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
U.S. Court of Appeals for the Ninth Circuit

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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 THE *AMICUS CURIAE*[1]

The Liberty Justice Center is a national, nonprofit, nonpartisan, public-interest litigation center that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. *See, e.g., Janus v. AFSCME,* 138 S. Ct. 2448 (2018).

The Liberty Justice Center is headquartered in Chicago, Illinois, and is interested in this case because the protection of private property rights is a core value vital to a free society. To that end, the Liberty Justice Center represents property owners in a variety of cases around the country. *See, e.g. Leibundguth Storage & Van Serv., Inc. v. Vill. of Downers Grove, 939 F.3d 859, 860* (7th Cir. 2019); *Mendez v. Chicago*, Cook County Illinois Chancery Court No. 16 CH 15489; *United States v. Ford*, Southern District Of New York No. 7:19-cv-09600-KMK.

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[1] Rule 37 statement: All parties received timely notice of intent to file this brief. Petitioners filed a blanket consent, and the Respondent consented to the filing of this brief. No counsel for any party authored any part of this brief, and no person or entity other than *amicus* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This is not the first case in which this Court has faced a conflict between the rights of private property owners and the desire of unions to organize. Even in the context of labor relations, this Court has consistently recognized that private property owners retain the fundamental right to exclude. *See* Pet. at 26; *see, e.g., NLRB v. Town & Country Elec.*, 516 U.S. 85, 97 (1995). The Fifth Amendment provides that private property rights may not be wantonly abridged by any state just because the abridgment serves some public policy interest. Simply because California believes the right of employees to associate with a union is important does not confer an open-ended warrant to advance that interest by forcing an easement of Petitioners' property without compensation.

This Court has repeatedly held that unions have no right to usurp others' private property unless they can show that the infringement is necessary, in the most literal sense, such that no other reasonable avenues by which to contact employees are available. The Court has primarily addressed this question in the context of federal law, whereas this case involves a state regulation of labor relations. But the respect for private property rights embodied in those cases was not specific to the Wagner Act, but rather grounded in the fundamental protection for property rights the Constitution requires all statutes and regulations to respect.

This Court should reverse the decision below, and in doing so reiterate that employees' First Amendment rights of association are important, but their importance does not allow state governments to freely abridge others' Fifth Amendment rights to exclude,

which is essential to traditional understandings of private property, for mere convenience.

ARGUMENT

Property rights cannot be subordinated to the right to organize when unions have reasonable alternative means of communication.

In assessing rights of third parties to access private property for their own, even legitimate, ends, this Court's cases repeatedly emphasize that "the Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected." *Lloyd Corp. v. Tanner*, 407 U.S. 551, 570 (1972). In the labor context, where the rights of employers are circumscribed by the legal rights of employees to organize, this Court holds that since "[o]rganization rights are granted to workers by the same authority, the National Government, that preserves property rights", any "[a]ccommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

But this does not mean than the right to organize stands on equal footing with the rights of private property owners to exclude interlopers. Rather, this Court holds that labor rights may only overcome private property rights where "the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels." *Id.* In other words, the protection of labor rights "do[es] not authorize trespasses by nonemployee

organizers" except where there is in practice no other reasonable way for organizers to contact employees. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992). And by "reasonable," this Court did not mean "most convenient." Rather, it has explained that its "reference to 'reasonable' attempts was nothing more than a commonsense recognition that unions need not engage in extraordinary feats to communicate with inaccessible employees — not an endorsement of the view (which [the Court] expressly rejected) that the Act protects 'reasonable' trespasses." *Id.*

The Court's cases addressing this issue primarily arise in the context of applications of the National Labor Relations Act to employers and employees covered by that statute, unlike the employers and employees in this case. But this Court has not grounded its accommodation of private property rights in some text or legislative history of the NLRA, nor claimed that this is required as a matter of sensible federal labor policy. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 n.21 (1994) ("while this [property] right is not superseded by the NLRA, nothing in the NLRA expressly protects it"). Instead, it has based its requirement that labor rights accommodate private property rights in the fundamental guarantees of our founding documents, since it would "constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments" to subordinate basic rights to property in the name of labor peace. *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 547 (1972).

The cornerstone of this Court's teaching on the matter remains *Babcock*, which consolidated several cases with the same basic fact common to each: "the

employer refused to permit distribution of union literature by nonemployee union organizers on company-owned parking lots." 351 U.S. at 106. In other words, essentially the same facts as this case, except in a different industry. The Court found that "an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution." *Id.* at 112. If neither condition — other channels of communication being cut off, or the employer discriminatorily allowing others the same sort of access to his property — is satisfied, *Babcock* holds that "the employer may not be compelled to allow distribution even under such reasonable regulations" as a government may come up with. *Id.*

This Court briefly flirted with another standard, but only for a few years. In *Amalgamated Food Empolyees Union v. Logan Valley Plaza*, this Court dealt with Pennsylvania's application of standard principles against trespass to union picketing in a shopping center. 391 U.S. 308, 315 (1968). The Court analogized the shopping center, a retail space generally available to the public, to its earlier decision in *Marsh v. Alabama*, 326 U.S. 501 (1946).

