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

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Cristen Wohlgemuth
Counsel of Record
David C. McDonald
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
cristen@mslegal.org
dmcdonald@mslegal.org

Counsel for Amicus Curiae
January 6, 2021

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 occupation for "24 hours a day, 365 days a year." 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 circuit 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.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
IDENTITY AND INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. UNDER BACKGROUND PRINCIPLES OF PROPERTY LAW, UNION ORGANIZERS HAVE NO RIGHT TO ENTER PRIVATE PROPERTY	4
II. A PHYSICAL OCCUPATION OF ANY PORTION OF GROWERS' PROPERTIES VIOLATES GROWERS' RIGHT TO EXCLUDE AND IS A CATEGORICAL TAKING FOR WHICH JUST COMPENSATION IS OWED	8

III. A PHYSICAL OCCUPATION OF ANY DURATION VIOLATES GROWERS' RIGHT TO EXCLUDE AND IS A CATEGORICAL TAKING FOR WHICH JUST COMPENSATION IS OWED 14

IV. EXCLUSIVE OWNERSHIP IS FUNDAMNETAL TO THE DEFINITION OF PROPERTY PROTECTED BY THE UNITED STATES CONSTITUTION 18

V. THIS ACTION ILLUSTRATES DEEP CONCEPTUAL PROBLEMS IN THIS COURT'S EXISTING PROPERTY JURISPRUDENCE THAT MUST BE ADDRESSED IN AN APPROPRIATE CASE 21

CONCLUSION 27

TABLE OF AUTHORITIES

	Page
Cases	
Alden v. Maine, 527 U.S. 706 (1999)	18
Andrus v. Glover Const. Co., 446 U.S. 608 (1980)	7
Arkansas Game & Fish Comm'n v. United States, 568 U.S. 23 (2012)	*passim*
Arkansas Game & Fish Comm'n v. United States, 736 F.3d 1364 (Fed. Cir. 2013)	15, 16
Brandt v. United States, 710 F.3d 1369 (Fed. Cir. 2013)	1
Brown v. Legal Found. of Washington, 538 U.S. 216 (2003)	10, 11
Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226 (1897)	8
Continental Casualty Co. v. United States, 314 U.S. 527 (1942)	7
District of Columbia v. Heller, 554 U.S. 570 (2008)	18
Dolan v. City of Tigard, 512 U.S. 374 (1994)	1
Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810)	20
Hansen v. United States, 65 Fed. Cl. 76 (2005)	6

Head v. Amoskeag Mfg. Co.,
113 U.S. 9 (1885) 25

Hendler v. United States,
952 F.2d 1364 (Fed. Cir. 1991) 16, 17, 20

Horne v. Dep't of Agric.,
576 U.S. 350 (2015) ..... *passim*

Int'l News Serv. v. Associated Press,
248 U.S. 215 (1918) 20

Kaiser Aetna v. United States,
444 U.S. 164 (1979) 9, 14, 15

Kelo v. City of New London,
545 U.S. 469 (2005) 21, 24, 25

Klemic v. Dominion Transmission, Inc.,
138 F. Supp. 3d 673 (W.D. Va. 2015) 7

Klemic v. Dominion Transmission, Inc.,
No. 15-2338 (4th Cir. 2015) 7

Laguna Gatuna, Inc. v. United States,
50 Fed. Cl. 336 (2001) 1

Lingle v. Chevron U.S.A. Inc.,
544 U.S. 528 (2005) 5, 21

Loretto v. U.S. Teleprompter Manhattan CATV Corp, 458 U.S. 419 (1982) ..... *passim*

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 1, 5

Members of Peanut Quota Holders Ass'n v. United States, 421 F.3d 1323 (Fed. Cir. 2005) 9

Mountain States Legal Foundation v. Hodel, 799 F.2d 1423 (10th Cir. 1986) 1

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 11, 13, 17

Palmer v. Atlantic Coast Pipeline, 801 S.E.2d 414 (Va. 2017) 7

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 9

Prop. Reserve, Inc. v. Superior Court, 375 P.3d 887 (Cal. 2016) 5, 6

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Auth., 535 U.S. 302 (2002) 8, 11, 19

Wilson v. Interlake Steel Co., 649 P.2d 922 (Cal. 1982) 6

Yee v. City of Escondido, 503 U.S. 519 (1992) 10

Constitutional Provisions

U.S. CONST. Amend. V 8

Statutes

Cal. Lab. Code § 1152 2

Rules

Supreme Court Rule 37.3(a) 1

Regulations

Cal. Code Regs. Tit. 8, § 20201–02 17

Cal. Code Regs. Tit. 8, § 20216 17

Cal. Code Regs. Tit. 8, § 20218–20 17

Cal. Code Regs. Tit. 8, § 20279 17

Cal. Code Regs. Tit. 8, § 20900(e) 2, 13, 16

Other Authorities

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1769) 18

Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L. J. 1037 (1961) 23

James Madison, *Property*, *in* 14 THE PAPERS OF JAMES MADISON 266–68 (William T. Hutchinson et al., ed. 1983) 20, 22

