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

BRIEF OF OKLAHOMA, ARIZONA, ARKANSAS, KENTUCKY, MISSOURI, NEBRASKA, AND TEXAS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

California law forces agricultural businesses to allow labor organizers onto their property three times a day for 120 days each year. The regulation provides no mechanism for compensation. A divided panel below held that, although the regulation takes an uncompensated easement, it does not effect a *per se* physical taking of private property because it does not allow "24 hours a day, 365 days a year" occupation. As an eight-judge dissent from denial of rehearing en banc noted, the panel "decision not only contradicts Supreme Court precedent but also causes a conflict split."

The question presented is whether the uncompensated appropriation of an easement that is limited in time effects a *per se* physical taking under the Fifth Amendment.

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INTERESTS OF *AMICI CURIAE* [1]

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

The *Amici* States want to ensure that the federal constitution continues to protect our citizens' property. While state constitutions provide that protection against state and local governments, only the federal constitution can provide protection against the federal government.

The *Amici* States also want to protect their own property rights against the federal government. The increasing power of the federal government will harm state property interests directly if the federal Takings Clause is unmoored from its traditional roots.

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[1] *Amici* notified the parties of the intention to file this brief more than ten days in advance, and *Amici* submit this brief pursuant to Sup. Ct. Rule 37.4.

SUMMARY OF THE ARGUMENT

I. The Ninth Circuit improperly conflated this Court's jurisprudence on physical takings and regulatory takings. As a result, it treated the physical taking of an easement across two farms as a regulatory taking. This judgment was errant.

II. The decision below also conflicts with state court decisions on takings. The facts of this case would be a *per se* physical taking under *Amici* States' parallel state constitutional law because it is the physical taking of a cognizable interest in property. *Amici* States differentiate between physical and regulatory takings based on whether non-owners are gaining rights in property or whether the owner is being restricted in his use of his own property. *Amici* States also treat an easement with time-based restrictions as a cognizable interest in property that can be physically taken. Thus, *Amici* States treat the taking of an easement with time-based restrictions as a *per se* physical taking.

III. This Court should resolve this takings issue in this case. The federal government has advocated the same extreme position on takings that the Ninth Circuit upheld here, and *Amici* States are concerned that the federal government could use that interpretation to harm us and our citizens. We also agree with Petitioners that this is a clean vehicle for this Court to resolve the circuit split on this issue.

ARGUMENT

I. THE NINTH CIRCUIT'S RULING VIOLATES THIS COURT'S JURISPRUDENCE.

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

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

This legal framework was errant under this Court's takings jurisprudence. This Court's "longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002). "[W]e do not ask whether a

physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use." *Id.* The Ninth Circuit effectively ignored these instructions, citing caselaw from both lines of takings jurisprudence to formulate a rule that a physical invasion is only a taking if it causes enough interference with the property. Pet. App. A-18.

The Ninth Circuit's error was likely caused by greater familiarity with regulatory takings cases than physical takings cases. After all, "most takings claims turn on situation-specific factual inquiries" because no physical invasion occurred. *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 32 (2012). Some ambiguity in this Court's precedent may have encouraged the Ninth Circuit to take the more familiar route, as it misunderstood whether a physical taking needs to meet some permanence test in order to be a *per se* taking. *Compare id.* at 31 (describing a *per se* physical taking as a "permanent physical occupation"), *with id.* at 34 ("a taking need not be permanent to be compensable").

As sovereign states, *Amici* are intimately familiar with both physical and regulatory takings—and are concerned that the Ninth Circuit is rewriting the rule on physical takings through its misunderstanding of the two types of takings. Thus, while we concur in Petitioners' further detailed discussion of the federal takings cases, *see* Pet. 17-27, we believe a review of state law on takings would help clarify that Petitioners' reading of takings jurisprudence is correct—and how the Ninth Circuit's interpretation conflicts with state court decisions across the country interpreting this bedrock American constitutional guarantee.

