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 CALIFORNIA AGRICULTURAL LABOR RELATIONS BOARD, ET AL., *Respondents.*

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

## BRIEF OF LEGAL HISTORIANS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS


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## INTEREST OF *AMICI CURIAE* [1]

The undersigned are law professors who research and write in legal history. We are concerned that advocates in the past have presented this Court with a misleading account of early English and American property law. We write to provide the Court with a more complete history of the rights to exclude and enter private land.

## SUMMARY OF THE ARGUMENT

An absolute right to exclude has never existed in Anglo-American law. Early American law and its English precedents authorized the public and governmental officials to enter private property for multiple purposes. These non-trespassory entries are not limited to those that might incur public harms but reflect a general sense of societal interests. When owners challenged these measures, courts repeatedly held that they were neither trespasses nor violations of constitutional guarantees. To hold that California's narrowly tailored statute to protect farmworker rights is a taking would both violate this Court's precedent and "freeze the common law" of trespass in violation of the Anglo-American tradition. *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74, 93 (1980) (Marshall, J., concurring).

English common law recognized a wide variety of situations in which individuals, the public, or local

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[1] A list of *amici curiae* is provided in the Appendix. No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to this brief's preparation and submission. The parties have consented in writing to the filing of this brief.

communities, could enter private property without the consent of the landowner. Rights to graze livestock existed in villagers as a matter of "universal right" and in others by long use. Ways—public or community rights to cross private land—were customary, and England and Scotland have protected and extended them by statute in the twentieth century. English common law also guaranteed public rights to enter private lands under navigable waters up to the high tide line to fish and to boat. The right of the public to enter property of inns and other common carriers was so strong that individuals could bring an action of trespass against owners who unreasonably excluded them. All of these rights were recognized, enforced, and sometimes expanded by early American common and statutory law.

From the beginning, moreover, American common and statutory law created a strong tradition of rights to enter that did not exist under English common law. *See also* Resp'ts' Br. at 31-32. Courts recognized that these rights went beyond English common law, but affirmed them as protections of American interests and American freedom. Eighteenth century American statutes provided a cause of action for trespass to land only against those who committed a particular injury to property, and state statutes of limitations for trespass were also often far shorter than those in England. Until well into the nineteenth century, the public could enter unenclosed lands to hunt and graze their animals. The right to graze was so strong in many southern states that landowners were liable for injuries to livestock who wandered onto their unfenced land.

Early statutes also authorized entry to land for inspections, surveys, and other public purposes. In the early twentieth century, American law recognized an entirely new right to enter, authorizing planes to fly over private owners' lands despite the common law maxim that landowners' rights existed *ad coelom et ad infernos*. This Court approved this change in *United States v. Causby*, holding that such entries "are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." 328 U.S. 256, 266 (1946).

More recent limitations on the right to enter were rarely triumphs for individual freedom. Some nineteenth century limitations simply reflected a changing sense of societal and economic interests. But others deliberately increased rights of the more powerful over the less powerful. Famously, the enclosure of the commons in England displaced the common people in favor of wealthy landowners, leading to great poverty and political resistance. In the United States, many states granted businesses rights to deny service to anyone to allow them to exclude African Americans. In a strand of this history particularly relevant to a case involving workers' rights, several southern states prevented hunting and grazing on unfenced land after the Civil War to prevent free African Americans from supporting themselves, thereby giving plantation owners more power to control their labor.

Although some of the history presented in this brief is not well known outside the academy, modern law reflects this tradition of temporary entries to private property in the public interest. The

Restatement (Second) on Torts, for example, recognizes twenty different "Privileges [to enter land] Arising Irrespective of Any Transaction between the Parties," noting that these were only "the more usual privileges to enter land in the possession of another," and "not intended to be exclusive." *Restatement (Second) of Torts*, ch. 8, topic 2, intro. note & §§ 191-211 (Am. L. Inst. 1965). Indeed, Professor Thomas Merrill, much cited for his thesis that the right to exclude is the "sine qua non" of property, emphasizes that he does not argue that the right to exclude must be "unqualified," recognizing instead that all property is characterized by "different types and degrees of exclusion rights." Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 753 (1998).

This Court's precedents do the same. They acknowledge that a taking "may more readily be found when the interference with property can be characterized as a physical invasion by government," *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), and that invasions are takings if they cause "substantial" harm, *Causby*, 328 U.S. at 266, or "serious interruption to the common and necessary use of property," *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 179 (1871). But temporary invasions to protect the interests of those whom owners have invited onto land are not takings so long as the owners retain a reasonable return on their investment. *Yee v. City of Escondido*, 503 U.S. 519, 528-29 (1992) (upholding rent control statute although renters of mobile home lots could transfer right to occupy to strangers); *Block v. Hirsh*, 256 U.S. 135, 157-58 (1921) (upholding a temporary

restriction on the landlord's power to evict); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (holding a Minnesota statute delaying eviction of foreclosed borrowers constitutional).

The arguments of Petitioners and their amici, in other words, are contrary to the American legal tradition. They ignore the traditions of the common law both historically and today, which make limited rights to enter and exclude in the public interest part of the definition of property itself. Accepting their claims would enshrine in the Constitution an understanding of property that would have been wholly foreign to its drafters. If Petitioners seek an absolute right to exclude, they must look for it somewhere other than our common legal heritage.

