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.,
.

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

Amici Curiae Brief of Western Growers Association; California Fresh Fruit Association; Grower-Shipper Association of Santa Barbara and San Luis Obispo Counties; and Ventura County Agricultural Association.

In Support of Petitioners and For Reversal

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INTEREST OF *AMICI CURIAE*

The undersigned *amici curiae* file this brief in support of the Petitioners and for reversal.[1]

Founded in 1926, **Western Growers Association** is a nonprofit association representing local and regional family farmers in California, Arizona, Colorado and New Mexico. Western Growers' members grow, pack, and ship over half of the nation's fresh produce including nearly a third of America's fresh organic produce. Western Growers' member companies are dedicated to providing a great variety of safe and healthy fresh fruits, vegetables and tree nuts to consumers.

With offices and dedicated staff in Sacramento, California and Washington, D.C., Western Growers is a leading public policy advocate for the fresh produce industry and has a longstanding interest in property, employment, and labor matters affecting agriculture. Agricultural issues like the one involved here rarely appear in this Court, finding their more usual fora to be the state courts. Thus, the Association has filed state court amicus briefs in employment law cases raising matters of significance to its agricultural members. *See, e.g., Gerawan Farming, Inc. v.*

[1] Counsel for the *amici curiae* authored this brief alone and no other person or entity other than the *amici curiae*, their members or counsel have made a monetary contribution to the preparation or submission of this brief. Counsel for the *amici curiae* timely notified counsel for the parties that we intended to file this brief. The Petitioners filed a blanket consent to the filing of amicus briefs and Respondents have consented in writing to filing of this brief.

Agric. Labor Relations Bd., 3 Cal. 5th 1118 (2017); *Hess Collection Winery v. Agric. Labor Relations Bd.*, 140 Cal. App. 4th 1584 (2006); *S.G. Borrello & Sons, Inc. v. Dep't of Indus. Relations,* 48 Cal. 3d 341 (1989). The present case is of great importance to Western Growers and its members because most of its members are landowners whose property rights are impaired under the Agricultural Labor Relations Board's (ALRB) access rule regime.

California Fresh Fruit Association (CFFA) is a voluntary, nonprofit agricultural trade association that represents California's fresh fruit industry. The CFFA is the key public policy organization that represents the needs and interests of its members by advocating on their behalf on legislative and regulatory issues, at state, federal and international levels. The CFFA's membership is comprised of over 300 members, including growers, shippers and marketers of fresh grapes, blueberries and tree fruit, and also includes associate members indirectly involved with these commodities (e.g., labeling equipment, container/packaging suppliers, commodity groups, etc.). The membership is primarily located in the San Joaquin Valley, though its members are located as far north as Lake County and as far south as Coachella Valley. The CFFA-represented commodities include apricots, apples, blueberries, cherries, figs, kiwis, nectarines, peaches, pears, persimmons, plums, pomegranates and fresh grapes. Membership of the Association represents approximately 85% of the volume of fresh grapes and 95% percent of volume for deciduous tree fruit

shipped from California. Its members are seriously impacted by the ALRB's access rule.

Grower-Shipper Association. of Santa Barbara and San Luis Obispo Counties. Founded in 1947, the Grower-Shipper Association of Santa Barbara and San Luis Obispo Counties represents some 170 growers, shippers, farm labor contractors, and supporting agribusinesses. Members grow diverse field and nursery crops such as broccoli, strawberries, wine grapes, vegetable transplants, flowers, and tree fruit.

The association represents its members on a variety of local and regional issues, including agricultural employment, water resources, and land use. The association is known for taking on the toughest issues, especially land use, including particularly the union organizer/trespass rule set up by the ALRB.

