No. 20-107

IN THE

Supreme Court of the United States

CEDAR POINT NURSERY, ET AL.,

Petitioners,

v.

VICTORIA HASSID, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE SUPPORTING PETITIONERS

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STATEMENT OF INTEREST[1]

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market solutions for Ohio's most pressing public policy problems. The staff at the Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization, as defined by I.R.C. § 501(c)(3). The Buckeye Institute's Legal Center files and joins *amicus* briefs that are consistent with its mission and goals.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or their counsel have made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal presents yet another instance of "the Ninth Circuit endors[ing] the taking of property without just compensation." Pet. App. E-10 (Ikuta, J., dissenting from denial of rehearing en banc). The Ninth Circuit did so by relying largely on *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980)—an outdated, seldom-followed, and easily distinguishable decision. The Buckeye Institute agrees with Petitioners that the Ninth Circuit was wrong to rely on *PruneYard* and that the Court should reverse the decision below.

Petitioners are correct in characterizing *PruneYard* as "an anomaly in American law." Pet. Br. 32. Indeed, *PruneYard* stands out in this Court's line of property rights jurisprudence, and it does so for all the wrong reasons. At bottom, it undermines the right to exclude—a fundamental "stick" in the oft-cited "bundle" of property rights. *PruneYard* was difficult to square with this Court's jurisprudence when it was decided, and it is even more of an outlier now. Stare decisis does not require *PruneYard's* retention, and this Court should overrule it.

At the very least, the Court should not extend *Pruneyard* any further. By its own terms, *PruneYard* does not apply to per se takings like the one at issue here. Moreover, this Court and others have limited *PruneYard*'s application to publicly accessible places in which a property owner has already relinquished some property interest. Because Petitioners' businesses are not open to the public, they have not

relinquished any such interest. Simply put, *PruneYard* is inapplicable here. At minimum, the Court should clarify *PruneYard*'s limitations and reverse the decision below.

ARGUMENT

I. *PruneYard* is at odds with the right to exclude and should be overruled.

A. The right to exclude is fundamental to property rights.

The "right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). It has long been understood as the most fundamental element of property rights. In 1766, William Blackstone wrote, "[t]here is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that *sole and despotic dominion* which one man claims and exercises over the external things of the world, in *total exclusion* of the right of any other individual in the universe." 2 William Blackstone, Commentaries on the Laws of England *2 (1766) (emphasis added); *see also* John Locke, Two Treatises on Government, 209-10 (1821) ("[Property] being by [man] removed from the common state nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other men."). And this Court has emphasized that the "hallmark of a protected property interest is the right to exclude others." *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999).

Today, the right to exclude remains "an essential element of modern property rights." *Rawlings v. Kentucky*, 448 U.S. 98, 112 (1980) (Blackmun, J., concurring) (quotations omitted) (citing *Kaiser Aetna*, 444 U.S. at 179-180). Without it, "all other elements would be of little value." *Dickman v. Comm'r*, 465 U.S. 330, 336 (1984). In fact, "it is difficult to conceive of any property as private if the right to exclude is rejected." Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of* PruneYard v. Robins, 64 U. Chi. L. Rev. 21, 22 (1997).

Though state law generally determines which "sticks" a property owner will have in his "bundle," *see e.g.*, *United States v. Craft*, 535 U.S. 274 (2002), "there are limits on a state's ability to alter traditional understandings of property through legislation." Pet. App. E-16 (Ikuta, J., dissenting from denial of rehearing en banc). Indeed, the right to exclude is "so universally held to be a fundamental element of the property right," that it "falls within this category of interests that the Government cannot take without compensation." *Kaiser*, 444 U.S. at 179-80. And this Court has "long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). And for good reason. After all, the "great and chief end" of government is "the preservation of ... property." John Locke, Second Treatise of Government 62 (Blackwell ed., 1946).

