No. 20-107

IN THE
Supreme Court of the United States

CEDAR POINT NURSERY, ET AL.,

Petitioners,

v.

VICTORIA HASSID, ET AL.,

Respondents.

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

BRIEF OF SENATORS SHELDON WHITEHOUSE, JEFF MERKLEY, RICHARD BLUMENTHAL, CORY BOOKER, AND ALEX PADILLA, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are United States Senators Sheldon Whitehouse of Rhode Island, Jeff Merkley of Oregon, Richard Blumenthal of Connecticut, Cory Booker of New Jersey, and Alex Padilla of California. *Amici* share with the Court a strong interest in preserving the carefully balanced separation of powers and maintaining the operation of a functional government.

SUMMARY OF ARGUMENT

Petitioners in this case are two large-scale agricultural employers in California whose businesses depend on the manual labor of mostly migrant farmworkers. Resistant to the possibility that these workers might seek to improve their lot through unionization, petitioners set out to attack a four-decades-old California regulation that, recognizing the unique vulnerability of farmworkers to exploitation and the challenges of making contact with them through traditional modes of communication, affords union organizers a limited right to access the property of agricultural employers.

Rather than litigate in good faith to invalidate that law at trial, petitioners rushed to lose at every step of this case, until now. As they all but admit, they did this because their sights were fixed on obtaining

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part and no person or entity, other than *amici*, its members, or its counsel, has made a monetary contribution to its preparation or submission. Petitioners and Respondents have consented to the filing of this brief.

this Court's discretionary review of an extreme constitutional theory. This suspicious posture—plus other indicia of a coordinated political effort to engage this Court in freewheeling constitutional policymaking—should put the Court on alert. Rewarding this behavior risks pulling the Court out of its constitutionally designated lane, threatening the separation of powers, which requires that federal courts use their power to declare the law "only in the last resort, and as a necessity in the determination of *real, earnest, and vital* controversy between individuals." *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892) (emphasis added).

Petitioners' overbroad theory turns this Court's Takings Clause jurisprudence on its head, with far-reaching collateral consequences. Concocted over decades with financial backing from regulated industry interests hostile to labor unions and government regulation, petitioners' urged expansion of this Court's takings doctrine would threaten a host of federal, state, and local public safety and welfare laws that require government access to private property. In assessing challenges to government regulations that affect private property interests, this Court's regulatory takings case law has struck a "careful balance between property rights and government authority," *Murr v. Wisconsin*, 137 S. Ct. 1933, 1952 (2017) (Roberts, C.J., dissenting). But fueled by self-interest and ideological antagonism toward government authority, petitioners seek to elevate private property rights over public safety and welfare, thereby erasing government authority—and hence the public interest—

entirely from that balance. This Court should not encourage the means by which this case appears, and should not allow the outcome sought.

ARGUMENT

I. This Court Should Reject Petitioners' Request for a Broad, Radical Constitutional Ruling When They Chose To Forego Narrowly Tailored Relief.

a. Normally in litigation, the complaining party suffers some concrete injury, and then seeks redress for that injury. Normally, parties and their lawyers go to court to win. This is not just normal procedure, it is also a check on judicial overreach. But normal process is not what happened in this case. Nothing here is normal.

Petitioners here suffered no tangible injury. As the district court acknowledged, they "fail[ed] to allege facts in their pleadings that suggest that the Access Regulation has had *any negative economic impact on them at all*." Pet. App. B-10 (discussing Cal. Code Regs., tit. 8, § 20900(e) ("Access Regulation"). Petitioners never sought to prove otherwise.

The true moving party in this matter appears to be not an aggrieved plaintiff but an ambitious influence effort. It appears that the plaintiffs here are plaintiffs of convenience, recruited for this effort by the lawyers, rather than vice versa. This is becoming a pattern before the Court. While the relationship between lawyer and client is not ordinarily the Court's business, reversal of the customary role in which the client seeks

out the lawyer ought to be at least a signal of concern about the nature of the case or controversy.

Having suffered no real-world harm, petitioners nevertheless filed a federal lawsuit, which they immediately and quite candidly set out to lose. This ought to be another flag about the case-or-controversy problem.