Ventura County Agricultural Association is a non-profit business trade association, representing the interests of over two hundred agricultural and related employers in Ventura and Santa Barbara Counties in California since 1970. Its membership includes virtually all of the major agricultural employers, agricultural nurseries, cooperatives, packinghouses, farm labor contractors, trucking businesses and agricultural related support industries. Since 1976, the Association has represented the interests of numerous employers before the ALRB. The Association's General Counsel has litigated scores of administrative cases before the ALRB, and has engaged in investigations of unfair labor practice

charges involving "access" by union organizers under the ALRB's Access Regulation. Quite literally, a majority of the Association's membership will be affected by a decision in this case.

SUMMARY OF ARGUMENT

1. This Court has repeatedly held that one of the most important aspects of private property is the right to exclude third parties, a right that is vouchsafed by the 5th Amendment and protected by the courts. E.g., *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 122 (1978).

California has upended that proposition for the sake of one privileged group: organized labor. Specifically, in this case, agricultural labor unions. In all other cases, California recognizes the right of private property owners to establish rules by which third parties may be allowed to access private property, if at all. Otherwise, trespassers are subject to criminal prosecution. Cal. Pen. Code § 602. But not in the case of organized labor. In that case alone, California has enacted statutes and regulations that coerce acceptance of physical invasion. Regulations of the State's ALRB have exacerbated the problem for farmers by authorizing repeated trespass by union organizers for 120 days each year.

This is not the first time that California has established rules that denigrate the rights of private property owners. In overturning a California rule that would have allowed repeated trespass by the public, this Court concluded that

the state courts were divided into two jurisprudential groups. One consisted of California, the other of "every other court that has considered the question . . . ." *Nollan v. California Coastal Commn.*, 483 U.S. 825, 839 (1987). As it was in *Nollan*, California must again be brought back into the federal constitutional fold. Its specialized statutes and regulations that override the rights of private property owners in favor of labor organizer trespassers are invalid.

2. Assuming *arguendo* that there was a valid reason for the access seizure at issue here when it was adopted 45 years ago, there is no longer. Modes of communication have vastly changed during that time, making it unnecessary for union organizers to trespass on farms to communicate with workers.

3. This Court's decision in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) has been vastly over-read. The Ninth Circuit decision below is a paradigm. *PruneYard* was designed for a situation involving a massive shopping center catering to 25,000 patrons every day. To transfer a rule designed for an area conceived as the modern equivalent of a town square to allow trespass by labor organizers on a family farm makes neither logical nor jurisprudential sense. Moreover, *PruneYard* dealt with a property owner that actively *invited* third parties onto its property. That has no analog in this agricultural context.

4. The Supremacy Clause (U.S. Const., art. VI, cl. 2) establishes the U.S. Constitution as "the

supreme law of the land; . . . anything in the . . . laws of any State to the contrary notwithstanding."

The Ninth Circuit set the 5th Amendment on one pan of its justice scale and state regulations on the other — and concluded that the latter outweighed the former.

If the Supremacy Clause means anything, that holding cannot stand.

ARGUMENT

I.
THE RIGHT OF A PRIVATE PROPERTY OWNER TO EXCLUDE PEOPLE IS A VITAL ELEMENT OF PROPERTY

"Property" consists of many things. Indeed, the concept is so complex that this Court has repeatedly used the law professors' "bundle of sticks" analogy to illustrate it, concluding that either the taking of an entire "stick" (or right) from the "bundle" or the taking of a part of all the "sticks" violates the Takings Clause of the 5th Amendment.[2] When legislation is enacted which takes property with no intent to provide

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[2] *E.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982); *U.S. v. Security Indus. Bank*, 459 U.S. 70, 76 (1982); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984); *Hodel v. Irving*, 481 U.S. 704, 716 (1987); *Nollan*, 483 U.S. at 831.

compensation, the legislation is invalid. *Hodel v. Irving*, 481 U.S. 704 (1987).[3]

A.
This Court Has Long Protected A Property Owner's Right To Exclude

One "stick" which has received special protection from this Court has been the right of property owners to exclude others from their property. This Court has repeatedly referred to the right to exclude others as "one of the most essential"[4] and "most treasured strands in an owner's bundle of property rights."[5]

The Court of Appeals for the Federal Circuit has emphasized that trespass by (or, as here, at the direction of) the government is a more serious invasion than simple trespass by fellow citizens:

> "In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession — the right to exclude strangers, or

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[3] The statute in *Irving* was intended to solve a problem caused by intestate succession to miniscule native American estates. However, the recognized property right of devise and descent was taken from current owners without any intent to pay for that taking. As a result, this Court struck down the statute.

