No. 20-107

In The Supreme Court of the United States

CEDAR POINT NURSERY AND
FOWLER PACKING COMPANY, INC.,

Petitioners,

v.

VICTORIA HASSID, IN HER OFFICIAL CAPACITY AS CHAIR OF THE AGRICULTURAL LABOR RELATIONS BOARD; ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE NATIONAL EMPLOYMENT LAW PROJECT, NATIONAL WOMEN'S LAW CENTER, LATINOJUSTICE PRLDEF, PUBLIC JUSTICE, NATIONAL COUNCIL FOR OCCUPATIONAL SAFETY AND HEALTH, WORKSAFE, FOOD CHAIN WORKERS ALLIANCE, JUSTICE FOR MIGRANT WOMEN, NATIONAL COUNCIL OF JEWISH WOMEN, INC., HEARTLAND CENTER FOR JOBS AND FREEDOM, ECONOMIC POLICY INSTITUTE, NATIONAL EMPLOYMENT LAWYERS' ASSOCIATION, NATIONAL CENTER FOR LAW AND ECONOMIC JUSTICE, AND JUSTICE AT WORK IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici National Employment Law Project, National Women's Law Center, LatinoJustice PRLDEF, Public Justice, National Council for Occupational Safety and Health, WorkSafe, Food Chain Workers Alliance, Justice for Migrant Women, National Council of Jewish Women, Inc., Heartland Center for Jobs and Freedom, Economic Policy Institute, National Employment Lawyers' Association, National Center for Law and Economic Justice, and Justice at Work are nonprofit organizations aimed at advancing policies that reinforce our nation's stated values of equality, opportunity, and justice. Amici have an interest in the outcome of this case based on their experiences advocating for workers' rights, and the need to ensure effective access to worksites in order to uphold labor and workplace laws.

Amici write not to repeat arguments made by the parties, or other amici, but to describe the possible dire impacts of a ruling in this case to a broad set of workers and communities in the many low-wage sectors that share many of the characteristics as the jobs in this case.[1]

[1] All parties have consented to the filing of this brief. In addition, no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than amici or amici's counsel made a monetary contribution to the preparation or submission of this brief, as provided in Rule 37.3(a) and 37.6.

SUMMARY OF ARGUMENT

Companies that use their premises for commercial activities are limited in their right to exclude unwanted individuals. Business owners expect and rely on long-standing public safeguards that require periodic on-site inspection of themselves, their subcontractors, and competitors in workplaces like agriculture and food production, warehousing, poultry and meatpacking, hospitals and nursing homes, construction sites, security and janitorial, landscaping, retail, mining and extraction, restaurants, and hotels. Inspection and other on-site visits by government and third-party experts is vital for the health and safety of workers, consumers, and the broader public, and rules permitting such access also promote enduring public policies against discriminatory exclusions by businesses.

In this case, Petitioners challenge a long-standing California Agricultural Labor Relations Board ("ALRB" or "Board") rule that permits union organizers to seek permission to enter onto employer property for limited periods, during lunchtimes or before or after a shift, to talk to workers. Petitioners claim that the ALRB regulations violate their Fifth Amendment right to exclude unwanted visitors from their property as a per se taking.

Workers earning lower wages like the agricultural workers employed by Petitioners face high rates of wage theft, work in dangerous jobs, and rely on enforcement of workplace protections that includes on-site access for audits and inspections to ensure

compliance.[2] For these reasons, public policies and agencies aim strategic enforcement resources at high-violation industries to ensure compliance and deter unfair competition.

Amici write to highlight these and similarly-situated workers' interests to this case, providing additional and relevant facts to the Court as it is asked to radically alter constitutional law in a way that would cause immeasurable harm to workers and our society.

If Petitioners' argument succeeds, it could not only ban union organizers but also open the door to threaten worksite access by the government and authorized third parties that ensure myriad protections related to safety and health, civil rights, and the general well-being of the public. Without access to company premises, enforcement of worker and community protections will be hamstrung and potentially meaningless, undoing landmark policies from the New Deal and civil rights eras. And, as other amici point out, including the National Association of Counties, the success of this argument could endanger a much broader swath of regulation for the public safety and welfare.

[2] *See*, *e.g.*, amicus brief for California Rural Legal Foundation et al. for a description of the job quality and workplace violations endemic in agriculture.

ARGUMENT

I. Commercial firms cannot assert a Fifth Amendment right to exclude people—workers, customers, and, importantly to this case, non-employee labor representatives—from their commercial operations if that access is related to commercial regulation of the firm.

The question presented in this case is whether a Fifth Amendment physical taking has occurred. The answer is no. Nothing in this Court's history supports the notion that a commercial firm has suffered a per se physical taking when a state or locality or the federal government makes and implements rules that regulate commercial activity for the public good. This Court has never prohibited the kind of circumscribed, time-limited access regulation of commercial activity presented in this case.

Petitioners' challenge fails to state a per se physical taking under the Fifth Amendment. The California ALRB's regulation, Cal. Code Regs., tit. 8, § 20900, is a 45-year-old limited access rule aimed at the activities of the business, i.e., petitioners' use of land for commercial enterprise. *See Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) (finding no physical, per se taking because the "laws at issue here merely regulate petitioners' *use* of their land by regulating the relationship between landlord and tenant"); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982) (distinguishing a permanent, physical occupation from regulation that merely restricts the use of private

property). The Board's regulations are not land-use regulation aimed at private property. They seek to regulate specific labor relations inherent to agricultural commerce. *See* Cal. Code Regs., tit. 8, § 20900(d) (noting the California legislature's "declared purpose of bringing certainty and a sense of fair play to a presently unstable and potentially volatile condition in the agricultural fields of California").

