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 Ninth Circuit Court of Appeals

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

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QUESTION PRESENTED

Whether a regulatory interference 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 its magnitude, provided there is no in-kind compensation via a "reciprocity of advantage," and the regulation does not target a use that state law properly defines as a public harm.

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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 (NFIB) Small Business Legal Center is a 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, with 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 property—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

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 it. "Under the implementing regulations, union organizers are not required to seek or secure the consent of the employer." Pet. Br. at 6.

Amici ask that the Court confirm what it has already implied in several other 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—is a taking of that fundamental attribute, regardless of the rights and interests that remain untrammeled.

The Fifth Amendment is clear: "nor shall private property be taken for public use, without just compensation." Since the Founding, the Court has applied a broad reading of "property" to reflect the Framers' Lockean reverence for the private realm—a realm generally protected from mob rule or the dictates of a Leviathan state. In recent decades, the Court has recognized that the constitutional meaning of "property" includes intangible interests, including the useful value of a parcel of land. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1024–27 (1992).

Although public actors can't confiscate an intangible interest in the ordinary sense, they can impose regulations so disruptive of a fundamental

attribute of ownership that they are, in economic and conceptual terms, equivalent to a confiscation. Accordingly, the Court has over the past century invalidated several uncompensated "regulatory takings" that have "go[ne] too far" in interfering with any number of "strands" in the bundle of property rights, 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 on the nature of that interference. Easements are often part-time, and the Court has 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). This does 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 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. 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 might work for "negative" easements—those that restrict the owner from engaging in certain activities (while continuing to permit others)—but it is hardly suitable for affirmative public easements that grant outsiders access to private property. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (holding that whether a regulation effects a partial taking involves "essentially ad hoc, factual inquiries," including the regulation's "economic impact," "the extent to which the regulation [interferes] with distinct investment-backed expectations," and "the character of the governmental action").

For negative easements, which tend not to include invasions, it makes some sense to apply *Penn Central*'s crude formula to determine if the regulation has "go[ne] too far." But no formula is needed for affirmative easements, where the question of whether a regulation has gone too far is answered in the affirmative as soon as a court finds the interfered-with right to be a fundamental attribute of ownership.

California's union-access easement is a taking of a fundamental aspect of ownership that does not pass the thresholds for justifying harm-preventing regulations that the Court established in *Lucas* and (earlier the same term) *Lechmere, Inc. v. NLRB*. *Lechmere* requires that the restriction of a private right be necessary to the elimination of a public harm or the achievement of a public benefit, and that there are no sufficient alternative means for achieving the same ends. 502 U.S. 527, 537–41 (1992). Here there

are many alternative means available to California, rendering the union-access law a per se taking of the fundamental right to exclude.

This absolutism is not unique to the right to exclude, and it does not belong to all aspects of ownership. As was the case in *Penn Central*, substitutes for 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 of compensation that can remedy even a partial disruption of the right to exclude. That's because the right is binary: once disrupted it is gone for good.

Finally, California's abridgment of the right to exclude doesn't curtail harmful externalities or eliminate impediments to a general public benefit, the traditional justifications for not paying compensation when abridging basic attributes of ownership. Rules that limit the use of property to prevent one's neighbors, or the broader public, from bearing the costs of externalities are not takings because nothing within the rightful ambit of ownership is taken. Such regulations help define the contours of ownership. In a sense, they clarify that the right to harm the public is not something that is "owned"—so it's not something for which compensation is owed when it is "taken." *Lucas* added that this anti-harm rationale extends to non-harmful exercises of otherwise fundamental rights that are impediments to a public benefit. 505 U.S. at 1024 ("[T]he distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder. . . . One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from 'harming' South

Carolina's ecological resources; or, instead, in order to achieve the 'benefits' of an ecological preserve.").

The union-access easement does not fall under any of the traditional justifications for abridging a fundamental aspect of ownership without providing just compensation. It's not like, say, requiring homeowners to install fire-preventive measures. Such costs are put on all similarly situated owners, thus creating a reciprocal benefit that accrues to all and are thus justified under an anti-harm construction of the state's police powers. But 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 there is no harm-prevention justification for the exercise of the state's police power where there are alternatives for union engagement with employees. The latter because the rule is applied too narrowly for a measurable reciprocal advantage to obtain.