II. STATE LAW DEMONSTRATES THAT A CORRECT LEGAL FRAMEWORK WOULD TREAT THIS CASE AS A *PER SE* PHYSICAL TAKINGS CASE.

In state courts throughout the country, physical takings of a citizen's property are *per se* takings. These physical takings occur whenever any cognizable interest in property is taken, regardless of whether a fee simple interest, a limited easement, or some other interest is at issue.

The Ninth Circuit used different analysis because it misunderstood two legal principles: (1) the invasion of non-owners onto the property controls the distinction between physical and regulatory takings and (2) a permanent easement can have limits on scope. As a result, it errantly concluded that this case is a regulatory takings case and that the time-limited easement at issue is not the equivalent of other easements in takings jurisprudence. *Amici* States offer their understanding of the two legal principles to help clarify for this Court how much the Ninth Circuit's errant conclusions deviate from other courts across the country.

A. The Traditional Line Between *Per Se* Takings Claims and Regulatory Takings Claims Is the Ownership of a Cognizable Interest in Property.

Properly understood, physical takings cases turn on whether a cognizable property interest was taken, not on whether enough property rights were affected. *Contra* Pet. App. A-18. Like the U.S. Constitution, state constitutions inherited the English common law tradition of protecting private property "without any distinction between different types." *Horne v. Dep't of Agric.*, 576 U.S. 350, 358 (2015). As the

Supreme Judicial Court of Massachusetts stated over 150 years ago, the word "property" in a takings clause "include[s] every valuable interest which can be enjoyed as property and recognized as such." *Old Colony & F.R.R. Co. v. Inhabitants of Plymouth Cty.*, 80 Mass. 155, 161 (1859). Several states interpreted their takings clause using that exact same understanding. *See, e.g.*, *Schuster v. Pennsylvania Tpk. Comm'n*, 149 A.2d 447, 453 (Pa. 1959); *Liddick v. City of Council Bluffs*, 5 N.W.2d 361, 372 (Iowa 1942); *In re Forsstrom*, 38 P.2d 878, 887 (Ariz. 1934), *overruled in part on other grounds by State ex rel. Morrison v. Thelberg*, 350 P.2d 988 (Ariz. 1960); *James S. Holden Co. v. Connor*, 241 N.W. 915, 919 (Mich. 1932); *Callen v. Columbus Edison Elec. Light Co.*, 64 N.E. 141, 143 (Ohio 1902); *S. Kansas Ry. Co. v. Oklahoma City*, 69 P. 1050, 1056 (Okla. 1902).

This rule is distinct from regulatory takings because those "takings" arise from a different governmental power. As Oklahoma courts have explained, a takings case must distinguish between the power of eminent domain and the police power. *See St. Louis & S. F. R. Co. v. Love*, 118 P. 259, 262-63 (Okla. 1911). The power of eminent domain involves altering a party's "exclusive right to the occupancy, use, and control" of its estate by making the party "a tenant in common with some other person, corporation, or the public" over part or all of its estate. *Id.* at 262. In contrast the police power involves telling "every property owner" how to "use his own" estate rather than allowing others to use the estate. *Id.* at 263. The former requires just compensation, while the latter usually does not. *See id.*

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

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

B. State Case Law Confirms That Permanent Easements Can Have Time Limits in Their Scope.

Because the Ninth Circuit treated this case as a regulatory takings case, it muddled the distinction between the taking of an easement and substantial interference with property. An easement does not cease to be a cognizable interest in property if it falls below some threshold of the number of property rights

affected. *Contra* Pet. App. A-18. A proper understanding of easements would help avoid the Ninth Circuit's error.

By their very nature, easements are restricted property rights. "An easement is a right to make use of another's land for some definite and limited purpose." *Bonner v. Oklahoma Rock Corp.*, 863 P.2d 1176, 1181 (Okla. 1993) (original emphasis omitted). It obligates the burdened estate "not to interfere with the uses authorized by the easement." Restatement (Third) of Property (Servitudes) § 1.2 (2000). An easement may have express terms defining the authorized uses and still be an easement. *See, e.g.*, Okla. Stat. tit. 60, § 54.