Time and again, in such cases as *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) and *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), this Court has made clear that businesses cannot assert a Fifth Amendment right to exclude others where access is related to—in fact, necessitated by—commercial regulation of the firm. While the Fifth Amendment protects certain property rights, those rights are not unlimited. Where there is a state interest in regulating property, a "broad range of governmental purposes and regulations satisfies" the requirements for a valid infringement of property rights. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987). Where the state's regulations focus on *commercial activity*, the government's ability to regulate is even greater given "the State's traditionally high degree of control over commercial dealings[.]" *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1026 (1992).

Here, Petitioners and companies like them are commercial enterprises. Their very reason for being—the means by which they generate revenue and profit—requires them to invite people onto their premises. Employees, contractors, and subcontractors are

invited and welcomed onto the property to work the land. At the same time, commercial firms' right to exclude is limited and based on statutory protections in the public interest. Rules that permit certain governmental and third-party access to commercial property are vital for the health and safety of workers, of consumers, and of the broader public, and rules that restrict corporations' right to exclude promote longstanding public policies against discriminatory exclusions. The ALRB's rule is one of countless regulatory regimes across the country in which the state has an interest in regulating commercial activity for the common good.

This Court has repeatedly said that for a physical taking to occur, there must be "actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property." *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924). This Court has distinguished between "permanent physical occupation, and a physical invasion short of an occupation, and a regulation that merely restricts the use of property." *Loretto*, 458 U.S. at 430. Further, "[n]ot every physical *invasion* is a taking . . . [because] they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property." *Id.* at 435 n.12. Government rules in all sorts of public policy arenas, discussed in greater detail in Section II, grant people periodic access to private property that does not amount to a "permanent and physical occupation" of the property. *Id.* at 434-35.

Petitioners' argument has no connection to this Court's takings jurisprudence and would wreak untold havoc on public policies that form the backbone of our public health and wellbeing. On this point, the Court is clear: "[N]either property rights nor contract rights are absolute. . . . Equally fundamental with the private right is that of the public to regulate it in the common interest." *Nebbia v. New York*, 291 U.S. 502, 523 (1934). Petitioners seek to extinguish the public's ability to regulate ordinary commercial activity in the guise of an inapplicable takings argument.

II. If the California rules are unconstitutional, many government-authorized enforcement actions, and the safety, health, and welfare of workers and communities could be in jeopardy.

A. Workers, the broader public and employers depend on government-authorized individuals' access onto private property in order to ensure compliance with regulations and to ensure employee safety and health.

Ensuring compliance with workplace and public protections often requires public officials and authorized third parties to temporarily enter onto private land, and this activity has not given rise to constitutional liability under the Takings Clause. The Solicitor General agrees: "both this Court and the lower courts have long recognized that all property is held subject to certain core exercises of the police power, like

law-enforcement searches and health and safety inspections—though other constitutional constraints, like the Fourth Amendment, may apply."[3] From meat and poultry plants, to hospitals, mines, and grocery stores, temporary and physical access by government and third parties in furtherance of public protections are an important and common feature of business operations.

Below, amici illustrate a sampling of the many instances where government access to employer property along with third parties (and sometimes solely by third parties) serves as a critical compliance check on firms' behavior. The alternative is for enforcement agencies to conduct desk or phone audits or wait for individual workers' evidence, but worker fear of retaliation and loss of economic security present severe barriers to many workers, meaning that individual complaint-driven and desk-audit enforcement is woefully inadequate.[4]

1. Occupational Safety & Health Act.

The 1970 Occupational Safety and Health Act ("OSH Act") authorizes the health and safety agency to

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[3] Brief amicus curiae of the United States, at 29; *see also* Brief amici curiae of National Association of Counties et al.

[4] David Weil and Amanda Pyles, *Why Complain? Complaints, Compliance and the Problem of Enforcement in the US Workplace*, 27 COMP. LABOR LAW & POL'Y JOURNAL 59 (2006), available at: https://www.researchgate.net/publication/267260153_Why_Complain_Complaints_Compliance_and_the_Problem_of_Enforcement_in_the_US_Workplace.

enter onto premises to inspect workplaces for health and safety compliance. 29 U.S.C. § 657. Section (e) of the Act allows for authorized employee representatives to accompany Compliance Safety and Health officers during any physical inspection of a worksite "for the purpose of aiding such inspection," and to "provide an appropriate degree of involvement of employees." 29 U.S.C. § 657(e); 29 C.F.R. § 1903.8. Although these representatives are normally employees (and where there is a union representing the employees, a representative from the union), the law permits third parties, such as industrial hygienists or others who may aid in the inspection, to join in the walk-around.[5] 29 C.F.R. § 1903.8; *see*, *e.g.*, *Matter of Establishment Inspection of Caterpillar Inc.*, 55 F.3d 334, 336 (7th Cir. 1995).[6]

As discussed below for meat and food processing and warehousing, other government agencies inspect worksites for health and safety compliance, including

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[5] Relevant to the union organizers' access in this case, union representation is positively correlated with health and safety on the job. Economic Policy Institute, *Why Unions are Good for Workers—especially in a crisis like Covid-19*, Aug. 25, 2020, https://www.epi.org/publication/why-unions-are-good-for-workers-especially-in-a-crisis-like-covid-19-12-policies-that-would-boost-worker-rights-safety-and-wages/.

