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 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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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 their lands, and to thereby establish a safe and undisturbed work environment for themselves and their employees. The regulation challenged in this

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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.

case purports to impose an access easement on agricultural businesses for the private benefit of union activists. Such laws threaten AFBF members' efforts to safeguard their workplaces against unauthorized intrusions. For that reason, AFBF files this brief to supplement and expand upon Petitioners' arguments that the access regulation here is unconstitutional.

SUMMARY OF THE ARGUMENT

The California regulation at issue—hereinafter referred to as the "Access 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). 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 3 hours each day, 120 days per year. *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. Petitioners' Appendix ("App.") G13—G15. For the reasons stated in the Petitioners' Brief on the Merits, the employees are right. Under this Court's existing precedents, the Access Regulations result in a *per se* taking of an easement without just compensation.

This brief supplements Petitioners' Brief on the Merits by exploring an additional reason why the

Access Regulation effects an unconstitutional taking and should be struck down: The regulation appropriates an easement, not for a public use or purpose, but for the benefit of a class of private individuals—union activists—and their private recruitment efforts. The regulation therefore violates, not only the "just compensation" requirement of the Takings Clause, but the "public use" requirement, as well. U.S. Const. amend. V.

In addition, this brief expands upon a fundamental principle affirmed by this Court's modern takings jurisprudence: The government's appropriation of an easement effects a *per se* taking of a recognized property interest, regardless of how often the interest is used, or how long a particular instance of such use lasts. Because the permanent Access Regulation appropriates an easement across private property for the use and benefit of third-party strangers, it effects a *per se* taking. That is so, even if the *use* of the easement may be limited in frequency and duration.

ARGUMENT

A. The Access Regulation Violates the "Public Use" Requirement of the Takings Clause

The Takings Clause of the Fifth Amendment to the United States Constitution prohibits the government from taking private property unless (a) it is for a "public use" and (b) "just compensation" is paid to the owner. U.S. Const. amend. V, XIV; *see also Brown v. Legal Foundation of Washington*, 538 U.S. 216, 231-32 (2003) (underscoring the Takings Clause's two separate requirements). The Takings Clause was

enshrined in the Constitution so that the government cannot "force some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

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). A government taking of private property for a private use or purpose is categorically barred. As this 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; *Calder v. Bull*, 3 U.S. 386 (1798) (holding that "[i]t is against all reason and justice" to presume that the legislature has been entrusted with the power to enact "a law that takes property from A and gives it to B").

"Nor would the [government] be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit."[2] *Kelo*, 545 U.S. at 478. If a taking is designed

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[2] The Court has not fleshed out when a "pretextual taking" occurs. Professor Daniel Kelly identified four criteria that courts have used to determine whether a private taking is pretextual: (1) the magnitude of public benefits resulting from the taking, with negligible or nonexistent public benefits indicating a pretextual taking; (2) the extensiveness of any planning process prior to the taking; (3) whether the government has identified the private parties or class of private parties who stands to benefit from the taking; and (4) the intent or motive of the government in taking the property. Daniel Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and*

simply "to benefit a particular class of identifiable individuals," then the taking is not for a "public use" and is therefore unconstitutional. *Id.* Significantly, takings with only an "incidental" public benefit "are forbidden by the Public Use Clause." *Id.* at 490 (Kennedy, J., concurring). The fact that the government does not appropriate property for its *own* use, but rather for a third party's use, does not immunize the government from liability under the Takings Clause. *See Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419 (1982) (holding that a "taking" under the Takings Clause occurs even when, under the authority of law, "a stranger directly invades and occupies the owner's property" and does not pass to or through the government's hands).

Respondents may argue that *Kelo* provides the Access Regulation with legal cover. But *Kelo* involved a starkly different set of facts.

In *Kelo*, the Court upheld a city's taking of homes in an economically distressed area so that Pfizer could build a $300 million research facility. *Kelo*, 434 U.S. at 473. The city was able to establish to the Court's satisfaction that it had to condemn the homes, not "to benefit a particular class of identifiable individuals"—such as Pfizer's shareholders—but to benefit the community at large. As the Court

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Impermissible Favoritism, 17 Sup. Ct. Econ. Rev. 173, 185-199 (2009); *see also* Ilya Somin, *Eminent Domain in the United States: Public Use, Just Compensation, & 'The Social Compact': Introduction: The Judicial Reaction to* Kelo, 4 Alb. Gov't L. Rev. 1, 24-36 (2011) (discussing "the problem of pretext," in the context of Professor Kelly's four factors and how those factors have been applied in lower courts since *Kelo*).

observed, the city was merely trying to execute a "carefully formulated . . . economic development plan that it believ[ed would] provide appreciable benefits ***to the community***, including . . . new jobs and increased tax revenue." *Id.* at 483-84 (emphasis added)).

