No. 20-107

IN THE

Supreme Court of the United States

CEDAR POINT NURSERY, ET AL.,
Petitioners,

v.

VICTORIA HASSID, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals

BRIEF OF THE CATO INSTITUTE AND NFIB LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether interferences with the "right to exclude," a fundamental attribute of ownership, should be subject to a *Lucas*- or *Loretto*-style *per se* takings test, no matter the magnitude of the interference.

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts. NFIB is the nation's leading small business association, representing members in Washington and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

This case interests *amici* because the "fundamental attributes" of ownership—the strands in its "bundle of rights"—should be accorded the same protection from state interference as those of life and liberty, the other pillars of the Lockean philosophy at the heart of our nation's founding documents.

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fifth Amendment is clear: ". . . [N]or shall private property be taken for public use, without just compensation." U.S. Const. amend V. Since the Founding, the Court has applied a broad reading of "property" to reflect the Framers' Lockean reverence for the private realm; a realm protected from the whims of mob rule, or from the dictates of a Leviathan state. In the past century, the Court has recognized that the constitutional meaning of "property" includes intangible, or nonphysical, interests, including the useful value of a parcel of land. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

While public actors can't possibly *confiscate* these interests in the ordinary sense of the word, they can impose regulations so disruptive of a fundamental attribute of ownership that they are, in economic and conceptual terms, equivalent to a confiscatory action. In recognition, the Court has over the past century invalidated a host of uncompensated "regulatory takings" that have "go[ne] too far" in interfering with any number of "strands" in the bundle of property rights, *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922), including, perhaps most importantly, the "right to exclude." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982).

Whether an interference with a fundamental attribute of ownership rises to a taking depends, of course, on the nature of that interference. Easements are often part-time, and the Court has long recognized that whether an interference effects a taking is a measure of the "extent of the occupation." *See Nollan*

v. Cal. Coastal Comm'n, 483 U.S. 825, 831–32 (1987) (internal citations omitted). And this should not mean the extent of the occupation relative to the entire property *as a collection of rights and interests*, but rather to the interfered-with right or interest *by itself*.

The right to exclude—the right interfered with here—is so fundamental to the longstanding Anglo-American conception of property that when the government "takes" it, it "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Loretto*, 458 U.S. at 435 (citing *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979)). *See also Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (describing the right to exclude as "a fundamental element of the property right").

An easement that disrupts an owner's absolute right to exclude others, however slight, effects a total interference *with that right*. There is no functional difference here between "classic" and "regulatory" takings, because whatever label a court applies, the result is the same: The owner cannot always choose who enters or uses his property. The *Penn Central* test may work for "negative" air or light easements—those that merely restrict the owner from engaging in certain activities (while continuing to permit others). *See Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (holding that determining if a regulation effects a taking involves "essentially ad hoc, factual inquiries," including factors such as "the economic impact of the regulation," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action").

Yet the *Penn Central* test is hardly suitable to affirmative public easements that grant outsiders access to private property. For negative easements, which tend not to include physical invasion, it makes sense to apply an economic formula—though *Penn Central*'s is fairly crude—to determine if the regulation indeed has "go[ne] too far." But no economic formula is necessary for affirmative easements, where the question of whether a regulation has gone too far is answered, affirmatively, as soon as it is determined that the interfered with right is a fundamental attribute of ownership.

There are two categorical "exceptions" to the absolute character of a fundamental attribute of ownership. We put "exceptions" in quotes because, while they exempt certain interferences from a direct-compensation requirement, these interferences either: (a) *properly* restrict the use of property within its common-law contours, or (b) are indirectly compensated through the benefit, or "reciprocal advantage," the affected owner derives from the government's imposing the same restrictions on all who are similarly situated. *See* Richard A. Epstein, *Simple Rules for a Complex World* 134–37 (1995). *See also Jackman v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922) ("The exercise of [the police power without just compensation] has been held warranted in some cases by what we may call the average reciprocity of advantage."). Thus, in either exception, the public action only *appears* to be an interference. Courts have in the past misapplied these exceptions in order to shield inconvenient, but no less bona fide interferences, from their constitutional due. This case offers a prime opportunity to change course.