Petitioners sought neither compensatory damages nor even nominal damages. They asked the district court for only a declaratory judgment and an order enjoining California from enforcing its Access Regulation against them, plus attorneys' fees and costs of suit.

Petitioners chose not to press other readily available claims that might well have afforded them the relief they purport to desire. They set aside those arguments in favor of a far-reaching and extreme constitutional theory—one incompatible with this Court's precedents—that was all but certain to lose in the lower courts.

First, petitioners based their Fifth Amendment argument "entirely on the theory that the access regulation constitutes a permanent physical invasion of their property and therefore is a per se taking." Pet. App. A-15. Even though their challenge to the Access Regulation raises issues squarely within the regulatory takings framework this Court established in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), petitioners declined to allege facts or advance legal arguments—even in the alternative—under that framework. The Ninth Circuit observed: "At no point in this litigation have the

Growers challenged the regulation under *Penn Central*." *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 533 (9th Cir. 2019). Whether or not petitioners are correct (and they are not) that the Access Regulation constitutes a "permanent physical invasion" of their property and thus a per se taking under this Court's categorical takings precedents, their unwillingness to press a *Penn Central* claim is consistent with a calculated plan to lose below.

Second, petitioners chose not to avail themselves of administrative remedies that could have afforded them all the relief they say they desire. The California Agricultural Labor Relations Board ("Board") has an obligation to "follow applicable precedents of the National Labor Relations Act." Cal. Labor Code § 1148. One such precedent—this Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992)—holds that the NLRA access right applies only when "the location of a [workplace] and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them." *Id*. at 533-34. Petitioners are well aware of this precedent, having cited it in their Complaint to argue that organizers' access to their agricultural workplaces "is unnecessary given the alternative means of communication available." Compl. ¶ 64. Petitioners reiterated this allegation at oral argument in the Ninth Circuit, arguing that there are "plenty of alternative means for the union to talk with workers," and that "all the workers [at Cedar Point Nursery and Fowler Packing Company] live in houses or hotels. Many have cellphones." Oral Argument at 9:23, *Cedar Point Nursery v. Shiroma*, 923 F.3d 524 (9th Cir. 2019). But even

though such facts could have been marshalled in support of an argument that the Access Regulation exceeds the Board's authority under the California Agricultural Labor Relations Act, petitioners never brought such a claim.

Just as they envisioned, petitioners lost in the district court. The district court dismissed their case with leave to amend, all but laying out a road map for a viable amended complaint. But petitioners declined to amend their complaint at all, choosing to press forward with an ill-fated appeal of their per se takings claim. Again, this conduct raises a flag about the purported case or controversy in this case, signaling both a desire to lose and a desire to rush to a presumably favorable venue.

Petitioners sought this Court's discretionary review forthwith. On petition for certiorari, petitioners were joined by an all-too-familiar little fleet of *amici*. But the identities of the orchestrators are obscured, as apparently allowed under this Court's rules. This is another flag.

Pursuing certiorari, petitioners and their many allied *amici* alleged a circuit split that was, in reality, not even a hairline fracture—neither a true nor deep conflict. *See* Pet. 13-17 (claiming that the decision below created a conflict with a single case from the early 1990s, *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991), in which the Federal Circuit specifically disclaimed any attempt to "decide here what physical occupancy, of what kind, for what duration, constitutes a *Loretto* taking," *id.* at 1377); *see* Rules of the Supreme Court of the United States, No. 10, Considerations Governing Review on Certiorari (noting that

Supreme Court review may be warranted where "a United States court of appeals has entered a decision *in conflict* with the decision of another United States court of appeals *on the same important matter*") (emphasis added). Nor has petitioners' novel and extreme constitutional theory had any chance to percolate in the lower courts. This Court has "in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). Particularly since this case has arrived at this Court through a simulacrum of real litigation, pursued and given choral support by anonymously funded advocacy groups, "percolation" is even more essential.

Petitioners also made clear that they had devised their lower-court litigation strategy to eliminate potential "vehicle" problems that might frustrate this Court's review. They explained that they had "consistently declined to press a regulatory takings claim, and instead rest their argument on the notion that the uncompensated taking of an easement constitutes a *per se* violation of the Takings Clause." Pet. 28. Thus, they assured, "[t]he question presented—whether government appropriation of a time-limited easement for the benefit of favored third parties is a categorical taking—is outcome-dispositive here." *Id.* at 27-28.

b. It is of course generally the case that "the party who brings a suit is master to decide what law he will rely upon." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). But this Court's entertainment of such a transparent ploy to obtain its review

risks taking the Court out of its constitutionally designated lane, threatening the separation of powers and raising the specter of judicial activism.

