of property rights under the Fifth Amendment, broadening the circumstances under which the public owes compensation for intrusions on private property." Gregory C. Sisk, *Returning to the PruneYard: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech*, 32 Harv. J.L. & Pub. Pol'y 389, 408 (2009).

The Court should clarify the meaning and role of the "permanency" concept in takings cases in order to

resolve a circuit split, and ensure continued adherence to the Court's long-standing takings precedents.

CONCLUSION

For these reasons, and those stated in the petition, the petition should be granted.

DATED: September 2020

Respectfully submitted,

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