No. 20-107

In the

Supreme Court of the United States

CEDAR POINT NURSERY, ET AL.,
Petitioners,

v.

VICTORIA HASSID, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Claremont Institute's Center for Constitutional Jurisprudence
c/o Dale E. Fowler School of Law
Chapman University
One University Drive
Orange, CA 92866
(877) 855-3330
caso@chapman.edu

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

INTEREST OF AMICUS CURIAE.....1

SUMMARY OF ARGUMENT.....1

ARGUMENT 2

I. The Fifth Amendment Defines a Preexisting Natural Right to Own and Use Property to the Exclusion of Others.....2

A. The place of the Keepings Clause in the scheme of constitutional liberty.....2

B. The California regulation strips landowners of their right to exclude others. 6

II. There is No "Public Use" Here Under Either the the Original Meaning of the Keepings Clause or Court's Doctrine.....8

A. The Union's Activities Here Do Not Qualify as a "Public Use" According to the Original Meaning of the Keepings Clause. 8

1. Justice Thomas's originalist research in *Kelo* 9

2. Recent corpus linguistic scholarship on "public use" 11

3. The lack of a "public use" here.....13

B. The Union's Activities Here Do Not Qualify as a "Public Use" under *Kelo v. New London*.....14

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Bartemeyer v. State of Iowa,
85 U.S. 129 (1873).....3

Cedar Point Nursery v. Shiroma,
923 F.3d 524 (9th Cir. 2019) 6

Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York,
447 U.S. 530 (1980).....14

Corfield v. Coryell,
6 F. Cas. 546 (C.C.E.D. Pa. 1823).....3

Dolan v. City of Tigard,
512 U.S. 374 (1994) 3, 14

In re Kemmler,
136 U.S. 436 (1890).....3

Johnson v. United States,
333 U.S. 10 (1948).....3

Kaiser Aetna v. United States,
444 U.S. 164 (1979).....3, 7

Kelo v. City of New London, Conn.,
545 U.S. 469 (2005).....*passim*

Koontz v. St. Johns River Water Mgmnt. Dist.,
570 U.S. 595 (2013).....1

Lambert v. City & Cty. of San Francisco,
529 U.S. 1045 (2000).....6

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992).....3

Lynch v. Household Fin. Corp.,
405 U.S. 538 (1972) 3

Miller v. United States,
357 U.S. 301 (1958) 5

Murr v. Wisconsin,
137 S.Ct. 1933 (2017).....1, 2

Nollan v. California Coastal Comm'n,
483 U.S. 825 (1987).....3, 14

PruneYard Shopping Center v. Robbins,
447 U.S. 74 (1980).....7

Sackett v. Environmental Protection Agency,
566 U.S. 120 (2012).....1

Shaw v. Hunt,
517 U.S. 899 (1996).....14

Constitution

U.S. Const. Amend. V 4,7

U.S. CONST. art. I, § 10.....9

U.S. CONST. art. I, § 8.....9

Other Authorities

Adams, John, *Discourses on Davila,* THE WORKS OF JOHN ADAMS (Charles Francis Adams ed., 1851)...5

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112 Harv. L. Rev. 747 (1999).....9

Blackstone, William, COMMENTARIES ON THE LAWS OF ENGLAND (Univ. of Chicago Press 1979) (1765) 4

Coke, Sir Edward, THIRD INSTITUTE OF THE LAWS OF ENGLAND (1644) (William S. Hein Co. 1986).....4

Hamilton, Alexander, *The Defense of the Funding System*, in THE PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett ed., 1973) 5

Johnson, S., A Dictionary of the English Language (4th ed. 1773) 9

Kochan, Donald J., *The ~~[Takings]~~ Keepings Clause: An Analysis of Framing Effects from Labeling Constitutional Rights*, 45 Florida State Univ. L. Rev. 1021 (2018) 2

Lee, Thomas R. & Phillips, James C., *Data-Driven Originalism*, 167 U. Penn. L. Rev. 261 (2019).....11

Lewis, J., Law of Eminent Domain § 165 (1888) 9

Rutland, Robert, THE BIRTH OF THE BILL OF RIGHTS (Northeastern Univ. Press 1991) 4

THE BILL OF RIGHTS, ORIGINAL MEANING AND CURRENT UNDERSTANDING, (Eugene W. Hickcok, Jr., ed.) (Univ. Press of Virginia 1991) 3

Webster, Noah, *An Examination into the Leading Principles of the Federal Constitution* (Oct. 10, 1787).....6

Statutes

Declaration of Independence, 1 Stat. 1.....4

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the individual right to ownership and use of private property. The Center has previously appeared before this Court as *amicus curiae* in several cases addressing these issues, including *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017); *Koontz v. St. Johns River Water Mgmnt. Dist.*, 570 U.S. 595 (2013); *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012); and *Kelo v. City of New London, Conn.*, 545 U.S. 469 (2005).