## ARGUMENT

### I. ENGLISH COMMON LAW RECOGNIZED MANY RIGHTS TO ENTER PRIVATE LANDS; AMERICAN COMMON AND STATUTORY LAW EMBRACED THESE RIGHTS.

English common law recognized many rights to enter private lands without permission. Scholars agree that those believing that Blackstonian property is about "sole and despotic dominion" and "total exclusion," 1 William Blackstone, *Commentaries on the Laws of England in Four Books* 304 (Liberty Fund, Inc. 2011) (1753), "have not read much Blackstone." Carol M. Rose, *Canons of Property Talk, or Blackstone's Anxiety*, 108 Yale L.J. 602, 601 (1998); *see also* Merrill, *supra*, at 753 (agreeing that "there is no question but that [Blackstone's] statement is hyperbolic"). Readers

who continue past Blackstone's introductory rhetorical flourish will find hundreds of pages of rights to enter the lands of others. These include rights to enter land to graze animals, fish, or simply crossover, and obligations by public callings to serve all customers.

Early American law adopted many of these rights, often extending them past their English origins. While some rights emerged from immediate necessity, *see, e.g.*, *Proctor v. Adams*, 113 Mass. 376 (1873); *Campbell v. Race*, 61 Mass. 408, 412 (1851), most did not. Rather, the law at the time of the Founders recognized multiple rights to enter when it served the public interest.

### A. English Law Recognized Many "Rights of Commons" in Villagers and Long-Users.

Rights of commons were a key feature of early English property law. 1 Blackstone, *supra*, at 322-23. Farmers could graze livestock on private waste or fallow lands in a village as "a matter of most universal right." *Id.* at 322. The right did not arise from grant, but existed "for the encouragement of agriculture" and the "necessity of the thing." *Id.* The same public interest might lead to commons of piscary (fishing), turbary (digging peats), and estover (collecting wood). *Id.* at 322-23. Such commons might also arise from "immemorial usage and prescription." *Id.* at 322. New England colonists continued this tradition, planning their communities around commons with rights in all proprietors of the town. *See* Bethany R. Berger, *It's Not About the Fox: The Untold History of Pierson v. Post*, 55 Duke L.J. 1089, 1110-15 (2006). As discussed in section II, American law also extended these rights far beyond

their English common law origins, recognizing a wealth of use rights in the entire public.

### B. English Law Often Recognized "Ways" to Cross Over Private Lands.

Blackstone also recognized the long English tradition of rights to cross over private lands. 1 Blackstone, *supra*, at 323. These "ways" included not only familiar rights on government highways and private easements by grant, but also "common ways, leading from a village into the fields," and broad ways by prescription based "immemorial []us[e]." *Id.* at 323-24. American law was more grudging toward public rights of way, but still provided several means by which use of roads over private land might ripen into public ownership. Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. Chi. L. Rev. 711, 724-26 (1986). The United Kingdom has retained a robust tradition of public ways over private land, expanding them by statute in recent decades. *See* John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 Neb. L. Rev. 739, 769-77 (2011) (discussing the National Parks and Access to the Countryside Act of 1949 and Countryside and Rights of Way Act of 2000 in England, and the Land Reform (Scotland) Act of 2000).

### C. English and American Law Recognized Robust Public Rights to Enter Submerged Private Lands.

English common law recognized even broader public rights to enter private submerged and tidal lands. In the 1660s, Sir Matthew Hale declared in his celebrated *De Jure Maris* that "the common

people of England have regularly a liberty of fishing in the seas or creeks or arms thereof, as a publick common of piscary, and may not without injury to their right be restrained of it." Matthew Hale, *A Treatise de Juris Maris et Brachorium Ejusdem*, *reprinted in* Stuart Moore, *A History of the Foreshore and the Law Relating Thereto* 377 (1888). Although submerged and tidal lands "may be a private man's freehold,
yet it is charged with a publick interest of the people which may not be prejudiced or damnified." *Id.* at 404-05. A leading English treatise declared that these rights were "of such great national importance," they inspired "numerous statutes for the regulation and preservation of them" beginning with the Magna Carta. 1 Joseph Chitty, *Treatise on the Game Laws and of Fisheries* 245-46 (1812). Fish weirs on private lands could be torn down as public nuisances, and the public had a right to fish and dry nets on the seashore. *Id.* at 244, 247. Although English law occasionally permitted grants of an exclusive fishery, landowners had the burden of proving the grant, and even then could not deny boats the right to dock on one's banks without evidence of abuse of the right. *Id.* at 269-75.