[4] *Kaiser Aetna*, 444 U.S. at 176; *Loretto*, 458 U.S. at 433; *Ruckelshaus*, 467 U.S. at 1011; *Irving*, 481 U.S. at 716; *Nollan*, 483 U.S. at 831.

[5] *Loretto*, 458 U.S. at 435.

> for that matter friends, but *especially the Government*." *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991) (emphasis added).

Moreover, this Court has been particularly protective against governmental actions which permit strangers to invade private property:

> "This is *not* a case in which the Government is exercising its regulatory power in a manner that will cause an *insubstantial devaluation* of petitioners' private property; rather, the imposition of the navigable servitude in this context will result in *an actual physical invasion* of the privately owned marina." *Kaiser Aetna*, 458 U.S. at 180 (emphasis added).

Like *Kaiser Aetna*, this case does not involve "insubstantial devaluation" of property. The State's adoption and enforcement of statutes and regulations allowing actual physical intrusion onto farmers' private property has taken a possessory interest in the property in the form of an easement. Colorfully, Professor Tribe once referred to such trespassers on private property as "government-invited gatecrashers." Laurence H. Tribe, *American Constitutional Law*, § 9-5 at 602 (2d ed. 1988). Or, as this Court called them, "interloper[s] with a government license." *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987). Indeed, they are. But the 5th Amendment provides a shield against such "gatecrashers" and "interlopers."

The Court of Appeals for the Federal Circuit waxed a bit poetic in describing the government and its designees as intruders:

> "The intruder who enters clothed in the robes of authority in broad daylight commits no less an invasion of these rights than if he sneaks in in the night wearing a burglar's mask. In some ways, entry by the authorities is more to be feared, since the citizen's right to defend against the intrusion may seem less clear. Courts should leave no doubt as to whose side the law stands upon." *Hendler*, 952 F.2d at 1375.

This Court has routinely noted that government actions resulting in actual physical invasion are relatively simple to analyze from the vantage point of the 5th Amendment: physical invasion is a taking that cannot be accomplished without compensation. "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002).

This Court's cases make no distinction between actual physical invasion by the government (*e.g.*, *Pumpelly v. Green Bay Co.*, 13 Wall. [80 U.S.] 166, 181 (1871) [artillery shells]; *United States v. Causby*, 328 U.S. 256, 261 (1946) [military aircraft]) and legislation or regulations authorizing trespass by others. Some of the Court's prime

physical invasion cases simply involved enabling (or, at least, purporting to enable) third party trespass. In *Nollan*, 483 U.S. 825, a California agency sought to authorize random beach goers to trespass on private property. In *Loretto*, 458 U.S. 419, the New York legislature authorized cable TV companies to install equipment in apartment buildings without consent from the building owners. In *Kaiser Aetna*, 444 U.S. 164, the United States sought to open a private marina to use by the general public. Each was rebuffed because no compensation was provided.

In plain terms, the right to exclude unwanted persons from private property is "deeply rooted in our legal tradition." *Washington v. Glucksburg*, 521 U.S. 702, 722 (1997). The point is simply this: Neither by itself, nor through authorizing others, may a public agency invade the right of private property owners to exclude third parties from their land — not without compensation.