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

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

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

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

While that case involved a prescriptive easement, an Iowa case shows how express easements can have similar limits. *See Riverton Farms, Inc. v. Castle*, 441 N.W.2d 405, 406 (Iowa Ct. App. 1989). An owner of two tracts of land purchased easements over an intervening estate, and the easements specified that they were "for the purpose of moving cattle and equipment to and from buyer's land." *Id.* A trial court found that "equipment" referred to farm equipment. *See id.* at 407. Based on that finding, it found two further

restrictions on the easements were consistent with the purpose of the easement. *See id.* at 407-08. It concluded that equipment and cattle could only use the easement during "daylight hours" and that equipment could only use the easement during "planting, cultivating, and harvest seasons." *Id.* The appellate court affirmed that these restrictions were "reasonable" and "in line with the intent of the parties." *Id.*

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

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

An easement may even be limited to two hours in the morning and two hours in the evening. In one D.C. case, owners of neighboring Georgetown houses had a three foot passageway between them.

See Wheeler v. Lynch, 445 A.2d 646, 647 (D.C. 1982). The passageway was on both properties, and each owner had an easement to use the other's half of the passageway. *See id.* When one property owner planned to build a second building on their lot, the other owner sought declaratory judgment regarding the proper use of the easement during construction. *See id.* at 648. The trial court concluded several limitations were appropriate, including "[t]hat during the period of the construction of the building, the use of the easement for the transportation of materials and equipment shall be limited to the hours of 9:30 a.m. to 11:30 a.m. and 2:00 p.m. to 4:00 p.m. weekdays." *Id.* The appellate court affirmed that the restrictions on the easement were reasonable. *See id.*

Nothing in California property law denies that these sorts of easements are property interests. California might not construe its state takings clause as covering every cognizable interest in property, *see Agric. Labor Relations Bd. v. Superior Court*, 16 Cal. 3d 392, 403 (1976) (state takings clause does not cover "laws passed in the promotion of public welfare" like the access regulations at issue here), but California does recognize these type of easements as interests in property. Its civil code expressly contemplates limits on easements: "The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." Cal. Civ. Code § 806. These express terms can include limits on hours of use. *See, e.g.*, *Willard v. First Church of Christ, Scientist*, 7 Cal. 3d 473, 475 (1972) (affirming the validity of an easement "for automobile parking during church hours"); *Scher v. Burke*, 192 Cal. Rptr. 3d 704, 719 (Ct. App. 2015) (noting an easement "limited to day-

light hours"), *aff'd,* 3 Cal. 5th 136 (2017); *Bixby Hill Cmty. Ass'n, Inc. v. Rancho Los Alamitos Found.*, No. B156650, 2002 WL 1767429, at *2 (Cal. Ct. App. July 31, 2002) (noting an easement "limited to those hours when the [historical] Site shall be open to the public"). Thus, while California's state takings law may be different than *Amici* States' takings law, its property law is no different.

In short, easements in California and elsewhere are best described as Petitioners describe them: "[a]n easement remains an interest in property even where it does not permit third-party access to private property all day, every day—it does not morph into a regulatory use restriction when limited in time." Pet. 20.

In states like many of the *Amici* States, this case would be a clear taking. Our courts prohibit the taking of a valuable property interest without just compensation, and a time-limited easement is a valuable property interest. Thus, if this taking had occurred in our states, it would require just compensation.

III. THE COURT SHOULD USE THIS VEHICLE TO RESOLVE THE ISSUE.

The Court should hear this particular case in order to resolve this takings issue because (1) this question of takings law risks grave harm to the States if not corrected, and (2) this case is a good vehicle to address the issue.