[6] The Trump Administration withdrew a 2013 Letter of Interpretation that clarified the right of non-union third parties to accompany OSHA during walk-around inspections. https://www.osha.gov/laws-regs/standardinterpretations/2013-02-21. The underlying regulations are still intact permitting third parties; however, there is more discretion with the OSHA inspector as to who to permit. https://www.osha.gov/sites/default/files/2018-12/fy10_sh-20853-10_osha_inspections.pdf.

in long-term care (nursing homes) and hospitals. For these worksites with specialized health and safety compliance requirements, mandatory annual inspections and surveys may be performed by authorized private professional review organizations and designated ombudspersons.[7]

Without third party access, employer property, health and safety inspections would flounder, given a dire lack of government resources and capacity to inspect alone. As of January 2020, OSHA had a total of 862 inspectors to cover millions of workplaces, the lowest number of on-board inspectors in the previous 45 years. At this staffing level, it would take the agency 165 years to inspect each workplace under its jurisdiction just once.[8]

The current health and safety emergencies facing workers in warehouses, meat processing, nursing homes, grocery stores, and other premises-based jobs

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[7] *See*, *e.g*, listing of inspections of facilities operated under Medicare and Medicaid by the Centers for Medicaid Services in the Department of Health & Human Services and other entities, permitting CMS or its designee to inspect records, lists, etc., at 81 Fed. Reg. 81 at 68799, 68800, 68867, available at: https://www.federalregister.gov/documents/2016/10/04/2016-23503/medicare-and-medicaid-programs-reform-of-requirements-for-long-term-care-facilities.

[8] NAT'L EMP. L. PROJECT, WORKER SAFETY IN CRISIS: THE COST OF A WEAKENED OSHA, at 2–3 (Apr. 2020), https://s27147.pcdn.co/wp-content/uploads/Worker-Safety-Crisis-Cost-Weakened-OSHA.pdf.

during the COVID-19 pandemic illustrate the need for robust oversight using all tools and persons at hand.[9]

2. Mine Safety & Health Act.

The Mine Safety and Health Administration ("MSHA") has a long tradition of allowing miners' representatives to enter mines along with its inspectors under the Mine Act and accompanying regulations. 30 U.S.C. § 813(f); 30 C.F.R. § 40.1. Permitted miners' representatives on inspections can be a member of an organization which represents two or more miners at a coal or other mine, and include union representatives. 30 U.S.C. § 813(f); 30 C.F.R. § 40.1. MSHA regulations provide for a minimum of two annual inspections of surface mines and four annual inspections of underground mines, and sometimes more if the mine has explosive or toxic gasses. 30 U.S.C. § 813(a). Depending on the size of the worksite, each inspection can take a day to a few weeks. These inspections have never been considered a physical taking, even though the usage may be continuous. *See Thunder Basin v. Reich*, 510 U.S. 200 (1994).

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[9] *See*, *e.g.*, Joel Grover, *More Than 800 SoCal Supermarket Workers Test Positive for COVID-19*, NBC4NEWS (Dec. 30, 2020), https://tinyurl.com/yacpcq2d; LA Cnty. Dep't of Pub. Health, *Workplace Outbreaks Surge as Public Health Ramps Up COVID-19 Vaccination Capacity 281 New Deaths and 14,564 New Confirmed Cases of COVID-19 in Los Angeles County* (Jan. 13, 2021), https://tinyurl.com/y6h4so3z; Nat'l Empl. Law Proj., *OSHA Must Protect COVID Whistleblowers Who File Retaliation Complaints* (Oct. 8, 2020), https://www.nelp.org/publication/osha-failed-protect-whistleblowers-filed-covid-retaliation-complaints/.

In *Thunder Basin*, the Court highlighted the reason for the access enforcement scheme, one that was put in place to curb "frequent and tragic mining disasters" due to the ineffectiveness of the enforcement measures existing at the time of the Mine Act. *Id*. at 209-10 (citing S.Rep. No. 95-181, p. 4 (1977), U.S. Code Cong. & Admin. News 1977, p. 3401, Legislative History of the Federal Mine Safety and Health Act of 1977). In *Thunder Basin*, the Court dismissed any Fifth Amendment challenge to such access, arguing that such claims "misconstrue *Lechmere*," since the right to exclude union organizers derives from state property law, which states can redefine:

> [w]ithout addressing the merits of petitioner's underlying claim, we note that petitioner appears to misconstrue *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 112 S.Ct. 841, 117 L.Ed.2d 79 (1992). The right of employers to exclude union organizers from their private property emanates from state common law, and while this right is not superseded by the NLRA, nothing in the NLRA expressly protects it. To the contrary, this Court consistently has maintained that the NLRA may entitle union employees to obtain access to an employer's property under limited circumstances. *See id*., at 537, 112 S.Ct., at 848; *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112, 76 S.Ct. 679, 684, 100 L.Ed. 975 (1956). Moreover, in a related context, the Court has held that Congress' interest in regulating the mining industry may justify limiting the private property interests of mine operators. *See Donovan v. Dewey*, 452 U.S. 594,

> 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981) (unannounced Mine Act inspections do not violate the Fourth Amendment).

