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 FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

CYNTHIA FLEMING CRAWFORD
Counsel of Record
MICHAEL PEPSON
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(571) 329-2227
ccrawford@afphq.org
Counsel for Amicus Curiae

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BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioners on its own behalf.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. AFPF works toward these goals, in part, by defending the individual rights and economic freedoms that are essential to ensuring that all members of society have an equal opportunity to thrive. As part of this mission, it appears as an *amicus curiae* before state and federal courts.

SUMMARY OF ARGUMENT

The Fifth Amendment provides only two means by which the government may deprive a person of property: either by due process of law or for public use with just compensation. Neither method authorizes the government to simply transfer private property from one private person to another private person through legislation. The California Agricultural Labor Relations Board ("the Board") cultivated a new method: promulgate a regulation that creates an

[1] All parties have consented to the filing of this brief after receiving timely notice. *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made any monetary contributions to fund the preparation or submission of this brief.

easement of limited scope, burdening a defined group of people with no takings analysis or individualized opportunity to be heard; then deny that any appropriation took place, leaving no recourse to the landowner who is deprived of the right to exclude private persons from private land.[2]

The regulation in question also creates a property right for the beneficiary of the regulation, union organizers: the right to access the Growers' property for nearly a third of the days in a year. This right of access is not available to the general public. Thus the regulation acts not just as an appropriation but as a transfer of rights from one limited set of private parties, the Growers, to another limited set of private parties, the unions. The Constitution provides no authority for the government to simply take property from one person and give it to another. Even the most acute example of using eminent domain to convey real property from one private party to another private party, *Kelo v. City of New London, Conn.,* 545 U.S. 469 (2005), acknowledged that the Fifth Amendment governed; and the government there exercised its powers of eminent domain by first formulating a public benefit to excuse the taking.

But the government cannot simply declare that one person's property now belongs to someone else.

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[2] The Court of Appeals' error in presuming that a grant of physical access to the property of Cedar Point Nursery and Fowler Packing Company ("Growers") is a form of regulatory taking rather than an easement—a discrete property right of longstanding—as well as the contours of "permanence" in defining the scope of an easement, have been well briefed by Petitioners and other *amici*. Those arguments will not be reiterated here.

This statement, standing alone, is uncontroversial. But small accretions in the power of the state to strip or transfer property rights, such as *Pruneyard Shopping Center v. Robins* , 447 U.S. 74 (1980), and *Kelo*, have allowed the state to skirt constitutional limitations to the benefit of preferred private parties at the expense of other private parties by simply denying that constitutional limitations apply to the type of transfer employed.

This case demonstrates the consequences of loosening takings constraints through case law: the physical invasion of land by a private party based on policy considerations but no actual takings analysis. "When faced with a clash of constitutional principle" with case law at odds with "the text, history, and structure of our founding document," this Court "should not hesitate to resolve the tension in favor of the Constitution's original meaning." *Kelo*, 545 U.S. at 523 (Thomas, J., dissenting). The Court should revisit *Pruneyard* and *Kelo* to clarify the constitutional limits on the government's power to take private property and transfer it to someone else and reverse the Ninth Circuit in this case to protect Petitioners against uncompensated taking of their property rights.

ARGUMENT

I. The Fifth Amendment Provides Only Two Lawful Means by Which a Person may be Deprived of Property by the State.

The Fifth Amendment provides two methods by which a person may be deprived of property: either by due process of law; or for public use with just compensation. U.S. Const. Amend. V.

The California statute grants an easement to physically access real property, thus depriving the Growers of a traditional interest in their real property—the right to exclude. Notwithstanding the physical invasion of land, the law purports to regulate, not appropriate, and thus the legislature identified no public use that could justify a taking and provided no compensation for the property taken.

But the alternative to a taking for public use would require due process of law before the government could take the property. It must be one or the other—there is no constitutional alternative. Here, neither due process nor compensation was provided, making the deprivation of property rights inconsistent with the Fifth Amendment.