ARGUMENT

The facts here are straightforward. California law allows union organizers to enter petitioners' properties during specified hours for a certain number of days each year. All the organizers must do is provide notice to the state Agricultural Labor Relations Board of the date and duration of their planned entry. Once petitioners are given notice, they *must* provide access, without a chance to contest the entry. "Under the implementing regulations, union organizers are not required to seek or secure the consent of the employer." Pet. Br. at 6.

Amici urge the Court to make explicit what it has already implied in several unrelated contexts: that any interference with the "right to exclude"—be it a small cable running through one's property or an easement permitting others to enter without recourse—is a taking of that fundamental attribute of ownership, regardless of the rights and interests that remain untrammeled.

This absolutism is not unique to the right to exclude, though it certainly does not belong to all aspects of ownership. For example, restrictions on the right to destroy one's property upon death (but not *inter vivos*) have been validated in at least one state court as an offense to public policy. *See Eyerman v. Mercantile Trust Co., N.A.*, 524 S.W.2d 210 (Mo. Ct. App. 1975). And, as was the case in *Penn Central*, alternatives to the restricted use, if within the scope of the owner's "investment-backed expectations," can also defeat a potential takings claim. But there is no alternative short of payment that compensates even a

partial disruption of the right to exclude. Because the right is binary, once disrupted it is gone for good.

But an "interference" implies that there is an interest or right to begin with. Accordingly, regulations that limit the use of property to prevent one's neighbors, or the broader public, from bearing the costs of so-called "externalities" cannot be takings because nothing within the rightful ambit of ownership is taken. All the law does in these cases is ensure that proprietors operate within the contours of the rights ownership *does* bestow. Put simply, laws that stop externally harmful uses of property aren't takings; laws that prohibit uses within the common-law and statutory meanings of "property" are.

Petitioners would thus be wrong to claim that a taking occurs when state inspectors enter their property to ensure compliance with state pollution laws, but they are right to challenge as a taking union organizers who wish to access employees who can be reached outside work hours. The former entails petitioners' internalizing the costs of the activities they engage in on their property. The latter is at best tangential to their on-premises activities, and, with a clear off-premises alternative, is unnecessary.

California cannot claim that the easement here is simply a balancing of private versus public interests, or that petitioners are compensated "in kind." The former is foreclosed because, as explained just above, there are alternatives for union engagement with employees. The latter is foreclosed because the rule applies to too narrow a population for a measurable reciprocal advantage to obtain.

The state rule is not like, for example, requiring homeowners to install fire-preventive measures. The cost of these installations to each homeowner (or landlord) is arguably reciprocated through the imposition of the same requirements on all similarly situated. Or it merely compels proprietors to internalize the cost of potential fire damage that their neighbors would otherwise absorb. In either case, the imposition is not a bona fide interference, as it is here.

The sole argument California has left is that a union-access easement isn't a taking because no property right is really "taken" when an interference constitutes something less than "permanent and continuous" occupation. The Court should clarify that its settled jurisprudence precludes such a claim.

I. THE "RIGHT TO EXCLUDE" IS A FUNDAMENTAL ATTRIBUTE OF OWNERSHIP

The right to exclude should not be as easily impaired as California seeks to make it here. The Court has said that the right to exclude is "so universally held to be a fundamental element of the property right," that "an actual physical invasion," even if "only an easement," nonetheless requires just compensation. *Kaiser Aetna*, 444 U.S at 180. The Court further recognized the singular harm interferences with this right inflict:

> [A]n owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property . . . [S]uch an occupation is qualitatively more severe than a regulation that imposes affirmative duties on the owner,

> since the owner may have no control over the timing, extent or nature of the invasion.

Loretto, 458 U.S. at 436. *Kaiser Aetna* and *Loretto* are just two among several modern opinions extolling the right to exclude as essential to the preservation of all other rights and interests attending ownership. *See*, *e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas*, 505 U.S. at 1044; *Nollan*, 483 U.S. at 831.