American law enthusiastically embraced and even extended these rights. *See* Rose, *The Comedy of the Commons, supra*, at 727. Massachusetts' Liberties Common (1641-1647) provided that "no town shall appropriate to any particular person or persons, any great pond containing more than ten acres of land, and . . . in all creeks, coves, and other places, about and upon salt-water, where the sea ebbs and flowes, the proprietor of the land adjoyning

shall have propriety to the low-water-mark . . . Provided that such proprietor shall not by this liberty, have power to stop or hinder the passage of boates or other vessels, in or through any sea, creeks or coves to other men's houses or lands." *The Book of the General Lavves and Libertyes Concerning the Inhabitants of the Massachusets Collected out of the Records of the General Court, for the Several Years Wherin They Were Made and Established, and Now Revised by the Same Court, and Disposed into an Alphabetical Order, and Published by the Same Authority in the General Court Holden at Boston, in May 1649*, at 50 (1660) ("Massachusetts' Liberties Common"), *reprinted in The Colonial Laws of Massachusetts, Reprinted from the Edition of 1660, with the Supplements to 1672, Containing Also, the Body of Liberties of 1641*, at 170 (William H. Whitmore ed. 1889). The founding documents of Southampton, New York, similarly guaranteed that "noe person . . . whatsoeuer shall challenge or claime any proper Interest in seas, rivers, creekes, or brooks howsoeuer bounding or passing through his grouude but ffreedom of fishing, fowling and nauigation shall be common to all within the bankes of the said waters whatsoeuer." *The Dispossall of the Vessell* 4 (1639), *reprinted in First Book of Records of the Town of Southampton* (John H. Hunt ed. 1874). Vermont even enshrined in its original constitution the right "to fish in all boatable and other waters (not private property) under proper regulations." Vt. Const. ch. 2, § 39 (1777) (now codified at Vt. Const. ch. 2, § 67).

With or without positive law on the issue, early American courts also recognized these rights. The Connecticut Supreme Court, for example,

declared these "public and common rights" were a "title paramount to the title of the" landowner. *Lay v. King*, 5 Day 72, 77 (Conn. 1811). This Court thoroughly examined the issue in *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842), holding that a grant of lands under navigable waters from the Duke of York could not prevent New Jersey from authorizing another's oyster bed there. "It would require very plain language in these letters-patent," the Court declared, "to persuade us that the public and common right of fishery in navigable waters, which has been so long and so carefully guarded in England, and which was preserved in every other colony founded on the Atlantic borders, was intended, in this one instance, to be taken away." *Id.* at 414.

Some states went further than the English common law, rejecting the principle that the sovereign could grant an exclusive fishery, or even the navigability limitation. In 1810, for example, the Pennsylvania Supreme Court rejected the English common law principle that riparian owners had an exclusive fishery from the banks of freshwater rivers unaffected by the tide. *Carson v. Blazer*, 2 Binn. 475, 477-78 (Pa. 1810). Declaring that "the uniform idea has ever been, that only such parts of the common law as were applicable to our local situation have been received in this government," the court denied a landowner's trespass claim against defendants fishing from an island in the middle of the Susquehanna River. *Id.* at 477-78, 483-84. New Hampshire adopted a particularly expansive version of fishing rights, as described in *Percy Summer Club v. Astle*, 145 F. 53 (C.C.D.N.H. 1906). The court

declared that English laws permitting exclusive fisheries in landowners "were regarded here as oppressive," and "contrary to the fundamental rules of law, because, as the proprietor of the soil has only the usufruct of water . . . there would seem to be no reason for excluding the rest of the community therefrom so long as it can share without trespassing, whether by passage through the forests or by canoes or boats up the rivers and streams." *Id.* at 63. This distinctly American history protected "the interest of the public at large," creating a "natural presumption . . . in favor of free fishing and free fowling in the nonnavigable rivers, ponds, and lakes in New Hampshire, and in the forests so long as they remain forests." *Id.* at 64.

### D. English and American Law Forbade Innkeepers and Other Public Callings from Excluding Customers without Reasonable Cause.

If a business held itself out to serve the public, individuals not only had a right to enter the property, but could seek damages if the owner excluded them. In 1701, Sir John Holt, Lord Chief Justice of the King's Bench opined that "where-ever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject . . . . If an inn-keeper refuse to entertain a guest where his house is not full, an action will lie against him . . . ." *Lane v. Cotton* [1701], 88 Eng. Rep. 1458, 1464-65 (PC). Blackstone adopted this view, writing that "if an inn-keeper, or other victualler, hangs out a sign and opens his house for travelers, it is an implied

engagement to entertain all persons who travel that way; and . . . an action on the case will lie against him for damages if he, without good reason refuses to admit a traveler." 2 Blackstone, *supra*, at 100.

Early American Law fully adopted this principle. Chancellor James Kent explained that common carriers "are bound to do what is required of them in the course of their employment . . . and if they refuse without some just ground, they are liable to an action." 2 James Kent, *Commentaries on American Law* 464-65 (1827); *see also id.* at 445, 499 (including common carriers, innkeepers, farriers, porters, and ferrymen in this rule). In an 1837 case, moreover, the New Hampshire Supreme Court held that an innkeeper could not exclude a stagecoach driver for soliciting passengers in the public rooms. *Markham v. Brown*, 8 N.H. 523 (1837). The court declared "[t]here seems to be no good reason why the landlord should have the power to discriminate in such cases . . . any more than he has the right to admit one traveller [sic] and exclude another, merely because it is his pleasure." *Id.* at 529-30. This Court has also recognized this principle, noting that public accommodations statutes "but codify the common-law innkeeper rule which long predated the Thirteenth Amendment." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964); *Bell v. Maryland*,
378 U.S. 226, 255 (1964) (Douglas, J., concurring) (opining that "the good old common law" enshrined in the Fourteenth Amendment, included "[t]he duty of common carriers to carry all, regardless of race, creed, or color.").