SUMMARY OF ARGUMENT

The right to own and use property is a fundamental right that includes the right to exclude others. The California regulation at issue eviscerates that right by effectively imposing an easement across petitioners' property for the use of union representatives. This is confiscation of private property that is not in support of a public use and for which no compensation has been paid.

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[1] All parties have consented to the filing of this amicus brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

ARGUMENT

I. The Fifth Amendment Defines a Preexisting Natural Right to Own and Use Property to the Exclusion of Others

A. The place of the Keepings Clause in the scheme of constitutional liberty.

Amicus adopts Professor Donald Kochan's suggestion to refer to the private property rights protection of the Fifth Amendment as the "Keepings Clause." Donald J. Kochan, *The ~~[Takings]~~ Keepings Clause: An Analysis of Framing Effects from Labeling Constitutional Rights*, 45 Florida State Univ. L. Rev. 1021, 1023 (2018). As Professor Kochan points out, we generally refer to rights preserving provisions of the Constitution by the rights they protect – such as the Free Press Clause rather than the Censorship Clause. *Id*. As noted below, the Fifth Amendment was adopted to protect the right of the individual to own and use and private property. Its purpose is not to protect government power to confiscate property. The focus should not be on the government's power to take, but rather the individual's right to keep. As this Court noted in *Murr*, the Constitution protects "the individual's right to retain the [property] interests and exercise the freedoms at the core of private property ownership." 137 S. Ct. at 1943. It is appropriate, therefor, to refer to the individual right at issue. Referring to the Fifth Amendment's "Keepings Clause" is one way to capture the purpose of the protection at issue.

This Court has so often characterized the individual rights in property as "fundamental" that it is difficult to catalogue each instance. The Court has noted

that these rights are among the "sacred rights" secured against "oppressive legislation." *Bartemeyer v. State of Iowa*, 85 U.S. 129, 136 (1873). These rights are the "essence of constitutional liberty." *Johnson v. United States*, 333 U.S. 10, 17 n.8 (1948). In a word, they are "fundamental." *In re Kemmler*, 136 U.S. 436, 448 (1890). Justice Washington noted that rights that are "fundamental" are those that belong "to the citizens of all free governments." *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823). He listed individual rights in property as one of the primary categories of fundamental rights. *Id*.

This Court has followed Justice Washington's view, noting that constitutionally protected rights in property cannot be viewed as a "poor relation" with other rights secured by the Bill of Rights. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994); *see Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (citing to John Locke, Blackstone, and John Adams, the Court noted that "rights in property are basic civil rights").

Moreover, the individual right in property is not in mere ownership. Instead, this Court has noted that the right in property is the right to use that property. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987); *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). This also includes the right to exclusive use – the right to exclude others. *Dolan*, 512 U.S. at 384; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). This Court did not invent the idea of the ownership and use of private property as a fundamental right. The individual rights in private property are

a cornerstone of the liberties enshrined in the Constitution.

Although there was little mention of a fear of federal confiscation of property during the ratification debates, James Madison included the Keepings Clause in the proposed Bill of Rights based on the protections included in the Northwest Ordinance. *See* THE BILL OF RIGHTS, ORIGINAL MEANING AND CURRENT UNDERSTANDING, (Eugene W. Hickcok, Jr., ed.) (Univ. Press of Virginia 1991) at 233. The Northwest Ordinance of 1787 included the first analog of the Bill of Rights and it expressly protected property from government confiscation. Robert Rutland, THE BIRTH OF THE BILL OF RIGHTS (Northeastern Univ. Press 1991) at 102. The drafters of the individual rights provisions of the Northwest Ordinance took their cue from the 1780 Massachusetts Constitution. *Id*. at 104.

While Madison may have used the language of the Massachusetts Constitution in crafting protections for individual rights in property, those protections, were firmly grounded in the Founders' theory of individual liberty and government's obligation to protect that liberty. This is the theory of government that animates our Constitution.

One of the core principles of the American Founding is that individual rights are not granted by majorities or governments but are inalienable. Declaration of Independence ¶2, 1 Stat. 1. The Fifth Amendment seeks to capture a part of this principle in its announcement that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V.

