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

BRIEF OF OKLAHOMA, ALABAMA, ARIZONA, ARKANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, NEBRASKA, SOUTH CAROLINA, AND TEXAS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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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 "24 hours a day, 365 days a year" occupation. 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 conflict 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

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

INTERESTS OF AMICI CURIAE[1]

The *Amici* States have a longstanding commitment to protecting private property rights. "It is a universal principle that wherever an individual's right of ownership of property is recognized in a free government, other rights become worthless if the government possesses uncontrollable power over the property of the individual. The constitutional guaranty of the right to own and use property is unquestioned." *Mattoon v. City of Norman*, 617 P.2d 1347, 1349 (Okla. 1980) (citations omitted).

While *Amici* States and their citizens are not California residents, the Ninth Circuit's interpretation of the Takings Clause has implications beyond California. State constitutions may provide protection of property rights against state and local governments, but only the federal constitution can provide protection against the federal government. Likewise, when our citizens do business in other states like California, only the federal Constitution can ensure their property in other states remains protected.

The *Amici* States also want to protect their own property rights against the federal government. The federal government has previously urged the same reading of the Takings Clause as the Ninth Circuit adopted here. The increasing power of the federal government carries the particular risk of facilitating federal government coercion of states. If the federal government can classify taking state property with a

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[1] Amici submit this brief pursuant to Sup. Ct. Rule 37.4.

time limit as a mere regulation, it can use those regulations or threats of those regulations to exact concessions from states with whom it politically disagrees. *See* Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 861-62 (1989).

SUMMARY OF THE ARGUMENT

I. The Ninth Circuit improperly conflated this Court's jurisprudence on physical takings and regulatory takings. As a result, it treated the physical taking of an easement across two farms as a regulatory taking. A review of state court decisions on takings demonstrates the Ninth Circuit's error. The facts of this case would be a per se physical taking under *Amici* States' parallel state constitutional law because it is the physical taking of an ownership interest in property. *Amici* States differentiate between physical and regulatory takings based on whether non-owners are gaining rights in property or whether the owner is being restricted in his use of his own property. *Amici* States also treat an easement with time-based restrictions as an ownership interest in property that can be physically taken. Thus, *Amici* States treat the taking of an easement, even one with time-based restrictions, as a per se physical taking.

II. Finding this case to be a per se physical taking does not require treating all temporary entries as takings. States, for example, can conduct Fourth Amendment searches, subject to that provision's reasonableness restraints, without being required to

pay compensation under the Fifth Amendment. States can also enter property to exercise their power to enforce the common law restraints on property, such as to abate noxious uses, without paying compensation. And they may do so to avert imminent danger. But the challenged California law fits none of these categories. Instead, Respondents' position is that the law may invade private property rights without being subject to the restraints in the Fourth Amendment and common law *and* without being required to pay just compensation under the Fifth Amendment. This Court should reject granting such a *carte blanche* to take private property.

ARGUMENT

I. TAKINGS JURISPRUDENCE FROM STATE COURTS DEMONSTRATES THE NINTH CIRCUIT'S RULING IMPROPERLY CONFLATED PHYSICAL TAKINGS WITH REGULATORY TAKINGS.

When the government forces farm owners to give non-employees a right of access to the farm, the government has taken an easement in those farms. The actual physical invasion by union employees on to Petitioners' farms only confirms that a physical appropriation occurred here. There was also no compensation for this appropriation even though the Takings Clause of the U.S. Constitution states: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST., AMEND. V. This is a classic case of a physical taking that violates the U.S. Constitution.

The Ninth Circuit ignored the obvious facts and decided a "regulatory taking" was at issue here. It even confused the physical and regulatory takings tests, describing a physical taking as a category of regulatory taking. Pet. App. A-14.

This legal framework was errant under this Court's takings jurisprudence. This Court's "long-standing distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002). "[W]e do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use." *Id.* The Ninth Circuit effectively ignored these instructions, citing caselaw from both lines of takings jurisprudence to formulate a rule that a physical invasion is only a taking if it causes enough interference with the property. Pet. App. A-18.

The Ninth Circuit's error was likely caused by greater familiarity with regulatory takings cases than physical takings cases. After all, "most takings claims turn on situation-specific factual inquiries" because no physical invasion occurred. *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 32 (2012). Some ambiguity in this Court's precedent may have encouraged the Ninth Circuit to take the more familiar route, as it misunderstood whether a physical taking needs to meet some permanence test in order to be a per se taking. *Compare id.* at 31 (describing a per se physical

taking as a "permanent physical occupation"), *with id.* at 34 ("a taking need not be permanent to be compensable").