B. *PruneYard* is at odds with the right to exclude.

This Court's case law is replete with cases honoring the right to exclude. *PruneYard* stands out as a "notable exception." Gregory C. Sisk, *Returning to the* Pruneyard: *The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech*, 32 Harv. J.L. & Pub. Pol'y 389, 407 (2009). In *PruneYard*, the Court "equivocated on the strength of its conviction[ ]" that "the essence of private property is the right to exclude." Richard A. Epstein, *The Constitutional Perils of Moderation: The Case of the Boy Scouts*, 74 S. Cal. L. Rev. 119, 141 & n.55 (2000). This equivocation, as Petitioners aptly explained in their petition, "represents the low-water mark for the right to exclude." Pet. 27.

Simply put, *PruneYard* is at odds with the right to exclude. In *PruneYard*, the Court rejected a takings challenge to a California constitutional provision requiring a privately-owned shopping center to allow expressive speech on its grounds. The PruneYard shopping center's owner attempted to exclude a group of high school students from soliciting petition signatures and distributing leaflets pursuant to its "strict policy against the distribution of handbills within the building complex and its malls." 447 U.S. at 77, 80. The students sued the owner for violating their speech rights under the California Constitution, and the California Supreme Court held that the students "were entitled to conduct their activity on PruneYard property." *Id.* at 78. The owner appealed to this Court, maintaining that "such a result infringed [his] property rights" in violation of the U.S.

Constitution. *Id.* The *Pruneyard* Court actually acknowledged that "there ha[d] literally been a 'taking' of th[e] right [to exclude]" and extolled the importance of that right. *Id.* at 82. Yet the Court upheld the challenged law on the theory that it did not "unreasonably impair the value or use of their property as a shopping center." *Id.* at 83. This shoddy treatment of the right to exclude is at odds with this Court's takings law.

"[F]rom the beginning," *PruneYard* "rested uneasily within the Court's case law." Sisk, *supra*, 407. Legal scholars have noted the incongruity of *PruneYard* with the rest of this Court's jurisprudence, explaining that "*PruneYard* strips away the exclusive right of use and converts a private shopping center into a limited commons." Epstein, *Takings, Exclusivity and Speech*, *supra*, 36. Courts, too, have recognized that "*Pruneyard* was wrong when decided." *Fashion Valley Mall, LLC v. Nat'l Labor Relations Bd.*, 42 Cal. 4th 850, 870 (2007) (Chin, J., dissenting). Given the unsteady foundation, it is not surprising that this Court and others repeatedly have declined to extend *PruneYard*, taking pains to distinguish it. *See infra*, section II.

Not only was *PruneYard* dubious on the day it was decided, but developments in takings law have made it even more of an outlier. Indeed, in recent years, this Court "has significantly expanded its interpretation of property rights under the Fifth Amendment, broadening the circumstances under which the public owes compensation for intrusions on private property." Sisk, *supra*, 408. Moreover, the Court analyzed *PruneYard* as a regulatory taking. 447

U.S. at 82, n.5. (noting that the shopping center did "not maintain that this [was] a condemnation case"). At that point, the Court "had not yet developed the analysis strictly protecting private property from an uncompensated taking for use by others." Frederick W. Schoepflin, *Speech Activists in Shopping Centers: Must Property Rights Give Way to Free Expression?*, 64 Wash. L. Rev. 133, 153 (1989). It was later that the Court "set forth the taking by physical occupation test" in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and the "taking by easement analysis" in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). *Id.* at n. 144.

When viewed in light of those cases, "[t]he dubious continuing validity of *PruneYard* becomes starkly apparent." Sisk, *supra*, 408; *see also* Epstein, *Takings, Exclusivity and Speech*, *supra,* 34. Importantly, *PruneYard* "relied in part on the minimal impairment to the property's valuable use from the presence of speech activists." Schoepflin, *supra*, 153. But the Court's post-*PruneYard* cases "established that states have virtually no authority to take property from one private party for use by another without paying compensation, even if the taking serves a legitimate public interest." *Id.* (citing *Nollan*, 483 U.S. at 839; *Loretto,* 458 U.S. at 441). Indeed, "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002). And a property owner "suffers a special kind of

injury when a *stranger* directly invades and occupies [his] property." *Loretto*, 458 U.S. at 436.