Property implies the right to exclude. Indeed, it demands it. Blackstone described the "right of property" as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." William Blackstone, *Commentaries on the Laws of England* *2 (1768). As one scholar noted, Blackstone's understanding of the right was as much a product of realist thinking as it was a belief in "humanity's God-given dominion over the things of the earth." But, "[a]s society developed . . . the undifferentiated 'communion of goods' suggested by Biblical accounts of property ownership failed to provide adequate incentives for production." Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. Pa. L. Rev. 1, 32 (1996). In Blackstone's words, "if as soon as he walked out of his tent or pulled off his garment, the next stranger who came by would have a right to inhabit the one and to wear the other," a man would have no incentive to produce or maintain either. Blackstone, *supra*, at *3.

Far from God, Blackstone's definition traces its lineage to Roman conceptions of the right. *See* Juan Javier Del Granado, *The Genius of Roman Law from a Law and Economics Perspective*, 13 San Diego Int'l

L.J. 301, 316 (2011) ("Roman property law typically gives a single property holder a bundle of rights with respect to everything in his domain, to the exclusion of the rest of the world."). This ancient understanding of the "right to property" as, essentially, the "right to exclude" others from possession or use has carried to the present day. As Richard Epstein put it, "[t]he notion of exclusive possession" is "implicit in the basic conception of private property." *Takings: Private Property and the Power of Eminent Domain* 63 (1985).

Dissenters to this view of property tend to subscribe to communitarian theories rooted in progressive political thought rather than in actual legal reasoning. *See* J.M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. Miami L. Rev. 1119, 1122 (1990) (describing the preeminent Legal Realist Wesley Newcomb Hohfeld's theory of a "property right" as "not an attribute or thing that inheres in the property itself, or in its owner," but instead "the state's legal sanction to perform or refrain from performing certain types of actions"). Dissenters' reliance on a positivistic view of the law is especially fatal in the context of the meaning of "property" within the Anglo-American tradition that preceded ratification of the Constitution. *See* Paul J. Larkin Jr., *The Original Understanding of "Property" in the Constitution*, 100 Marq. L. Rev. 1, 16–55 (2016) (surveying the evolution of "property" from the Magna Carta to the immediate pre-ratification period).

In the words of one eminent scholar, it is the "*sine qua non*" of property. Without it, all other rights inuring to the owner is "purely contingent." Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730–31 (1998) (emphasis original). This

reflects Blackstone's rationale that the exclusionary right serves, perhaps foremost, as an incentive to produce and maintain the "things" of life—shelter, clothing, foodstuffs, and the like.

From Blackstone to Epstein, this conception of the right permeates both scholarship and jurisprudence. In *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, the Court found that "[t]he hallmark of a protected property interest is the right to exclude others." 527 U.S. 666, 673 (1999). Justice Scalia continued: "That is why the right that we all possess to use the public lands is not the 'property' of anyone—hence the sardonic maxim, explaining what economists call the 'tragedy of the commons,' *res republica*, *res nullius*." *Id.* Drawing a healthier (and, as discussed below, a more counter-majoritarian) relationship between the public and private realms than the deprivations of the tragedy of the commons would allow depends, in no small part, on the robustness of the right to exclude. The flimsier the right, the greater the imbalance in the public's favor.

And, echoing Blackstone, the right to exclude—that is, sole dominion in possession and use—is essential to the survival of an efficient, or at least a self-perpetuating, system of property:

> [T]he right to exclude captures the central features of common-law property that make it such a valuable social institution. Property is sovereignty, or rather, thousands of little sovereignties parceled out among the members of society. This devolution of sovereignty over the control of resources encourages investment in and improvement

> of resources by allowing owners to capture the full value of their efforts. It also makes it relatively easy to identify with whom one must deal to acquire resources, thereby lowering the transaction costs of exchange, and allowing resources to move to their highest and best use. The right to exclude others . . . diffuses power in society, thus helping to preserve liberty.

Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va. L. Rev. 885, 973 (2000).