As sovereign states, *Amici* are intimately familiar with both physical and regulatory takings—and are concerned that the Ninth Circuit is rewriting the rule on physical takings through its misunderstanding of the two types of takings. Thus, while *Amici* concur in Petitioners' detailed discussion of the federal takings cases, *see* Pet. Br. 17-28, a review of state court rulings on takings makes clear that Petitioners' reading of takings jurisprudence is correct.

Specifically, in state courts throughout the country, physical takings of a citizen's property are per se takings. These physical takings occur whenever some ownership interest in a person's property is taken, regardless of whether a fee simple interest, a limited easement, or some other interest is at issue. The Ninth Circuit arrived at a different result because it misunderstood two legal principles: (1) the invasion of non-owners onto the property controls the distinction between physical and regulatory takings and (2) a permanent easement can have limits on scope. As a result, it errantly concluded that this case is a regulatory takings case and that the time-limited easement at issue is not the equivalent of other easements in takings jurisprudence.

A. The traditional line between per se takings claims and regulatory takings claims is whether non-owners invaded the property.

Properly understood, physical takings cases turn on whether an ownership interest in property was

taken, not on whether enough property rights were affected. *Contra* Pet. App. A-18. Like the U.S. Constitution, state constitutions inherited the English common law tradition of protecting private property "without any distinction between different types." *Horne v. Dep't of Agric.*, 576 U.S. 350, 358 (2015). As the Supreme Judicial Court of Massachusetts stated over 150 years ago, the word "property" in a takings clause "include[s] every valuable interest which can be enjoyed as property and recognized as such." *Old Colony & F.R.R. Co. v. Inhabitants of Plymouth Cty.*, 80 Mass. 155, 161 (1859). Several states interpreted their takings clause using that exact same understanding. *See, e.g.*, *Schuster v. Pennsylvania Tpk. Comm'n*, 149 A.2d 447, 453 (Pa. 1959); *Liddick v. City of Council Bluffs*, 5 N.W.2d 361, 372 (Iowa 1942); *In re Forsstrom*, 38 P.2d 878, 887 (Ariz. 1934), *overruled in part on other grounds by State ex rel. Morrison v. Thelberg*, 350 P.2d 988 (Ariz. 1960); *James S. Holden Co. v. Connor*, 241 N.W. 915, 919 (Mich. 1932); *Callen v. Columbus Edison Elec. Light Co.*, 64 N.E. 141, 143 (Ohio 1902); *S. Kan. Ry. Co. v. Oklahoma City*, 69 P. 1050, 1056 (Okla. Terr. 1902).

This rule is distinct from regulatory takings because those "takings" arise from a different governmental power. As Oklahoma courts have explained, a takings case must distinguish between the power of eminent domain and the police power. *See St. Louis & S. F. R. Co. v. Love*, 118 P. 259, 262-63 (Okla. 1911). The power of eminent domain involves altering a party's "exclusive right to the occupancy, use, and control" of its estate by making the party "a tenant in common with some other person, corporation, or the public" over part or all of its estate. *Id.* at 262. In

contrast the police power involves telling "every property owner" how to "use his own" estate rather than allowing others to use the estate. *Id.* at 263. The former requires just compensation, while the latter usually does not. *See id.*; *see also, e.g.*, *Simpson v. City of N. Platte*, 292 N.W.2d 297, 300 (Neb. 1980) (making the same distinction).

A regulatory taking is an aggressive use of the police power rather than an acquisition of a property interest. *See Edmondson v. Pearce*, 91 P.3d 605, 618 (Okla. 2004) (describing this Court's regulatory takings case law as "recognizing there are limits to the exercise of the police power in regard to the regulation of property"). Oklahoma courts test for whether use of the police power has become a taking by assessing whether the governmental act "merely impair[s] the use of the property" or causes "substantial interference with the use and enjoyment" of the property *Mattoon*, 617 P.2d at 1349, 1351. The focus in this inquiry is on the property's owner's use of his own property rather than on another's use of his property. *See id.*

Even activities labelled as police power actions may still be per se takings. For example, Oklahoma courts have declared "police power" actions to be takings when a state statute reallocated riparian rights to the public at large. *See Franco-Am. Charolaise, Ltd. v. Oklahoma Water Res. Bd.*, 855 P.2d 568, 577 (Okla. 1990) ("the use of stream water is *not just restricted but is taken for public use*"). A police power action may even later transform into a taking: although a city has the power to remove oil that is emitting vapors in shallow ground, it cannot sell that oil to non-owners and keep the proceeds without committing an uncompensated taking. *See Frost v. Ponca City*, 541

P.2d 1321, 1322-24 (Okla. 1975). The essential question is always whether non-owners received property rights.