The "oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (citation omitted). This guardrail comes from Article III of the Constitution, which limits the power of the federal courts to the adjudication of "Cases" and "Controversies," meaning that they cannot "say what the law is" just because a party so desires. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). In their discretion, federal courts must use their power to declare the law "only in the last resort, and as a necessity in the determination of *real, earnest, and vital* controversy between individuals." *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892) (emphasis added); *see also Donald J. Trump v. New York*, 592 U.S. ___ (2020) ("A foundational principle of Article III is that an actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation") (internal quotation marks and citation omitted).

As the first Chief Justice explained in his famous letter declining President Washington's request for an advisory opinion on treaty interpretation, "[t]he lines of Separation drawn by the Constitution between the three Departments of Government, their being in certain Respects checks on each other, and our being judges of a court in the last Resort, are Considerations which afford strong arguments against the Propriety of" issuing opinions outside the context of a true and good-faith dispute. Letter from the Justices of the Supreme Court to George Washington (Aug. 8, 1793).

The Court repeatedly emphasized this constraint over the subsequent centuries, explaining in 1885, for example, that it had "no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies." *Liverpool, N.Y. & Phila. S.S. Co. v. Comm's*, 113 U.S. 33, 39 (1885). "In the exercise of that jurisdiction," the *Liverpool* Court explained, the Supreme Court is "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* But that is just what petitioners' manipulative, self-defeating legal strategy would have this Court do.

These precedents show that what the Founders expected in the Case or Controversy clause was the natural travel of real disputes through sincere proceedings, and then to ultimate disposition by this Court. The process of development, filtration, percolation—and yes, delay—that is provided by the natural process of cases wending their way through the litigation and appeal process is one that helps protect the Court from advisory determinations.

Justice Barrett made this point clear over and over in her recent confirmation hearing. To Chairman Graham she said: "[J]udges can't just wake up one day and say I have an agenda. . . . You have to wait for cases and controversies, which is the language of the [Constitution,] to wind their way through the process." To Senator Coons she described "how a case winds its way up and it's because litigants chose to challenge the law again and you know, it went through the district court and the [Circuit] and now

the Supreme Court has granted cert on it and is answering the question." To Senator Cornyn she said: "[A]s opposed to policymakers that don't have to wait on real parties and real disputes and the parties get to shape the case their way, they get to decide what legal issues they're going to contest and that narrows what the court can do." Senator Whitehouse asked quite specifically: "[Y]ou've repeatedly mentioned during this hearing the phrase about litigation 'winding its way up' through the courts and ultimately to the Supreme Court. And, you've described that process of winding its way *as an important restraint on judicial activism*, that you've got to wait until a court gets to you in the ordinary [course], correct?

> BARRETT: Correct.
>
> WHITEHOUSE: That's a fair description of where you've been?
>
> BARRETT: Correct.

Confirmation Hearing on the Nomination of Amy Coney Barrett to Be an Associate Justice of the Supreme Court of the United States, Oct. 13-14, 2020 (emphasis added).

It is no novelty that proper percolation of real disputes through good-faith, adversarial litigation not only advances the quality of judicial decision-making, but restricts courts' "having an agenda," distinguishes judicial decision-making from that of "policymakers," and is correctly seen as a "restraint on judicial activism." These were not trick questions, and the answers are obvious. Set against those principles is the anonymously funded machinery encircling the Court, that is purpose-built to sideline these safeguards, and that

has fast-laned this question through a procedure flying multiple flags of faux litigation. *Amici* respectfully submit that the Court has a responsibility to police this mess.