Legally, this case is an analytical twin to the cases cited above (*Kaiser Aetna*, *Nollan*, *Loretto*). In each, a government regulation sought to compel a private property owner to open property to physical intrusion and use by strangers. In *none* of these cases did a government agency itself physically intrude on private property. In *each*, however, *government enacted regulations that purported to enable strangers to trespass at will*. And it was that enablement — that the underlying owners did not invite and were powerless to prevent — that rendered the government liable for

a taking. As the Court of Appeals for the Federal Circuit summarized it:

> "As a general proposition, if the Government for purposes of public use physically occupies, either by its own agents or *by third parties*, privately owned land over the owner's objections, *liability is a foregone conclusion*." *Brown v. United States*, 73 F.3d 1100, 1103 (Fed. Cir. 1996) (emphasis added).

Here, such random and unwanted intrusions by union representatives — at times and in manners of their own choosing — is so significant that, as this Court held in *Kaiser Aetna*:

> ". . . the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government *cannot* take without compensation." 444 U.S. at 180 (emphasis added).

The idea that compensation is a necessary adjunct of government action that takes private property was reinforced eight years later:

> ". . . government action that works a taking of property rights *necessarily* implicates the 'constitutional obligation to pay just compensation." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (emphasis added).

Compensation is thus an automatic requirement when property interests are taken.

B.
Good Intentions Cannot Save The Regulation

The Ninth Circuit suggests that the Legislature recognized a problem, accepted the duty to solve it, and devised a solution. *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 527-28 (9th Cir. 2019). But its opinion proceeds as though recognition of a legitimate governmental *goal* (accepting *arguendo* that the goal is legitimate) validates whatever *solution* is chosen.

That is not the law in the United States. Determination of a legitimate governmental objective is the first, not the last, step. The means chosen to achieve the objective must then survive Constitutional scrutiny.

Good intentions are constitutionally irrelevant, although they may be legally and morally necessary. For the proper exercise of any governmental power, the underpinning of such a beneficent purpose must exist. That much was settled no later than 1922, when this Court examined a statute designed to stop land subsidence caused by underground coal mining and concluded that the prerequisites for exercise of both police power and eminent domain were present:

> "We assume, *of course*, that the statute was passed upon the conviction that an exigency existed

> that would warrant it, and we assume that an exigency exists that would warrant the exercise of the power of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (emphasis added).[6]

More recent authority echoes that conclusion: "the Takings Clause *presupposes* that the government has acted pursuant to a valid public purpose." *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 543 (2005) (emphasis added).

Once it is determined that the government action is done to achieve a legitimate goal, then the means chosen must be examined against the constitutional matrix to ensure that private rights have not been violated.[7] Governmental power is

[6] *See also Florida Rock Indus, Inc. v. United States*, 18 F.3d 1560, 1571 (Fed. Cir. 1994): "It is necessary that the Government act in a good cause, but it is not sufficient. The takings clause already assumes the Government is acting in the public interest . . . ." More than that, it assumes that the Government is acting pursuant to lawful authority. If not, the action is *ultra vires* and void. Compare *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (unlawful wartime seizure voided) with *United States v. Peewee Coal Co.*, 341 U.S. 114 (1951) (compensation mandatory after lawful wartime seizure).

[7] We note that the Ninth Circuit relied in part on the California Supreme Court's 4-3 decision upholding this regulation in *Agric. Labor Relations Bd. v. Superior Court*, 546 P.2d 687 (1976). See *Cedar Point*, 923 F.3d at 537. A fundamental problem with such reliance is that, in 1976, California essentially recognized few rights in property

not permitted to run roughshod over the constitutionally protected rights of individuals. That is what this Court was talking about when it concluded in *First English* that:

> "many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them." 482 U.S. at 321.

Pennsylvania Coal was merely one in a long line of decisions in which this Court — speaking through various voices along its ideological spectrum (*Pennsylvania Coal* having been authored for the Court by Justice Holmes) — patiently, and consistently, explained to regulatory agencies that the general legal propriety of their actions and the need to pay compensation under the Fifth Amendment present different questions, and the need for the latter is not obviated by the virtue of the former. Emphasizing the point, the dissenting opinion in *Pennsylvania Coal* had argued the absolute position that a "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking." 260 U.S. at

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owners. For a review of the California situation, see Gideon Kanner & Michael M. Berger, *The Nasty, Brutish And Short Life Of* Agins v. City Of Tiburon, 50 The Urban Lawyer 9 (2019). Indeed, this Court's modern era takings decisions did not begin until 1979 — three years later. It was not until then that California's peculiar jurisprudence was brought under control. See *First English,* 482 U.S. at 311 (1987); *Nollan*, 483 U.S. at 839 (1987).