Marsh addressed the right of Jehovah's Witnesses to distribute religious literature on a 'public' sidewalk on a 'public' street in a "so-called town" wholly owned and run by the Gulf Shipbuilding Corporation. *Id.* at 502–3. This was a "company town" scenario, in which a private company was assuming the form and carrying out the functions of a municipal corporation —

owning all housing, streets, stores, providing services like basic utilities and trash pickup — to the point where "there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation." *Id.* This presented a conundrum for First Amendment law, which generally requires state action. *See The Civil Rights Cases,* 109 U.S. 3 (1883). The Court in *Marsh* held that, in the context of a "company town," the private company had in practice become The State, and should be required to respect the rights of private third parties to speak in the public spaces it controlled.

Logan Valley extended *Marsh* to the (then relatively new and exotic) context of a large public shopping mall, finding that it saw "no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the 'business district' is not under the same ownership." 391 U.S. at 319. "Ownership does not always mean absolute dominion," the Court explained. *Id.* at 325. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id.* Therefore, the mall was "the functional equivalent of a 'business block,'" *a la Marsh*, and "for First Amendment purposes must be treated in substantially the same manner." *Id.* Following this logic, the Court found that unions had a First Amendment right to

carry out their activities on private property that overrode owners' right to exclude.[2] Thankfully, this decision did not stand for very long.

The Court first reassessed *Logan Valley*'s right of union access in a context distinct from labor activity — handbilling against the Vietnam War. Like *Logan Valley,* the property owner in *Lloyd Corp. v. Tanner* operated a retail space in which third parties wished to spread their message. 407 U.S. 551, 552–53 (1972). The Court rejected analogies to *Logan Valley*, however, and commented that dicta in *Logan Valley* suggesting that "whenever a privately owned business district serves the public generally its sidewalks and streets become the functional equivalents of similar public facilities" would be an "an incorrect interpretation of the Court's decision in *Marsh*." *Id.* at 562. It therefore more or less limited *Logan Valley* to its facts, but declined to overrule it. *See id.* at 563.

That same year, the Court likewise refused to apply *Logan Valley* to a union organizing campaign. In *Central Hardware Co. v. NLRB*, as in *Bobstock*, nonemployee union organizers solicited employees in a private parking lot. 407 U.S. at 540–41. The Court rejected the idea that *Logan Valley* meant that any property "open to the public" was fair-game for union organizing, since "[t]o accept it would cut *Logan Valley* entirely away from its roots in *Marsh*. It would also constitute an unwarranted infringement of long-settled rights of private property protected by the Fifth and Fourteenth Amendments." *Id.* at 547. Union organizers had no general right to enter onto private

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[2] In the context of a space generally open to the public, which is not the case of Petitioners here.

property, even retail property that might be generally open to private patrons, for the purposes of soliciting membership. To suggest so was to ask for an unwarranted infringement of the property rights protected by the Fifth Amendment. Instead, the Court applied *Babcock*, holding that the property owner's right to exclude, even from public spaces, must be respected, emphasizing that "the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and minimal." *Id.* at 545.

Just a few years later, the Court finally put *Logan Valley* out of its misery. In *Hudgens v. NLRB*, striking unionized warehouse workers picketed a retail location of their employer inside a private mall. 424 U.S. 507, 509 (1976). Employees of the shopping center (rather than their employer) demanded they leave, since they were on the shopping center's property. The Court held that *Logan Valley* did not grant the picketers a right to trespass in the shopping center, finding that "the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case" since "the ultimate holding in *Lloyd* amounted to a total rejection of the holding in *Logan Valley*." *Id.* at 518. As in *Central Hardware*, the Court explained that *Babcock*'s language allowing for some accommodation of union activity in derogation of property rights did not mean they were equally important; rather under federal law "[t]he locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." *Id.* at 522.

Two years later, in *Sears v. San Diego County District Council of Carpenters*, the Court elaborated that "the burden imposed on the union is a heavy one" and therefore "the balance struck by the [NLRB] and the courts under the *Babcock* accommodation principle has rarely been in favor of trespassory organizational activity." 436 U.S. 180, 205 (1978). The employer's property right to exclude "remains the general rule." *Id.* "To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation." *Id.*

Next in this saga of interrelated precedents came a non-labor case, *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). Like *Lloyd, PruneYard* dealt with conventional First Amendment activity at a private shopping mall — soliciting petition signatures regarding a U.N. resolution. Unlike *Lloyd*, the state high court had held that the state constitution's cognate of the federal free speech clause required that state law property rules be subordinated to the speech at issue. The Court distinguished *Llyod* on this basis, holding that it did not "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Id.* at 81 (citing *Cooper v. California*, 386 U.S. 58, 62 (1967)). It was not the role of federal law "to define 'property' in the first instance." *Id.* at 84. Therefore, California's limit on the right to exclude was acceptable.