This case is not alone. As *amici* have previously warned this Court, over recent decades a flood of strategic faux litigation—cases fabricated to bring issues before the Court when litigants presume it will give them policy victories—has proliferated. For example, we have seen flocks of "freedom-based public interest law" organizations that exist only to change public policy through litigation, and which often do not disclose their funders. *See* Timothy L. Foden, *The Battle for Public Interest Law: Exploring the Orwellian Nature of the Freedom Based Public Interest Movement*, 4 Conn. Pub. Int. L.J. 210, 232-33 (2005). We have seen behavioral signals like those present here, such as litigants who rush to lose cases in lower courts "as quickly as practicable and without argument, so that [they] can expeditiously take their claims to the Supreme Court." Plaintiffs' Notice of Motion, Motion for Judgment on the Pleadings, and Memorandum of Points & Authorities in Support of Motion for Judgment on the Pleadings, *Friedrichs v. Cal. Teachers Ass'n*, No. 8:13-cv-676- JLS-CW (C.D. Cal. July 9, 2013), ECF No. 81.

Almost invariably, and as we have seen in this case, infra n.4, such plaintiffs are accompanied by throngs of *amici*, whose common funding sources and connections to the organizations behind the supposed party-in-interest are obscured by ineffective disclosure rules. *See* Mary Bottari, *Behind Janus: Documents Reveal Decade-Long Plot to Kill Public-Sector Unions*, In These Times (Feb. 22, 2018) (detailing

through exhaustive investigative reporting how DonorsTrust, Donors Capital Fund, and the Bradley Foundation collectively bankrolled at least 15 *amicus* briefs in *Janus* and funded both organizations representing the plaintiff—information never disclosed in the litigation). If this "fast lane" machinery were not being rewarded with judicial policy victories, it would not sustain its donors' interest very long. The existence of this apparatus is itself a warning signal, and cases coming through the apparatus stripped of the basic accoutrements of real litigation (like trying to win the case at trial) ought to be a red flag.

Here, petitioners' rush to lose at every step of the litigation (until this one) shows that there is nothing "real, earnest, or vital" about this controversy. *Wellman*, 143 U.S. at 345 (1892). Let's be clear: we do not contest that petitioners and whoever is funding their effort want the law changed to their favor. Their desire for an outcome is sincere. But the cottage industry that facilitates, orchestrates, and accelerates those desired outcomes lures the Court into trespassing upon elemental protections of the Constitution: that cases be real, not fabricated; that plaintiffs be injured, not recruited; that procedure be followed, not jumped; and that the healthy process of "winding" percolation not be subverted. It is also, in our respectful view, appropriate for the Court to assure that no interest gains special access to the Court through anonymously funded entities designed to create a facsimile of litigation that transports favored questions for favored interests around these safeguards and directly to the doorstep of this Court.

II. Petitioners' Desired Rule Would Distort the Takings Clause and Have Far-Reaching Consequences Beyond This Case.

Like many recent Supreme Court cases, this suit comes before the Court as part of a larger strategy to disable public interest regulation—a "stalking horse for much larger game." Cass R. Sunstein & Adrian Vermuele, *The Unbearable Rightness of Auer*, 84 U. Chi. L. Rev. 297, 299 (2017). The scope of the relief requested exhibits the quest for the "larger game" of sweeping policy outcomes, not narrowly tailored judicial remedies.

We remind the Court again of the elemental tension we live with in politics and government between two classes of citizens. One is an insider influencer class that occupies itself with rent-seeking from government, and desires rules of political engagement that make government more and more amenable to its power and influence. The second class is the general population, which has an abiding institutional interest in a government with the capacity to resist that special-interest influence. This is a centuries-old tension.[2]

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[2] *See* David Hume, *Philosophical Works of David Hume* 290 (1854) ("Where the riches are in a few hands, these must enjoy all the power and will readily conspire to lay the whole burden on the poor, and oppress them still farther, to the discouragement of all industry."); Andrew Jackson, 1832 Veto Message Regarding the Bank of the United States (July 10, 1832) (transcript available in the Yale Law School library) ("It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purpose . . . to make the richer and the potent more powerful, the humble members of society . . . have neither the time nor the means of securing like favors to themselves,

Backed by untold financial support from regulated industry interests that have long sought to hobble labor unions and the American regulatory system, petitioners urge this Court to adopt a novel and sweeping constitutional rule that dramatically departs from this Court's Takings Clause jurisprudence—to recast this Court's takings precedents to the benefit of a narrow set of property-holder interests. In our view they seek this not despite but because of the far-reaching collateral consequences of such a sweeping holding.