417 (Brandeis, J., dissenting.) Eight Justices rejected that proposition.

In *Loretto*, 458 U.S. 419, New York's highest court upheld a statute as a valid exercise of the police power, and therefore dismissed an action seeking compensation for a taking. This Court put it this way as it reversed:

> "The Court of Appeals determined that § 828 serves [a] legitimate public purpose . . . and thus is within the State's police power. We have no reason to question that determination. *It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid*." *Loretto*, 458 U.S. at 425 (Marshall, J.) (emphasis added).

Similarly, in *Kaiser Aetna*, 444 U.S. 164, the Corps of Engineers decreed that a private marina be opened to public use without compensation. This Court disagreed, and explained the relationship between justifiable regulatory actions and the just compensation guarantee of the Fifth Amendment:

> "In light of its expansive authority under the Commerce Clause, there is *no* question but that Congress *could* assure the public a free right of access to the Hawaii Kai Marina if it so chose. *Whether a statute or regulation that went so far amounted to a taking, however, is an entirely separate*

> *question*." *Kaiser Aetna*, 444 U.S. at 174 (Rehnquist, J.) (emphasis added).

Or, as the Court put it in *Nollan*:

> "That is simply an expression of the Commission's belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast. The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose.'" 483 U.S. at 841 (Scalia, J.).

That is why this Court concluded in *First English* that the Fifth Amendment was designed "to secure *compensation* in the event of *otherwise proper interference* amounting to a taking." 482 U.S. at 315 (Rehnquist, C.J.) (first emphasis, the Court's; second emphasis added.)

In a similar vein are cases like *Preseault v. I.C.C.*, 494 U.S. 1 (1990) (Brennan, J.); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (Blackmun, J.); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (Rehnquist, J.); and the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (Brennan, J.). In each of them, this Court was faced with the claim that Congress, in pursuit of legitimate objectives, had taken private property

without just compensation. The goal in each was plainly legitimate (respectively, the creation of recreational trails over abandoned railroad right-of-way easements, obtaining expert input prior to licensing of pesticides, dealing with the issue of compensation in the aftermath of the Iranian hostage crisis, and widespread railroad bankruptcy). *See also U.S. v. Security Industrial Bank*, 459 US 70 (1982) (retroactive application of bankruptcy legislation is subject to the Fifth Amendment). Nonetheless, the Court did not permit those proper legislative goals to trump the constitutional need for compensation when private property was taken in the process. In each, the Court directed the property owners to the Court of Federal Claims to determine whether these exercises of legislative power, *though substantively legitimate*, nonetheless required compensation.[8]

This consistent teaching probably explains why the Court of Appeals for the Federal Circuit, the body which hears all appeals from the Claims Court (the court which adjudicates more takings cases than any other because it is virtually the exclusive forum for takings cases against the United States), has had no trouble recognizing that the Just Compensation Clause operates against proper governmental action:

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[8] To this end, the Fifth Amendment's just compensation guarantee has been held self-executing. The availability of compensation validates and constitutionalizes the otherwise wrongful government action. *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 714-15 (1999) (Kennedy, J.); *United States v. Clarke*, 445 U.S. 253, 257 (1980).