Thus, in a takings case under a traditional state law understanding, the question of whether a case is a physical takings case or a regulatory takings case depends on whether the government added users to the property or restricted the owner's use of his own property. The former are per se cases, while the latter are fact-specific inquiries. The Ninth Circuit missed this important distinction in how government works when it described a physical taking as merely a category of regulatory taking. *See* Pet. App. A-14.

B. State case law confirms that permanent easements can have time limits in their scope.

Because the Ninth Circuit treated this case as a regulatory takings case, it muddled the distinction between the physical taking of an easement and a regulation's substantial interference with property. An easement does not cease to be an ownership interest in property if it falls below some threshold of the number of property rights affected. *Contra* Pet. App. A-18. A proper understanding of easements would help avoid the Ninth Circuit's error.

By their very nature, easements are restricted property rights. *See* Pet. App. E-23-24 (Ikuta, J., dissenting). "An easement is a right to make use of another's land for some definite and limited purpose." *Bonner v. Oklahoma Rock Corp.*, 863 P.2d 1176, 1181 (Okla. 1993) (original emphasis omitted). It obligates the burdened estate "not to interfere with the uses authorized by the easement." RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 1.2 (2000). An easement

may have express terms defining the authorized uses and still be an easement. *See, e.g.*, Okla. Stat. tit. 60, § 54.

Even absent express limitations, all easements have restrictions because of the concept of reasonable use. When an easement is granted generally, without terms, the owner of the easement only has the right to "make reasonable use of the easement." *Burkhart v. Jacob*, 976 P.2d 1046, 1049 (Okla. 1999); *see also, e.g.*, *Quinn v. Stone*, 270 P.2d 825, 827 (Idaho 1954) ("When the right of way is not bounded in the grant, the law bounds it by the line of reasonable enjoyment." (quoting *Grafton v. Moir*, 29 N.E. 974, 976 (N.Y. 1892))); RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.10 (2000). An easement owner cannot "unreasonably overburden the servient estate." *Burkhart*, 976 P.2d at 1049. State courts use several factors to determine the limits on an easement, including "(1) the purpose of the easement, (2) the new use compared to the past use, taking into account the purpose of the land and the language granting the easement, (3) the physical character of the easement, [and] (4) the burden on the servient land." *Id.* at 1050 (citing *Hayes v. City of Loveland*, 651 P.2d 466, 468 (Colo. Ct. App. 1982)).

Easements vary in restrictions and there is no bright line about what restrictions are impermissible for easements. An easement may be available "24 hours a day, 365 days a year," Pet. App. A-18, yet still have other restrictions. An easement may also be restricted in time and still be an easement.

Several examples from state law show how valid easements can have time restrictions.

In one Minnesota case, an owner of a rural estate used a field road across another property in order to reach the highway. *See Block v. Sexton*, 577 N.W.2d 521, 523 (Minn. Ct. App. 1998). When a controversy arose, a trial court found a prescriptive easement to use that field road "between May and October of each year," basing that limit on evidence showing that the easement owner had used the field road only during those months. *Id.* at 523, 526. On appeal, the owner raised the same theory of easements that the Ninth Circuit applied in this case—that an easement cannot be limited in time. *See id.* at 526. The appellate court rejected that argument, noting even older precedent supporting its conclusion that the extent of an easement need not be 365 days per year. *See id.* (citing *Swan v. Munch*, 67 N.W. 1022, 1024 (1896)).