The Framers recognized the dangers even their balanced form of republicanism posed to property rights. *See* Federalist No. 10 (Madison), in *The Essential Debate on the Constitution: Federalist and Antifederalist Speeches and Writings* 125 (Robert J. Allison & Bernard Bailyn eds., 2018) ("Hence it is, that such [d]emocracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property."). But they also knew that majoritarian needs would often supersede individual liberties, including property rights. *See* William M. Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 699–701 (1985) (discussing the balancing of public and private rights, including the insight that "a major strand of republican thought held that the state could abridge the property right in order to promote common interests").

Requiring compensation offered a doctrinal compromise—allowing public needs to be fulfilled, with just payment ensuring that the only intrusions

made into the private realm were indeed necessitous. *See* William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 825–34 (1995) (discussing the growing support for "just compensation" among colonial thinkers).

The post-Founding generation of American jurists and scholars continued to elevate the right to exclude as one of the boundary stones protecting the private realm from unnecessary public invasions. In *Wynehamer v. People*, the New York Court of Appeals held that "[m]aterial objects . . . are property . . . because they are impressed by the laws and usages of society with certain qualities, among which are, *fundamentally*, the right of the occupant or owner to use and enjoy them exclusively . . ." 13 N.Y. 378, 396 (1856) (emphasis added). "When a law annihilates the value of property and strips it of its attributes, *by which alone it is distinguished as property*, the owner of it is deprived of it according to the plainest interpretation . . ." *Id.* at 398 (emphasis added).

Other cases from this period show that the Framers' compromise between the common law's reverence for the private realm and the needs of the public remained alive and well into the late 19th century. *See generally Mugler v. Kansas*, 123 U.S. 623 (1887). The law of nuisance and the reciprocity of advantage—though those courts didn't call them that—figured prominently in nineteenth-century caselaw drawing the line between private and public rights. See Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549, 1585–1605 (2003) (surveying 19th-century eminent domain caselaw). But the default view among jurists

of the time was that property conferred absolute use and dominion *up to the border of a superseding public right*. *Id.* at 1597 ("If the people vest their equal property rights in a commons . . . a neighboring private owner becomes subject to a duty not to use his own in a manner that interferes with the purposes of the public domain."). As today, however, courts during this time overrelied on the reciprocity of advantage, often ruling that bona fide interferences with—and thus takings of—fundamental attributes of ownership had been "compensated" through the general good the interferences conferred. *Id.* at 1587–89 (discussing two right-of-way cases, representative of the then-prevailing jurisprudence, in which the claimants' consolation for public interferences with their private property were "what Frank Michelman and Richard Epstein have described as an 'implicit in-kind compensation' justification for a restraint on private property").

Recent precedent continues to reflect, in words if not action, the absolutist view of property's elementals—though courts continue to over-broaden the scope of the average reciprocity of advantage, *see* Part II, *infra*). The Court in *Hodel v. Irving* wrote that the right to devise, "the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times." 481 U.S. 704, 716 (1987). The right to exclude germinates from the same Anglo-American tradition and deserves a similar treatment.

The Framers, for the most part, read this tradition as according rights in private property absolute protection except when certainly necessary for the common good. *See* Ilya Somin, *The Grasping Hand:*

Kelo v. City of New London *and the Limits of Eminent Domain* 36–39 (2015) (discussing early post-ratification cases, including *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 311 (1795), in which Justice William Patterson held that the state's eminent domain power can be used only "in urgent cases, or cases of the first necessity"). As discussed, the Framers' primary innovation—to require the government to make just compensation even when operating under common-good necessity—provided the fortress of ownership with another layer of protection, one that did not exist under common law at the time. *See* Treanor, *The Original Understanding of the Takings Clause and the Political Process*, *supra*, at 785 ("Even with respect to physical seizures of property by the government, the compensation requirement was not generally recognized at the time of the framing of the Fifth Amendment.").