> "In such cases the characteristic feature is the defendant's use of rightful . . . regulatory rights to control and prevent exercise of [private] ownership rights the defendant is unwilling to purchase and pay for."[9]

In sum, for a taking to occur, it matters not whether the regulators acted in good or bad faith, or for good or bad reasons. What matters is the impact of their acts, not the purity *vel non* of their motives. Indeed, if their motives are benign — or done for the best of reasons — that only fortifies the need for compensation required by the Takings Clause of the Fifth Amendment.[10]

> "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and of the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize

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[9] *Florida Rock Indus., Inc. v. U.S.*, 791 F.2d 893, 899 (Fed. Cir. 1986) (quoting with approval; emphasis the Court's). *See also Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1177 (Fed. Cir. 1991); *Skaw v. United States*, 740 F.2d 932, 939 (Fed. Cir. 1984).

[10] *See Hughes v. Washington*, 389 U.S. 290, 298 (1967): "[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." (Stewart, J., concurring) (emphasis original.)

> praiseworthy government officials no less, and perhaps more than mediocre ones." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (footnote omitted.)[11]

Thus, it is not enough for California to conclude that — as a matter of state policy — it was a good thing to allow union members to trespass on farms to organize employees. As a matter of federal Constitutional policy, such a severe invasion of protected property rights cannot occur unless compensation is paid.

C.
If a Need For the Regulation Existed 45 Years Ago, It Does No Longer

California's farm trespass rule was adopted in a different era. The time was the mid-1970s, when modes of communication were far different. Thus, the regulation was adopted on the theory that "[g]enerally, unions seeking to organize agricultural employees do not have available alternative channels of effective communication." 8 Cal. Code Regs. § 20900(c).

California's regulators thought that was an adequate basis for authorizing union organizers to trespass on farms because this Court had earlier noted that employer's rights might have to yield a bit when necessary for union members to communicate with workers. *See N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). But, as

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[11] *See also Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *McNabb v. United States*, 318 U.S. 332, 347 (1943).

this Court later explained, that concept was a narrow exception. It "simply does not protect nonemployee union organizers *except in the rare case* where the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels." *Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527, 533 (1992) (emphasis added; internal quotes and citation omitted).

This is not now (assuming *arguendo* that it ever was) one of those rare cases. Time and technology have a way of changing things.

First, contrary to some classic older visions, farm workers rarely migrate these days. Most stay put. *See generally* United States Dep't of Agriculture, Economic Research Service, *More Farmworkers are Settled, Fewer are Migrants*, https://www.ers.usda.gov/topics/farm-economy/farm-labor/#employment (last updated April 22, 2020; last accessed Dec. 28, 2020).

Second, nor do they generally live on the farms where they work. *See*, *e.g.*, Aguirre International, *The California Farm Labor Force: Overview and Trends from the National Agricultural Workers Survey* 30, https://www.alrb.ca.gov/wp-content/uploads/sites/196/2018/05/CalifFarmLaborForceNAWS.pdf (last accessed Dec. 28, 2020).

Indeed, the complaint in this case shows that the employees do not live on site. There is no reason they cannot be contacted off site.

Third, technology has intervened. Mobile phones and social media contacts have proliferated

— even among farm workers, although that may seem counterintuitive to those unfamiliar with 21st century farms and their workers. As one observer put it, "The widespread adoption of mobile phones brought more predictability to the informal agricultural job market for farm workers . . . ."[12] According to another, "Farmworkers are just like everybody else—we all have smartphones. . . . Many of them are active on Facebook and WhatsApp, so we use Facebook as a means to be able to communicate with workers."[13] Social media didn't exist when California's farm trespass rule was adopted or when a 4-3 majority of the State Supreme Court narrowly approved it. The same unions that insist on the need to trespass on farms to contact the workers operate websites and radio stations as means of communication. *See*, *e.g.*, campesina.com; https://chavezfoundation.org/communications-fund/.[14]

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[12] Carlos Jimenez, *From telephones in rural Oaxaca to mobile phones among Mixtec farm workers in Oxnard, California*, https://doi.org/10.1177/1461444816655098 (last accessed Dec. 28, 2020).

[13] Los Angeles Times' Essential California Newsletter, *Using Social Media to Make Sure Farmworkers Know Their Rights*, June 14, 2019, https://www.latimes.com/newsletters/la-me-ln-essential-california-20190614-story.html (last accessed Dec. 28, 2020).