A. Appropriation of Property Without Due Process or Just Compensation Violates the Fifth Amendment.

The Fifth Amendment requires due process of law for the government to deprive a person of property. U.S. Const. Amend. V. Although the type and extent of process is not set forth in the Constitution, this Court has said that "it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property, or right to property, shall be taken for the benefit of another, or for the benefit of the state, without compensation, and that no one shall be condemned in his person or property without an opportunity of being heard in his own defense." *Holden v. Hardy*, 169 U.S. 366, 390–91 (1898). As a general rule, due process requires that "individuals must receive notice and an opportunity to be heard before the Government deprives them of property."

United States v. James Daniel Good Real Prop., 510 U.S. 43, 48 (1993). "The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property . . . ." *Id*. at 53.

Due process requirements apply when the government asserts control over real property, including rights of ownership such as "the right of sale, the right of occupancy, the right to unrestricted use and enjoyment" as well as "the right to evict occupants, to modify the property, to condition occupancy, to receive rents"; in short "all rights pertaining to the use, possession, and enjoyment of the property." *James Daniel Good Real Prop*., 510 U.S. at 52, 54. Due process also applies when the government has only a limited interest in the property such as "in preventing the sale, destruction, or continued unlawful use of the real property." *Id*. at 62. Even a limited interest in levying upon a deficient taxpayer's property—an interest that could be satisfied through a monetary payment without invading the land itself—requires notice and an opportunity for a hearing. *Id*. at 61 (citations omitted). Thus, even property rights that represent only a single strand in the bundle of rights, such as the right to exclude, cannot be appropriated without due process.[3]

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[3] "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips v. Wash. Legal*

Nevertheless, "the Board determined that adopting a universally applicable rule for access—as opposed to case-by-case adjudications" would best serve the legislative purpose, App. A-7, thus expressly eschewing notice and an opportunity to be heard in favor of other policy goals. This approach does not satisfy the Fifth Amendment because the due process clause "is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave [the legislature] free to make any process 'due process of law,' by its mere will." *Den ex dem. Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 276 (1855). *Cf. Chicago, B. & Q.R. Co. v. City of Chicago,* 166 U.S. 226, 236–7 (1897).

Shortly after enactment, a state court challenge to the regulation alleged that it violated due process; that case failed. *See* App. A-9 citing *Agric. Labor Relations Bd. v. Superior Court (Pandol & Sons)*, 546 P.2d 687, 693–99 (Cal. 1976). In this case due process as a potential vehicle for depriving Petitioners of their property was not asserted—leaving as the only potential vehicle for satisfying the Fifth Amendment a taking for public use.

Like the requirements of due process, the two elements of Fifth Amendment taking "serve to protect 'the security of Property,' which Alexander Hamilton described to the Philadelphia Convention as one of the 'great obj[ects] of Gov[ernment],' . . . "by providing safeguards against excessive, unpredictable, or unfair

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Found., 524 U.S. 156, 164 (1998). Easements are property under California state law. *See, e.g., L.A. Terminal Land Co. v. Muir*, 136 Cal. 36, 48 (1902); *Balestra v. Button*, 54 Cal. App. 2d 192, 197 (1942).

use of the government's eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will." *Kelo,* 545 U.S. at 496 (O'Connor, J. dissenting) (citing 1 Records of the Federal Convention of 1787, p. 302 (M. Farrand ed.1911)).

It does not suffice, therefore, that the Board considered granting unions access to the Grower's property as an effective means of furthering organizational rights, nor that the Board considered the grant to be merely an "accommodation," nor that "[t]he access regulation was intended to 'provide clarity and predictability to all parties.'" App. A-6–7. The Fifth Amendment was designed as a shield against uncompensated application of exactly this type of political process.[4]

Nor does it matter that the Board placed restrictions on the easement, because any easement, by definition, is restricted in some way, granting "only nonpossessory rights of use limited to the purposes specified in the easement agreement." *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1844 (2020). *But cf.* App. A-29 (Leavy, J., dissenting) (noting "the Access Regulation allowing ongoing access to Growers' private properties, multiple times a day for 120 days a year (four 30-day

[4] *See also* App. E-16 (Ikuta, J., dissenting from denial of rehearing *en banc*) ("Although property rights are defined by state law, there are limits on a state's ability to alter traditional understandings of property through legislation.").

periods per year)").[5] As this Court has recognized, temporal restrictions or effects on an easement do not prevent the easement from being compensable property. *See, e.g., United States v. Dickinson*, 331 U.S. 745, 751 (1947) (recognizing taking for an "easement for intermittent flooding of land above the new permanent level"); *United States v. Causby*, 328 U.S. 256, 268 (1946) (recognizing compensable taking in overflight easement and holding that issue of permanent or temporary went to valuation of required compensation). The Board's weighing of policy preferences to conclude that the limited easement was of higher value than the rights of the property owners is just the type of conclusion that the Fifth Amendment was designed to both accommodate and limit.