Lawrence Berger, *Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203 (1978) 25

Letter from Thomas Jefferson to Albert Gallatin (Oct. 13, 1802), *in* 9 THE WORKS OF THOMAS JEFFERSON 398, 399 (Paul Leicester Ford ed. 1904–05) 26

Restatement (Second) of Torts § 158 6

RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) 20, 23

Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 2002 CATO SUP. CT. REV. 5 (2002) 18, 19, 21

Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998) 18, 20, 23

William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) 18

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Mountain States Legal Foundation ("MSLF") is a nonprofit, public-interest legal foundation organized under the laws of the state of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have defended individual liberties and been active in litigation regarding the proper interpretation and application of the Takings Clause. *See, e.g.*, *Brandt v. United States*, 710 F.3d 1369 (Fed. Cir. 2013) (represented Plaintiff); *Horne v. Dep't of Agric.*, 576 U.S. 350 (2015) (as *amicus curiae*); *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (2001) (represented Plaintiff); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (as *amicus curiae*); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (as *amicus curiae*); *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (en banc) (as Plaintiff).

The right to own and use property includes, at its core, the right to exclude others. Defense of the right to exclude is central to MSLF's mission. Indeed, if the government may utilize a private business's property

---

[1] Pursuant to Supreme Court Rule 37.3(a), all parties provided consent to the filing of this amicus curiae brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

at any time without payment of just compensation—or authorize third parties to do so—businesses, such as those run by Cedar Point Nursery and Fowler Packing Company (collectively, "Growers"), will be thrown into disarray and will suffer significant monetary and productivity losses. Therefore, MSLF respectfully submits this *amicus curiae* brief, urging the Court to reverse the Ninth Circuit's judgment below.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Agricultural Labor Relations Act provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Cal. Lab. Code § 1152. The Agricultural Labor Relations Board enacted a regulation under the Act, which provides that employees have "the right of access by union organizers to the premises of an agricultural employer for the purposes of meeting and talking with employees and soliciting their support . . . ." Cal. Code Regs. Tit. 8, § 20900(e) ("Access Regulation"). In fact, upon written notice, union organizers can enter the property for three hours per day: An hour before work, an hour after work, and an hour during lunch for up to four 30-day periods each year. *Id*. Growers have

been subject to actual and attempted entries by union organizers pursuant to the Access Regulation. On one occasion, United Farm Workers organizers entered Cedar Point Nursery's property and accessed their trim sheds, where hundreds of employees were preparing strawberry plants during the busy harvest season. Petition for Writ of Certiorari ("Pet. Br.") at 7. The union organizers disrupted the employees' work by moving through the trim sheds with bullhorns, distracting and intimidating workers. *Id*.

Growers filed an as-applied challenge to the Access Regulation against members of the Agricultural Labor Relations Board (collectively, "Board"), arguing that, *inter alia*, the Access Regulation effectuated a taking of Growers' property without just compensation in violation of the Taking Clause of the Fifth Amendment to the United States Constitution, as applied to the states via the Fourteenth Amendment. *Id.* at 8–9. The district court dismissed the case, reasoning that the Access Regulation permitted only a temporary physical occupation of Growers' property, and therefore no "categorical taking[]" had occurred. *Id.* at 9. The Ninth Circuit affirmed, over the spirited dissent of Judge Leavy, and denied en banc review, again over spirited dissent, this time from Judge Ikuta. *Id.* at 9–11.

The district court and Ninth Circuit erred in permitting the physical invasion of Growers' private property without just compensation. The right to exclude others is the *sine qua non* of property rights; not some inconsequential element of the whole that can be tossed aside without thought. Depriving Growers of the right to exclude union organizers is, standing alone, a taking, and the provision to union

organizers of an ongoing right of access, regardless of the limited restrictions placed upon it by the Access Regulation, demands just compensation. Further, respect for the Constitution's protection of private property from government interference requires doing away with certain shibboleths that have come to engulf the Nation's takings jurisprudence: namely the "bundle of sticks" analogy for property and the conflation of public use with public purpose.