a. On the merits, petitioners are wrong that this Court's holding in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), does not control here. *PruneYard* unanimously held that California could prohibit the private owner of a shopping center from excluding peaceful expressive activity in the open areas of the center. Petitioners seek to dismiss *PruneYard* as fact-bound. They argue that "subsequent decisions of this Court have effectively limited *PruneYard* to its facts,

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have a right to complain of the injustice of the Government."); Niccolo Machiavelli, *The Prince* ch. IX (1532) ("[O]ne cannot by fair dealing, and without injury to others, satisfy the nobles, but you can satisfy the people, for their object is more righteous than that of the nobles, the latter wishing to oppress, whilst the former only desire not to be oppressed."); Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws* Book V (1748) ("To men of overgrown estates, everything which does not contribute to advance their power and honor is considered by them as an injury."); Theodore Roosevelt, *New Nationalism Speech* (1910) ("[T]he United States must effectively control the mighty commercial forces[.] . . . The absence of an effective state, and especially, national, restraint upon unfair money-getting has tended to create a small class of enormously wealthy and economically powerful men, whose chief object is to hold and increase their power.").

consistently emphasizing that it applies only to property already publicly accessible." Pet'rs' Br. 32 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (noting that in *PruneYard*, "the owner had not exhibited an interest in excluding all persons from his property")). But petitioners here do not seek to exclude "all persons" from their properties, *Loretto*, 458 U.S. at 434. To the contrary, the properties in question are large-scale agribusinesses, which depend on the labor of the farmworkers who till and harvest their fields—workers they invite onto their property each day as a matter of course along with the innumerable other contractors, delivery services, and produce buyers intimately enmeshed in farming operations.

Just as *PruneYard* established that California may require shopping mall owners to allow peaceful speech on their private property without triggering a compensable taking, here the State is well within its rights—as a matter of public policy to "ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations"[3]—to protect these workers by allowing limited access to the properties for union organizers. Petitioners cannot simply wave away this controlling precedent.

Second, petitioners seek to rewrite this Court's seminal categorical takings precedents, *Loretto* and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), which establish that a "'permanent physical occupation' has occurred . . . where individuals are

[3] Cal. Labor Code § 1140 note (West 2011) (Historical and Statutory Notes).

given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed." 483 U.S. at 832. Together with the Trump Administration, petitioners argue that this test is satisfied here because the regulation permits "indefinite," even if "intermittent," access. *See* Br. for The United States as *Amicus Curiae* in Support of Reversal 10 *et seq*. But the time-limited nature of this regulation is no small matter. The regulation permits union organizers to access the worksites for only a few, narrowly prescribed hours per day, on just 120 days per year. This is a far cry from the 24-hours-a-day, 365-days-a-year intrusions at issue in *Nollan* and *Loretto*. As this Court made clear in *Nollan*, it is the permanent *and continuous* nature of such access that renders an easement a per se taking.

Petitioners' contorted reading of these precedents would mean "that a right of access that applies for a maximum of 360 hours (3 hours per day for 120 days per year) out of 8,760 hours in a year— i.e., for a maximum of only 4% of the time each year," Michael C. Dorf, *Takings and Time*, Dorf On Law (Nov. 16, 2020)—constitutes a "permanent and continuous" intrusion. That defies both common sense and this Court's own understanding of its guidance in *Nollan*. *See Nollan*, 483 U.S. at 832 n.1 (noting that the restriction on the right to exclude upheld in *PruneYard*, which required the shopping center to indefinitely allow political speech by members of the general public during normal business—i.e., far more access than the Access Regulation allows—did *not* constitute "permanent access").

Third, petitioners seek to upend the "the careful balance between property rights and government authority that [this Court's] regulatory takings doctrine strikes," *Murr v. Wisconsin*, 137 S. Ct. 1933, 1952 (2017) (Roberts, C.J., dissenting). As Chief Justice Roberts explained in *Murr*, "there is an incentive [in regulatory takings cases] for owners to define the relevant 'private property' narrowly." *Id.* Joined by Justices Thomas and Alito, the Chief Justice continued: "Put in terms of the familiar 'bundle' analogy, each 'strand' in the bundle of rights that comes along with owning real property is a distinct property interest." *Id.* "If owners could define the relevant 'private property' at issue as the specific 'strand' that the challenged regulation affects," the Chief Justice reasoned, "they could convert nearly all regulations into per se takings. And so we do not allow it." *Id.* But by seeking to define the relevant property interest narrowly as only the single strand of their right to exclude, that is precisely what petitioners seek to do here. This Court should not allow it.