Id. at 217.

MSHA inspectors and third-party miner representatives can also access the property for spot inspections, such as methane checks, and to follow up on complaints, making their access continuous in nature. 30 U.S.C. § 813(f). Miners' representatives are tasked with assisting mine operators to comply with the health and safety standards under the Mine Act. 30 U.S.C. § 813(f). They are allowed to report accidents, health and safety hazards, and unsafe conditions, and can even request a special inspection to investigate violations or imminent dangers to the Secretary. 30 U.S.C. § 813(g)(1); 30 C.F.R. § 43.2. MSHA inspectors are not required to give advance notice of these inspections, and the miners' representatives can be present during the inspection, as well as during the pre- and post-inspection conferences. 30 U.S.C. § 813(f); 30 C.F.R. § 40.1.

The importance of maintaining robust mine safety compliance, including providing access to miners' representatives, cannot be overstated in light of the recent history of mining disasters. Massey Energy's Upper Big Branch mining disaster that killed 29 miners in 2010 was the worst such disaster in 40 years.[10] When

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[10] U.S. Dep't of Labor, Mine Safety and Health Administration, *Report of Investigation*, May 9, 2007, available at:

workers and families at the non-unionized mine asked the United Mine Workers of America to represent them in the subsequent investigation, the union's access generated a comprehensive report on the mining disaster that resulted in government investigations and prosecutions.[11]

3. U.S. Department of Agriculture's Food Safety and Inspection Service and the U.S. Food and Drug Administration.

To ensure that the commercial supply of meat, poultry, and egg products is safe for consumption and accurately labeled, the U.S. Department of Agriculture's Food Safety and Inspection Service ("FSIS") employs thousands of inspectors with the authority to access the property of privately-owned food production facilities. The Federal Meat Inspection Act, 21 U.S.C. § 642, permits duly authorized representatives to access places of business to examine facilities.

In accordance with U.S. Department of Agriculture ("USDA") regulations, most production facilities are required to provide permanent, rent-free office

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https://www.amsj.com.au/wp-content/uploads/2020/01/MSHA-Sago-Report-of-Investigation.pdf.

[11] Howard Berkes, *Union: W.VA. Mine Disaster was Industrial Homicide*, NPR (Oct. 25, 2011), available at: https://www.npr.org/sections/thetwo-way/2011/10/25/141681614/union-w-va-mine-disaster-was-industrial-homicide. *See* U.S. Dep't of Justice, *Former Massey Energy CEO Sentenced to a Year in Federal Prison* (Apr. 6, 2016), available at: https://www.justice.gov/opa/pr/former-massey-energy-ceo-sentenced-year-federal-prison.

space for the exclusive use of FSIS inspectors. 9 C.F.R. § 307.1. The Agricultural Marketing Act of 1946,

7 U.S.C. § 1624(a), grants the Secretary of Agriculture authority to enter into contracts with private firms and other individuals to inspect, compile reports and surveys, and perform other functions. In other words, the USDA statute and regulations mandate that private property owners grant permanent access to outsiders for the purpose of worker and public health. No one would assert a taking here.

Similarly, the Food and Drug Administration ("FDA"), under the Food Safety Modernization Act ("FSMA"), has enforcement powers that grant it the power to conduct investigations and enforce safety standards. 21 U.S.C. § 2224(c). Responding to recent history of produce contamination, the FSMA mandates government inspections of private food facilities and establishes an inspection frequency based on the facility's risk of potential contamination. FDA inspectors and third parties thus are permitted to access privately-owned food production facilities.[12]

Before Congress passed the FSMA in 2011, a number of food safety failures underscored the urgent need for public regulation of food supply chains. The

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[12] *See*, *e.g.*, Reneé Johnson, *The Federal Food Safety System: A Primer*, Congressional Research Service (Dec. 16, 2016), https://fas.org/sgp/crs/misc/RS22600.pdf; and *FSMA Final Rule on Accredited Third-Party Certification*, U.S. Food and Drug Admin. (Nov. 2015), https://www.fda.gov/food/food-safety-modernization-act-fsma/fsma-final-rule-accredited-third-party-certification.

infamous 2006 e.coli outbreak resulting from bagged spinach highlighted the government's inability to adequately inspect and regulate food supply chains. Those failures contributed to a difficult-to-contain outbreak that led to nearly 200 consumer illnesses and three deaths resulting from the contaminated produce.[13] The FSMA, by authorizing the FDA and outside inspectors to access private food facilities, creates a regulatory regime that ensures that food contamination can be prevented and contained through on-site inspections.[14]

These are common regulations of commercial activity that require the state's and authorized users' temporary access to private property. They are the foundation of the nation's food safety, ensuring that the public can purchase and enjoy food without risk of illness or death. Yet Petitioners' argument perilously opens the door to Fifth Amendment challenges to these and other governmental regulatory activities critical to the health and safety of workers and the public.

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[13] Libby Sander, *Source of Deadly E.coli Is Found*, The New York Times (Oct. 13, 2006), https://www.nytimes.com/2006/10/13/us/13spinach.html.