PruneYard was foundational to the Ninth Circuit's decision below. And as Petitioners frankly

acknowledge, *PruneYard* represents "the low-water mark for the right to exclude." Pet. at 27. However, in the four decades since the decision in *PruneYard*, this Court has repeatedly cabined or distinguished its application. This Court has said several times that *PruneYard* is limited to the context of a property owner who voluntarily opens his land as a public space. *See id.* (quoting *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 434 (1982) ("the owner had not exhibited an interest in excluding all persons from his property")); *Nollan v. Cal. Coastal Com*, 483 U.S. 825, 832 n.1 (1987) (*PruneYard* did not apply "since there the owner had already opened his property to the general public, and in addition permanent access was not required"); *Horne v. Dep't of Agric.*, 576 U.S. 351, 364 (2015) (*PruneYard* applied to "an already publicly accessible shopping center").

This Court righted the ship in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), which Petitioners rightly explain "recognized the fundamental nature of the right to exclude as it arises in labor relations." Pet. at 26. As in this case, *Lechmere* addressed a labor organizing campaign — but unlike this case of private property not open to the public, *Lechmere* involved union access to a public retail parking lot. 502 U.S. at 530. The Court said definitively that *Babcock* applied, and that *Babcock*'s allowance for union access in unusual circumstances was very narrow. *Id.* at 534.

The Court explained that while *Babcock* allowed for an exception when employees could be reached no other way, "[t]here is no hint in *Hudgens* and *Central Hardware*, however, that our invocation of *Babcock's* language of 'accommodation' was intended to repudiate or modify *Babcock's* holding that an employer need

not accommodate nonemployee organizers unless the employees are otherwise inaccessible." *Id.* The Court continued: "Indeed, in *Central Hardware* we expressly noted that nonemployee organizers cannot claim even a limited right of access to a nonconsenting employer's property until 'after the requisite need for access to the employer's property has been shown.'" *Id.* (quoting 407 U.S. at 545). Therefore, "in practice, nonemployee organizational trespassing had generally been prohibited except where unique obstacles prevented nontrespassory methods of communication with the employees." *Id.* at 535 (internal quotation marks omitted). "So long as nonemployee union organizers have reasonable access to employees outside an employer's property, the requisite accommodation has taken place. It is only where such access is infeasible that it becomes necessary and proper to take the accommodation inquiry to a second level, balancing the employees' and employers' rights." *Id.* at 538.

The Court provided examples of the few times when *Babcock's* test could be met: an isolated mining camping or a remote mountain resort hotel. *Id.* at 539. But as long as employees can participate in "the ordinary flow of information that characterizes our society," *Babcock's* exception will not apply. *Id.* at 540. Today, with instant access to the Internet from the palm of your hand, and micro- and geo-targeting of marketing through social media, it is hard to imagine any circumstance where *Babcock's* test, as explained in *Lechmere*, could ever be met. Union organizers have numerous alternative tools to find, target, and reach workers without the need to strip employers of their property rights.

A few years later, the Court summarized *Lechmere* and *Babcock* together in a single sentence with an opening phrase that makes clear the point: "And, of course, an employer may as a rule limit the access of nonemployee union organizers to company property." *NLRB v. Town & Country Elec.*, 516 U.S. 85, 97 (1995).

Yet, the Ninth Circuit decided to ignore this Court's precedent in *Lechmere* and follow *PruneYard* instead. This was a fundamental mistake that revives a long-embalmed case and makes a mess of this Court's otherwise consistent takings doctrine.

Not only has this Court declined to apply *PruneYard* outside the context of the public portion of a shopping center, as explained above it has repeated affirmed the right to exclude, even in a public shopping center, in the context of labor organizing, holding that *Babcock* applies to determine the balance between the rights of unions to organize and the property rights of employers to exclude — and repeatedly emphasized that the balance tilts towards property owners outside of extraordinary circumstances.

If anything, the Petitioners' right to exclude here is stronger than in those other cases where the Court has already recognized a right to exclude. This is not an open-air shopping district, a public shopping mall, or even a public retail parking lot. *PruneYard*'s allowance for a state subordinating private property rights in the context of a public space for core First Amendment activity should not apply to a private property owner who operates a private space. *Lechmere,* decided 12 years after *PruneYard*, makes the point clear — that case limited union invasion of private property rights even in the case of a parking lot. 502 U.S. at 530. Moreover, the *Babcock* exception is not even arguably applicable

here: Petitioners' employees live in hotels off-site, *see* Pet. App. G-9 ¶¶ 26–27, Pet. App. G-11 ¶ 36, and can therefore be readily communicated to without violating Petitioners' right to exclude. There is simply no justification for the State of California to override the employers' Fifth Amendment rights under current precedent.

CONCLUSION

Since *Babcock* was first decided in 1956, this Court's jurisprudence on the right to exclude versus the right to organize has consistently, though not completely, prioritized the common-law rights of private property owners over the statutory rights of labor organizers. When state action is present, as it is here, that common-law right to exclude is a constitutional right to prevent a taking. The Ninth Circuit's use of *PruneYard* is contrary to this Court's later development of the doctrine, especially in *Lechmere*, and this error should be corrected.

Respectfully submitted,

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