The Court also has "established that the extent of impairment of private property use is not a consideration in non-regulatory taking cases." Schoepflin, *supra*, 153; *see Loretto*, 458 U.S. at 437 (noting that the "*extent* of the occupation" is relevant only "in determining the compensation due"). When the government sanctions trespass onto private property, "no matter how minute the intrusion" or "how weighty the public purpose," it requires compensation. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). Thus, in light of "the analyses set forth in [these cases], the continued viability of *Prune Yard* is suspect." Schoepflin, *supra*, 153.

Nollan illustrates the Court's expanded conception of what constitutes a permanent physical occupation. As Judge Ikuta observed, [t]o the extent there was any doubt as to whether the appropriation of an easement constitutes a taking, it was dispelled by *Nollan*." Pet. App. E-21 (Ikuta, J., dissenting from denial of rehearing en banc). In *Nollan*, the Court found a taking "where individuals are given a permanent and continuous right to pass ... even though no particular individual is permitted to station himself permanently upon the premises." *Nollan*, 483 U.S. at 832. Indeed, "[t]o say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather ... 'a mere restriction on its use,' is to use words in a manner that deprives them of all their ordinary meaning." *Nollan*, 483 U.S. at 831 (citation omitted).

Here, the Ninth Circuit held that Petitioners did not suffer a taking, in part, because union organizers could not continually occupy Petitioners' property. But especially after *Nollan*, there is simply "no support for the [Ninth Circuit's] claim that the government can appropriate easements free of charge so long as the easements do not allow for access '24 hours a day, 365 days a year.'" Pet. App. E-26 (Ikuta, J., dissenting from denial of rehearing en banc); *see also* Alan E. Brownstein & Stephen M. Hankins, *Pruning* Pruneyard*: Limiting Free Speech Rights Under State Constitutions on the Property of Private Medical Clinics Providing Abortion Services*, 24 U.C. Davis L. Rev. 1073, 1172 (1991) (acknowledging that *Nollan* "[c]learly [and] … substantially expands the definition of a permanent physical occupation"); *id.* at 1161. Thus, even if *PruneYard* once had fit with this Court's takings clause jurisprudence, it no longer does.

C. In light of that history, it is appropriate to overrule *PruneYard* here.

In the past four decades, "jurisdictions throughout the nation have overwhelmingly rejected [*PruneYard*]." *Fashion Valley Mall,* 42 Cal. 4th at 870 (Chin, J., dissenting). And this Court's takings jurisprudence has also expanded in ways that cannot reasonably be reconciled with *PruneYard*. In light of that history, it is appropriate to overrule *PruneYard* now.

Stare decisis "is at its weakest" when this Court interprets the Constitution. *Agostini v. Felton*, 521

U.S. 203, 235 (1997). The Court's "cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important here: the quality of [*PruneYard*]'s reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2478-79 (2018). All of these factors weigh in favor of overruling *PruneYard*.

PruneYard's reasoning is an aberration, which makes its rule unworkable within the broader context of this Court's Takings Clause jurisprudence. *See supra*, section I.B. As explained, *PruneYard* seriously undervalued the right to exclude. Moreover, *PruneYard*'s already shaky foundation has crumbled under the weight of subsequent holdings from this Court. *See supra*, section I.B; *infra*, section II. This Court has moved away from *PruneYard*'s logic, rendering it inconsistent with later decisions.

Finally, reliance issues are minimal. Overruling *PruneYard* would formalize what courts across the country have already recognized—*PruneYard* is an anomaly in takings law. *See supra*, section II. Overruling the case would also reaffirm that the right to exclude remains a "fundamental element of the property right," *Kaiser*, 444 U.S. at 179-80—something the Ninth Circuit has "[o]nce again" forgotten. Pet. App. E-10 (Ikuta, J., dissenting from denial of rehearing en banc).

Going forward, no court should have occasion to "blunder[]" a property rights decision by "relying on *PruneYard*." *Id.* at E-29. "The time has come for [this Court] to forthrightly overrule *Pruneyard.* ... Private property should be treated as private property, not as a public free speech zone." *Fashion Valley Mall, LLC*, 42 Cal. 4th at 870 (Chin, J., dissenting). Accordingly, the Court should overrule *PruneYard* and reverse the decision below.