[14] In a broader context, the so-called "Arab Spring" (not to mention our domestic "Occupy" movements) was said to have been powered by social media. *See*, *e.g.*, Paolo Garbaudo, *Tweets And The Streets: Social Media And Contemporary Activism* (2012); Jeffrey S. Juris, *Reflections on #Occupy Everywhere: Social Media, Public Space, And Emerging*

II.
THIS COURT NEEDS TO CLEARLY DELINEATE THE NARROW LIMITS OF ITS *PRUNEYARD* HOLDING

PruneYard v. Robins, 447 U.S. 74 (1980) is a case that is truly *sui generis*. The problem is that too many lower courts and government agencies treat it as laying down broad rules of both conduct and constitutional rights under the First and Fifth Amendments. The Ninth Circuit's decision below is an apt example, holding that the State's confiscation of an easement from farmers to allow union organizers to exercise free speech and petition under the First Amendment via trespass did not sufficiently intrude on the property owner's rights under the Fifth Amendment to overturn the regulation. *Cedar Point*, 923 F.3d at 531-32.

The most important thing about *PruneYard* is not that it concluded that there are times when private property must be treated as though it were public for free speech purposes, but the incredibly rare set of facts that led to that conclusion and that should guide its application. This Court has acknowledged the narrowness of those facts and, thus, the narrowness of the opinion. *E.g.*, *Nollan*, 483 U.S at 832, n.1 (owner "had already opened his property to the general public"); *Loretto*, 458 U.S. at 434 ("the owner had not exhibited an interest in excluding all persons from his property"); *Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994) ("right to

Logics Of Aggregation, 39 Am. Ethnologist 259 (2012); Sasha Costanza-Chock, *Media Cultures and the Occupy Movement*, 11 Social Movement Studies 375 (2012).

exclude would not be regulated, it would be eviscerated").

Evidently, that message needs to be more clearly sent.

A.
The Facts Underlying *PruneYard* Were So Rare, the Opinion is *Sui Generis*

PruneYard dealt with an exceptional fact situation — one that is not present in this case, nor in many others that have been and will be litigated. As this Court summarized it:

> "Appellant PruneYard is a privately owned shopping center in the city of Campbell, Cal. It covers approximately 21 acres — 5 devoted to parking and 16 occupied by walkways, plazas, sidewalks, and buildings that contain more than 65 specialty shops, 10 restaurants, and a movie theater." 447 US at 77.

By any definition, the PruneYard Shopping Center was large. It also contained common areas set aside for public gathering. The petition gatherers set up their table in the center's "central courtyard." Thus, when analyzing the "public v. private" nature of the shopping center, *PruneYard* relied heavily on what it viewed as the functional equivalence of the shopping center to a traditional public forum, i.e. (in the words of the California Supreme Court whose opinion was affirmed), replacing the "central business district" of an ordinary city or becoming a "miniature downtown." 23 Cal. 3d at 907, 910, n.5. Indeed, it was the large

size and heavy use of the PruneYard center (drawing daily crowds of 25,000 people to its "congenial environment" and "numerous amenities") and the consequent fact that such a property — with such intense uses — could not seriously be impacted by a "handful of additional orderly persons" operating under "reasonable regulations adopted by the shopping center owner" that impelled *PruneYard* to its conclusion that the PruneYard center must allow handbillers and petitioners in the public areas.

When this Court affirmed, it emphasized the importance of the size and scope of the center, covering "several city blocks." *PruneYard,* 447 U.S. at 83-84. Justice White's concurring opinion emphasized that the Court "was dealing with the *public or common areas* in a large shopping center." *Id.* at 95 (concurring opinion) (emphasis added). Likewise, Justice Powell: "I join . . . on the understanding that our decision is limited to the type of shopping center involved in this case." *Id.* at 96 (concurring opinion).

B.
PruneYard Can Have No Impact Here

In this Court's words, given the underlying facts, "[t]here is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center. 447 U.S. at 83.