B. A Taking is Limited to the Property Right Compensated—and No More.

The Ninth Circuit committed a fundamental logical fallacy when it inverted this Court's observation that a permanent physical invasion chops through the bundle of property rights "taking a slice of every strand,"[6] to mean that *unless* every strand

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[5] *Cf.* App. E-11 (Ikuta, J., dissenting from denial of rehearing *en banc*) ("According to Cedar Point, . . . [t]he union organizers disrupted work by moving through the trim sheds with bullhorns, distracting and intimidating the workers.").

[6] "The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, *cf. Andrus v. Allard*, 444 U.S. 51, 65–66 (1979), the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a

has been sliced, then there has been no permanent physical invasion.[7] That backwards proposition does not apply where, for example, a right-of-way[8] does not preclude the landowner from traversing the same land but still works a physical invasion as recognized in the myriad of cases that support the proposition that "even if the Government physically invades only an easement in property, it must nonetheless pay compensation," *id.* at 433 (collecting cases). The Ninth Circuit's logical fallacy does not apply here either. As Judge Ikuta, joined by six other Ninth Circuit Judges explained, dissenting from the Circuit's decision against hearing this case *en banc*, "[o]nce again, the Ninth Circuit endorses the taking of property without just compensation." App. E-10 (Ikuta, J., dissenting from denial of rehearing *en banc*).

The ease with which an easement for a limited particular purpose can be granted, compensated as a taking, and then constrained to the terms on which it was granted, is demonstrated by railroad easements.

For example, in *Moffitt v. United States*, the property was a 1.57-mile segment of railroad right-of-way. 147 Fed.Cl. 505, 508 (2020). The right-of-way was established in 1857 through condemnation

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slice of every strand." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

[7] At its most basic level, a physical invasion is concrete action that takes place in the material world—which is not dependent on whether a legal doctrine applies to it. It would make no sense, for example, to claim that the person reading this brief does not exist because there is no legal doctrine that explains the reader's existence.

[8] A right-of-way is a type of easement. *Cowpasture River Pres. Ass'n*, 140 S. Ct. at 1844.

proceedings for use in operating a rail line. *Id*. at 508–09. When the railway sought to discontinue rail service and instead use the land for a recreational trail, the question was whether the original easement was broad enough to encompass that newly proposed use. *Id*. at 510. If not, "then a Fifth Amendment 'taking' of the land burdened by the easement occurs." *Id*. In *Moffit* there were two takings involved, each of which implicated a separate compensable act: the first taking in which an easement was imposed for use as a railway; and a second taking that would have converted the original railway easement into an easement for use of the land as a recreational trail.[9] Both easements applied to the same land; but each represented a discrete compensable taking. *Id*. at 518.

In addition to usage restrictions, a taking may be limited to only certain rights relative to real property, including intangible rights. For example, in *Hodel v. Irving*, the right to pass property to one's heirs was recognized as a constitutionally protected property right. 481 U.S. 704, 716 (1987). *See also Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1938 (2019) (J. Sotomayor dissenting) ("no one believes that a right must be tangible to qualify as a property interest." (citing *Armstrong v. United States*, 364 U.S. 40, 48–49 (1960) (treating destruction of valid liens as a taking); *Adams Express Co. v. Ohio State Auditor*, 166 U.S. 185, 219 (1897) (treating "privileges,

[9] The process of "railbanking" would provide a mechanism for staying abandonment of the railway easement, thus extending the temporal limits on the easement and essentially making the limited easement permanent. *Id*. at 510 ("When the trail agreement is reached, the Fifth Amendment taking becomes permanent since the abandonment procedures are effectively blocked.").

corporate franchises, contracts or obligations" as taxable property)). It is thus not necessary that *every* strand in the bundle be sliced before a compensable taking occurs. In fact, it is the opposite—the compensable taking is limited to only the scope of the right that is taken.