## II. AMERICAN LAW HAS FREQUENTLY RECOGNIZED RIGHTS TO ENTER THAT WENT BEYOND SUCH RIGHTS IN ENGLISH COMMON LAW.

Although Americans adopted much of English common law, they insisted on their right to depart from it to serve the needs of their new country. Early trespass statutes provided no general right to exclude, creating actions for trespass only for those who committed specific harms on other's land. Statutes of limitations for trespass were often far shorter than they were in England, allowing entries of dubious legality to quickly ripen into full title. The colonies and states, moreover, almost uniformly recognized the rights of the public to enter unfenced land to hunt and graze livestock. Statutes also frequently authorized officials and others to enter private property to carry out public purposes. The advent of airflight led the United States to again shape the common law to suit evolving societal needs, creating a new concept of "navigable airspace." When the question came before the Supreme Court in *United States v. Causby*, 328 U.S. 256 (1946), this Court followed the traditional path of allowing temporary entry so long as it did not cause substantial damage to use and enjoyment of land. *Id.* at 266.

### A. State and Colonial Law Did Not Authorize a Broad Action for Trespass Against Unconsented Entries to Land.

Although most states today broadly criminalize unprivileged intentional entry to land by statute, early American law reflects no such general prohibition. Instead eighteenth-century American

law appears to have authorized trespass actions only for activities believed particularly harmful to the interests of the landowner or the public. *See* Brian Sawers, *Original Misunderstandings: The Implications of Misreading History in* Jones, 31 Ga. St. U. L. Rev. 471 (2015). Although early cases and treatises frequently invoke Blackstone to support multiple rights to enter and use land owned by others, American cases did not even quote Blackstone's "absolute dominion" language before 1837 and did so only three more times before 1900; the classic treatises by Chancellor Kent and Justice Story did not do so at all. David B. Schorr, *How Blackstone Became a Blackstonian*, 10 Theoretical Inquiries in L. 103, 120-22 (2009).

A study of the 409 reported cases using the word "trespass" between 1701 and 1800 revealed none arising from simple entry to land. Sawers, *Original Misunderstandings*, *supra*, at 491-92. Most reflect the old sense of trespass on the case as a broad writ for torts, while others were disputes over ownership of land. *Id.* The three cases that arose from temporary entries all involved not only entering land but also taking something of value, whether mussels, timber, or honey. *Id.* Although one might assume that these cases reflect only the tip of the legal claims iceberg, individuals were far more litigious in colonial America, with between eleven and twenty-four percent of the population involved in a lawsuit in any given year. Marc Galanter, *Reading the Landscape of Disputes: What We Don't Know (and Think We Know) About Our Allegedly Litigious Society*, 31 UCLA L. Rev. 4, 41 (1983).

Eighteenth century trespass statutes also reveal no general prohibitions on entering another's land. Early statutes only sanctioned those who stole the owner's property or otherwise caused a particular harm after entry. Sawers, *Original Misunderstandings, supra*, at 499. Between 1723 and 1806, Connecticut, New Hampshire, Vermont, Pennsylvania, and New York all enacted laws declaring it a trespass to log on another's land without permission. *Id.* at 499-501. Other statutes reflect more distinctive harms. New Hampshire, for example, sought to restrain "'sundry evil minded persons'" by declaring it a trespass to settle on unclaimed state lands in 1778, and made it a trespass to enter a saltmarsh and remove flattsweed without the landowner's permission in 1794. *Id.* at 499-500 (quoting Act of Feb. 15, 1791, 1792 N.H. Laws 261, 261). As discussed below, moreover, all early American states enacted statutes providing that it was a trespass for cattle to enter land with a "good and sufficient fence." *See infra* Section II.b. These statutes declaring specific activities were trespasses suggest that other entries were not. The Connecticut Supreme Court, for example, adopted this interpretation in *Studwell v. Ritch*, 14 Conn. 292 (1841), holding that its statutes providing that entry by livestock into fenced lands was a trespass meant that entry into unfenced land was not. *Id.* at 295.

A number of American states also enacted statutes of limitations for trespass far shorter than those provided in English law. Statutes of limitations for trespass are significant because occupying land openly, exclusively, and without permission for the limitations period gives rise to

ownership by adverse possession. *See Leffingwell v. Warren*, 67 U.S. 599, 605 (1862) ("The lapse of the time limited by such statutes not only bars the remedy, but it extinguishes the right, and vests a perfect title in the adverse holder"; creating remedies beyond a state statute of limitations would "usurp the function of another and a distinct governmental department."). Blackstone stated that fifty years was the time limit for actions to recover possession of land, 2 Blackstone, *supra*, at 113-14, although a twenty-year limitation soon became the norm in England. Henry W. Ballantine, *Title by Adverse Possession*, 32 Harv. L Rev. 135, 138-39 (1918). While some states adopted twenty-year limits, many states, particularly on the frontier, adopted shorter ones to facilitate resolution of claims. Tennessee and Mississippi, for example, both prohibited suits for recovery of land more than seven years after a cause accrued. John Haywood, *Statutes Laws of the State of Tennessee of a Public and General Nature; Revised and Digested* 215-16 (1831); Anderson Hutchinson, *Code of Mississippi: Being an Analytical Compilation of the Public and General Statutes of the Territory and State, with Tabular References to the Local and Private Acts, from 1798-1848,* at 829 (1848). California, Arizona, and Montana allowed only five years to sue for trespass. 1850 Cal. Stat. 344, Ariz. Code ch. 35, §§ 4-10 (Howell 1865), Mont. Rev. Stats. div. 1, ch. 2, §§ 29-36 (Boos 1881). All of these statutes radically alter the moment at which trespass turns into title.