While that case involved a prescriptive easement, an Iowa case shows how express easements can have similar limits. *See Riverton Farms, Inc. v. Castle*, 441 N.W.2d 405, 406 (Iowa Ct. App. 1989). An owner of two tracts of land purchased easements over an intervening estate, and the easements specified that they were "for the purpose of moving cattle and equipment to and from buyer's land." *Id.* A trial court found that "equipment" referred to farm equipment. *See id.* at 407. Based on that finding, it found two further restrictions on the easements were consistent with the purpose of the easement. *See id.* at 407-08. It concluded that equipment and cattle could only use the easement during "daylight hours" and that equipment could only use the easement during "planting, cultivating, and harvest seasons." *Id.* The appellate court affirmed that these restrictions were "reasonable" and "in line with the intent of the parties." *Id.*

Easement restrictions can also be more aggressive than a mere time limit. In one New Hampshire case, a party who had made "occasional" and "non-commercial" use of a road tried to use the road for a commercial operation removing gravel and wood. *See Cote v. Eldeen*, 403 A.2d 419, 420 (N.H. 1979). The court limited both the hours of commercial operation and the number of loads that could be hauled over the road during those hours in order to "limit exercise of the easement to its proper scope." *Id.*

An easement can also include a notice requirement for use. In one Idaho case, a trial court was tasked with interpreting disputed terms of an ambiguous express easement. *See Phillips Indus., Inc. v. Firkins*, 827 P.2d 706, 712 (Idaho Ct. App. 1992). The court concluded from evidence that the easement included an implied restriction requiring "no less than 24 hours advance notice when the easement was going to be used." *Id.* The notice also had to include "an approximate time when to expect the use." *Id.* The appellate court affirmed that substantial evidence supported the restrictions on the easement. *See id.*

An easement may be limited to two hours in the morning and two hours in the evening. In one D.C. case, owners of neighboring Georgetown houses had a three foot passageway between them. *See Wheeler v. Lynch*, 445 A.2d 646, 647 (D.C. 1982). The passageway was on both properties, and each owner had an easement to use the other's half of the passageway. *See id.* When one property owner planned to build a second building on their lot, the other owner sought declaratory judgment regarding the proper use of the easement during construction. *See id.* at 648. The trial court concluded several limitations were appropriate,

including "[t]hat during the period of the construction of the building, the use of the easement for the transportation of materials and equipment shall be limited to the hours of 9:30 a.m. to 11:30 a.m. and 2:00 p.m. to 4:00 p.m. weekdays." *Id.* The appellate court affirmed that the restrictions on the easement were reasonable. *See id.*

An easement may even combine several of these restrictions. In a Utah case, members of a grazing association regularly used a trail each spring and fall to drive cattle. *See Crane v. Crane*, 683 P.2d 1062, 1063 (Utah 1984). When a dispute arose with the owner of the trail over using it, the association members sued, claiming an easement. *See id.* The trial court found an easement existed, but it also found several restrictions: limited to one day in the spring and ten days in the fall, limited to specific numbers of cattle, limited to three hours each crossing, and requiring advanced notice. *See id.* at 1063 n.1. The state supreme court largely affirmed, adding further minor restrictions on use. *See id.* at 1068.

Nothing in California property law denies that these sorts of easements are property interests. California might not construe its state takings clause as covering every ownership interest in property, *see Agric. Labor Relations Bd. v. Superior Court*, 16 Cal. 3d 392, 403 (1976) (state takings clause does not cover "laws passed in the promotion of public welfare" like the access regulations at issue here), but California does recognize these type of easements as interests in property. Its civil code expressly contemplates limits on easements: "The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." Cal. Civ. Code

§ 806. These express terms can include limits on hours of use. *See, e.g.*, *Willard v. First Church of Christ, Scientist*, 7 Cal. 3d 473, 475 (1972) (affirming the validity of an easement "for automobile parking during church hours"); *Scher v. Burke*, 192 Cal. Rptr. 3d 704, 719 (Ct. App. 2015) (noting an easement "limited to daylight hours"), *aff'd*, 3 Cal. 5th 136 (2017); *Bixby Hill Cmty. Ass'n, Inc. v. Rancho Los Alamitos Found.*, No. B156650, 2002 WL 1767429, at *2 (Cal. Ct. App. July 31, 2002) (noting an easement "limited to those hours when the [historical] Site shall be open to the public"). Thus, while California's state takings law may be different than *Amici* States' takings law, its property law is no different.

In short, easements in California and elsewhere are best described as a right of access in which "limitations are inherent." Pet. Br. 23. "[T]here is no support for the . . . claim that the government can appropriate easements free of charge so long as the easements do not allow for access '24 hours a day, 365 days a year.'" Pet. App. E-26 (Ikuta, J., dissenting). The Ninth Circuit's distinction between time-limited easements and the (rare) easement that is all-encompassing has no basis in American property law. And under both federal and state takings law, state appropriation of an easement is a per se physical taking.