"[T]he Supreme Court has repeatedly, and consistently, recognized that the appropriation of an easement that allows for entry onto private property constitutes a taking of property." App. E-22 (Ikuta, J., dissenting from denial of rehearing *en banc*). That is exactly what happened here—a *per se* taking of real property. Therefore, Petitioner should, at the least, be compensated for that taking.

II. The Holding in *Kelo* Needs Guardrails to Clarify that a Benefit to a Defined Class of Private Parties is Not a Public Use.

More broadly, this Court should address an ongoing source of confusion in takings jurisprudence that casts a long shadow and is implicated, whether silently or expressly, whenever private property is taken for use by another private party. *Kelo*, which allowed real property to be taken from private persons and transferred to another private party for redevelopment, 545 U.S. at 477, 490, represents the outer edge of takings jurisprudence and merits clarification or narrowing because the power to disregard one person's property rights in preference of another person jeopardizes both freedom and security.

Protection of private property is among the highest duties of the government, in part, because "[i]ndividual freedom finds tangible expression in property rights." *James Daniel Good Real Prop.*, 510 U.S. at 61. "The fundamental maxims of a free

government seem to require, that the rights of personal liberty and private property should be held sacred." *Wilkinson v. Leland*, 27 U.S. 627, 657 (1829). Thus, appropriation of private property imperils freedom, requiring strict application of legal constraints.

The constraints provided by the Fifth Amendment protect against legislative action, because "government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint." *Id.* It is simply not enough to declare a policy beneficial to the people to bypass property rights. "At least no court of justice in this country would be warranted in assuming, that the power to violate and disregard them; a power so repugnant to the common principles of justice and civil liberty lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people." *Id.* Hence the requirement to pay for property before appropriating it for public use is as much a matter of freedom as justice.

But more to the point, from time immemorial, the exercise of state power to take private property and transfer it to another private party with no identified public use has been repugnant to our legal system. Indeed, from before the founding and for over two hundred years thereafter, the Court rebuffed such a proposal. *Id.* at 658 ("We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union.").

The contours of this doctrine were relaxed in *Kelo*, but not without vigorous dissent and a narrow concurrence in which Justice Kennedy reiterated that ""transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause." 545 U.S. at 490 (Kennedy, J. concurring). In Justice Kennedy's view, "[a] court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications." *Id.* at 491.

As this case shows, Justice Kennedy's words must be heeded lest the appropriation of private property from one limited class of persons in favor of another limited class of persons becomes the norm. Even under the lenient requirements of *Kelo*, this case must fail because no public use was identified at all. Indeed, the public does not even have access to the easement. The Court should make clear that the Fifth Amendment requires identification of a public use that must—in fact, as well as in theory—benefit the public and not a limited class of private actors.

A. Public Use—What is it?

Dissenting in *Kelo*, Justice Thomas wrote that: "the Public Use Clause, originally understood, is a meaningful limit on the government's eminent domain power. Our cases have strayed from the Clause's original meaning, and I would reconsider

them." 545 U.S at 506. Likewise, Justice O'Connor, also in dissent, noted that: "The public use requirement . . . imposes a more basic limitation, circumscribing the very scope of the eminent domain power: Government may compel an individual to forfeit her property for the *public's* use, but not for the benefit of another private person. This requirement promotes fairness as well as security." *Id*. at 497. (emphasis in original) (citing *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 336, (2002) ("The concepts of 'fairness and justice' ... underlie the Takings Clause")). If the concept of public use is to retain any meaning, what characteristics must that use entail?

Justice O'Connor identified three "categories of takings that comply with the public use requirement . . . Two [that] are relatively straightforward and uncontroversial." 545 U.S. at 497. The first is the transfer of private property to public ownership, such as taking land for a military installation. *Id*. at 497–98 (citing *Old Dominion Land Co. v. United States,* 269 U.S. 55 (1925)). The second is the transfer of private property to private parties who use the land for a public purpose. Examples would include common carriers like railways or utilities. *Id*. (citing *National Railroad Passenger Corporation v. Boston & Maine Corp.,* 503 U.S. 407 (1992); *Mt. Vernon–Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.,* 240 U.S. 30 (1916)). Neither of these straightforward categories applies here.