ARGUMENT

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

The right to exclude should not be as easily impaired as California does 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 harm such interferences inflict:

> [A]n owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property . . . 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). 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 carries to the present day. As Richard Epstein put it, "[t]he notion of exclusive possession" is "implicit in the basic conception of private property." Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 63 (1985).

In the words of one eminent scholar, the right to exclude is the "*sine qua non*" of property, and, without it, all other property rights are "purely contingent." Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730–31 (1998). This reflects Blackstone's rationale that the right serves, perhaps foremost, as incentive to produce and maintain the "things" of life—shelter, clothing, foodstuffs, etc. Blackstone, *supra*, at *3.

From Blackstone to Epstein, this conception of the right permeates scholarship and jurisprudence. In *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, Justice Scalia 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.* A healthy, non-parasitic relationship between the public and private realms depends, in no small measure, on the robustness of the right to exclude. The flimsier the right, the greater the imbalance in the public's favor—and the greater prevalence of the tragedy of the commons.

The right to exclude is essential to the survival of an efficient, 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 . . . It [] 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) (1787) ("Hence it is, that such Democracies 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 compromise: allowing public needs to be fulfilled, with just payment ensuring that the only intrusions made into the private realm were indeed necessary. *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 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' need to find a 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 Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887) ("A prohibition upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot be deemed a taking or an appropriation of property for the public benefit."). The anti-harm principle and the reciprocity of advantage—though those courts didn't call them that—figured prominently in 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 case law). The default

view 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 then over-relied on the reciprocity of advantage, often ruling that interferences with, and thus takings of, fundamental attributes of ownership were "compensated" through the general good the interferences conferred. *Id.* at 1587–89 (discussing two right-of-way cases, representative of then-prevailing jurisprudence, in which the claimants' consolation for public interferences with their private property was "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 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 right to exclude germinates from the same Anglo-American tradition as other fundamental property rights, such as the right to devise property to family, and it deserves a similar treatment. *See Hodel v. Irving*, 481 U.S. 704, 716 (1987) ("[T]he right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times."). The Framers for the most part read this tradition as according absolute protection to rights in private property 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").

The Framers' primary innovation—to require the government to make just compensation—provided the fortress of ownership with another layer of protection, one that did not exist under contemporary common law. *See* Treanor, *The Original Understanding of the Takings Clause*, *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. INTERFERENCES WITH FUNDAMENTAL ATTRIBUTES OF OWNERSHIP THAT DO NOT RESTRICT HARMFUL USES OR CONFER RECIPROCAL ADVANTAGES ARE PER SE TAKINGS

The absolute character of the right to exclude does not mean that all interferences require compensation. Many interferences are compensated through reciprocal advantages, while others only appear to be interferences but are in reality restricting property to non-harmful uses (including uses that impede public benefits). The right to exclude, while fundamental, is not immune to these important carveouts.

Examples include the government's prerogative to destroy a property to prevent a fire's spread, *Taylor v.*

Inhabitants of Plymouth, 49 Mass. 462 (1844), or from 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 proper ambit 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 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 . . . [is] 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.").

Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (2000), offers an analogue to the apparent superseding public right California seeks to assert in this case. *Pruneyard* held that the Takings Clause did not prevent states from forcing a private business—a

sprawling shopping mall—to host third-parties' exercise of their free-speech rights (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." *Id*. at 83.

This justification is inapplicable here because union-organizing on-premises will—or at least has the potential to—significantly disrupt commercial activities. Pet. Br. at 28. To the extent the Court finds *Pruneyard* relevant, the case should be limited to its narrow facts, in which the superseding public right is a (state) *constitutional* one and not merely rooted in common law or statute.

When interferences don't contour private property rights within anti-harm borders or are not otherwise reciprocated "in kind," courts tend to recognize the right to exclude as absolute, as in *Loretto*. The problem, however, is that courts and commentators still tend to characterize many interferences as compensated through a general, "unanalyzed" 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.").