II. At a minimum, the Court should not extend *PruneYard* any further.

If this Court "do[es] not overrule *Pruneyard*, [it] should at least not carry it to the extreme" that the Ninth Circuit does. *Fashion Valley Mall,* 42 Cal. 4th at 870 (Chin, J., dissenting). Even if *PruneYard* were arguably correct, the Ninth Circuit's reliance on it here is misplaced. *PruneYard* applies only to regulatory takings—not to per se takings. Moreover, this Court and others have limited *PruneYard*'s application to publicly accessible places in which a property owner has already relinquished some property interest. Because Petitioners' businesses are not open to the public, they have not relinquished such an interest. Simply put, *PruneYard* is inapplicable here. Should the Court keep *PruneYard*'s holding intact, it should clarify *PruneYard*'s limitations and reverse the decision below.

PruneYard has several limitations. First, *PruneYard* applies only to regulatory takings. In *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), this Court admonished the "Government and dissent" for "again confus[ing] our inquiry concerning

per se takings with our analysis for regulatory takings." *Id.* at 364. The Court clarified that a "regulatory restriction on use that does not entirely deprive an owner of property rights may not be a taking under *Penn Central*," and explained *PruneYard*'s application in that context. *Id.* But that analysis does not apply "once there is a taking, as in the case of a physical appropriation," *id.*, like the one here. *See also Schoepflin*, *supra*, 153 (noting that "the Court analyzed *PruneYard* as a regulatory taking" and that had the case "been brought as a condemnation case, the outcome might have been different"). Here, "California has not merely regulated the 'right to exclude' certain persons from property that is open to the public based on their speech, as in *PruneYard*; rather, California has appropriated a state-defined property right." Pet. App. E-31 (Ikuta, J., dissenting from denial of rehearing en banc). In doing so, it has effected a per se physical taking. *PruneYard* thus does not apply in this context.

In any event, *PruneYard* is limited to publicly accessible places in which the owner has already relinquished some property interest. The Ninth Circuit complained below that Petitioners "overstat[ed] the extent to which [this] Court relied on the fact that the *PruneYard*" shopping center was "generally open to the public." Pet. App. A-19. But *PruneYard* itself framed the issue as "whether state constitutional provisions, which permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center *to which the public is invited*, violate the shopping center owner's property rights" under the Takings Clause.

447 U.S. at 76-77 (emphasis added). Moreover, post-*PruneYard* cases teach that "the conduct of the landowner is of relevance in the constitutional analysis." *Jersey Cent. Power & Light Co. v. F.E.R.C.*, 810 F.2d 1168, 1193 (D.C. Cir. 1987) (Starr J., concurring). Under *PruneYard*, "willfully surrendering one of the 'bundle' of property rights may result in greater, state-protected intrusion by outsiders than the property owner intended." *Id.* In Judge Starr's view, the *PruneYard* shopping center "lost the right to exclude some visitors by issuing an invitation to the public generally to visit the center for commercial purposes." *Id.*[2] Justice Thurgood Marshall also noted this distinction. Concurring in *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1 (1986), he explained that the "degree of intrusiveness" in *PruneYard* is different than in other Takings Clause cases because the owner "voluntarily encouraged" others to enter the property; by contrast, the plaintiff in *Pacific Gas* had "not abandoned its right to exclude others" and had not invited the general public to use its property. *Id.* at 22-23.

This Court's subsequent decisions have made similar distinctions. Most recently, in *Horne,* the

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[2] Even this circumscribed view of *Pruneyard* is in tension with the Court's holding in *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972), that property does not "lose its private character merely because the public is generally invited to use it for designated purposes." *Id.* at 569; *see also* Epstein, *Takings, Exclusivity and Speech*, *supra*, 38-40. If anything, this incongruity further demonstrates why *PruneYard* must go.