The third category of taking, which was at issue in *Kelo* and would be at issue here had a takings analysis been performed, is the transfer of private property to another private party—not for public use—but for

private use in a manner that purportedly may serve a public purpose. *See id*. at 498. This is a question that has long tested the Court, in part, because the analysis implicates deference to legislative bodies and matters of traditional State concern.[10]

For example, in *Berman v. Parker,* the issue was an Act of Congress that sought to eliminate blighted areas of Washington, D.C., by acquiring the property and leasing or selling the property for redevelopment pursuant to a comprehensive development plan in order to improve public health and safety. *Berman v. Parker,* 348 U.S. 26, 28–29 (1954). The Court held that the agency could take title to all real property involved in the redevelopment project even if some of that property was not blighted. *Id*. at 34–35. The Court also accepted that some redevelopment would be performed by private parties, finding that "once the public purpose has been established," the "public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude," thus disposing of Mr. Berman's argument that the Fifth Amendment forbids "taking from one businessman for the benefit of another businessman." *Id*. at 33–34. Notably, the scope of the project included real estate slated for indisputably public uses, such as

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[10] AFPF respectfully believes that *Kelo* was wrongly decided and should be overturned. Within five years of its aftermath, forty-three states pursued legislative reforms, many of which strengthened protections against eminent-domain abuse, and numerous state courts stepped into the breach. *See* Five Years After *Kelo*: The Sweeping Backlash Against One of the Supreme Court's Most-Despised Decisions, Institute for Justice (June 2010), https://ij.org/wp-content/uploads/2015/08/kelo5year_ann-white_paper.pdf.

schools, parks, and roads, in addition to development to be performed by and for private enterprise—including original property owners—as agents to fulfill Congress's plan. *Id*. at 34–35. Contrary to *Kelo* and to this case, the holding in *Berman* did not turn on converting the specific property of a limited class of property owners into property in favor of a different limited class of private parties, but rather, began with a plan for the public benefit that employed private-to-private transfer as one of the means to accomplish that public benefit.

Nevertheless, *Berman* has sown confusion regarding the scope of government authority to define as a public purpose the transfer of property from one private person to another private person for the benefit of the recipient. For example, in *Hawaii Housing Authority v. Midkiff,* condemnation proceedings that were used to transfer land from large landholders to individual lessees was held to be within the State's police power and therefor consistent with the Fifth Amendment. Simultaneously the Court maintained that "the Court's cases have repeatedly stated that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." 467 U.S. 229, 240–41 (1984) (collecting cases). This view was expanded in *Kelo* to encompass economic development plans with conjectural public benefits, such as increased tax revenue or new jobs, that could only be realized as the secondary effects of direct private benefits. That is, the supposed public benefits could only be generated if the private recipients of the land were first successful in their own ventures so there would taxes owed and jobs to fill. *Kelo*, thus, would appear to stand for the proposition

that the government may transfer property from one private person to another private person for the direct benefit of the recipient if, in turn, the recipient might be expected to generate some benefit back to the state. This, as Justice Thomas stated in dissent, "constru[es] the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning." *Kelo*, 545 U.S. at 506.

And as Justice Thomas explained more recently in *Horne v. Department of Agriculture*: "The Takings Clause prohibits the government from taking private property except 'for public use,' even when it offers 'just compensation.'" 576 U.S. 351, 370 (2015) (Thomas, J., concurring) (quoting U.S. Const. Amend. 5). This traditional limitation on the government's takings powers should "impose[] a meaningful constraint on the power of the state—'the government may take property only if it actually uses or gives the public a legal right to use the property.'"[11] *Id.* (Thomas, J., concurring) (quoting *Kelo*, 545 U.S. at 521 (Thomas, J., dissenting)).