Here, however, the situation is precisely the opposite. Instead of a massive shopping center catering to some 25,000 customers each day, this

case involves working farms that require their employees to focus on cultivation and harvest.

More importantly, the shopping center owner in *PruneYard* had *invited* everyone to come in. As shown above, that is the basis on which this Court distinguished *PruneYard* in the past. The entire *raison d'etre* of the PruneYard shopping center was to have thousands of people in the center all times. Not so here. The farmers who brought this case did *not* invite the union gatecrashers to come in at their pleasure and disrupt employees at critical times of the year. Thus, in addition to the sheer size of the PruneYard, and its established public gathering areas, the critical issue is the invitation. These farmers were given no choice, either as to whether union organizers could come onto their farms or when and under what circumstances that could happen.

When this Court affirmed the California Supreme Court, it relied on the fact that the property owner retained the right to enforce reasonable time, place and manner restrictions "that will minimize any interference with its commercial functions." *PruneYard,* 447 U.S. at 83. That is the precise opposite of the situation here. In this case, the farmers have no control over time, place, or manner; those parameters having been set by the State.

Nothing in either the facts of *PruneYard* or the *ratio decidendi* of the opinion requires *all* property owners — of whatever size or configuration or use — to accept third parties trespassing for any reason. Especially when, as here, they disrupt

farm employees at a critical time in the growing season.

III.
STATE STATUTES AND REGULATIONS CANNOT TRUMP THE FIFTH AMENDMENT

It should go without saying that a state cannot enact statutes or regulations that conflict with the U.S. Constitution. It should, but it is evidently necessary to say aloud because the Ninth Circuit seemed to have little trouble holding that this California regulation could run roughshod over the private property rights involved here.

The Constitution is clear:

> "This Constitution . . . shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the . . . laws of any State to the contrary notwithstanding." U.S. Const., art. VI, cl. 2.

What the Ninth Circuit sought to establish was the primacy of the State's regulations.

The 7th Circuit expressed the true rule with simple elegance:

> "The Constitution and the laws of the United States are the supreme law of the land. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Because of the Supremacy Clause of the United States Constitution, Article VI, Clause 2, *states may not enact laws or*

> *regulations which are contrary* to federal law." *Youakim v. Miller*, 562 F.2d 483, 494 (7th Cir. 1977); (emphasis added).

The point of our Constitution in general — and its Bill of Rights, in particular — is to provide a baseline of minimal protection to all the rights of all citizens, with individual states having the discretion to provide *more, but never less* protection. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943). If there is a role for state courts and state laws, this is it: providing *more* protection than the U.S. Constitution mandates.

As Professor Akhil Amar summarized it, "the federal constitution stands as a secure political safety net — *a floor below which state law may not fall*."[15] Any conflicting state law is simply "without effect."[16] In other words, as the Court classically held in *Marbury v. Madison*, 1 Cr. [5 U.S.] 137, 177 (1803), it is the Court's job to see that other levels of government remain true to the Constitution. That would include protecting the rights of

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[15] Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1100 (1988); emphasis added. See also Gideon Kanner, *Just How Just is Just Compensation?* 48 Notre Dame L. Rev. 786, 784 (1973): "it seems safe to say that the Constitution — or at least the Bill of Rights — was the product of the framers' fear of an overreaching government, and their desire to protect individual citizens from governmental excesses. . . . [T]he purpose of the . . . Bill of Rights [] was to protect the people from the government, not vice versa."

[16] *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

property owners from the depredations of state and local government.

The Supremacy Clause stands as a barrier to California regulations that trench on the rights of private property owners. The offending ALRB regulation is invalid.

CONCLUSION

Ends and means. As is so often the case in constitutional litigation, that is what this case is about. Regardless of the validity of the ALRB's goal, the Fifth Amendment precludes achieving it by means that take property from farm owners and operators without compensation.

The decision of the Ninth Circuit should be reversed.

Respectfully Submitted,

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