The "reciprocity of advantage" alternative to direct compensation set forth in cases like *Jackman v. Rosenbaum*, 260 U.S. 22 (1922), while sometimes

complex, is often easily ascertained. In *Jackman*, city authorities deemed a shared wall unsafe and tore it down. *Id.* at 29. The Court ruled that "[t]he exercise of this has been held warranted in some cases by what we may call the average reciprocity of advantage." *Id.* at 30. For example, the state supreme court below had cited the reciprocal benefit of "increased safety against fire and traced the origin to the great fire in London in 1666." *Id.*

But there likely is no reciprocal advantage when many similarly situated owners, making the same categorical uses of their land, are *not* burdened with the same regulation. If regulations are applied unequally, then that's good evidence that reciprocal advantages are not being enjoyed by similarly situated property owners. In such cases, not only do "formally neutral rule[s]" hide a wealth transfer, but they are also not truly neutral. Richard A. Epstein, *Simple Rules for a Complex World* 135 (1995). And that's the case here: state officials use their discretion—hidden behind a facially neutral permitting process—to grant trespassing rights to unions strong-willed enough to resort to the audacious disruptive activities the regulation allows. Not all union activists are so bold, though the boldest now have the imprimatur of state government.

Except where there are obvious reciprocal advantages, the Court should expand the *Loretto* per se takings test to cover all interferences with a fundamental attribute of ownership, including the right to exclude—no matter the method (e.g., easements) or instrumentality (e.g., union organizers) through which it is achieved.

To give this expansion real teeth, the Court should likewise clarify the circumstances under which courts may use one of the two categorical exceptions to fundamental-attribute interferences discussed above. Without clear limits on judicial deference to rights-contouring or to the reciprocity of advantage, some courts will continue to incorrectly depict improper interferences as harm preventing. And limiting the use of reciprocity of advantage 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. Too often, however, the Court has relied on one of the categorical exceptions to avoid providing a clear resolution to what remains a doctrinal cliffhanger. This has created confusion in the lower courts. *See* Pet. Br. at 3 (contrasting the decision below with the Federal Circuit's ruling in *Hendler v. United States*, 852 F.2d 1364 (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"); *see also* 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.").

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. Both cases involve an actual physical invasion of property. Both invasions work only partial interferences. *Loretto* involved a partial taking because the invasion extended only to a small cable box. The interference here is partial because it is limited to a few hours a day for a maximum of 120 days each year.

The seeds of this welcome course correction are already planted in the Court's takings jurisprudence. In *Pumpelly v. Green Bay Co.*, the Court clarified that "a serious interruption to the common and necessary use of property may be . . . equivalent to the taking of it, and that under the constitutional provisions 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 are necessarily intertwined.

Since *Pumpelly*, the Court has many times endorsed the pro-segmentation view of the bundle of property rights, which holds that "every regulation of any portion of an owner's 'bundle of sticks' is a taking of that particular portion considered separately." Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667, 1676 (1988). *See, e.g.*, *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 593, 601–02 (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, 481–82 (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, 749 (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, 625 (1963) (suggesting that a requisition of a portion of owner's water rights merits compensation under the Tucker Act).

That pro-segmentation viewpoint makes a powerful case for testing fundamental-attribute interferences using a per se takings checklist. The above cases segmented rights and interests in order to determine whether noncategorical takings had occurred—that is, *Penn Central*-style or, rather, proto-*Penn Central*-style takings. There is no conceptual argument, after *Loretto* and *Lucas*, against importing this view into the present context.

III. CALIFORNIA DOES NOT HAVE THE ANTI-HARM JUSTIFICATION NECESSARY TO EXERCISE ITS POLICE POWER HERE

California argues that reshaping petitioners' right to exclude is justified as necessary to prevent a public harm or further a public benefit. The state's argument fails in light of two simple facts: (1) unions have ample

means to contact and organize employees outside of infringing private property rights, something that is even truer in the golden age of digital communication; and (2) of the "more than 16,000 agricultural employers in California, petitioners' statistics indicate that union organizers invoked the regulation to access the property of just 62 employers in 2015." Opp. Br. at 20. In other words, a regulation the state calls "necessary" is hardly ever used.

More importantly, in terms of good legal doctrine, the Court should not let California creatively and illegitimately rework the definition of "public harm"—or its conceptual inverse, "public benefit"—to make takings claims disappear. Endorsing this argument would empower every state and municipality in the country to wipe away takings claims with a magic word. The invocation of "harm-prevention" to avoid takings claims must be conceptually coherent and remain cabined within historical principles of common law. California's claim is neither.

The *Lucas* Court recognized that "'prevention of harmful use' was merely our early formulation of the police power justification necessary to sustain . . . any regulatory diminution in value." 505 U.S. at 1026. The Court added:

> The transition for our early focus on control of "noxious uses" to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between "harm-preventing" and "benefit-conferring" regulation is often in the eye of the beholder.