### B. The Public Had Free Rights to Hunt and Graze on Unfenced Land.

A striking example of a distinctly American property right is the public right to hunt and graze on private unfenced land in most parts of the country until the mid-nineteenth century. Eric T. Freyfogle, *On Private Property: Finding Common Ground on Ownership of Land* 30-31 (2007) ("A full right to exclude was thus the exception for private lands, not the norm."). In 1788, when the Founders drafted and adopted the U.S. Constitution, "the entire country was open range." Brian Sawers, *Property Law As Labor Control in the Postbellum South*, 33 Law & His. Rev. 351, 352 (2015). Far from a violation of rights, these entries were considered part of the fundamental rights of Americans. *See* Freyfogle, *supra*, at 46-47.

The right to enter property to hunt was enshrined in the earliest American laws. Massachusetts' Liberties Common (1641-1647) insisted that any man might "pass and repass on foot through any mans propriety" to fish at the great ponds within the colony so long as they "trespass not on any mans corn or meddow." Massachusetts' Liberties Common at 50. The right to hunt on unenclosed lands was so important that Vermont and Pennsylvania included it in their original constitutions. *See* Vt. Const. ch. 2, § 39 (1777) (guaranteeing inhabitants the right to hunt in season "on the lands they hold, and on other lands (not enclosed)"); Pa. Const. § 43 (1776) (guaranteeing inhabitants the right to hunt in season "on the lands they hold, and on all other lands therein not

inclosed"). Vermont's constitution still guarantees this right. Vt. Const. ch. 2, § 67.

Even states without such constitutional provisions recognized the right. In 1818, for example, the Constitutional Court of Appeals of South Carolina dismissed a trespass claim against a hunter, opining that it "never yet entered the mind of any man" that the right could "be defeated at the mere will and caprice of an individual." *McConico v. Singleton*, 9 S.C.L. (2 Mill) 244, 352-53 (1818). This tradition remains with us in limited form today. A 2004 survey found that twenty-nine states permitted hunting on private unenclosed lands unless the owner had posted a written prohibition, twenty-seven by statute. Mark R. Signon, *Hunting and Posting on Private Land in America*, 54 Duke L.J. 549, 560-61 (2004).

American courts knew that their hunting rights departed from the common law and celebrated this fact. Blackstone believed that English law initially restricted the right of hunting to the king, extending it only grudgingly to those who hunted on their own lands. 1 Blackstone, *supra*, at 263-65. The Vermont Supreme Court, however, has repeatedly rejected landowners' trespass claims against hunters even as it acknowledged that the provision altered the common law baseline. *See Cabot v. Thomas*, 514 A.2d 1034, 1037-38 (Vt. 1986). Justice Oliver Wendell Holmes wrote an opinion for this Court reaching the same conclusion in *McKee v. Gratz*, 260 U.S. 127, 136 (1922). *McKee*, written the same term the Court decided *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), refused to hold it was trespass "as [a] matter of law" to enter private land, harvest

mussels from a marked bed, and take the shells to make buttons, because American practice had mitigated the "strict rule of the English common law" prohibiting hunting on private property. *McKee*, 260 U.S. at 136.

Well into the nineteenth century, American law also recognized broad public rights to enter unfenced land to graze livestock. Freyfogle, *supra*, at 33. Most of the original colonies and states had laws providing that entry by livestock only gave rise to an action for trespass if the landowner had a "good and sufficient" fence to keep them out, excepting only those considered particularly destructive, like swine and "unruly" cattle and horses. *See, e.g.*, *Laws of Connecticut: An Exact Reprint of the Original Edition of 1673,* at 24 (1865); *Acts and Laws of His Majesty's Province of New Hampshire, with Sundry Acts of Parliament* 122 (1771); Samuel Neville, *Acts of the General Assembly of the Province of New-Jersey, from the Time of the Surrender of the Government in the Second Year of the Reign of Queen Anne, to This Present Time* 209 (1752).

Courts recognized that these laws departed from the English common law. The Connecticut Supreme Court dismissed a trespass case involving a cow that entered and damaged unfenced land, declaring, "[i]t is very clear, that according to the *English* common law [it is] the duty of every man to take care of his cattle; and if he suffers them to trespass upon the lands of others, he is generally liable for the damages, whether those lands were, or were not, enclosed by a sufficient fence," but "such is not the law of Connecticut," and the plaintiff could not recover. *Studwell v. Ritch*, 14 Conn. 292, 295

(1841); *see also Kerwhaker* v. *Cleveland, Columbus & Cincinnati R.R. Co.*, 3 Ohio St. 172 (1854) (holding stock owner not liable for allowing his livestock to run upon railroad tracks). When a Kentucky landowner challenged the constitutionality of statutes preventing suits to recover for damages by livestock on unfenced land, the Kentucky Supreme Court summarily held "we entertain no doubt of the constitutionality of the statutes referred to," which were intended "to provide a just and reasonable protection for the rights of owners of inclosed land and of stock" *Wills v. Walters*, 68 Ky. 351, 352 (1869).