[14] Under the U.S. Warehouse Act, 7 C.F.R. § 869.108, warehouse operators must permit any agent of the Department of Agriculture to enter and inspect or examine any licensed warehouse, offices of the warehouse operator, books, records, papers, and accounts.

III. Anti-Discrimination Rules Limiting Employers' Right to Exclude Workers and Individuals are in Jeopardy Under Petitioners' Argument.

There is a long history of businesses challenging anti-discrimination laws as unconstitutional takings that infringe on their property rights to exclude whomever they wish from their property. *See*, *e.g.*, *Commonwealth v. Beasy*, 386 S.W.2d 444, 446-47 (Ky. 1965) (rejecting restaurant owner's arguments that Louisville, Kentucky ordinance prohibiting discrimination on the basis of race, color, religious beliefs, ancestry, or national origin violated his constitutional rights of property, including his rights under the Takings Clause of the Kentucky State Constitution); *Pinnock v. Int'l House of Pancakes Franchisee*, 844 F. Supp. 574, 586-89 (S.D. Cal. 1993) (rejecting business owner's arguments that required alterations to property to make restaurant wheelchair-accessible under the Americans with Disabilities Act was an unconstitutional taking). The Court has consistently rejected such arguments, most famously in *Heart of Atlanta Motel*, *supra*, 379 U.S. at 258-60 (1964) (finding that a company "has no 'right' to select its guests as it sees fit, free from governmental regulation").[15] But a ruling for Petitioners would place that jurisprudence in jeopardy.

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[15] Scholars have recognized that, as a doctrinal matter, *Heart of Atlanta* resolved such Takings Clause and property rights challenges to anti-discrimination statutes. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1302 (1996) (explaining that the

The Institute for Justice, writing in support of Petitioners as amicus curiae, argues that "Government-sanctioned physical invasions of private property almost always constitute a taking." Amicus Brief of Instit. for Justice at 7. Other amici go further, arguing that "*any* interference with the 'right to exclude' . . . is a taking of that fundamental attribute" of property rights. Amicus Brief of Cato Inst. at 2; *see also* Amicus Brief of Mountain States Legal Foundation at 9, 21-26 (arguing that "the right to exclude others is the *sine qua non* of property rights, not some inconsequential element of the whole that can be tossed aside without thought," and that the "bundle of sticks" conception of property rights should be retired). But this radical conception of government regulation and view of the nature of property rights threatens the foundations of well-established anti-discrimination law.

Thus, under Petitioners' theory of the case, Title VII of the Civil Rights Act and analogous federal civil rights laws have been and could be argued to impermissibly sanction a taking insofar as they require

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constitutionality of the Civil Rights Act of 1964 was "sufficiently in question that it took a decision of the Supreme Court to lay to rest contentions that it unlawfully took property rights without just compensation") (citing *Heart of Atlanta*, 379 U.S. at 258-61, and collecting older cases); Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1220-21 (2014) ("[A]s a doctrinal matter, the Supreme Court's *Heart of Atlanta* decision resolved the property-and-contract challenge to Title II of the Civil Rights Act."). Courts also recognized that *Heart of Atlanta* had settled such questions. *See*, *e.g.*, *Beasy*, 386 S.W.2d at 446-47; *Twitty v. Vogue Theatre Corp.*, 242 F. Supp. 281, 284-85 (M.D. Fla. 1965).

employers to permit "physical invasions" of their property by employees that they might otherwise wish to exclude on the basis of race, color, national origin, sex, disability, or age. An employer who wishes to exclude a Black employee could be emboldened to argue that Title VII constitutes a taking of its "right to exclude," and thus a per se taking. *See* Amicus Brief of Cato Inst. at 15 ("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.") Similarly, the Americans with Disabilities Act of 1990 ("ADA") could be argued to constitute a taking insofar as it requires businesses to make reasonable accommodations that permit entry onto their property by customers they might otherwise wish to exclude on the basis of their disability. A business owner could thus not only challenge the ADA's reasonable accommodation requirements as a taking but also demand that the government pay for the cost of a ramp. *See* Amicus Brief of W. Growers Assoc. et al. at 10 ("Neither by itself, nor through authorizing others, may a public agency invade the right of private property owners to exclude third parties from their land—not without compensation.").

While courts have historically rejected such absolutist arguments about the impact of civil rights laws on property rights, particularly given the government's compelling interest in protecting and addressing

discrimination,[16] a ruling here in favor of Petitioners would embolden employers to resurrect such arguments, thereby threatening critical civil rights protections.

IV. Many workers who will be impacted by this ruling are disproportionately people of color and immigrants, are low-paid and subject to wage theft and work-related illness and injury, and benefit from jobsite access by experts and third parties.

The standards at issue in this case impact millions of low-paid workers, including in agricultural and non-agricultural sectors. In this brief, so as not to repeat arguments made by others, amici focus on the more than 61 million workers, over a third of all U.S. workers, who labor in non-agricultural on-premises jobs, including in the retail, food service, hotel, hospital, nursing home, construction, mining, janitorial, security, landscaping, warehousing, car wash, meat and food processing, apparel manufacturing, dry-cleaning and laundry, beauty and nail salon, and childcare sectors.[17] According to government projections, on-premises jobs that require reporting to a worksite will

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[16] *See*, *e.g.*, *People v. King*, 18 N.E. 245, 248-49 (N.Y. 1888) (rejecting property rights challenge to public accommodations statute prohibiting discrimination on basis of race, color, or previous condition of servitude and emphasizing the public interest in preventing racial discrimination between citizens).