A. The Ninth Circuit's Decision Harms *Amici* States.

While *Amici* States and their citizens are not California residents, the Ninth Circuit's interpretation

of the Takings Clause has implications beyond California. The federal government's eminent domain power is controlled by that clause, and the federal government has previously urged the same reading of that clause as the Ninth Circuit adopted here. As the federal government's power grows, it could use the Ninth Circuit's reading of the Takings Clause to harm *Amici* States.

The federal government has argued to other courts that some new multi-factor "permanence" test is required for physical takings. *See* Appellant's Opening Brief, at 35, *Caquelin v. United States*, 959 F.3d 1360 (Fed. Cir. 2020) (No. 19-1385) ("The Supreme Court's decision in *Arkansas Game* makes abundantly clear that temporary physical takings claims require fact-specific consideration (rather than treatment as a taking per se)."). The Federal Circuit rejected this theory, correctly recognizing that nothing in *Arkansas Game* requires treating the taking of an easement as something less than a *per se* physical taking. *See Caquelin*, 959 F.3d at 1369. It also recognized the two lines of takings jurisprudence differentiate between "regulat[ing] the landowner's conduct on her land" and "formal legal interest[s] in land." *Id.* But the Ninth Circuit's decision in this case breathes new life into the federal government's position.

Amici States are concerned about the federal government's taking power because that power could directly harm the states. Since 1875, the federal government has been authorized to take state property for its own use under the eminent domain power. *See*

Kohl v. United States, 91 U.S. 367, 372 (1875).[2] As the federal regulatory state increases, its impacts on state property also increase. *See Arkansas Game*, 568 U.S. at 26 (federal flooding of state-owned land). *Amici* States are concerned that other federal circuits will adopt the Ninth Circuit's reading of the Takings Clause, allowing the federal government to take state property without just compensation by merely adding a time limit.

This power carries the particular risk of facilitating federal government coercion of states. If the federal government can classify taking state property with a time limit as a mere regulation, it can use those regulations or threats of those regulations to exact concessions from states with whom it politically disagrees. *See* Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. Pa. L. Rev. 829, 861-62 (1989). The issue may never reach this Court, either, because states have to weigh the costs of litigating the regulation (and potentially losing) against the cost of giving the federal government what it wants.

More than Petitioners' farms in California will suffer loss if the federal government continues the aggressive theory of takings law that it advocated in *Caquelin*. This Court should confirm the bright line between physical and regulatory takings before *Amici* States and their citizens are harmed.

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[2] This case may not be consistent with the original understanding of the Constitution. *See* William Baude, *Rethinking the Federal Eminent Domain Power*, 122 Yale L.J. 1738, 1741 (2013). Nevertheless, that issue is not before the Court today.

B. This Case Presents a Good Vehicle to Resolve the Question.

In addition to Petitioners' comments on why this case is a good vehicle, Pet. 27-31, *Amici* States offer two further observations.

First, the Federal Circuit's statements in *Caquelin* confirm that there is a circuit split here. Pet. 13-17. Some members of the Ninth Circuit disputed the existence of a split, Pet. App. E-8-E-9, but their argument was based on their false conflation of physical and regulatory takings—a mistake that the Federal Circuit does not make. *See Caquelin*, 959 F.3d at 1369.

Second, Petitioner's waiver of any regulatory takings claim under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), is a rarity that makes a better vehicle highly unlikely. Without such a waiver, courts like the Ninth Circuit are likely to treat cases like this one as *Penn Central* regulatory takings, and may even grant some compensation. The Ninth Circuit strongly suggested it would have taken that approach in this case absent the waiver. Pet. App. A-19–A-20. Such outcomes would deter appeals to this Court because the question of physical or regulatory taking would have an unclear effect on the outcome of the case. The line between physical and regulatory takings is best resolved in this clean vehicle.

CONCLUSION

For the reasons stated, this Court should grant Petitioners the writ of certiorari.

Respectfully submitted,

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