This Court affirmed this departure from the common law in 1890, rejecting an action for damages from sheep herds grazing on private unfenced lands interspersed with lands in the public domain. *Buford v. Houtz*, 133 U.S. 320 (1890). This Court declared that applying "principle of law derived from England" would violate the "custom of nearly a hundred years, that the public lands of the United States . . . shall be free to the people who seek to use them, where they are left open and uninclosed." *Id.* at 326.

The statutes of southern states, went even further, making landowners liable for damages to livestock that wandered onto their unfenced land. *See, e.g.*, James Davis, *Complete Revisal of All the Acts of Assembly, of the Province of North-Carolina, Now in Force and Use* 500 (1773); *Acts of Assembly, Now in Force, in the Colony of Virginia* 308-09 (1752). In 1854, when a railroad argued the common law of trespass as a defense to an action for killing a cow on its tracks, the Alabama Supreme Court declared that Alabama laws adopted "contain

provisions in direct repugnance to the common law on this subject, and to the extent of this repugnance repealed it." *Nashville & Chattanooga R.R. Co. v. Peacock*, 25 Ala. 229, 232 (1854). These laws, the court continued, "show conclusively that the unenclosed lands of this State are to be treated as common pasture for the cattle and stock of every citizen." *Id.* In *Vicksburg & Jackson Railroad Co. v. Patton*, 31 Miss. 156 (1856), the Mississippi Supreme Court similarly rejected the English common law rule as "inapplicable to the condition and circumstances of the people of those States, and repugnant to the custom and understanding of the people, from their first settlement down to the present time." *Id.* at 184-85. In a policy "sanctioned by strong reason of public convenience," it declared, unfenced lands "have been understood, from the early settlement of the State, to be a common of pasture." *Id*. at 185. The Georgia Supreme Court rejected a trespass defense to liability with equal vehemence: "Such Law as this would require a revolution in our people's habits of thought and action. A man could not walk across his neighbor's unenclosed land, nor allow his horse, or his hog, or his cow, to range in the woods nor to graze on the old fields, or the 'wire grass,' without subjecting himself to damages for a trespass. Our whole people, with their present habits, would be converted into a set of trespassers. We do not think that such is the Law." *Macon & W. R.R. Co. v. Lester,* 30 Ga. 911, 914 (1860).

These comprehensive rights to enter were not designed to abate public harm; instead, they conferred a benefit on the public. *Contra* Br. of the

Cato Inst. et al. at i, Dec. 31, 2020 (suggesting that temporary rights to enter are takings unless they prevent a public harm). Nor, as *McKee v. Gratz*'s, 260 U.S. 127, treatment of the defendants' button-making reveals, did this right turn on necessity. While hunting and grazing were once more important for subsistence than they are today, neither colonial nor modern law ever limited entry rights to those who needed to hunt or graze on private lands to eat. Instead, the centuries-old American right to hunt and graze on unenclosed lands, like the California statute at issue here, reflects an American tradition of limited access to private property to protect the public interest.

### C. Early Statutes Often Authorized Entry for Those Engaged in Public Purposes.

Early American statutes frequently authorized public officials and others carrying out public purposes to enter private property. In 1801, for example, the Northwest Territory authorized officers to "demand admittance, in the day time, into any house or chamber" upon oath or affirmation by any credible person that goods subject to civil attachment were in there. *Acts of the Second General Assembly of the Northwest Territory*, ch. 144, § 4 (1802), *reprinted in* 1 *The Statutes of Ohio and of the Northwestern Territory, Adopted or Enacted from 1788 to 1833 Inclusive* 311 (Chase 1833).

States regularly authorized officials tasked with inspecting goods to enter property to search for such goods. Such officials could, for example, "enter on board any ship or vessel whatsoever, lying and being in the harbor where such inspector is authorized to inspect." *See*, *e.g.*, Mass. Gen. Laws ch.

8, § 4 (1823) (concerning the quality of "pot and pearl ashes"); 1815 N.H. Laws 428 (same); *see also* N.Y. Rev. Stat. ch. 17, art. 10, § 185(6) (Duer 1846) (allowing inspectors to enter the vessels to search for hops). More idiosyncratically, Connecticut law gave towns "authority, at all times, to enter and inspect" all schools and medical institutions using cadavers. Conn. Rev. Stat. § 139 (1849).