Setting aside the flaws in petitioners' arguments, look at their scope. Once litigation gets disconnected from real plaintiffs with real injuries seeking their own remedies, this is what you get: powerful but hidden special interests can lurk behind anonymously funded front groups to seek sweeping policy outcomes. For instance, petitioners' attempt to wriggle away from the plainly applicable *Penn Central* framework would undo this Court's precedents requiring a fact-intensive takings analysis and a balancing of competing interests—to assess the "balance between property owners' rights and the government's authority to advance the common good." *Murr v. Wisconsin*, 137 S.

Ct. at 1951. Adopting petitioners' proposed rule would perpetually stack the deck against government's interest to advance the public welfare. That, of course, is by design.

b. This Court and the public should be clear-eyed about the deregulatory goals of the interests that have so heavily invested in engineering this case. Petitioners' anomalous views of the Takings Clause do not arise out of nowhere; they certainly don't arise naturally out of this case. Regulated industry interests have devoted themselves for decades to creating and arguing this theory, long before these plaintiffs made their appearance, *see* infra n.5. At least eleven of the *amici* who filed briefs in support of petitioners are funded by the same set of industry-tied foundations and anonymous money groups.[4] As usual, none of these common funding ties has been disclosed to this Court, so the true beneficiaries of the ruling sought for petitioners hide comfortably in the shadows.

Some of these *amicus* briefs envision extending petitioners' Takings Clause project even further. The Buckeye Institute argues that "it is appropriate to

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[4] These eleven *amici* include: Pelican Institute for Public Policy, Cato Institute, NFIB Small Business Legal Center, Americans for Prosperity Foundation, New England Legal Foundation, Mountain States Legal Foundation, Institute for Justice, Chamber of Commerce of the United States of America, Center for Constitutional Jurisprudence, Buckeye Institute, and Liberty Justice Center. Entities that fund multiple *amici* in this set include (but are not limited to) DonorsTrust, Donors Capital Fund, the Lynde and Harry Bradley Foundation, the Charles G. Koch Charitable Foundation, and the Sarah Scaife Foundation. *See generally* SourceWatch, a project of Center for Media and Democracy; more details on file with the office of Sen. Whitehouse and available upon request.

overrule *PruneYard*." *See* Br. of *Amicus Curiae* The Buckeye Institute 9. The industry-funded Cato Institute and NFIB Small Business Legal Center urge the Court to "expand the *Loretto* per se takings test to cover *all* . . . interference with a fundamental attribute of ownership," far overreaching the question presented here. *See* Br. of *Amici Curiae* Cato Institute and NFIB Small Business Legal Center 15 (emphasis added). And long before this case, petitioners' counsel, Pacific Legal Foundation (PLF), which shares many of the same industry-backed funders as these *amici,* was at the tip of the spear of a persuasion campaign to advance elements of the extreme per se takings theory they advance here.[5]

c. Given this context, it is difficult to imagine that the far-reaching consequences of petitioners' proposed rule are unforeseen to them at all. Should this Court accede to this campaign to rewrite its takings framework, the result would be to render inoperable a broad swath of federal, state, and local regulatory programs that in some way require entry onto private property.

This includes a number of signature federal environmental, labor, and consumer laws that regulate

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[5] *See, e.g.*, David L. Callies & J. David Breemer, *The Right to Exclude Others From Private Property: A Fundamental Constitutional Right*, 3 Wash. U. J.L. & Pol'y 39 (2000) ("Professor Callies gratefully acknowledges the support of . . . the Hawaii Property Law Project (funded in part by the Pacific Legal Foundation . . .) in the research and writing of this article"); *see also* James Burling, *The Latest Take on Background Principles and the States' Law of Property After Lucas and Palazzolo*, 24 U. Haw. L. Rev. 497 (2002) (Burling was an attorney at Pacific Legal Foundation at the time he wrote this paper, and still works there today). Industry-tied amici in this case cite to these papers.

entities in interstate commerce. For instance, under the Resource Conservation and Recovery Act, which gives the Environmental Protection Act (EPA) authority to control hazardous waste and to issue civil and criminal penalties for noncompliance, the EPA and its agents have the right "to enter at reasonable times any establishment or other place where hazardous wastes are or have been generated, stored, treated, disposed of, or transported from," and to inspect and obtain samples of such wastes. 42 U.S.C. § 6927(a).