The importance of individual rights in property predated the Declaration of Independence and the American Constitution. Blackstone noted that property is an "absolute right, inherent in every Englishman … which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND Bk. 1, Ch. 1 at 135 (Univ. of Chicago Press 1979) (1765). From the pronouncement that "a man's house is his castle" (Sir Edward Coke, THIRD INSTITUTE OF THE LAWS OF ENGLAND at 162 (William S. Hein Co. 1986) (1644)) to William Pitts' argument that the "poorest man" in the meanest hovel can deny entry to the King (*Miller v. United States*, 357 U.S. 301, 307 (1958)), the common law recognized the individual right in the ownership and use of private property. Blackstone captures the essence of this right when he notes that the right of property is the "sole and despotic dominion … over external things of the world, in total exclusion of the right of any other person in the universe." Blackstone, COMMENTARIES, *supra*, Bk. 2, Ch. 1 at 2. The individual rights in private property are part of the common law heritage that our Founders brought with them to America.

Alexander Hamilton argued that the central role of property rights is the protection of all of our liberties. If property rights are eliminated, he argued, the people are stripped of their "security of liberty. Nothing is then safe—all our favorite notions of national and constitutional rights vanish." Alexander Hamilton, *The Defense of the Funding System*, in 19 THE PAPERS OF ALEXANDER HAMILTON 47 (Harold C.

Syrett ed., 1973). This idea was also endorsed by John Adams: "Property must be secured, or liberty cannot exist." John Adams, *Discourses on Davila*, in 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851). Our nation's Founders believed that all which liberty encompassed was described and protected by their property rights. Noah Webster explained in 1787: "Let the people have property and they will have power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other privileges." Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* (Oct. 10, 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION (Philip B. Kurland and Ralph Lerner, eds., Univ. Chicago Press 1987) 597.

Although the right to own and use property is a fundamental civil liberty, it has not been one that has received much protection in California. *Lambert v. City & Cty. of San Francisco*, 529 U.S. 1045 (2000) (Scalia, J., dissenting). That attitude is also clear in the regulation at issue in this case. Without any recognition of the individual right to own property, the regulation strips owners of their rights to exclude others from the property.

B. The California regulation strips landowners of their right to exclude others.

The lower court ruled that there was no per se taking because the union was not permanently occupying the owner's property. *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 532 (9th Cir. 2019). The court agreed that the challenged regulation does take away

the right to exclude – but dismissed that as insignificant since destruction of one strand in the bundle of rights is insufficient to prove a taking. *Id*. at 533.

Yet, the right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna*, 444 U.S. at 176. The *Kaiser* Court held "that the 'right to exclude'" is so fundamental that the Government may not take that right "without compensation." *Id.* at 179; *Dolan*, 512 U.S. at 393-94.

This is quite different from the situation at issue in *PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980). In *PruneYard*, the shopping center sought to bar individuals from distributing brochures and soliciting signatures for petitions. *Id*. at 78. But shopping center had already invited the general public on to the property – more than 25,000 people visited the center each day. *Id*. Thus, while the Court recognized that the lower court ruling interfered with the right to exclude, that interference was balanced against the fact that the center was "a large commercial complex that covers several city blocks … and is open to the public." *Id*. at 83-84.

In this case, the public is not invited on to the petitioners' property. The state regulation that takes an easement across the petitioners' property to allow the union to invade the nonpublic areas is an interference an order of magnitude greater than that under consideration in *PruneYard*. Further, the easement here was not taken for a public use. The public could exercise no rights over the petitioners' property. Only the union has the right to traverse this state-created easement, and it does so for its own private economic purposes.

II. There is No "Public Use" Here Under Either the Original Meaning of the Keepings Clause or the Court's Doctrine

Seemingly overlooked by the lower courts, to even allow the government to take property, the Constitution first requires a "public use." U.S. Const. amend. V, cl. 5. *See also Kelo*, 545 U.S. at 506 (Thomas, J., dissenting) ("Though one component of the protection provided by the Takings Clause is that the government can take private property only if it provides 'just compensation' for the taking, the Takings Clause also prohibits the government from taking property except "for public use.'"). Thus, even with "just compensation," the government cannot confiscate property for non-public uses. And whether looking at the original meaning of the Keepings Clause or this Court's doctrine, making it easier for a private organization to recruit members is not a "public use."

A. The Union's Activities Here Do Not Qualify as a "Public Use" According to the Original Meaning of the Keepings Clause.