II. ALL BONA FIDE INTERFERENCES WITH FUNDAMENTAL ATTRIBUTES OF OWNERSHIP EFFECT *PER SE* TAKINGS

The absolute character of the right to exclude does not mean that all interferences with the right require direct compensation, be it real or nominal. As discussed above, many interferences are compensated through reciprocal advantages, while still others only *appear* to be interferences, in reality working to contour property rights within their proper common-law boundaries. The right to exclude, while fundamental, is not immune to these important carveouts. All fields of law, from tort to criminal, allow for uncompensated interferences with the right to exclude where such interferences further

superseding public rights—public rights that together, and by negative inference, sketch the boundaries of private rights.

Examples include the government's power, from necessity, to destroy a property to prevent a fire's spread (especially when "pulling [the house] down, rather hastened than caused its destruction"), *Taylor v. Inhabitants of Plymouth*, 49 Mass. 462 (1844), or to prevent its falling into enemy hands. *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149, 154 (1952). In neither case did the government have to compensate the injured owner, because neither the "right" to spread a fire nor to enemy occupation is within the ambit of common-law rights of ownership. One recent example includes the government's apparent, if unfortunate, right to chase a criminal into one's home, destroying it in the process. *See Lech v. Jackson*, 791 Fed. Appx. 711 (10th Cir. 2019), *cert. denied*, *Lech v. Jackson* (U.S., June 29, 2020) (No. 19-1123). *See generally Miller v. Schoene*, 276 U.S. 272, 279–80 (1928) ("[W]here the public interest is involved preferment of that interest over the property of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.").

Rights that are absolute in one constitutional regard—here the right to exclude in the takings context—do not become absolute *shields* to all public actions. *See* Merrill, *Property and the Right to Exclude*, *supra*, at 753 ("[E]ven the fee simple absolute in land can be seen as a qualified complex of exclusion rights, in which owners exercise relatively full exclusion rights with respect to certain kinds of intrusion (e.g., by strangers) but highly qualified or

even nonexistent exclusion rights with respect to other kinds of intrusions (e.g., low-level nuisances).").

Pruneyard Shopping Ctr. v. Robins offers an analogue to the apparent superseding public right California seeks to assert in this case. There, the Court held that the Takings Clause did not prevent states from forcing private businesses—there a sprawling shopping mall—from hosting third-parties' exercise of their First Amendment rights (by handing out leaflets). "There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center." 447 U.S. 74, 83 (2000). This reasoning is inapplicable here because, as petitioners' explain, union-organizing on-premises will, or at least has the potential to, significantly disrupt their commercial activities. Pet. Br. at 28. To the extent the Court would find *Pruneyard* relevant, *amici* urge that the case be limited to its narrow facts: cases in which the superseding public right is a *constitutional* right (*e.g.*, freedom of speech), and not merely a common-law or statutory right.

When interferences are bona fide—when they don't merely contour private property rights within their common-law borders or are not otherwise reciprocated "in kind"—our courts tend to recognize the right to exclude as absolute, as was the case in *Loretto*. The problem, however, is that courts and legal commentators still tend to characterize bona fide fundamental-attribute interferences (read: takings) as compensated through a generalized, "unanalyzed" average reciprocity of advantage. *See*, *e.g.*, Brian A. Lee, *Average Reciprocity of Advantage* 3, in *Philosophical Foundations of Property Law* (J.E.

Penner & H.E. Smith eds., 2013) ("Judicial and academic discussions . . . have often appealed to the concept of average reciprocity of advantage. However, these appeals have frequently been cursory, leaving the concept unanalyzed and consequently failing to understand its limitations.").

To help the courts along, the Court should expand the *Loretto per se* takings test to cover *all* cases in which a public action effects a bona-fide interference with a fundamental attribute of ownership, including the right to exclude, and no matter the method (*e.g.*, easements) or instrumentality (*e.g.*, union organizers) through which the interference is achieved.