ARGUMENT

I. UNDER BACKGROUND PRINCIPLES OF PROPERTY LAW, UNION ORGANIZERS HAVE NO RIGHT TO ENTER PRIVATE PROPERTY

The Ninth Circuit's chief error in affirming the district court's dismissal of this case was the Circuit's failure to ground its analysis in longstanding background principles of state property law. While the district court did properly recognize that governmental regulations and seizures of private property are governed according to the longstanding traditions of the state's common law of property, it ended its inquiry without determining whether the Access Regulation deprived Growers of property rights they previously had under California law. Pet. App. C-11 n.6. Any law or decree that deprives a property owner of a previously held right "cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of

property and nuisance already place upon land ownership." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992).

Inherent in Growers' private property rights is the right to exclude others from entering their properties. In fact, this Court has recognized that the right to exclude is "perhaps the most fundamental of all property interests." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

Accordingly, state law may define property rights to allow a right of access to property for certain persons and purposes, but it must compensate the property owner for the taking—a fact recognized under California law. In *Prop. Reserve, Inc. v. Superior Court*, 375 P.3d 887 (Cal. 2016), the California Supreme Court reviewed a challenge to a state law that granted the California Department of Water Resources a right of access to private properties in order to conduct environmental and geological studies on land that the state, in the future, might seek to acquire by negotiation or eminent domain for a water project. *Id.* at 892. The statute provided for a "precondemnation" proceeding, which required the agency to obtain a court order prior to entering the properties and deposit with the court an amount sufficient to cover any damages that may result from conducting such environmental and geological studies. *Id.* at 924. The California Supreme Court determined that the statute sufficiently provided just compensation for any taking of property that occurred because it not only required the agency to deposit with the court an amount the court determined would be the probable actual damages, but also permitted the property owner to obtain compensation in the same

proceeding for any actual damages after-the-fact. *Id.* at 893. In so holding, the court assumed that any physical trespass onto private property by the state, or authorized by the state, would constitute a taking. *Id.*

In identifying the sorts of physical entry that may constitute a taking, California courts have looked to the Restatement (Second) of Torts, which provides additional insight into how the common law defines Growers' property rights by explaining the exceptions to liability for the tort of trespass.[2] *See, e.g.*, *Wilson v. Interlake Steel Co.*, 649 P.2d 922, 925 (Cal. 1982) (looking to the Restatement (Second) of Torts in determining whether common law granted the agency a license to enter onto private property); *Prop. Reserve Inc.*, 375 P.3d at 909 (same). The Restatement prohibits third parties from trespassing onto private property and provides only limited exceptions to a landowner's right to exclude. Restatement (Second) of Torts § 158. Those exceptions allow third parties to enter onto private property for certain traditionally accepted purposes, such as abating a nuisance or executing an arrest warrant. *Id.* §§ 202–07. None of

---

[2] The Court of Federal Claims has aptly explained the relationship between takings jurisprudence and tort law in defining property rights:

> [T]he common law of property relie[s] on tort principles, particularly trespass and nuisance, to help define the concept of property itself and the scope of property interests. The development of takings law was, in effect, an extension of the principles of trespass and nuisance to the actions of the government.

Hansen v. United States, 65 Fed. Cl. 76, 96 (2005).

the Restatement's common-law exceptions grant union organizers a right to enter onto private property for any purpose. *Cf.*, *Klemic v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673, 688 (W.D. Va. 2015) (state law that merely codified existing common-law right of natural gas company to enter onto private property to service their gas line within their easement was not a taking), *appeal filed*, No. 15-2338 (4th Cir. Oct. 30, 2015).[3] Indeed, the existence of such limited common-law exceptions demonstrates that Growers have the right to exclude in the first place. *See Andrus v. Glover Const. Co.*, 446 U.S. 608, 616–17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent.") (citing *Continental Casualty Co. v. United States*, 314 U.S. 527, 533 (1942)).

Thus, Growers continue to have the right to exclude union organizers from their private property. *See Loretto v. U.S. Teleprompter Manhattan CATV Corp*, 458 U.S. 419, 433 (1982). Growers must, therefore, be compensated when union organizers exercise the right of access granted them by the Access Regulation, regardless of the Access Regulation's provision of procedures for union organizers to follow when accessing Growers' properties. *Compare* Pet.

---

[3] Appeal voluntarily dismissed after being held in abeyance pending decision by the Virginia Supreme Court in *Palmer v. Atlantic Coast Pipeline*, 801 S.E.2d 414 (Va. 2017), which similarly found a common-law right for utility company employees to enter private property to conduct survey work in conjunction with lawful eminent domain proceedings.

App. A-17–A-18 (panel emphasizing that the Access Regulation does not give union organizers "24 hours a day, 365 days a year" access to Growers' properties), *with Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 236 (1897) ("The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation."). The Ninth Circuit erred in failing to analyze how Growers' property rights were defined by state law prior to the Access Regulation and specifically in failing to recognize the significant violation of those property rights when the state rescinded Growers' right to exclude.