[17] National Employment Law Project ("NELP") analysis of pooled American Community Survey microdata, 2015-2019, https://data.census.gov/mdat/#/search?ds=ACSPUMS5Y2019.

maintain their prevalence in the coming decade.[18] These jobs that enable U.S. consumers to meet basic needs often leave the workers who perform them struggling to meet their own. Long-standing enforcement mechanisms that require worksite access by third parties to ensure compliance are critical to worker and public protections. The stakes could not be higher for the workers in these jobs.

Workers who are Black, indigenous, people of color, and immigrants are overrepresented in on-premises jobs. People of color comprise 37.1 percent of the overall workforce, but 46.1 percent of on-premises workers.[19] Black workers are overrepresented by over 100 percent in hospital, nursing home, and security work: while Black workers are 11.8 percent of all workers, they are 25.8 percent of low-paid hospital and nursing home workers such as nursing assistants and phlebotomists, and 30.5 percent of private security guards.[20] Latinx workers are overrepresented by over 100 percent in hotel and landscaping work: Latinx workers are 16.7 of all workers, but 38.2 percent of hotel workers and 34.7 percent of landscaping and

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[18] NELP analysis of U.S. Bureau of Labor Statistics Employment Projections, 2019-2029, https://www.bls.gov/emp/tables/emp-by-detailed-occupation.htm.

[19] NELP analysis of pooled American Community Survey microdata, 2015-2019, https://data.census.gov/mdat/#/search?ds=ACSPUMS5Y2019.

[20] NELP analysis of pooled American Community Survey microdata, 2015-2019, https://data.census.gov/mdat/#/search?ds=ACSPUMS5Y2019.

groundskeeping workers.[21] Asian and Pacific Islander workers are overrepresented by over 100 percent in salons and garment factories: Asian and Pacific Islander workers are 5.8 percent of all workers, but 18.2 of beauty and nail salon workers, and 11.7 percent apparel manufacturing workers.[22] Immigrant workers, including undocumented workers, are approximately 17.2 percent of all workers but 21.0 percent of on-premises workers.[23] Workers who were born outside the U.S. are especially overrepresented in garment factories, food processing plants, industrial laundries, and hotels—comprising between 30 and 42 percent of workers at those sites.[24] Approximately 41.8 percent of workers of color and 42.1 percent of immigrant workers hold an on-premises job, compared to 28.7 percent of white, non-Hispanic workers and 32.9 percent of workers born in the U.S.[25]

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[21] NELP analysis of pooled American Community Survey microdata, 2015-2019, https://data.census.gov/mdat/#/search?ds=ACSPUMS5Y2019.

[22] NELP analysis of pooled American Community Survey microdata, 2015-2019, https://data.census.gov/mdat/#/search?ds=ACSPUMS5Y2019.

[23] NELP analysis of pooled American Community Survey microdata, 2015-2019, https://data.census.gov/mdat/#/search?ds=ACSPUMS5Y2019.

[24] NELP analysis of pooled American Community Survey microdata, 2015-2019, https://data.census.gov/mdat/#/search?ds=ACSPUMS5Y2019.

[25] NELP analysis of pooled American Community Survey microdata, 2015-2019, https://data.census.gov/mdat/#/search?ds=ACSPUMS5Y2019.

Companies in these sectors routinely invite contractors and subcontractors onto their property, creating multi-layered employment relationships that can create race-to-the-bottom dynamics with stifling effects on job quality and the power workers have to negotiate terms of work and exercise their rights.[26] Subcontracting to temporary help and staffing agencies in warehousing, construction, personal care, manufacturing, agricultural and retail sectors place downward pressure on wages, benefits, and safety standards.[27] These practices make jobs contingent and diffuse accountability for labor standards, reducing worker bargaining power and increasing the likelihood of labor standards violations.

Low pay and working poverty are particular problems for too many on-premises workers. In 2019, median wages for dozens of categories of on-premises workers were well below the median for all workers, $49,041, and below the equivalent of a $15 hourly wage. Workers earning median wages less than the

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[26] *See*, *e.g.*, NAT'L EMPL. L. PROJ., *Who's the Boss: Restoring Accountability for Outsourced Work*, 2014, available at: https://www.nelp.org/publication/whos-the-boss-restoring-accountability-for-labor-standards-in-outsourced-work/.