To frame it differently, imagine a private party had paid for and obtained from Petitioners the easements at issue in this case—clearly a possibility under the state law discussed above—after which California passed a law transferring that easement from that private party to itself or another private party. Would that be a taking? Of course it would. *Cf.* Pet. App. E-

21 n.7 (Ikuta, J., dissenting) (explaining that using eminent domain either on existing easements or to carve out new easements both require compensation).

The opposite conclusion would have far reaching consequences, not just in California. The federal government, through agencies like the Bureau of Land Management (BLM), has not been shy in attempting to extract easements from property owners, especially in the West. *See, e.g.*, *Wilkie v. Robbins*, 551 U.S. 537, 541-50 (2007); *see also id.* 578-84 (Ginsburg, J., concurring in part and dissenting in part). Indeed, if Respondents are correct, the BLM need not have engaged in the extreme harassment recounted in *Wilkie* to obtain the sought-after easement; it could have simply taken the easement (perhaps with a time limitation) and ignored the need for compensation. And after *Wilkie*, there remains little to protect landowners from such expropriation beyond the Fifth Amendment's requirements after the easement has actually been physically taken, as it has here. The Court should not let that protection fall by the wayside.

II. REVERSAL WOULD NOT MEAN THAT ALL GOVERNMENTAL ENTRIES ONTO PRIVATE PROPERTY CONSTITUTE PER SE TAKINGS.

Although resolving the two doctrinal errors noted above would correct the Ninth Circuit's erroneous determination that taking an easement does not require compensation, reversal would not mean that every temporary entry on to private property by the government, such as Fourth Amendment searches, would be *per se* a taking under the Fifth Amendment. The Ninth Circuit treated all temporary entries as

exercises of the police power that are evaluated as possible regulatory takings. Pet. App. A-17—A-18. That overbroad conceptualization is incorrect.

While States, including *Amici*, cannot take easements without just compensation, we still may exercise police power that includes temporarily entering private property to execute searches for civil and criminal investigative purposes, to enforce common law restrictions on the use of property, and to forestall imminent danger to the public. *E.g.*, *Sullivant v. City of Oklahoma City*, 940 P.2d 220, 225 (Okla. 1997). Although easements and such uses of the police power both entail entering private property, a closer look explains why we treat them separately under distinct doctrines.

We must start by recognizing that "[t]he state has no inherent right to enter anybody's property." *Robinson v. Arkansas State Game & Fish Comm'n*, 565 S.W.2d 433, 435 (Ark. 1978). Private property rights are protected by government interference by several distinct sources including the common law, the Fourth Amendment (and state analogues), and—in cases such as this—constitutional prohibitions against uncompensated takings.

A. Governments can execute reasonable searches, subject to Constitutional constraints, which are not takings under the Fifth Amendment.

In *Amici* States, as under the U.S. Constitution, different provisions of law protect against different entries on to private property. When law enforcement entries constitute a search of private property, they are not subject to federal takings clause limits on governmental power and are instead limited by differ-

ent Constitutional provisions. *See, e.g.*, U.S. CONST. AMEND. IV; OKLA. CONST. ART. 2 § 30. Not every search is proscribed by state or federal limits, of course: only "unreasonable" searches of "persons, houses, papers, and effects." *Id.*

Unlike takings, searches take place when "[t]he Government physically occupie[s] private property *for the purpose of obtaining information*." *United States v. Jones*, 565 U.S. 400, 404-07 (2012) (emphasis added). Of course, like Fifth Amendment takings, searches may occur without physical invasion of property, but like takings—and like this case—a physical invasion of property nonetheless *per se* implicates the constitutional protection. *Id.*

The power to conduct reasonable searches grants significant flexibility to governments while still protecting private property rights. For example, searches of open fields are valid warrantless searches in federal law and many states' parallel law. *See, e.g.*, *Oliver v. United States*, 466 U.S. 170, 176 (1984); *Teague v. State*, 674 P.2d 560, 561 (Okla. Ct. Crim. App. 1984). It is also essentially undisputed that states can conduct warrantless inspections on certain activities that impose particular dangers on public health and safety, like alcohol sellers. *See, e.g.*, *Oklahoma Alcoholic Beverage Control Bd. v. McCulley*, 377 P.2d 568, 570 (Okla. 1962). The harder issue is how far this power to use warrantless inspections extends. *See, e.g.*, *State v. Howerton*, 46 P.3d 154, 156-57 (Okla. 2002) (administrative inspection of boats); *see also City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 435-36 (2015) (Scalia, J., dissenting) (collecting federal and state examples).