II. A PHYSICAL OCCUPATION OF ANY PORTION OF GROWERS' PROPERTIES VIOLATES GROWERS' RIGHT TO EXCLUDE AND IS A CATEGORICAL TAKING FOR WHICH JUST COMPENSATION IS OWED

The Takings Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. Amend. V. This Court has long differentiated between physical takings and regulatory takings. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Auth.*, 535 U.S. 302, 321–22 (2002). "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, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof . . . . even [if] that use is temporary." *Id.* at 322. In contrast, the Court's regulatory takings jurisprudence "is of more recent vintage and is

characterized by 'essentially ad hoc, factual inquiries.'" *Id.* (quoting *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978)). Only regulatory takings that deprive the landowner of "all economically valuable use" are categorical, or "*per se*" takings. *Id.* at 320–21. *All* physical takings, however, are categorical takings. *Id.* at 321–22. In *Horne*, the Court treated physical takings and categorical takings as one and the same, emphasizing that the lower courts should not "confuse our inquiry concerning *per se* takings with our analysis for regulatory takings." *Horne v. Dep't of Agric.*, 576 U.S. 350, 364 (2015).

In *Kaiser Aetna v. United States*, this Court unequivocally held that 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. 164, 179–80 (1979). Deprivation of the right to exclude can, standing alone, constitute a taking. *Loretto*, 458 U.S. at 433; *Kaiser Aetna*, 444 U.S. at 179–80. And while the amount of just compensation due may vary depending on "whether a part or a whole of that interest has been appropriated by the government for the benefit of the public," *Members of Peanut Quota Holders Ass'n v. United States*, 421 F.3d 1323, 1330 (Fed. Cir. 2005), the Ninth Circuit here wrongly focused on Growers' failure to allege a permanent physical invasion, Pet. App. A-15–A-18. Additionally, this Court has "solidly established" that physical takings need not be "permanent" to be compensable. *Arkansas Game &*

Fish Comm'n v. United States, 568 U.S. 23, 32–37 (2012) (collecting cases).

Ignoring this Court's precedent, the Ninth Circuit panel assumed that, regardless of whether Growers' right to exclude was taken, only permanent physical occupations (and regulatory takings depriving the property of all economically beneficial use) can qualify as *per se* takings. Pet. App. A-14–A-15. That decision cannot be squared with this Court's takings jurisprudence.

As demonstrated *supra*, there is a "settled difference" in this Court's takings jurisprudence "between appropriation and regulation."[4] *Horne*, 576 U.S. at 362. A physical occupation "is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the [physical] invasion." *Loretto*, 458 U.S. at 436 (emphasis in original). There are straightforward differences between regulatory and physical takings: Regulatory takings limit a property owner's *use* of private property, whereas physical takings effectuate an *appropriation* of private property. *Horne*, 576 U.S. at 363; *see Yee v. City of Escondido*, 503 U.S. 519, 528 (1992) (explaining that a categorical taking occurs whenever the government authorizes a "physical invasion" of private property, thus taking away the

[4] It is "the text of the Fifth Amendment itself" that "provides a basis for drawing a distinction between physical takings and regulatory takings." *Brown v. Legal Found. of Washington*, 538 U.S. 216, 233 (2003). Thus, this Court's jurisprudence regarding physical takings "is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules." *Id*.

right to exclude). The Access Regulation falls under the latter category.

In *Loretto*, this Court stated that a physical taking is one which "require[s] the landlord to suffer the physical occupation of a portion of his building by a third party . . . ." 458 U.S. at 440. In *Horne*, the Court explained that a regulation allowing the government to take "possession and control" of property (in that case, raisins subject to a marketing order) is a physical taking, not a regulatory one.[5] 576 U.S. at 362. In *Brown*, the Court reiterated that "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." 538 U.S. at 233 (internal citation omitted);[6] *see Nollan*

---

[5] It is worth noting that, in *Horne*, this Court soundly rejected the government's argument that a categorical taking had not occurred because the plaintiffs retained an interest in their property. 576 U.S. at 362–64. It is similarly irrelevant here that Growers were not completely dispossessed of their property. *Compare* Pet. App. A-17–A-18 (Ninth Circuit panel emphasizing the limits on union organizers' access to Growers' properties and erroneously analogizing its decision that evisceration of the right to exclude cannot alone constitute a taking with the regulatory takings "parcel as a whole" doctrine), *with Horne*, 576 U.S. at 364 (emphasizing the difference between "[a] regulatory restriction on use that does not entirely deprive an owner of property rights[, which] may not be a taking under *Penn Central*" and "a physical appropriation, [where] 'we do not ask . . . whether it deprives the owner of all economically valuable use' of the item taken.") (quoting *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 323).