By contrast, the Access Regulation here was not designed to, and does not, benefit an entire community or the general public. Rather, it was designed to benefit a particular class of identified individuals—union organizers—to promote their private interest in recruiting workers to their organizations. Cal. Code Regs. tit. 8, § 20900(a) (declaring the regulation's purpose to be "to encourage and protect" the rights of "agricultural employees"). Even if one assumed a broad public benefit resulted from the Access Regulation, it would only be incidental to the regulation's purpose, which is to help union organizers fill their ranks and coffers. Such an incidental benefit does not satisfy the "public use" requirement. *Kelo*, 545 U.S. at 480 (Kennedy, J., concurring).[3]

As Petitioners argue, the Access Regulation is unconstitutional, because it effects a taking without compensation. But the regulation is unconstitutional for the additional reason that it serves no public use or purpose, even under this Court's decision in *Kelo*.

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[3] The Access Regulation, which serves a purely private purpose, is distinguishable from a law authorizing public officials to enter private property for inspection and enforcement of public health and safety regulations. Such a law would not entail the appropriate of an easement, giving rise to a taking. But even if it did, it clearly would serve a public purpose.

B. A Government-Authorized Occupation of Private Property, Even When Periodic or Intermittent, "Chops" Through the "Bundle of Rights" and Effects a *Per Se* Taking

In its takings cases, the Court has sometimes invoked the "bundle of rights" metaphor to describe property ownership.[4] *See, e.g., Tahoe-Sierra Pres. 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'

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[4] The "bundle of rights" metaphor to describe property rights is not without its critics. The 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). As another scholar explained, "[u]nder 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 (1999) (internal citations omitted). The "bundle of rights" metaphor can be understood 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).

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 effects a *per se* taking. *Loretto*, 458 U.S. at 435 (emphasis added). In that case, state law mandated that a landowner allow a cable television company to install cable facilities on the owner's property. The Court concluded that the law eliminated all "strands" in the owner's "bundle of rights": "[T]he 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 [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 owner's property. Thus, it was easy to see how the facilities destroyed the owner'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. App. 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.

The analysis and rationale in *Loretto* and *Nollan* apply with equal force and effect to the Access Regulation. The regulation permanently[5] 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 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. The Court's takings cases suggest that the elimination of just one "strand"—such as the "fundamental" right to exclude—is sufficient. *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979).

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[5] The regulation has no end date and is, in that sense, permanent. The Ninth Circuit itself seemed to agree on this point. App. A-17. Nor does California appear in any of its briefs to contest the permanency.

In fact, one could 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, the Court found that the appropriation of the easement was a *per se* taking consistent with *Loretto*. *Nollan*, 483 U.S. at 841-42.

Consider, too, the facts in *Lucas*. There, 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. There, the 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." He still retained possession of the property, as well as the rights to exclude others from, and dispose of, the land. Nevertheless, the Court held that elimination of the right to use alone could result in a *per se* taking. *Id.* at 1031-32.

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.

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 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).

C. An Appropriated Easement Effects a *Per Se* Taking, Regardless of the Frequency or Intermittency of the Easement's Use

The Ninth Circuit found that the easement created by the Access Regulation does not constitute a "permanent . . . occupation." App. A-16. The court did

not dispute that the easement or regulation itself is permanent. Nor could it. Neither the Access Regulation nor the easement it creates has an expiration or end date. App. A-17. Instead, the court focused on the fact that the unionizers' *use* of the easement is not "continuous," but "unpredictabl[e]" and intermittent. App. A-17—A-18. That, too, appears to be the State's position. *See, e.g.*, Respondents' Brief in Opposition (to Petition for Writ of Certiorari), pp. 7-8.

As Judge Ikuta rightly 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, as reflected in the decision below. *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).

But setting aside the debate over "permanent" versus "temporary" occupations, easements are 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* recognizes that salient fact. *Nollan*, 83 U.S. at 842.

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]

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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 California Coastal Commission-imposed public-access easements burdening private property in the coastal zone

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 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 Ninth Circuit sought to distinguish this case from *Nollan*. App. A-17. Quoting *Nollan*, 483 U.S. at 832, the court reasoned that "the regulation does not grant union organizers a 'permanent and

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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) (https://documents.coastal.ca.gov/assets/access/accesspl.pdf).

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 created by the easement endures. In that sense, the right is "permanent."[8]

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

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[8] Merriam-Webster defines "permanent" as "continuing or enduring without fundamental or marked change." Available at https://www.merriam-webster.com/dictionary/permanent. Another dictionary (Lexico) defines the term as "[l]asting or intended to last or remain unchanged indefinitely." Available at https://www.lexico.com/en/definition/permanent.

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 Ninth Circuit decision conflicts not only with *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 Ninth Circuit'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. As the Court there observed, the landowner in *PruneYard* "had already opened his property to the general public."

Nollan, 483 U.S. at 832 n.1. That is worlds apart from the Access Regulation, which authorizes third-party strangers to enter—and conduct private business—on agricultural employers' properties.

PruneYard has become anachronistic and is due for reconsideration in the context of this case, particularly given the confusions it has sown in the lower courts. In the time since the case was decided in 1980, this 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 role of "permanency" (if any) in the Court's modern takings jurisprudence—a jurisprudence in which *Pruneyard* no longer has a place.

CONCLUSION

The Court should vacate the judgment below and remand the matter for further proceedings.

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