Government officials and private persons acting under official authority could also enter land to survey it in preparation for exercise of eminent domain. *E.g.*, Act of Apr. 15, 1782, ch. 481, § 5 (§ 7 P.L.), *reprinted in* 10 *Statutes at Large of Pennsylvania from 1682 to 1801*, at 480 (Mitchell & Flanders 1904). Courts repeatedly found that such entries were not takings unless the surveyors damaged the land. As Justice Baldwin wrote in riding circuit in New Jersey, "[a]n entry on private property for the sole purpose of making the necessary explorations for location, is not taking it . . . nothing is taken from him, nothing is given to the company." *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. 821, 831 (C.C.N.J. 1830), *see also Cushman v. Smith*, 34 Me. 247, 260-62 (1852). The Massachusetts Supreme Court similarly clarified that in takings, the property was "permanently subjected to a servitude," but temporary "interference with the absolute right of the owner of real estate . . . is one of every day's occurrence; indeed, so common, as to be acquiesced in without remonstrance, or even a question as to the right so to do." *Winslow v. Gifford*, 60 Mass. (6 Cush) 327, 329-30 (1850). This principle is applied to this day. *Klemic v. Dominion Transmission, Inc.*, 138 F. Supp.

3d 673 (W.D. Va. 2015) (Virginia statute authorizing natural gas companies to enter land and survey it for pipelines did not result in a taking).

### D. The Airspace Servitude is a Modern Modification of the Right to Exclude to Serve Societal Needs.

The most striking modern alteration of the right to exclude is the airspace servitude. As Blackstone wrote, until the twentieth century, land had "an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad coelum*, is the maxim of the law." 1 Blackstone, *supra,* at 314. The invention of the airplane threw that maxim into disarray. Lawyers asked whether the common law could change with the times, what it meant in the first place, and whether it really mattered at all. *See* Stuart Banner, *Who Owns the Sky: The Struggle to Control Airspace from the Wright Brothers On* 69-93 (2008). States, property owners, and the federal government wondered who could regulate what passed above the land and how. Meanwhile, European countries began to regulate and encourage commercial aviation, building far safer and more pleasant airflight than was available in the United States. *Civil Aeronautics: Legislative History of the Air Commerce Act of 1926 Approved May 20, 1926 Together with Miscellaneous Legal Materials Relating to Civil Air Navigation* 22 (1941). Finally, Congress resolved the controversy in one fell swoop, enacting the Air Commerce Act defining "'navigable airspace'" as "airspace above the minimum safe altitudes of flight prescribed by the Secretary of Commerce . . . and such navigable airspace shall be subject to a public right of freedom

of interstate and foreign air navigation in conformity with the requirements of this Act." Air Commerce Act of 1926, ch. 341, § 10, 44 Stat. 568, 574 (1926) (codified as amended at 49 U.S.C. § 40102(32)).

This Court blessed this resolution in *United States v. Causby*, 328 U.S. 256 (1946). In *Causby*, the United States had leased an airport for military use, and was flying planes so low and so frequently that about 150 of the Causbys' chickens had died from "flying into the walls from fright," resulting in "the destruction of the use of the property as a commercial chicken farm." *Id.* at 259. The Causby family could not sleep and was nervous and frightened. *Id.* In reviewing the claim, this Court declared that the "ancient doctrine that at common law ownership of the land extended to the periphery of the universe . . . has no place in the modern world." *Id.* at 260-61. The Court therefore held that "[f]lights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." *Id.* at 266. But because the damages to Causby's property "were the product of a direct invasion of respondents' domain . . . 'so long as the damage is substantial, that determines the question whether it is a taking.'" *Id.* at 265-66 (quoting *United States v. Cress*, 243 U.S. 316, 328 (1917)). The Court thus treated the law of trespass as it always has been in American law: modifiable to accommodate changing public needs, but not to the point of causing substantial damage to landowners' rights.

## III. LATER LIMITATIONS ON THE RIGHT TO ENTER WERE OFTEN NOT TRIUMPHS OF INDIVIDUAL RIGHTS.

Although advocates sometimes treat an absolute right to exclude as a matter of individual liberty, expansions of the right to exclude have often undermined human freedom. In the England of Blackstone's time, enclosure by wealthy landowners curtailed rights of commons and impoverished the commoners. *See* David Thomas Konig, *Law and Society in Puritan Massachusetts: Essex County, 1629-1692*, at 4 (1979) (noting that "the enclosure of the common fields had dispossessed thousands and produced a population of menacing 'sturdy Beggars' who streamed into London or wandered about the countryside"). In the United States, states expanded rights of businesses to refuse service so that they could exclude African Americans. Most relevant in a case about farmworker rights, several states curtailed rights to hunt and graze on unfenced land to give plantation owners more authority to control the labor of newly freed African Americans.

The "We Refuse the Right to Serve Service to Anyone" signs still posted by some businesses reflect the erosion of the common law obligation to serve. Many jurisdictions reduced this obligation specifically so that businesses could exclude African Americans. *See* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283 (1996). The month after Congress enacted the Civil Rights Act of 1875 requiring equal access without regard to race to inns, public conveyances, theaters, and other places of public amusement, ch. 114, 18 Stat. 335 (1875), the