[6] *Brown* illustrated the difference between physical and regulatory takings:

v. California Coastal Comm'n, 483 U.S. 825, 831 (1987) ("To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather . . . 'a mere restriction on its use,' is to use words in a manner that deprives them of all their ordinary meaning."). The Court's bright-line rule that physical invasions constitute a categorical taking "avoids otherwise difficult line-drawing problems" and respects both the letter and the spirit of the Takings Clause. *See Loretto*, 458 U.S at 436 ("[C]onstitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.").

The Access Regulation is not a mere regulatory limit on Growers' use of their property, such as a rule requiring Growers to provide employees a certain number of breaks in an eight-hour workday or imposing safety measures on the use of equipment in their packing facilities. A regulation authorizing

---

> [C]ompensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, *even though that use is temporary*. Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, or when its planes use private airspace to approach a government airport, it is required to pay for that share no matter how small. But a government regulation that merely prohibits landlords from evicting tenants unwilling to pay a higher rent, that bans certain private uses of a portion of an owner's property, or that forbids the private use of certain airspace, does not constitute a taking.

538 U.S. at 233–34 (emphasis added) (citations omitted).

union organizers to enter Growers' properties for up to three hours per day, for four 30-day periods per year, is fundamentally different than regulations that limit the manner in which Growers may use their property. The Access Regulation has far more in common with the beach access easement taken in *Nollan* than it does with, for example, the temporary development moratoria at issue in *Tahoe-Sierra*. As in *Nollan*, the Access Regulation simply cannot be characterized as a "restriction on . . . use." 483 U.S. at 831. It "require[s] [owners] to suffer the physical occupation [of their properties]," *Loretto*, 458 U.S. at 440, and it is that "physical invasion" that places this case in the categorical takings category. *See Arkansas Game & Fish Comm'n*, 568 U.S. at 38.

Finally, the invasion sanctioned by the Access Regulation was both intended and foreseeable. *Arkansas Game & Fish Comm'n*, 568 U.S. at 39 ("Also relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action."). Indeed, the entire purpose of the Access Regulation is to grant union organizers access to private property that they did not previously have. *See* Cal. Code Regs. Tit. 8, § 20900(e) (declaring "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").

III. A PHYSICAL OCCUPATION OF ANY DURATION VIOLATES GROWERS' RIGHT TO EXCLUDE AND IS A CATEGORICAL TAKING FOR WHICH JUST COMPENSATION IS OWED

The Ninth Circuit's focus on whether the Access Regulation grants union organizers "permanent" access to Growers' private properties is misguided. Pet. App. A-15–A-18. The court's confusion seemed to stem from the inappropriate characterization of physical takings as required to be permanent in nature. *Id*. The panel started with the erroneous premise that a physical taking of property does not always constitute a categorical taking, and suggested that, because the Access Regulation does not allow union organizers to permanently move onto Growers' property, no categorical taking occurred. *Id.* (determining that anything short of a "permanent physical occupation" must be analyzed under *Penn Central*'s balancing test). This analysis conflicts directly with this Court's precedent.

Put simply, this Court's decisions "confirm that takings temporary in duration can be compensable." *Arkansas Game & Fish Comm'n*, 568 U.S. at 32–33 ("[W]e have rejected the argument that government action must be permanent to qualify as a taking."). The general rule is not that *Penn Central*'s regulatory takings analysis applies whenever a government occupation is temporary. Rather, the rule is "if government action would qualify as a taking when permanently continued, temporary actions of the same character may also qualify as a taking." *Id.* at 515. In *Kaiser Aetna*, marina owners had formed a bay by dredging a shallow lagoon and a connecting outlet

into contiguous navigable waters. 444 U.S. at 164. The government claimed that the property owners were required to open the lagoon to public use since it was now subject to a "navigational servitude." *Id.* at 179–80. In rejecting that argument, this Court relied on the fact that "the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina . . . . And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation." *Id.* (citations omitted). It was irrelevant that the public's use would be only intermittent; the most determinative fact was the government's contention that "the owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others." *Id.* at 176. The government's attempt to create a "right of access" to the landowners' private property went "so far beyond ordinary regulation or improvement for navigation as to amount to a taking . . . ." *Id.* at 178.