[27] Laura Padin and Maya Pinto, *Lasting Solutions for America's Temporary Workers*, National Employment Law Project, Aug. 26, 2020, https://www.nelp.org/publication/lasting-solutions-americas-temporary-workers/; Christine Owens, Catherine Ruckelshaus, Laura Padin, *Comments on RIN 1235-AA26: Joint Employer Status Under the Fair Labor Standards Act*, National Employment Law Project, June 25, 2019, https://s27147.pcdn.co/wp-content/uploads/Comments-USDOL-Joint-Employer-Status-FLSA.pdf.

equivalent of $15 an hour, or $31,200 annually for a full-time year-round worker, included dishwashers and cooks at restaurants, housekeeping cleaners and desk clerks at hotels, nursing assistants and orderlies at hospitals and nursing homes, helpers at construction sites, janitors and security guards and landscapers at commercial buildings, stockers and package handlers at warehouses, car wash workers, butchers at food processing facilities, sewing machine operators at garment factories, laundry and dry-cleaning workers, manicurists and skin specialists at salons, and child-care workers at daycare facilities.[28] Across sectors in the U.S., 23.0 percent of all workers receive incomes that place them under 200 percent of the federal poverty threshold; for on-premises workers, that share is 35.2 percent—well over one-third of workers who report that their main job is in on-premises work earn an annual wage that makes them eligible for several types of public assistance.[29]

Compounding the challenge of subsisting on income from a job with a low pay rate is the cruel reality that wage theft rates tend to be higher among low-paid workers[30] and those with less bargaining power—

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[28] NELP analysis of pooled American Community Survey microdata, 2015-2019, https://data.census.gov/mdat/#/search?ds=ACSPUMS5Y2019.

[29] NELP analysis of pooled American Community Survey microdata, 2015-2019.

[30] David Cooper and Teresa Kroeger, *Employers steal billions from workers' paychecks each year*, Economic Policy Institute, May 10, 2017, https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/.

related to factors like immigration status[31] and workplace fissuring.[32] Due to a combination of meager pay and pervasive employer noncompliance with federal wage and hour and other labor laws, several on-premises job sectors—agricultural and well as retail, food service, hotel, construction, janitorial, landscaping, apparel manufacturing, beauty and nail salon, security, and childcare—have been distinguished as "low wage, high violation" by the U.S. Department of Labor, under bipartisan administrations.[33] The DOL has undertaken some proactive enforcement action in these industries to root out wage theft. Both complaint-driven and strategic enforcement action by the Wage and Hour Division found that businesses in the on-premises retail, food service, hotel, hospital, nursing home, construction, mining, janitorial, security, landscaping, warehousing, car wash, meat and food processing, apparel manufacturing, dry-cleaning and laundry, beauty and nail salon, and childcare sectors owed $567 million in back wages for over one million Fair Labor Standards Act violations found in cases ending between 2010 and 2017 (the last year for which data is available). Over half a billion dollars in wage theft penalties is staggering, but represents only a fraction of wages

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[31] Michael Felsen and M. Patricia Smith, *Wage Theft Is a Real National Emergency*, The American Prospect, Mar. 5, 2019, https://prospect.org/power/wage-theft-real-national-emergency/.

[32] David Weil, *The Fissured Workplace, Why Work Became So Bad for So Many and What Can Be Done to Improve It*, May 2017.

[33] U.S. Dep't of Labor, Wage and Hour Division, https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries.

stolen from on-premises workers. A 2017 analysis by the Economic Policy Institute ("EPI"), building on a seminal 2009 study of wage theft in low-paid sectors, estimated that employers stole $50 billion from low-paid workers, a large share of them in on-premises sectors, in 2016.[34] Another EPI analysis estimated that employers effectively steal $15 billion in wages from workers each year via minimum wage violations alone, and that this form of wage theft is more prevalent in low-paid sectors,[35] which employ millions of on-premises workers.

According to a recent nationally-representative survey of U.S. workers, during the COVID-19 pandemic, on-premises workers in farming, healthcare support, food services, building services, personal care, retail, construction and extraction, and production work were more likely to report wage theft. The survey found that 11.4 percent of workers in those low-paid on-premises sectors reported that they had

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[34] Celine McNicholas, Zane Mokhiber, and Adam Chaikof, *Two billion dollars in stolen wages were recovered for workers in 2015 and 2016—and that's just a drop in the bucket*, Economic Policy Institute, Dec. 13, 2017, https://www.epi.org/publication/two-billion-dollars-in-stolen-wages-were-recovered-for-workers-in-2015-and-2016-and-thats-just-a-drop-in-the-bucket/; Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, 2009, https://www.nelp.org/wp-content/uploads/2015/03/BrokenLaws-Report2009.pdf.

[35] David Cooper and Teresa Kroeger, *Employers steal billions from workers' paychecks each year*, Economic Policy Institute, May 10, 2017, https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/.

experienced at least one of four forms of wage theft—not being paid the correct wage rate, not being paid for all hours worked, having an employer keep a portion of tips, or having the cost of personal protective equipment deducted from pay—between March and October 2020, compared to 7.3 of all other workers.[36]

Nonfatal work-related illness and injury rates for many categories of on-premises work are high. In 2019, the overall rate of nonfatal occupational illnesses and injuries in private industry was 2.8 cases per 100 full-time equivalent workers.[37] The nonfatal work-related illness and injury rate was as high as 7.0 for construction, up to 4.8 for mining, up to 6.9 for meat and food processing, 5.9 for nursing homes, 5.7 for industrial laundries, 5.5 for hospitals, 5.4 for commercial bakeries, and 4.5 for hotels.[38]

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[36] NELP analysis of findings from a nationally-representative survey of U.S. workers administered by the research firm SSRS September 7 to October 16, 2020. The difference in reported wage theft between workers in designated on-premises sectors and those in other sectors is significant at a .95 confidence level. Maya Pinto, Rakeen Mabud, Amity Paye, and Sanjay Pinto, *Foundations for a Just and Inclusive Recovery*, NAT'L EMPL. L. PROJ. et al. (Feb. 3, 2021), available at: https://www.nelp.org/wp-content/uploads/Foundations-for-Just-Inclusive-Recovery-Report.pdf.