But ultimately these invasions to obtain information are different in kind than takings, subject to different constitutional restrictions. An entry cannot be both a law enforcement search and a taking; it must be analyzed under the correct provision. The Open Fields doctrine authorizes searches, but no one contends it would allow states to host agency picnics on any private farm without providing just compensation. So while reversal in this case would not impair government's ability to conduct searches, inspections, and the like, those invasions of private property are subject to the reasonableness and warrant requirements of state and federal constitutions, not the eminent domain requirements. And there is no question that the state law at issue here is not attempting to effectuate a "search."

A harder distinction to draw may be between Fourth Amendment seizures of property and Fifth Amendment takings, but while those concepts may overlap on occasion, it is clear that *searches* are distinct from *seizures* and *takings* of private property. The restrictions on unreasonable seizures most often concern situations when a person who commits wrongdoing with his property, such as a crime or civil infraction, is subjected to penalties for that violation. *See Edmondson*, 91 P.3d at 616 n.13. Such penalties are "as a facial matter" not protected by a state takings clause because they are instead governed by different constitutional provisions on seizure. *Id.* But neither government's ability to conduct reasonable searches, nor its capacity to seize forfeited property, would be undermined by recognizing that the appropriation of an easement to facilitate union organization constitutes a taking.

B. Governments can enter private property to enforce limitations on private property use without taking an easement under the Fifth Amendment.

"The general rule is that both [property and contracts] shall be free of government interference." *See Howe v. City of St. Louis*, 512 S.W.2d 127, 131 (Mo. 1974) (quoting *Nebbia v. People of State of New York*, 291 U.S. 502, 523 (1934)). But "government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm." *Id.* (quoting *Nebbia*, 291 U.S. at 523). State laws that implement these limits include "the law of nuisance, easements by necessity, sanitary regulations, the law of surface water, building codes, and zoning ordinances." *Id.* This Court has long recognized the prevention of public nuisances, carefully defined, does not effectuate a taking even when involving a physical occupation. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1022, 1028-30 (1992). And the government often enforces these limits through its search and seizure power.

Laws concerning public nuisances are a common way that landowners encounter these governmental entries on to their property. States have the power to declare things "injurious to health and safety" as public nuisances that are prohibited on private property. *See Calkins v. Ponca City*, 214 P. 188, 191 (Okla. 1923). It is a civil analogy to criminal law, allowing the state to prohibit certain acts and take steps to punish violations. *See id.* As happened in *Calkins*, cities use that state power to condemn infested, dilapidated buildings within their limits. *See id.* at 192-193. The owner may be ordered to abate the nuisance, but

government officials also have power to abate the nuisance if necessary. *See id.* at 189, 193; *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492 n.22 (1987) (collecting relevant state case law).

This authority is necessary for many basic functions of society. In one case in Norman, Oklahoma, a property owner allowed a hedge on the back of his property to grow so large as to obstruct a public alley where garbage trucks travelled. *See Updegraff v. City of Norman*, 287 P.2d 909, 910-911 (Okla. 1955). The city twice gave him notices to trim his hedge from the alley, threatening city action to remove the hedge. *See id.* at 911. He refused to trim the hedge and sought an injunction against its removal. *See id.* The trial court denied the injunction and the state supreme court affirmed, holding that the city could enter his property and abate the nuisance by removing the hedge. *See id.*

The power to temporarily enter property is limited to addressing a landowner's misuse of his own property, though, and is not a free pass for any entry a government deems important. *See Lucas*, 505 U.S. 1028-32. An example from Ohio demonstrates this limit. *See Kasch v. City of Akron*, 126 N.E. 61, 66 (Ohio 1919). In *Kasch*, landowners in the City of Akron sued the city over a proposed surface water sewer and sanitary sewer it planned to build across their property. *See id.* at 65. The city justified its entrance on private property on the ground that stagnant water on the property was "creating a nuisance, dangerous to the health of the citizens," and that it was abating the nuisance. *Id.* The court observed that the city created the nuisance of standing water on private property

because it failed to keep the street drains clear for passage of water. *See id.* The court also noted that the existing drainage of surface water on the private property would have been sufficient if the city had maintained the drains. *See id.* at 66.