Similarly, in *Arkansas Game & Fish Comm'n*, this Court considered whether temporary government action in flooding plaintiffs' property seasonally over a six-year period constituted a categorical taking. *Id.* at 517–18. In holding that the temporary flooding could constitute a taking, the Court explained, "[w]e do not read so much into the word 'permanent . . . .'" *Id.* at 520. On remand, the Federal Circuit determined that the temporary flooding of plaintiffs' property did indeed constitute a taking, given that such flooding was the foreseeable result of the government's actions and that the flooding "effected a wholesale change" in the plaintiffs' property rights. *Arkansas Game & Fish*

Comm'n v. United States, 736 F.3d 1364, 1372–75 (Fed. Cir. 2013).

Here, the Board created a right of access that did not exist prior to the Access Regulation, depriving Growers of the right to exclude union organizers for up to three hours per day, for four 30-day periods per year. Cal. Code Regs. Tit. 8, § 20900(e). This grant of a right to union organizers effected a "wholesale change" to Growers' property rights. *See Arkansas Game & Fish Comm'n*, 736 F.3d at 1374. The extent of union organizers' use of that right is immaterial except to measure damages—it is the indefinite deprivation of the right to exclude union organizers that constitutes a taking of Growers' property rights. *Hendler v. United States*, 952 F.2d 1364, 1364 (Fed. Cir. 1991), is instructive on this point. In that case, landowners challenged the U.S. Environmental Protection Agency's ("EPA") entry onto landowner's property to install groundwater wells and conduct groundwater monitoring. *Id.* at 1374–75. Similar to Growers here, there landowners faced penalties for interfering with the EPA's activities. *Id.* at 1374. The EPA argued that its entries onto landowners' properties were temporary in nature, and the district court agreed that more evidence was needed to determine the extent of the intrusion. *Id.* at 1375–76. In reversing, the Federal Circuit explained that "[a]ll takings are 'temporary,' in the sense that the government can always change its mind at a later time," but "the concept of permanent physical occupation does not require that in every instance the occupation be exclusive, or continuous and uninterrupted." *Id.* at 1376, 1378. The government's use of the landowners' property "for whatever

duration was necessary to conduct their activities" and the risk of them returning at any time was simply different in kind from a "common law trespass *quare clausum fregit*" (such as a "truckdriver parking on someone's vacant land to eat lunch"). *Id.* at 1376–77.

Even if the Ninth Circuit was correct in focusing on the duration of the invasion rather than the physical nature of the encroachment, the Access Regulation permanently grants union organizers access to Growers' properties—in essence, the government is "behav[ing] as if it ha[s] acquired an easement . . . ." *Hendler*, 952 F. 2d at 1378. The union organizers may return multiple times per day, for up to 30 days in a row; and may decide to return at any time in the future. Indeed, if Growers exercise their property rights to exclude union organizers, they can face legal action. *See* Cal. Code Regs. Tit. 8, §§ 20201–02, 20216, 20218–20, 20279. Such a deprivation of Growers' property rights is indistinguishable from the easement granted to the public in *Nollan*. *See* 483 U.S. at 831–32 ("We think a 'permanent physical occupation' has occurred . . . where 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*.") (emphasis added); *see also Hendler*, 952 F.2d at 1378 (where the government entered plaintiffs' land "at its convenience," there was "little doubt that such activity, even though temporally intermittent, is not 'temporary.' It is a taking of the plaintiffs' right to exclude . . . ."). The Ninth Circuit erred in finding the duration of the union organizers' occupation of Growers' property determinative, rather

than considering the ongoing and permanent deprivation of Growers' right to exclude effectuated by the Access Regulation.

IV. EXCLUSIVE OWNERSHIP IS FUNDAMNETAL TO THE DEFINITION OF PROPERTY PROTECTED BY THE UNITED STATES CONSTITUTION

The Framers of the United States Constitution recognized that a secure system of private property rights was absolutely fundamental to a system of ordered liberty in which the People govern themselves. William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 821–22 (1995). The Framers' conception of private property rights, informed by the English common law tradition, included "the free use, enjoyment, and disposal of all his acquisitions, without any control of diminution, save only by the laws of the land." 1 WILLIAM BLACKSTONE, COMMENTARIES *134 (referring to property as an "absolute" and "inherent" right).[7] The Framers also "believed that physical possession of property was particularly vulnerable to process failure"—that is, that the political process would not always adequately protect an individual's private property rights. Treanor, *The Original Understanding of the Takings Clause*, 95 COLUM. L. REV. at 833–34. Accordingly, the Framers included the Takings

[7] Blackstone's Commentaries were often cited as a resource by the Framers and "constituted the preeminent authority on English law for the founding generation . . . ." *District of Columbia v. Heller*, 554 U.S. 570, 593–94 (2008) (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)).