Or consider the Occupational Safety & Health Act, which authorizes the Secretary of Labor (through OSHA, its designee) "to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer" and "to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein . . . . " 29 U.S.C. § 657(a).

Federal law grants similar perpetual access rights to the Food and Drug Administration to enforce food and drug safety laws, *see* 21 U.S.C. § 374(a) (granting Secretary of Health & Human Services the authority "to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, tobacco products, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, tobacco products, or cosmetics in

interstate commerce"), to the Secretary of Housing & Urban Development to enforce the National Manufactured Housing Construction and Safety Standards Act, *see* 42 U.S.C. § 5413(b) (empowering Secretary "to enter, at reasonable times and without advance notice, any factory, warehouse, or establishment in which manufactured homes are manufactured, stored, or held for sale"), and to the Secretary of Labor to "make frequent inspections and investigations in coal or other mines each year" to enforce the Federal Mine Safety & Health Act of 1977 (Mine Act), *see* 30 U.S.C. § 813(a).

Under the Mine Act, Congress even mandated a schedule of inspections—requiring the Secretary to inspect any underground coal or other mines "in its entirety at least four times a year," a surface mine "in its entirety at least two times a year," and granting a right of entry for such purpose. *See id.* Much like the Access Regulation at issue here, the Mine Act requires that one or more representatives of the miners, who may or may not be employees of the mine operator, have the opportunity to accompany the Secretary during an inspection and to participate in pre- or post-inspection conferences. *Id.* § 813(f); *see also* 49 U.S.C. § 20107(b) (authorizing Federal Railroad Administration to enter property to inspect privately-owned railroad facilities); *see also* 49 U.S.C. § 1134(a) (granting National Transportation Safety Board the authority to "enter property where a transportation accident has occurred or wreckage from the accident is located"); *see also* 42 U.S.C. § 6382(a)(2) (authorizing Comptroller General, upon notice to owner or operator, to "enter, at reasonable times, any business

premise or facility" to inspect and "inventory and sample any stock of energy resources" pursuant to the Energy Policy and Conservation Act of 1975). Innumerable state and local laws provide for access to private property on similar terms. *See See v. City of Seattle*, 387 U.S. 541, 543-44 (1967) ("Official entry upon commercial property is a technique commonly adopted by administrative agencies at all levels of government to enforce a variety of regulatory laws").

In each of these laws, the inspection authorization unquestionably limits the property owner's right to exclude, and in each case gives the government an "indefinite" and "intermittent" access right, just like the Access Regulation here. Thus, under petitioners' proposed rule, any access under the above laws would be a per se taking requiring that the government compensate the owner for such "taking."[6]

This Court should not, in defiance of its own carefully balanced precedents, reward petitioners' far-

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[6] That inspections under many of these laws are made by government, rather than private, actors, has no bearing on the Takings Clause analysis. The *Loretto* Court made clear as much, specifying that the per se takings analysis depends on the character of the physical invasion, not whether the entry is by the government "or instead a party authorized by the State." *Loretto*, 458 U.S. at 432 n.9. Indeed, some government inspection regimes enable third parties to carry out inspections on the government's behalf. *See, e.g.*, 42 U.S.C. § 5413 (providing, under the Manufactured Housing Construction and Safety Standards Act, that the Secretary of Housing "is authorized to contract with . . . private inspection organizations to carry out his functions under this subsection"). And the attempts by petitioners' *amici* to save these other government inspection regimes through a patchwork of ill-defined exceptions are not persuasive. *See* Resp. Br. 6-8, 18-20.

reaching and self-serving campaign. There are too many warning flags, too much risk of collateral wreckage, and too little disclosure. The public interest—and the Constitution—demand restraint.

CONCLUSION

For the foregoing reasons, and those in Respondents' brief, the Court should affirm the circuit court's decision.

Respectfully submitted,

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