Whether examining Justice Thomas's research on the original meaning of "public use," or more recent scholarship utilizing corpus linguistics, a private organization's recruiting activities do not qualify as a "public use" under the original meaning of the Keepings Clause.

1. Justice Thomas's originalist research in *Kelo*.

In his dissenting opinion in *Kelo*, Justice Thomas's research found that "the Public Use Clause, originally understood, is a meaningful limit on the government's eminent domain power." *Id*. at 506 (Thomas, J., dissenting). He argued that "[t]he most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever." *Id*. at 508. Justice Thomas based this reading off several originalist sources, including dictionary definitions, etymology, intratextualism, other founding-era documents, the common law, and early American practice. *See id*. at 508-12.

For instance, looking at the 1773 edition of Samuel Johnson's *A Dictionary of the English Language*, Justice Thomas concluded that "[a]t the time of the founding, dictionaries primarily defined the noun 'use' as '[t]he act of employing any thing to any purpose.'" *Id*. at 508 (quoting 2 S. Johnson, A Dictionary of the English Language 2194 (4th ed. 1773)). Turning to etymology, he found that "[t]he term 'use,' . . . 'is from the Latin *utor*, which means to use, make use of, avail one's self of, employ, apply, enjoy, etc.'" *Id*. (quoting J. Lewis, Law of Eminent Domain § 165, p. 224, n. 4 (1888)). From these sources, Justice Thomas concluded that "[t]he term 'public use,' then, means that either the government or its citizens as a whole must actually 'employ' the taken property." *Id*. at 508-09.

Justice Thomas did concede that "another sense of the word "use" was broader in meaning, extending to "[c]onvenience" or "help," or "[q]ualities that make

a thing proper for any purpose." *Id.* at 509 (quoting Johnson, at 2194). But argued that "read in context, the term 'public use' possesses the narrower meaning." *Id.* To suss out that context, he first applied "intratextualism," wherein one interprets a term in the Constitution based on how that same term is used elsewhere in the document. *See* Akhil Reed Amar, *Intratextualism,* 112 Harv. L. Rev. 747, 748 (1999). And Justice Thomas determined that "[e]lsewhere, the Constitution twice employs the word 'use,' both times in its narrower sense." *Id.* *See also* U.S. CONST. art. I, § 10 ("[T]he the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States."); U.S. CONST. art. I, § 8 (granting power to Congress to "raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years"). Therefore, he concluded, the "same word in the Public Use Clause should be interpreted to have the same meaning." *Id.* Justice Thomas also looked to the Constitution's text to contrast the phrase "public use" with the phrase "general Welfare," observing that "[t]he Framers would have used some such broader term if they had meant the Public Use Clause to have a similarly sweeping scope." *Id.* He also found that "[o]ther founding-era documents made the contrast between these two usages still more explicit," such as state constitutions and the Northwest Ordinance. *Id.* at 509-10. Additionally, reading the Clause broadly "also unnecessarily duplicates a similar inquiry required by the Necessary and Proper Clause." *Id.* at 511. Hence, the Constitution's text . . . suggests that the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if

the public realizes any conceivable benefit from the taking." *Id.* at 510.

Justice Thomas found further support for this reading in the "Constitution's common-law background." *Id.* Looking at Blackstone, Kent, and founding-era cases, he concluded that "nuisance law" was the common law's "express method of eliminating uses of land that adversely impacted the public welfare," and that commentators and courts "carefully distinguished the law of nuisance from the power of eminent domain." *Id.* Finally, Justice Thomas discovered that "[e]arly American eminent domain practice largely bears out [the narrower] understanding of the Public Use Clause." *Id.* at 511.

2. Recent corpus linguistic scholarship on "public use"

Recent scholarship using a tool Justice Thomas did not have at his disposal in 2005, confirms his findings. *See* Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. Penn. L. Rev. 261, 311-316 (2019). That tool is the Corpus of Founding-Era American English (COFEA).[2] COFEA (pronounced koh-fee-uh), "is designed to represent general written American English from the founding era of the United States of America (i.e., 1765-1799)." *See* https://lcl.byu.edu/projects/cofea/. The version Lee and Phillips used contained about 140,000,000 words taken from three main databases. The First is the Founders Online from the National Archives, which contains letters, diaries, and other personal records of six prominent founders (including letters to them by non-founders). *See* https://founders.archives.gov/.

[2] *See* https://lawcorpus.byu.edu/cofea/concordances/search.

The second source of texts for COFEA comes from the Evans Bibliography of Early American Imprints, which contains books, pamphlets, and periodical publications printed in the United States during the time period. *See* https://lcl.byu.edu/projects/cofea/. The third source consists of legal documents from HeinOnline. *Id*.