Court specified that *PruneYard's* shopping center was "already publicly accessible." *Id.* at 364. In *Loretto*, the Court noted that the "owner [in *PruneYard*] had not exhibited an interest in excluding all persons from his property" since it was open to the public. 458 U.S. at 434. Similarly, in *Nollan*, the Court explained that *PruneYard* did not apply, because there, "the owner had already opened his property to the general public." *Nollan*, 483 U.S. at n.1. And in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court distinguished the shopping center in *PruneYard* which "attracted more than 25,000 daily patrons" from the "permanent recreational easement" the City of Tigard sought to impose on a landowner. *Id.* at 394. Taken together, those decisions limit *PruneYard* to its facts.

The lower courts have similarly recognized *PruneYard*'s limited application. For example, in *Central Illinois Light Co. v. Citizens Util. Bd.*, 827 F.2d 1169 (7th Cir. 1987), the Seventh Circuit declined to apply *PruneYard* to a utility company that had "maintain[ed] the right to exclude others from their property." *Id.* at 1174. Unlike the owner in *PruneYard*, the utility company "'ha[d] not abandoned its right to exclude others from its property to the [same] degree.'" *Id.* at 1174 (quoting *Pacific Gas & Electric Co.*, 475 U.S. at 22 (Marshall, J., concurring in judgment)).

The D.C. Circuit also refused to extend *PruneYard* beyond its facts. In *Waremart Foods v. NLRB*, 354 F.3d 870 (D.C. Cir. 2004), a stand-alone private grocery store successfully argued that nonemployee union representatives could not, under

California law, handbill customers in the store's parking lot. *Id.* at 876-77. The D.C. Circuit declined to consider the grocery store a "functional equivalent of [a] 'miniature downtown[],'" like the shopping center in *PruneYard*. *Id.* at 872, 876-77. The court explained that the store was not a traditional public forum like *PruneYard*'s shopping center, since people visited "solely to shop" and the "property owners invited members of the public for that purpose alone, not 'to meet friends, to eat, to rest, to congregate, or to be entertained at its premises.'" *Id.* at 876 (citing *Albertson's, Inc. v. Young*, 107 Cal. App. 4th 106, 119 (2003)). "In contrast to *Pruneyard*, ... [stand-alone stores] contain[] no plazas, walkways or central courtyard where patrons may congregate and spend time together." *Id.* (quoting *Trader Joe's Co. v. Progressive Campaigns*, 73 Cal. App. 4th 425, 433 (1999)).

State courts too—including those "interpreting state constitutional provisions similar in wording to California's free speech provision[,] have declined to follow [*PruneYard v.*] *Robins*. Indeed, some of these courts have been less than kind in their criticism of [*PruneYard v.*] *Robins*." *Golden Gateway Ctr. v. Golden Gateway Tenants Assn.*, 26 Cal. 4th 1013, 1020-21 (2001) (collecting cases). State courts that "have considered this issue overwhelmingly have chosen *not* to interpret their state constitutions as requiring private property owners, such as those who own large shopping malls, to permit certain types of speech, even political speech, on their premises." *United Food & Com. Workers Union, Local 919, AFL-CIO v. Crystal Mall Assoc., L.P.*, 270 Conn. 261, 274

(2004) (collecting cases). In fact, California remains "virtually alone" in adhering to *PruneYard*. *Fashion Valley Mall,* 42 Cal. 4th at 876 (Chin, J., dissenting).

In all of these cases, that entities maintained their rights to exclude mattered. It matters here too. Petitioners have not abandoned their right to exclude; neither facility is open to the public. Pet. Br. 7-8. Nor have the Petitioners encouraged the public to enter their property. *Id.* Instead, the unions have entered or attempted to enter Petitioners' property solely via the operation California's regulation. *Id.*

At bottom, "*Pruneyard* is easily distinguished" from this case. *Fashion Valley Mall,* 42 Cal. 4th at 870 (Chin, J., dissenting). Endorsed by the Ninth Circuit, the California government has stripped Petitioners of their right to exclude—a right that "has traditionally been considered one of the most treasured strands in an owner's bundle of property rights," *Loretto*, 458 U.S. at 435—based on an outdated, limited, and seldom-followed decision. The Court should reiterate *PruneYard*'s limits, make clear that it does not apply here, and reverse the decision below.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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