[37] Bureau of Labor Statistics, U.S. Dep't of Labor, *Survey of Occupational Injuries and Illnesses, 2019*, https://www.bls.gov/web/osh/summ1_00.htm.

[38] Bureau of Labor Statistics, U.S. Dep't of Labor, *Survey of Occupational Injuries and Illnesses, 2019*, https://www.bls.gov/web/osh/summ1_00.htm.

In 2010, the Occupational Safety and Health Administration launched the Severe Violators Enforcement Program to focus enforcement efforts on employers demonstrating "willful" or "repeated" violations of their Occupational Safety and Health Act obligations related to severe occupational hazards and workplace fatalities and catastrophes.[39] Among the 692 businesses that have earned a place on the OSHA list of "Severe Violators" in the last decade, a large majority, at least 442, are employers in low-paid on-premises sectors, most in the construction sector.[40]

Since March 2020, many workers in low-paid on-premises jobs have contracted the deadly COVID-19 virus at work. Workplace transmission has been a key driver of viral spread,[41] has had a devastating effect on communities of color and immigrant communities in

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[39] U.S. Dep't of Labor, Occupational Safety and Health Administration, *OSHA's severe violator enforcement directive effective June 18*, June 18, 2010, https://www.osha.gov/news/newsreleases/trade/06182010.

[40] U.S. Dep't of Labor, Occupational Safety and Health Administration, *Severe Violators Enforcement Program Case Log*, Jan. 1, 2021, https://www.osha.gov/enforcement#svep.

[41] Charles A. Taylor, Christopher Boulos, and Douglas Almond, *Livestock plants and COVID-19 transmission*, Proceedings of the National Academy of Sciences of the Unites States of America, Dec. 15, 2020, 117(5) 31706-31715, https://www.pnas.org/content/117/50/31706; David P. Bui, Keegan McCaffrey, Michael Friedrichs et al., *Racial and Ethnic Disparities Among COVID-19 Cases in Workplace Outbreaks by Industry Sector—Utah, March 6–June 5, 2020*, Morbidity and Mortality Weekly Report, U.S. Centers for Disease Control and Prevention, Aug. 21, 2020. 69(33)1133-1138, http://dx.doi.org/10.15585/mmwr.mm6933e3.

particular,[42] and is growing racial life expectancy gaps.[43] Anticipating more robust workplace regulations and standards at the federal level that require employers to adjust operational design for infectious disease control to mitigate workplace spread of COVID-19 and similar viruses on the horizon,[44] third-party access will be critical for compliance and worker and public safety.

Addressing low pay, wage theft, and health and safety risks associated with on-premises jobs, especially in the current recessionary and pandemic environment, is critical to stemming the growth of racial

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[42] Ken Jacobs, Tia Koonse, Jennifer Ray, *Workers as Health Monitors: An Assessment of LA County's Workplace Public Health Council Proposal*, University of California at Berkeley, July 21, 2020, https://laborcenter.berkeley.edu/workers-as-health-monitors-an-assessment-of-la-countys-workplace-public-health-council-proposal/; Rajiv Sethi et al., *Who Is Dying, and Why?* COVID-19 Rapid Response Impact Initiative Working Paper 19, Center for Ethics, Harvard University, May 20, 2020, https://ethics.harvard.edu/files/center-for-ethics/files/19cwhoisdying.pdf?m=1591386895; *Data show COVID-19 is hitting essential workers and people of color hardest*, Data for Justice Project, American Civil Liberties Union, Apr. 7, 2020, https://data.aclum.org/2020/04/07/covid-19-disproportionately-affects-vulnerable-populations-in-boston/?ms_aff=MA&initms_aff=MA&ms_chan=tw&initms_chan=tw.

[43] Theresa Andrasfay and Noreen Goldman, *Reductions in 2020 US life expectancy due to COVID-19 and the disproportionate impact on the Black and Latino populations* (Oct. 15, 2020) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7523145/.

[44] Executive Order on Protecting Worker Health and Safety, Jan. 21, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/21/executive-order-protecting-worker-health-and-safety/.

income and wealth inequality and racial health disparities. Such efforts will require policies and practices that enable communication with workers in their jobs, access to third-party experts, and policies that increase the power of workers in these jobs to make informed choices and to exercise their long-held rights, including to join a union.[45]

CONCLUSION

This Court's endorsement of Petitioners' taking argument would grievously undermine state, local, and the federal government's ability to make and enforce laws that protect the rights of workers and the public. Those floodgates should properly remain closed.

[45] In 2020, a Gallup poll showed a nearly 50-year-high approval rate of unions—65 percent, across all demographic groupings. Support for unions was highest among the young: 71 percent of those 18-34, compared to 63 percent of those in other age groups. Non-white respondents approved of unions by 70 percent, compared with whites at 64 percent, and women were slightly more likely to approve of unions—67 percent—compared to 63 percent of men. Megan Brenan, *At 65%, Approval of Labor Unions in U.S. Remains High*, Gallup (Sep. 3, 2020), available at: https://news.gallup.com/poll/318980/approval-labor-unions-remains-high.aspx.

For the foregoing reasons, the Court should affirm the Ninth Circuit's judgment.

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