Clause in the Fifth Amendment to safeguard against such inevitable government abuses. *Id.* at 854–55; Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 2002 CATO SUP. CT. REV. 5, 5 (2002) ("For the Framers of our Constitution, the principles of good government started with the protection of private property—that guardian of all other rights.").

Even as this Court's regulatory takings jurisprudence has evolved, the Court's physical takings jurisprudence has remained largely unchanged. *Compare Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 322 *with Brown*, 538 U.S. at 233. The principle that even takings "temporary in duration" are compensable was "solidly established in the World War II era," when the government took temporary possession of many properties incident to wartime necessity. *See Arkansas Game and Fish Comm'n*, 568 U.S. at 33 (collecting cases). Since then, the Court has continued to zealously protect private property owners against physical invasions of their property by the government. *See Horne*, 576 U.S. at 362 (the government's physical taking of raisins was unlike a regulatory limit on production of raisins because "[t]he Constitution . . . is concerned with means as well as ends," and a physical invasion always constitutes a *per se* taking). In our system of constitutional governance, it has long been recognized that "if the property of an individual, fairly and honestly acquired, may be seized without compensation[,]" then "[i]t may well be doubted whether the nature of society and of government . . . prescribe[s] [any] limits to the

legislative power." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810).

Exclusivity is the defining element that renders property "private" in the first instance. *See Int'l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("An essential element of individual property is the legal right to exclude others from enjoying it."); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 65 (1985) ("[T]he idea of property embraces the absolute right to exclude."); James Madison, *Property*, *in* 14 THE PAPERS OF JAMES MADISON 266–68 (William T. Hutchinson et al., ed. 1983) ("This term in its particular application means 'that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.'"). As the Federal Circuit succinctly stated in *Hendler*:

> The notion of exclusive ownership as a property right is fundamental to our theory of social organization. In addition to its central role in protecting the individual's right to be let alone, the importance of exclusive ownership . . . is now essential to economic development, and to the avoidance of the wasting of resources found under common property systems.

952 F.2d at 1375. There is no conception of private property rights that allows the government to snatch the right to exclude from the property owner's bundle of sticks with impunity. Without the right to exclude, private property would not exist. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998) (Arguing that the right to exclude is not only

the "essential stick" in the bundle of rights that comprise property, it is the "*sine qua non*" of property.). That is why this Court has consistently and repeatedly affirmed that a physical invasion of a property owner's right to exclude always constitutes a categorical taking. Epstein, *The Ebbs and Flows in Takings Law*, 2002 CATO SUP. CT. REV. at 6 ("[I]n all cases of occupation, the courts have adhered to a well-nigh per se rule that requires compensation whenever government occupies land, including some tiny fraction of a larger holding."). In holding otherwise, the Ninth Circuit has set a dangerous precedent that imperils the right to exclude—"perhaps the most fundamental of all property interests." *Lingle*, 544 U.S. at 539.

V. THIS ACTION ILLUSTRATES DEEP CONCEPTUAL PROBLEMS IN THIS COURT'S EXISTING PROPERTY JURISPRUDENCE THAT MUST BE ADDRESSED IN AN APPROPRIATE CASE

The ease with which the lower courts in this case dismissed Petitioners' arguments speaks to a larger problem within American property law, particularly as applied to takings. While this Court has long recognized the fundamental nature of the right to exclude, *see Lingle*, 544 U.S. at 539 (referring to it as "perhaps the most fundamental of all property interests"), courts' treatment of the right to exclude as merely one of many sticks in the bundle of rights making up property has allowed for the proliferation of uncompensated takings such as the one currently at issue. Similarly, the gradual enlargement of the term "public use" that culminated in *Kelo v. City of*

New London (a decision approving the forced transfer of land from low-to-middle class homeowners to a multinational pharmaceutical company for a development that was never built), has all but declared legislatures free to declare any forced transfer of property a legitimate taking for public use. *See generally*, 545 U.S. 469 (2005). The present controversy stems, in large part, from courts repeating these two fundamental conceptual errors that date back to the Progressive Era, when this Court was far less concerned with the protection of private property or the original public meaning of constitutional text.

This case demonstrates how the "bundle of sticks" metaphor for property has all but eviscerated the right to exclude, which is the fundamental core from which all other property rights emanate, to the extent that union activists are permitted to trespass on private property for the purpose of screaming propaganda to a captive audience under the color of state authority without any compensation to the property owner.

As demonstrated above, *see* Part IV, *infra*, exclusivity of ownership—the right to determine who or what is allowed to enter and under which conditions they remain—is absolutely central to the conception of property protected by the Framers in the Constitution. And while the Framers certainly had a wider conception of property as well, *see* James Madison, "Property," at 266 ("In its larger and juster meaning, [property] embraces every thing to which a man may attach a value and have a right . . . ."), their use of the term "property" generally tracked the

Blackstonian understanding of the term as referring to the core, interconnected rights to "exclude, to use or enjoy, and to transfer." *See* Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. at 736 (citing RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 58–59 (1985).