Id. at 1024. Given the modern conflation of public-harm prevention with conferring public benefits, "it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings' . . . from regulatory deprivations that do not require compensation." *Id.* at 1026.

Lucas tailors "prevention of harmful use" to the modern regulatory state, limiting fundamental-attribute regulations to those that, under background principles, "do no more than duplicate the result that could have been achieved in the courts . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally." *Id.* at 1029. So what qualifies as a "nuisance that affect[s] the public generally," sufficient to pierce the right to exclude?

Although most states' property and nuisance laws share a common-law foundation, modern exigencies can allow for divergences. States clearly can create new "background principles of . . . property and nuisance law," as *Lucas* phrased it. *See* James L. Huffman, *Background Principles and the Rule of Law: Fifteen Years After* Lucas, 35 Ecology L.Q. 1, 7 (2008). But, in order not to veer too drastically from the Framers' Lockean conception of property, modern property regulations must still adhere to something of a classical harm-prevention principle.

Some modern rules, like the one here, go too far. Without requiring *some* anti-harm justification—made in good faith and on reasonable grounds—a state might feel free to call anything "harmful," preventing entire categories of uses within its borders, either through outright bans or prohibitively

expensive regulations. *See Penn. Coal*, 260 U.S. at 415 ("When [the] seemingly absolute protection [of the right to just compensation] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears.").

Lucas "put to rest [] the notion that a government can avoid the reach of the Takings [Clause] by merely invoking a harm-preventing police power rationale." James Burling, *The Latest Take on Background Principles and the States' Law of Property After* Lucas *and* Palazzolo, 24 U. Haw. L. Rev. 497, 499 (2002). *See also* Pet. Br. at 30 ("A rule limiting the categorical treatment of easements to those applicable all day, every day" risks "property owners throughout much of the nation [seeing] their rights greatly diminished as governments increasingly sanction invasions of their property."). Courts generally give states broad deference to define a public harm. *See Berman v. Parker*, 348 U.S. 26, 32 (1954). And although, as *Lucas* recognized, a state can define harm broadly to include things that impede a public benefit, courts should still reference "independent source[s]" to determine if the state's definition is real and not a ruse. 505 U.S. at 1030. "[T]he state's necessarily broad power to define 'noxiousness' does *not* allow it to circumvent consciously the Takings Clause by dishonestly reclassifying as 'harmful' a use that the state actually considers benign." Note, *Taking Back Takings: A Coasean Approach to Regulation*, 106 Harv. L. Rev. 914, 920 n.42 (1993). Even where these sources weigh in favor of the regulation, if there are alternative means for achieving its purposes, it is logical to suppose—or at least burden the state with

disproving—that there are non-harm-preventing motives behind the regulation.

But states can cast certain elements of ownership as harmful in specific contexts or, under the modern theory *Lucas* discussed, as impediments to the achievement of a public benefit. This window is limited to circumstances in which there are no alternative means for achieving the same result. If one of either kind can be secured without having to abrogate a private right, a state could not rightfully claim that that private right is harmful or impedimentary. Nor should it be allowed to. *See Pruneyard*, 447 U.S. at 93–94 (Marshall, J., concurring) ("[O]ur cases demonstrate that there are limits on governmental authority to abolish 'core' common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.").

The courts' task is not to define "harm" but to make sure that the legislative (or administrative) definition is made in good faith. *See* Terrence J. Centner, *Legitimate Exercises of the Police Power or Compensable Takings: Courts May Recognize Private Property Rights*, 7 J. Food L. & Pol'y 191, 250 (2011). Unless modern exigencies render a previously unharmful land use clearly harmful, courts should be skeptical of a state's anti-harm justification.

Courts cannot vouchsafe that each anti-harm regulation will produce more benefits than costs—"that the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights." *Erie R.R. v. Public Utilities Comm'rs*, 254 U.S. 394, 410 (1921). But they can

ensure that each is at least *plausibly* harm-preventing. As the Court in *Lucas* put it:

> Since [a harm-preventing] justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.

505 U.S. at 1025 n.12.

The *Lucas* gloss reveals several faults in California's union-access easement. These faults undermine the state's argument that the easement is not a taking because there are no "alternative channels of effective communication," such that "both statutory and constitutional principles require that a reasonable and just accommodation be made between the right of unions to access and the legitimate property and business interests of the employer. Cal. Code Regs., tit. 8, § 20900(b).