But, for all that, at the very least, these cases required compensation to the owners, and did not, as was done in this case, simply take the property and give it to someone else *gratis*. The Court, therefore, should take this opportunity to place clear guardrails on *Kelo* and limit the government's power to take property to cases in which a defined public use of the property precedes the private transfer—and in all

[11] Here, it is far from clear whether the California Access Regulation meets this test, as it does not grant the *public* any right of access—only union organizers (and no one else, such as right-to-work advocates, who might have contrary views).

cases requires compensation to be paid when the taking is made.[12]

B. Without Strict Adherence to Both Elements, the Takings Clause Becomes a Nullity, Allowing Government to Take Property for Private Use Without Compensation.

This case illustrates why "it is 'imperative that the Court maintain absolute fidelity to' the [Takings] Clause's express limit on the power of the government over the individual, no less than with every other liberty expressly enumerated in the Fifth Amendment or the Bill of Rights more generally." *Kelo*, 545 U.S. at 507 (Thomas, J. dissenting) (quoting *Shepard v. United States,* 544 U.S. 13, 28 (2005) (cleaned up). Such fidelity requires application of both elements of the Takings Clause by requiring a "public use" and "just compensation." Otherwise, "the Takings Clause would either be meaningless or empty." *Id*. at 507.

Indeed, this is what has happened here, with the predictable result that the Fifth Amendment was not even consulted before the Grower's real property rights were transferred to other private persons. Completely eluding the Fifth Amendment goes even

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[12] It is far from clear that the Access Regulation itself, which subsidizes a favored category of speech at the expense of private property owners' rights, is a constitutional exercise of government power at all, irrespective of the amount of compensation awarded. *Cf. Horne,* 576 U.S. at 371 ("To the extent that the Committee is not taking the raisins 'for public use,' having the Court of Appeals calculate 'just compensation' in this case would be a fruitless exercise.").

further than Justice Thomas's warning that failure to strictly adhere to the public use requirement would flip the design of the Takings Clause: "Alternatively, the Clause could distinguish those takings that require compensation from those that do not." *Id*. This latter interpretation, which was silently applied here without any apparent recognition that it was happening "would permit private property to be taken or appropriated for private use without any compensation whatever." *Cole v. La Grange*, 113 U.S. 1, 8 (1885) (interpreting same language in the Missouri Public Use Clause). "In other words, the Clause would require the government to compensate for takings done 'for public use,' leaving it free to take property for purely private uses without the payment of compensation." *Kelo*, 545 U.S. at 507 (Thomas, J. dissenting).

So it has come to pass in this case.

III. *Pruneyard* Undermines Constitutional Rights and Should be Reconsidered.

As with *Kelo*, the fact-specific holding in *Pruneyard* has been stretched beyond its scope and sown mischief. *Amicus* believes that *Pruneyard* was wrong when decided, and subsequent decisions illustrate that it cannot be reconciled with this Court's First or Fifth Amendment jurisprudence. This Court should, at the least, reaffirm here that *Pruneyard* is limited to public areas of shopping centers, if not outright abandon this anachronistic decision and prevent its continued confusion of both First and Fifth Amendment rights.

Courts, including this Court, have worked hard to make sense of *Pruneyard's* takings analysis—both as an upfront takings issue and as a backdoor for

compelled speech in commercial settings.[13] This job has been complicated by the Court's express recognition in *Pruneyard* that "there has literally been a 'taking'" of "the right to exclude others." *PruneYard*

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[13] Indeed, the shadow of *Pruneyard* as a First Amendment case may be longer than as a takings case as support for the proposition that government can compel private entities to host the speech of other private parties in commercial settings. *Pruneyard*, 447 U.S. at 85 ("Appellants finally contend that a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others."); *Domen v. Vimeo, Inc.*, 433 F. Supp. 3d 592, 607 (S.D.N.Y. 2020) (discussing *Pruneyard*: "Plaintiffs seek to have this Court plow new ground and hold that *Pruneyard* extends beyond California real property owners to website owners like Vimeo."). *See also Craig v. Masterpiece Cakeshop, Inc.,* 370 P.3d 272, 288, (Colo. App. 2015), *rev'd Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n,* 138 S. Ct. 1719 (2018). But the issue in *Pruneyard* was whether California could "promote more expansive rights of free speech and petition than conferred by the Federal Constitution." *Id.* at 85. The Federal Constitution, of course, only protects against *governmental* infringement of speech rights; and thus "more expansive rights" in the context of a state constitution, consistent with the Federal Constitution, would further constrain *state* infringement of speech but could have no analogous effect on private persons vis-à-vis each other. Indeed, under the guise of "more expansive" rights, government mandates that private parties host or facilitate the speech of others may violate the First Amendment. *E.g.*, *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2378 (2018) (petitioners likely to succeed on the merits of their claim that state mandate that clinics disseminate a government-drafted notice violates the First Amendment); *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974) (holding unconstitutional Florida statute placing affirmative duty upon newspapers to publish replies of political candidates whom they had criticized).