Tennessee Legislature "abrogated" "[t]he rule of the common law giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement" and gave owners a right to bring actions against customers guilty of "turbulent" conduct. *The Code of Tennessee: Being a Compilation of the Statute Laws of the State of Tennessee, of a General Nature, in Force June 1, 1884,* at 399 (1884) (now codified at Tenn. Code §§ 62-7-109, 62-7-110); *see* Kenneth M. Mack, *Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segregation of Tennessee Railroads, 1875-1905*, 24 L. & Soc. Inquiry 377, 384 (1999) (discussing timing). The same year, a Delaware statute stipulated that "[n]o keeper of an inn, tavern, hotel, or restaurant, or other place of public entertainment or refreshment of travelers . . . shall be obliged," to serve "persons whose reception or entertainment . . . would be offensive to the major part of his customers and would injure his business." 15 Del. Laws 322 (1875) (now codified at Del. Code Ann. tit. 24, § 1501). Other jurisdictions narrowed the right to enter by judicial decisions. Courts in Massachusetts and Iowa, for example, held for the first time that the right of accommodation did not apply to places of amusement in cases involving Black patrons. *Bowlin v. Lyon*, 25 N.W. 766 (Iowa 1885); *McCrea v. Marsh*, 78 Mass. (12 Gray) 211 (1858).

This Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), and sit-ins by civil rights activists triggered a new wave of exclusion statutes. In 1954, Louisiana repealed its 1869 act that prohibited refusals to admit anyone in a public

inn, hotel, or public resort, and conditioned business licenses on providing service regardless of race. Harold J. Brouilette & Charles A. Reynard, *Index-Digest of Acts of the 1954 Louisiana Legislature*, 15 La. L. Rev. 103, 129 (1954). A 1956 Mississippi statute authorized "any public business . . . of any kind whatsoever . . . to refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve," authorizing a fine or imprisonment for those that refused to leave. 1956 Miss. Laws 307-08 (now codified at Miss. Code Ann.
§ 97-23-17). Arkansas enacted virtually the same provision in 1959, repealing it only in 2005. *See* 2005 Ark. Acts 423 (repealing Ark. Code Ann. § 4-70-101).

Refusing service in public accommodations because of race was, of course, prohibited by the Civil Rights Act of 1964. 42 U.S.C. § 2000a. When a motel owner challenged the measure as a taking of his property (among other constitutional claims) this Court dismissed the argument in just two sentences. "Neither do we find any merit in the claim that the Act is a taking of property without just compensation. The cases are to the contrary." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964).

The contraction of public rights to hunt and graze animals on unfenced private land has a similarly sorry history. To some extent the closing of the range reflects economic and technological changes: over the course of the nineteenth century, hunting, foraging, and grazing became less important and fencing livestock in became cheaper

and more efficient than fencing them out. Freyfogle, *supra*, at 44-45. But other reasons are less innocuous. A recent history shows that many states closed the range as a measure of labor control. Sawers, *Property Law As Labor Control, supra*. After the Civil War, plantation owners were eager to regain Black labor on terms favorable to them. *Id.* at 356. They complained that Black workers, able to support themselves by hunting, grazing a few livestock, and foraging in the open range, were unwilling to work year-round for low wages. *Id.* at 357-58. What followed were multiple measures reducing the right to enter and expanding the right to exclude.

Between 1865 and 1866, Louisiana, Georgia, South Carolina, North Carolina, and Alabama enacted their first general statutes criminalizing trespass on enclosed or unenclosed lands. *Id.* at 361. In the years following the end of Reconstruction, Texas, Mississippi, and Tennessee similarly forbade hunting on unenclosed lands on which landowners had posted signs denying permission. *Id.* at 362. Four southern states criminalized hunting in majority-Black counties, leaving hunting in majority-White counties untouched. *Id.* at 365.

The closing of the unfenced range to grazing was slower, in part because lower-income Whites dependent on the range fiercely resisted it. *Id.* at 368. But Alabama, South Carolina, Mississippi, and Arkansas began closing the open range immediately after the Civil War, starting with majority-Black counties. *Id.* at 370-71. In Georgia, White and Black voters successfully resisted initial attempts to close the range; by 1889, however, Georgia had closed the

range throughout its Black Belt, leaving it open in all but three majority-White counties. *Id.* at 373.

Several courts, moreover, have recognized that with respect to farmworkers, an expansive right to exclude is contrary to human freedom. The New Jersey Supreme Court held in *State v. Shack* that the common law of property includes "an accommodation between the right of the owner and the right of individuals who are parties with him in consensual transactions relating to the use of the property. . . . [W]e find it unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker's well-being." 277 A.2d 369, 373-74 (N.J. 1971). Property ownership, therefore, gave employers no right to deny reasonable entrance by visitors or organizations seeking to support farmworkers. *See Folgueras v. Hassle*, 331 F. Supp. 615, 623 (W.D. Mich. 1971) ("As a matter of property law, the ownership of a labor camp does not entail the right to cut off the fundamental rights of those who live in the camp."); *State v. DeCoster*, 653 A.2d 891, 893-94 (Me. 1995) (migrant workers entitled to receive visitors in their residences); *see also In re Catalano*, 623 P.2d 228 (Cal. 1981) (union representative did not violate trespass law by refusing to leave construction site).

The right to exclude is certainly not always—or even primarily—invidious. But an expansive right to exclude is not always liberatory. Indeed, sometimes it is anything but.

## CONCLUSION

Limited rights to enter are part of the American tradition of property. The opinion below should be affirmed.

Respectfully submitted,

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