To give this expansion real teeth, the Court should in the same breath clarify the circumstances under which courts may use one of the two categorical exceptions to fundamental-attribute interferences *amici* have discussed. Without clear limits on judicial deference to rights-contouring or to the reciprocity of advantage, at least some courts will continue to depict bona fide fundamental-attribute interferences as mere non-redistributive "piercings" of the right to exclude and other absolute property rights, instead of calling them the unconstitutional takings that they are. Limiting the use of the reciprocity of advantage, especially, would help to fulfill the Taking Clause's promise "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The Court has broadcast its willingness to hold interferences with fundamental attributes of ownership to a higher constitutional standard than

Penn Central and its progeny afford, though it has tended not to follow through on this sentiment. In practice, it too has often relied on one of the categorical exceptions to avoid providing a clear resolution to what remains a doctrinal cliffhanger. It is notable that in cases where the Court *did* find that a fundamental attribute of ownership was taken—that the public action in controversy did not merely pierce (or at least strain to the near-breaking-point) the right, and for non-redistributive purposes—the magnitude of the taking was irrelevant. This was at least the Court's understanding of how the categorical, if too-rarely applied, carveouts it created in *Loretto* and *Lucas* were meant to operate.

But the Court's inclination to cabin many fundamental-attribute takings within one of the two categorical "exceptions" has reverberated to the lower courts, causing interpretive confusion and, in this case, a circuit split. See Pet. Br. at 3 (contrasting the Ninth Circuit's ruling below with *Hendler v. United States*, 852 F.2d 1364, 1377–78 (Fed. Cir. 1991), and concluding that "the federal courts of appeals are now split as to whether an easement that is limited in time is subject to the same categorical rule"); Laura S. Underkuffler, *On Property: An Essay*, 100 Yale L.J. 127, 130–31 (1990) ("Various tests—such as the 'ordinary understanding' approach, the 'reasonable expectations' approach, the 'functional' approach, the 'bundle of rights' approach, and others—have been used . . . . The resulting incoherence is profound.").

Perhaps the reason for the Court's historical inclination against casting too wide a *per se* net is fear that this would chill legitimate governmental purposes, though *Loretto* appears not to have had

such an effect in the decades since. Merrill, *The Landscape of Constitutional Property*, *supra*, at 899 ("The Court in fact has recognized the danger of conceptual severance and has warned that 'a claimant's parcel or property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable.'") (quoting *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 644 (1993)). Whatever the cause, we doubt that it is disagreement with the common law's recognition that certain attributes of ownership are fundamental and therefore absolute.

If there were ever a chance for the Court to change course, this case is it. The facts are simple and the circumstances offer a clear analogy to the invasion that *Loretto* held to require compensation, even if nominal. Both cases involve an actual physical invasion of private property. Both invasions work only partial interferences of the property. *Loretto* involved a partial taking because the invasion extended only to a small cable box and line. The interference here is partial because it is limited to a few hours a day for a maximum of 120 days each year.

Amici urge the Court to reconsider its own overreliance on the categorical exceptions discussed in Part I, *supra*. *See* Lee, *Average Reciprocity of Advantage*, *supra*, at 4–8 (discussing the Court's use of the concept, including in *Penn Central* and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), in which the Court adopted, as Prof. Lee put it, "a very generous accounting of reciprocal advantage" whereby its presence "is the justification even for the state's police power").

The seeds of this welcome departure are already planted in the Court's takings jurisprudence. *Pumpelly v. Green Bay Co.* clarified early on that "it is not necessary that the land should be absolutely taken." 80 U.S. 166, 179 (1871). This was in reference to the *physical* interest in property; but there is no conceptual reason to relegate intangible attributes of ownership to a lesser status. Indeed, the tangible and intangible elements of ownership are necessarily intertwined. Setting aside intellectual property, one can hardly "possess" a right in something that does not physically exist, and an interest in a "thing" is merely a conceptual agreement among individuals, and between an individual and the state, that that individual has the sole right to possess it—be it a fee simple estate, a bailment, or anything in between. *See*, *contra* Balkin, *supra*, Laura S. Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 Tex. L. Rev. 2015, 2030 (2015) (describing "property" as "[having] *no meaning apart* from . . . the recognition and protection of individuals' rights in land; or rights in chattels; or rights in any identified source of wealth") (first emphasis original).