Shopping Center, 447 U.S. at 82. That finding should have been the end of the issue, leading to a clean and easy-to-follow progression into the compensation phase of a takings analysis.

Instead, having recognized the literal taking, the Court held that there was no "*unconstitutional infringement* of . . . property rights under the Takings Clause," introducing a variety of factors that relate to either: the extent of the taking/valuation; or, the State's authority to act in the first place. *PruneYard Shopping Center,* 447 U.S. at 83 (emphasis added). But as the Court explained in *Kaiser Aetna v. United States*, whether the government has authority to act and whether the action "amounted to a 'taking,' . . . is an entirely separate question." *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979).

In support of this unexplained dichotomy, the Court relied on two cases in which a compensable taking *was found*: *Armstrong v. United States*, 364 U.S. 40, 48–49 (1960) ("We hold that there was a taking of these liens for which just compensation is due under the Fifth Amendment"); and *Kaiser Aetna* 444 U.S. 164, 179–80 ("In this case, we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.").

Because the legal authority supported a compensable taking, but the Court held otherwise, there must have been something unique in the facts that would compel that conclusion. Two candidates were noted: first that the shopping center was "open to the public at large", and second that their activities were limited to "free expression and petition."

PruneYard Shopping Center, 447 U.S. at 83. Whether one or both of these facts were dispositive, the Court did not say.[14] Thus, *Pruneyard* represented a break from traditional takings analysis with little to no explanation.

It is possible, however, to discern from *Pruneyard* four characteristics relevant to the takings analysis. The first two: whether there was a physical invasion and, if so, whether such invasion was permanent, go to whether there was a taking in the first place. The third, application of the *Penn Central* impaired-value analysis goes to the valuation of the taking. And the fourth, whether the owner made the property open to the public goes to both the existence of a taking and informs the valuation analysis. As could be expected, each of these characteristics has been adopted by some courts for some purposes. But no consistent framework has emerged.

Indeed, *Pruneyard's* legacy is messy, fluctuating among non-dispositive *Pruneyard* elements and deeming them dispositive; relying on *Pruneyard* for the non-controversial proposition that government can regulate—which was not in dispute in that case or here; and for the perverse proposition that if the government has authority to regulate, then whatever it takes in furtherance of that authority is not a compensable taking. Obviously, this latter interpretation flips the Fifth Amendment on its head

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[14] As noted, *supra* n. 13, the emphasis in *Pruneyard* on the use of the property for speech purposes has nurtured the spurious principle that government can compel the use of private property to host unwanted speech without running afoul of the First Amendment.

and renders questions regarding "public use" and "just compensation" a nullity.[15]

Attempts to apply *Pruneyard* in otherwise straightforward cases of physical invasion have fared poorly—in large part because no one seems to know which direction to look for guidance. For example, some courts have relied on *Pruneyard* for the proposition that permanent physical invasions require compensation, but temporary invasions do not. *E.g.*, *Judlo, Inc. v. Vons Companies*, 259 Cal. Rptr. 624, 627 (Cal. Ct. App. 1989) (holding that compelled placement of a newsrack on private property in the shopping center that is open to the public would be a compensable taking because the rack was permanent). Note that in *Judlo*, whether the placement of the rack would unreasonably impair the value or use of the property was not considered.