A nuisance such as failure to maintain sufficient drainage on private property may have given the city the right to enter to fix that problem. *See id.* But "[a] city cannot, under the guise of abating a nuisance caused by itself, enter upon private property for the purpose of constructing a public sewer thereon, for surface and sanitary sewage, without first acquiring the right to do so by purchase or appropriation." *Id.* Thus, even the police power to abate nuisances does not authorize every entrance on to private property.

Of course, state law on the limits of police power is not uniform on the margins. A common disagreement between states is whether government officials must pay compensation when they enter private property to conduct surveys in furtherance of eminent domain. Some states hold that even the most slight entry beyond enforcing other laws is an unauthorized taking. *See, e.g.*, *Robinson v. Arkansas State Game & Fish Comm'n*, 565 S.W.2d 433, 435 (Ark. 1978). Other states hold that entering private property to survey it for eminent domain is not itself a taking. *See, e.g.*, *In re Pawtucket & Cent. Falls Grade Crossing Comm'n*, 89 A. 695, 701 (R.I. 1914). Even states in the latter category narrowly construe that authority, though, deeming minor damage done as part of the survey to be a taking. *See, e.g.*, *Burlington N. & Santa Fe Ry. Co. v. Chaulk*, 631 N.W.2d 131, 139-40 (Neb. 2001); *Root v. Kamo Elec. Co-op., Inc.*, 699 P.2d 1083, 1091 (Okla. 1985); *Oglethorpe Power Corp. v. Goss*, 322 S.E.2d 887, 890-

91 (Ga. 1984); *Missouri Highway & Transp. Comm'n v. Eilers*, 729 S.W.2d 471, 474 (Mo. Ct. App. 1987).

Despite that disagreement on the edges, *Amici* States agree on this core principle: governments do not have a generalized right of entry on to private property, but they do have a right to enter where necessary to enforce common law limitations on the use of private property and other such laws enacted under the police power to protect public health and safety.

This concept that police power allows some entry on to private property rests on the theory that private rights can only be enjoyed if the government imposes some restraint on private actions. *See State v. Drayton*, 117 N.W. 768, 771 (Neb. 1908). For private property to exist, all owners must use their property in such manner so as not to injure that of another. *See id.* ("*Sic utere tuo ut alienum non laedas*"). This principle is "the implied condition upon which every member of society possesses and enjoys his property." *Parks v. State*, 64 N.E. 862, 866 (Ind. 1902). Even the civil law recognizes this basic maxim of the common law. *See City of Crowley v. Duson*, 85 So. 226, 227 (La. 1920). One cannot have "the beneficial use of property" if his neighbors flout all laws. *See Drayton*, 117 N.W. at 771.

Thus, any system of private property includes the power of the government to enforce restraints on every owner and his neighbors. *See id.* Or as another *amici* put it, such governmental acts do not constitute takings because they either prevent uses of property that impose externalities on other property owners or compensate the owner through the advantages of the same reciprocal restrictions imposed on all property owners. *See Cato and NFIB* Amici Br. 10-15. Such

common law restraints on externalities imposed by private property uses explains why even physical intrusions—like requirements that all commercial buildings contain sprinkler systems—do not necessitate compensation under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The contrary view implies that cases like *Loretto* were wrongly decided.

However these restraints are conceived, the California regulation at issue here does not fall within this common law ambit of restrictions on the use of property and incursions necessary to enforce those restrictions. Thus, reversing the Ninth Circuit would not undermine the States' ability to continue to enforce such laws.

C. Governments can enter private property to address imminent harm without taking an easement under the Fifth Amendment.

Even when no law enforcement is at issue, states also have the power to enter private property in order to prevent imminent harm. *See Sullivant*, 940 P.2d at 225. The classic example is ordering the demolition of buildings as a fire break. *See id.* State courts have referred to this as a doctrine applicable "to the disasters of fire, flood, pestilence and war." *Knight v. Grimes*, 127 N.W.2d 708, 711 (S.D. 1964) (quoting *Sw. Eng'g Co. v. Ernst*, 291 P.2d 764, 768 (Ariz. 1955)).

One difficult question with this power is how much government action it authorizes. *See Brewer v. State*, 341 P.3d 1107, 1114-15 (Alaska 2014). In *Brewer*, firefighters acting under State authority set fire to vegetation on private property in order to deprive an oncoming wildfire of fuel—a tactic called burnouts.