Since *Pumpelly*, the Court has in several cases appeared to endorse a pro-segmentation view of the bundle of property rights, which holds, essentially, that "every regulation of any portion of an owner's 'bundle of sticks' is a taking of that particular portion considered separately." Margaret Jane Rudin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1676 (1988). *See also Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (state law effected a taking when it extinguished mortgagor's

remaining debt to mortgagee, even though the mortgagee retained a right to "reasonable rent"); *Chippewa Indians of Minn. v. United States*, 305 U.S. 479 (1939) (Congress violated the Takings Clause when it converted tribal lands into a national forest, although the lands were to be held in trust and the tribe was to receive the proceeds from the sale of its timber); *United States v. Dickinson*, 331 U.S. 745 (1947) (taking occurred when gradual flooding of property "stabilized," even when the land, as a *whole*, was not condemned); *United States v. Pewee Coal Co.*, 341 U.S. 114, 116 (1951) (holding that the government effected a taking when it "required mine officials to agree to conduct operations," *i.e.*, retaining the right to manage, "as agents for the Government"); *Dugan v. Rank*, 372 U.S. 609 (1963) (suggesting that a requisition of a *portion* of owner's water rights merits compensation under the Tucker Act).

The pro-segmentation viewpoint, as reflected in these rulings, makes a powerful case for testing fundamental-attribute interferences using a *per-se*-takings checklist, without consideration of how long the interference lasts. Although the above opinions segmented rights and interests in order to determine whether noncategorical takings had occurred (*i.e.*, *Penn-Central*-style or, rather, proto-*Penn-Central*-style takings), there is no conceptual argument, after *Loretto* and *Lucas*, against importing this viewpoint into the present context. Indeed, if siloing works for flanking maneuvers—as the grounds for finding *Penn-Central*-style takings—it's certainly good enough for frontal assaults.

CONCLUSION

Amici urge the Court to use this case to bring interferences that are not "permanent and continuous," but that nevertheless disrupt fundamental attributes of ownership, under *Loretto*'s *per se* takings canopy. Both involve physical invasions of the claimants' properties and differ only with respect to factors that should be irrelevant beyond calculating the amount of compensation owed. Bona fide interferences with the right to exclude achieved through easements warrant the same prophylactic work the common-law and the Constitution perform for more "permanent and continuous" invasions.

Petitioners warn that if the Ninth Circuit's ruling stands, it "would permit governments to seize all sorts of easements without compensation, so long as the easements include any time restrictions." Pet. Br. at 5. The *Penn Central* test might be good enough for partial diminutions in value—that is, when the test is whether a regulation really has "go[ne] too far" and passed the reciprocity-of-advantage threshold.

But public interferences with fundamental attributes of ownership, however short their duration or trivial the invasion, must be recognized as *per se* takings if the Takings Clause is to have its proper, prophylactic effect. When a fundamental attribute of ownership is involved, the "extent of the occupation" is anything or nothing. If the owner loses his power to exclude others for even a moment, in that moment he has lost the power completely. Otherwise, public officials can conceivably pile easement upon easement without pecuniary consequence, provided a mere second is left for the owner to exercise his rights.

In sum, the Court should grant certiorari to protect the right to exclude and other fundamental attributes of private ownership from the dangers of public overreach.

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September 2, 2020

No. 20-107

CEDAR POINT NURSERY, ET AL.,
Petitioners,
v.
VICTORIA HASSID, ET AL.,
Respondents.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that Brief of the Cato Institute and NFIB Legal Center as *Amici Curiae* in Support of Petitioners contains 5,777 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

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AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 2nd day of September, 2020, send out from Omaha, NE 3 package(s) containing 3 copies of the BRIEF OF THE CATO INSTITUTE AND NFIB LEGAL CENTER AS AMICI CURIAE IN SUPPORT OF PETITIONERS in the above entitled case. All parties required to be served have been served by third-party commercial carrier for delivery within 3 calendar days. Packages were plainly addressed to the following:

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Subscribed and sworn to before me this 2nd day of September, 2020.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

GENERAL NOTARY-State of Nebraska
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My Comm. Exp. September 5, 2023

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