The "bundle of sticks" conception of property, in contrast, has a much less storied pedigree. Having its roots in the late-nineteenth century, *see id.* at 737 (referencing Henry Clay as an early proponent of a more "nominalist" conception of property), the metaphor first gained popularity among the Legal Realists of the Twentieth Century, who rejected "archaic" notions of natural rights or strict adherence to constitutional text in favor of pragmatic balancing of interests inspired by the burgeoning fields of social science. *See id.* at 737–38. *See also* Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L. J. 1037, 1037–39 (1961) (examining origins of Legal Realism movement). The usefulness of the "bundle of sticks" metaphor, to a devotee of Legal Realism, is that it separates out each instrumentality or application of the right to private property so that Twentieth-Century innovations in governance, such as restrictive zoning and environmental regulations, can be rationalized as only affecting a single stick in a large bundle. These intrusions on the core of private property rights can thus be re-contextualized from unsanctioned invasions of the core of property ownership triggering the public use and just compensation components of the Fifth Amendment's Takings Clause to merely rearranging sticks in a large bundle of rights, any one of which can be adjusted or even removed entirely without significantly altering

the bundle as a whole. The metaphor is invoked, not to protect property rights, but to excuse their violation.

Much like the "bundle of sticks" metaphor, this Court's public use jurisprudence is an unfortunate relic of the Progressive Era that has managed to survive this Court's return to a more originalist jurisprudence generally. *Amicus* recognizes that the question of whether forced union access qualifies as a public use under the Takings Clause was not briefed below and is not properly before this Court. It is nonetheless troubling, however, that the current state of the law is such that California's assertion of public use was not even challenged in this case, considering the extraordinarily narrow and private union interests benefiting from the invasion of Petitioners' property, and urge this Court to consider revisiting its public use jurisprudence in an appropriate case.

As Justice Thomas explained in his *Kelo* dissent, "[t]he most natural reading of [the public use requirement] 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." 545 U.S. at 508 (Thomas, J., dissenting). It is the "public use" requirement, not a "the state legislature thinks a private transfer will have beneficial knock-on effects" requirement. The labor union desiring access to Growers' properties in this case is a private organization with private interests (one might call them "special" interests in other contexts). While the union's activities may potentially align in some respects with the public policy goals of

California's state legislature, the labor union is nevertheless primarily obligated to serve the private interests of its members; not the public as a whole.

Unlike the water mills at issue in the Mill Acts cases often cited by proponents of the more nebulous "public purpose" or "public benefit" approach to takings law, *see Kelo*, 545 U.S. at 479, n.8; Lawrence Berger, *Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 208–12 (1978), the union here is not engaged in a quasi-public exercise and makes no representations as to direct public benefits from its invasion of Growers' properties. *Cf. Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 18–24 (1885) (discussing the direct public benefit flowing from development of the state's water resources, common requirements that such mills are made available to the surrounding communities, and the rights and obligations of property owners abutting common public resources). There is no common law tradition of private organizations distributing advertising materials to potential members being considered a public good, let alone a public use (with the possible exception of certain forms of religious solicitation, which is far outside the scope of this brief).

This case illustrates the dangers of allowing "constitutional law" to replace independent analysis of constitutional text. Pithy metaphors take on a life of their own, growing far beyond their original application or usefulness to eventually, as now, obscure rather than elucidate. And small, pragmatic compromises are built on top of prior small, pragmatic compromises, building through iteration what would have never been accepted if constructed all at once—

just as Thomas Jefferson warned. *See* Letter from Thomas Jefferson to Albert Gallatin (Oct. 13, 1802), *in* 9 THE WORKS OF THOMAS JEFFERSON 398, 399 (Paul Leicester Ford ed. 1904–05) ("The utility of the thing has sanctioned the infraction. But if on that infraction we build a 2d, on that 2d a 3d, &c., any one of the powers in the Constitution may be made to comprehend every power of government."). While there is merit to the impulse behind *stare decisis*—consistency in the law is a normative value in and of itself—this Court cannot continue to shackle itself to ill-conceived precedents decided during times of American history where fidelity to the written constitution was much weaker than during the early Republic or today.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

DATED January 6, 2021

Respectfully submitted,

Cristen Wohlgemuth
Counsel of Record
David C. McDonald
Mountain States Legal Foundation
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
cristen@mslegal.org
dmcdonald@mslegal.org

Counsel for Amicus Curiae