Indeed, there *are* viable alternative means for organizing employees off-grounds and off the clock. For example, *Lechmere* offered several options that are just as practicable here. 502 U.S. at 540 (discussing the "union's success in contacting a substantial percentage of [employees] directly, via mailings, phone calls, and home visits," the potential for "advertising in local newspapers," and Justice Thomas's suggestion to post pro-union signage on "the grassy strip adjoining [the employer's] parking lot"). The *Lechmere* Court emphasized that "[s]o long as . . . union organizers have reasonable access to employees outside an employer's property, the

requisite accommodation has taken place." 502 U.S. at 538. "It is only where such access is infeasible that it becomes necessary and proper to . . . balanc[e] the employees' and employers' rights." *Id.*

Lechmere teaches that, even as the right to organize is a public benefit, employers' right to exclude does not constitute a public harm, provided "reasonable alternative means of access exist." *Id.* at 537. If alternative means aren't available, the state has a much stronger case that an employer's right to exclude impedes a public benefit and can therefore be reshaped to accommodate union access.

But nothing in the landscape of labor relations has changed so much to justify the union-access easement on a novel harm-prevention theory. Quite the opposite. In her dissental below, Judge Ikuta pointed out that as "the agricultural industry has changed dramatically in the past 40 years," "modern technology gives union organizers multiple means of contacting employees," making "the decades-old justifications for the . . . [r]egulation . . . questionable." *Cedar Point Nursery v. Shiroma*, 956 F.3d 1162, 1166 n.1 (9th Cir. 2020) (Ikuta, J., dissenting).

Perhaps the best proof of the absence of a public harm is how rarely the union-access law is used. In 2015, the law was invoked to access the property of just 0.0039 percent of agricultural employers in the state. Opp. Br. at 20. (noting that unions invoked the rule to access the property of just 62 of 16,000 such employers in 2015.). It seems that petitioners' exercising their right to exclude is not as harmful to the public weal as respondents claim. Given the low rate at which unions utilize the regulation, the

employers' right to exclude is no impediment to organizers' access to employees.

Meanwhile *Pruneyard*, which at first blush might appear to support the union-access easement where *Lechmere* rejects it, is readily distinguishable. As discussed above, *Pruneyard* involved the public right to the freedom of speech in a shopping mall, which superseded the mall's right to exclude. In *Pruneyard*, however, there was no alternative that would, *pace Lechmere*, defeat the access easement. The public areas of the sprawling mall had in effect become public forums, where the exercise of free speech was itself the public right at issue. 447 U.S. at 83–84 ("The Pruneyard is a large commercial complex that covers several city blocks . . . and is open to the public at large . . . Appellees were orderly, and they limited their activity to the common areas of the shopping center. In these circumstances, the fact that they may have 'physically invaded' appellants' property cannot be viewed as determinative."). Here, the underlying public right is for labor to organize, not to organize in a specific place. And there are clear means for securing it without having to disrupt petitioners' right to exclude.

In sum, courts should not defer pell-mell to the state's purported justification for restricting property rights—especially one as ancient as the right to exclude. Once a public benefit has been identified by reference to evolving "background principles" that officialize the public's revealed preferences, courts should of course defer to the state's approach to realizing that benefit. But courts should take available alternative means as strong indication that there are non-harm-preventing motives behind the

state action. *Lucas* imparts that this is the best approach to contouring the state's exercise of its anti-harm police power within constitutional borders. California's union-access easement is in this regard a case study in governmental overreach. There are alternative channels through which the state can extend the benefits of organized labor to petitioners' employees. The state ought to pursue these before it opts to impinge on petitioners' fundamental rights.

CONCLUSION

The Court should use this case to bring interferences that are not "permanent and continuous," but that nonetheless disrupt fundamental attributes of ownership, under *Loretto*'s per se takings canopy. This is especially true where anti-harm principles of state law, reflecting longstanding social practice, afford no exceptions.

Accordingly, the judgment below should be reversed.

Respectfully submitted,

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December 31, 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 Small Business Legal Center as *Amici Curiae* in Support of Petitioners contains 6,593 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 31st day of December, 2020, send out from Omaha, NE 3 package(s) containing 3 copies of the BRIEF OF THE CATO INSTITUTE AND NFIB SMALL BUSINESS LEGAL CENTER AS AMICI CURIAE IN SUPPORT OF PETITIONERS in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

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Subscribed and sworn to before me this 31st day of December, 2020.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

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