Other cases relying on *Pruneyard* have found economic impairment the dispositive factor—with no reference to physical intrusion, permanence, or public access. *E.g.*, *Batchelder v. Allied Stores Int'l, Inc.*, 445 N.E.2d 590, 592 (Mass. 1983). And still others have focused on openness to the general public, without consideration of permanence or the *Penn Central* impairment factors. *E.g.*, *Woodland v. Michigan Citizens Lobby*, 378 N.W.2d 337, 364 (Mich. 1985) ("the voluntary opening of the mall property to use by the general public diminishes, although it does not

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[15] *Pruneyard*, likewise, flipped the First Amendment on its head. Though the First Amendment issue is not before the Court in this case, to the extent that *Pruneyard* survives the Court's review here, the Court should reconcile the First Amendment holding from *Pruneyard* with the Court's other First Amendment decisions at the earliest opportunity.

extinguish, the owner's right to exclude."). Few cases ever reach the point of considering compensation.

The arc of these cases shows that the takings analysis in *Pruneyard* has largely devolved into whether the state has authority to regulate—which is completely beside the point. Even *with* authority to regulate, the government has a Fifth Amendment obligation to compensate. And the fact that the government may have authority to regulate merely informs the first Fifth Amendment element: public use, not the second element: just compensation. Thus, when courts rely on *Pruneyard* for the proposition that "a state may provide through its constitution a basis for the rights and liberties of its citizens independent from that provided by the Federal Constitution, and that the rights so guaranteed may be more expansive than their federal counterparts," *Com. v. Tate*, 432 A.2d 1382, 1387 (Penn. 1981), that assertion is neither here nor there when it comes to takings analysis. Indeed, such an interpretation bypasses the Fifth Amendment altogether by asking only whether the state may act, and not what its duties under the Fifth Amendment are when it does act.

The struggle to discern the holding of *Pruneyard* is aptly demonstrated by this case. Here, the Ninth Circuit noted that *Pruneyard* applied the *Penn Central* regulatory taking test despite having already acknowledged a taking. App. A-19. Thus, it would appear that in the Ninth Circuit, *Pruneyard* stands for application of *Penn Central* to deny a taking has

been made even when a physical invasion has been acknowledged.[16]

But like the Ninth Circuit's logical fallacy above, once a physical invasion has been demonstrated, the invasion cannot be waved away by muttering *Penn Central*.[17] Moreover, to the extent that any portion of the *Penn Central* analysis applies after a physical invasion has been proven, the question of whether the "restriction would unreasonably impair the value or use of the property" App. A-19, should go to valuation *not* to whether the physical world can be fictionalized to eliminate facts that do not comport with the preferred legal theory.

In addition, the Ninth Circuit concluded that the factual finding from *Pruneyard* that would appear to be most relevant to physical invasion of private property: the owner's decision to make the property open to the public, "[w]hile [it] was a consideration for the Court, it was not a dispositive one—and critically, it only factored into the Court's analysis under the standards set forth in *Penn Central*."[18] App. A-19. If that is so, and the public-access element of *Pruneyard* is only relevant to the question of valuation, then *Pruneyard* is left with no discernable holding

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[16] *Cf.* App. A-7–9 (Paez, J., concurring in denial of rehearing *en banc*) (conflating taking of an easement with valuation thereof).

[17] *Penn Central* itself may be untethered from the Constitution as originally understood. "The Court . . . has never purported to ground . . . [its regulatory takings] precedents in the Constitution as it was originally understood." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting).

[18] "*PruneYard* did not involve a state law that gave third parties access to otherwise private property[.] App. E-29 (Ikuta, J., dissenting from denial of rehearing *en banc*).

regarding when appropriation of the right to exclude transfigures from a taking that requires compensation under the Fifth Amendment into no "unconstitutional infringement" that does not require such compensation.

Application of the physical invasion test would go a long way toward resolving the disorder created by *Pruneyard* to clarify that physical invasions are controlled by *Loretto* and not by *Penn Central*. And the relevance of *Penn Central*, if any, to cases of physical invasion, is only to the second element of the Fifth Amendment: valuation of the property taken.

CONCLUSION

The Court should rule in favor of the Petitioners, reverse the decision below, and remand for further proceedings.

Respectfully submitted,

CYNTHIA FLEMING CRAWFORD
Counsel of Record
MICHAEL PEPSON
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
(571) 329-2227
ccrawford@afphq.org

Counsel for Amicus Curiae

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