See id. at 1109-10. The landowners sued, alleging the burnouts were an uncompensated taking. *See id.* at 1110. The state supreme court affirmed that entering private property to defend against fire was an exercise of the police power. *See id.* at 1114. Despite that conclusion, the court also reversed the trial court's dismissal of the takings claim. *See id.* at 1114-15.

Alaska's supreme court declined to exempt all government emergency actions from their state takings clause, instead holding that the use of police power must be justified by the doctrine of necessity. *See id.* at 1115. That doctrine "requires that there be an imminent danger and an actual emergency giving rise to actual necessity." *Id.* The court was concerned that the police power not vitiate Alaska's takings clause: "If the police power exception to just compensation is limited only by the sovereign power of the Government, . . . it becomes the exception which swallows the rule, an intolerable result." *Id.* (quoting *Morton Thiokol, Inc. v. United States*, 4 Cl. Ct. 625, 630 (1984)). In other words, governments can address emergencies without being subject to takings clauses, but abuses of that power can be considered a taking. *See also Southeastern Legal Foundation* Amicus. Br. 8-9.

So yes, the ability to take and destroy buildings to prevent fire has been subject to criticism as inconsistent with takings clauses. Justice Holmes famously quipped that these exceptions to takings jurisprudence "stand as much upon tradition as upon principle." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). And some states have statutorily abrogated their right to use this doctrine to a degree. *See Marty v. State*, 786 P.2d 524, 534 (Idaho 1989). Nevertheless, this rule maintains consistent rights for public officials and

private individuals regarding another's private property. When directly threatened by imminent public danger, all individuals are privileged to enter private property to abate the threat. *See id.* at 533-34 (discussing the common law doctrine); RESTATEMENT (SECOND) OF TORTS § 196 (1965). In this sense, governmental rights are not distinct from the rights of other non-owners; all non-owners are generally privileged to abate imminent threats. Exercising that prerogative is therefore not a taking of private property protected by the Fifth Amendment and is not jeopardized by reversing the decision below, which did not concern use of emergency powers.

* * *

Longstanding state and federal jurisprudence recognize that discrete categories of governmental entries onto private property do not constitute "takings," but are nonetheless protected by other common law or constitutional doctrines. Outside of those protections, private property rights are shielded against uncompensated governmental appropriation. Treating every "temporary" entry onto private property as the same inappropriately blurs these lines and threatens to eviscerate the Fifth Amendment's protections for all but the most all-engrossing and metaphysically permanent takings.

That is, any categorical rule exempting all "temporary" easements from the Takings Clause risks creating some unregulated category of government invasion of private property that lies between the search and seizure police power (or other invasions regulated by the common law) and takings. A law allowing anyone to enter private property to go fishing three hours per day would not be subject to the search

and seizure limitations, and yet under the Ninth Circuit's permanence rule, it would also not be a taking. A law allowing cable companies to install boxes and wires in private buildings only for 364 days—just long enough for the company to develop a nearby wireless network—would again be protected neither by the Fourth Amendment, Fifth Amendment, nor the common law. So too with a law allowing the general public at large to park on your lawn once a year during the state's nearby high school football championship game. The possibilities for entries on to private property without any constitutional or common law protection would be nearly unlimited.

Instead, *Amici* States have long understood and applied their police power in a way that protects public health and safety while honoring the private property rights of our citizens. In our experience, no government needs to imperil the foundational right to exclude others from private property in order to advance its interests.

The Ninth Circuit concluded otherwise by summarily treating all temporary entries as unprotected by the Takings Clause. Its faulty analysis weakened the protections granted by the Fifth Amendment.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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JANUARY 7, 2021

CERTIFICATE OF WORD COUNT

No. 20-107

Cedar Point Nursery, et al.,

Petitioners,

v.

Victoria Hassid, et al.,

Respondents.

STATE OF MASSACHUSETTS)
COUNTY OF NORFOLK) SS.:

Being duly sworn, I depose and say:

1. That I am over the age of 18 years and am not a party to this action. I am an employee of the Supreme Court Press, the preparer of the document, with mailing address at 1089 Commonwealth Avenue, Suite 283, Boston, MA 02215.

2. That, as required by Supreme Court Rule 33.1(h), I certify that the OKLAHOMAET AL.AMICUS AT MERITS STAGE IN SUPPORT OF PETITIONER(S) contains 6639 words, including the parts of the brief that are required or exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Lucas DeDeus

January 7, 2021

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January 7, 2021

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