By using COFEA, Lee and Phillips were able to do something that Justice Thomas could not—see how the entire term "public use" was being used rather than looking up its constituent words in a dictionary. After all, as they note, "the communicative content of a phrase isn't always the sum of its parts." Lee & Phillips, *Data-Driven Originalism*, at 283. And by relying on COFEA, Lee and Phillips could take a more representative sample of American English usage to more clearly determine the term's original public meaning.

They recorded the sense of a random sample of 125 instances of "public use"[3] from each of the Founders Online and HeinOnline texts, and 85 instances from the Evans texts.[4] *See id*. at 313-14 n.170. Lee and Phillips found that the "direct sense that Justice Thomas argued for is much more common than the broader, indirect sense that the *Kelo* majority adopted." *Id*. at 314. Specifically, "the likelihood of *public use* being used in the direct [or narrow] compared to the indirect [or broad] sense ranges from 5.7 times (Evans), to 29.3 times (Founders), to 97.8 times ([Hein]) more likely." *Id*. at 315. The authors further observe that "given that the Constitution is a legal

[3] They technically searched for the following variations: "public use," "public uses," "publick use," and "publick uses."

[4] They only found 86 instances in the Evans texts, and had to drop one for quoting the Constitution. *See id.* at 313 n.170.

text, the fact that in the legal materials of COFEA (as well as the Founders' letters) the direct sense is even more common than the indirect sense compared to ordinary materials is further evidence as to what the Constitution's communicative content is for the term *public use*." *Id*. Thus, while admitting that they "can only speak of probabilities here, the evidence is strong that Justice Thomas was correct: when the Constitution uses the term *public use* it means the government, military, or public owns or directly employs the item for a purpose, rather than the indirect-, broad-benefit sense the *Kelo* majority proposed." *Id*. at 315-16.

3. The lack of a "public use" here

Given this understanding of the original meaning of "public use," there is no public use here. The relevant California regulation provides union organizers "the right of access . . . 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). In other words, a private organization is soliciting membership. The public is not allowed on the property. Nor does the public have any control over the private organization. In fact, union membership is not even open to any member of the public. Thus, while there is clearly "use," it's just not the public kind. If it was, then a state could require companies to allow organizers from the Democratic Party or the National Rifle Association to solicit members on private property. Without a public use, the California regulation cannot satisfy the Keepings Clause. It therefore violates the Constitution.

B. The Union's Activities Here Do Not Qualify as a "Public Use" under *Kelo v. New London*.

Even under *Kelo*'s much broader definition of "public use," the regulation cannot satisfy the Keepings Clause. In *Kelo*, the Court interpreted the Keepings Clause to require the taking of property to "serve[] a 'public purpose.'" *Kelo*, 545 U.S. at 480. And the majority "defined that concept broadly." *Id*.

Applying it to the facts in *Kelo*, the Court observed that "[t]he City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue." *Id*. at 483. In other words, the government's actions in taking the property would lead to diffuse public benefits, even if indirect.

But here there are no such diffuse benefits. A private organization increases its revenue through dues paying members, but that doesn't increase jobs or taxes. The public cannot point to some way in which it is benefited, even if indirectly, such as the increased tax revenue in government coffers in *Kelo*. In any event, it is up to the government to prove the existence of a public use before it moves to take a significant property right. In the case of a fundamental right, the government bears the burden of persuasion on is power to take away that right. *See*, *e.g.*, *Dolan*, 512 U.S. at 392 n.8, 395; *Nollan*, 483 U.S. at 840-41; *see also Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996); *Consol. Edison Co. of New York v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 543 (1980).

There is no basis for concluding that this confiscation of an easement across petitioners' property served a public use. Indeed, finding a public use here would extend *Kelo* beyond its already expansive view of public use. Rather than serving a public purpose, public use would mean some members of the public receive private benefits. And that would read the Public Use Clause out of the Constitution. If the people want to amend the Constitution to do so, that is their prerogative. But courts should not.

CONCLUSION

By regulation, California has confiscated an easement across petitioners' property for the private use of a labor union. The property at issue is not open to the public and petitioners' right to exclude has been eviscerated by the state regulation. There was no showing a of a public use and no payment of compensation. The regulation violates the fundamental right to own and use property enshrined in the Keepings Clause of the Fifth Amendment.

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Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Claremont Institute's Center for Constitutional Jurisprudence
c/o Chapman University Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330
caso@chapman.edu

Counsel for Amicus Curiae