IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 16-16321

CEDAR POINT NURSERY AND FOWLER PACKING CO.,
Plaintiffs/Appellants,

v.

WILLIAM B. GOULD IV, et al.,
Defendants/Appellees.

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF APPELLANTS

On Appeal from the United States District Court
For the Eastern District of California

No. 1:16-cv-00185-LJO-BAM
The Honorable Lawrence J. O'Neill,
Judge, U.S. District Court

Ilya Shapiro
Counsel of Record
Frank Garrison (admission pending)
CATO INSTITUTE
1000 Massachusetts Ave. NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org
fgarrison@cato.org

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Dated: December 8, 2016

s/Ilya Shapiro
Ilya Shapiro

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INTEREST OF *AMICUS CURIAE*

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs. This case interests Cato because it concerns the Fourth Amendment right of property owners to be free from unreasonable seizures.

No person other than *amicus* or *amicus*'s counsel authored any portion of this brief or paid for its preparation and submission. All parties have consented to this filing. Fed. R. App. P. 29(a); Circuit Advisory Committee Note to Rule 29-3.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fourth Amendment was drafted as a bulwark against the rampant government oppressions that existed before the Founding. As a recent Supreme Court case observed, those oppressions were one of the sparks that started the American Revolution:

> [I]n 1761, the patriot James Otis delivered a speech in Boston denouncing the use of writs of assistance. A young John Adams was there, and he would later write that "[e]very man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance." According to Adams, Otis's speech was "the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."

Riley v. California, 134 S. Ct. 2473, 2494 (2014) (citations omitted). This case reminds us that such dangers of regulatory overreach still exist.

Cedar Point Nursery and Fowler Packing Company sued the California's Agricultural Labor Relations Board and the United Farm Workers, claiming violations of their Fourth Amendment right to be free from unreasonable seizures.[1] The plaintiff-appellants alleged that union organizers unlawfully entered their property, under color of the California Agricultural Labor Relations Act's Access Regulation. This

[1] They also made a Fifth Amendment takings claim, which *amicus* does not address.

regulation provides that "the rights of employees under [California] Labor Code Section 1152" include "the right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support." Cal. Code Regs. tit. 8, § 20900(e).

The Fourth Amendment protects property owners from government actions that give government agents—anyone acting to further a government objective—an easement on private property. Yet the Access Regulation essentially deputizes trespassers who, through their disruptive presence, are allowed to seize private property. The Fourth Amendment is one of many constitutional provisions that were specifically adopted to protect property rights, and the right to exclude others is a fundamental aspect of these rights. The right to exclude was recognized as a fundamental tenet of property rights at common law, and has continued to be recognized as such through our nation's history.

The district court below, however, ignored the importance of property rights in determining whether the Fourth Amendment is triggered. In holding that property owners did not have a right to exclude union organizers from their property, the court misread

Supreme Court precedent on what constitutes a meaningful interference with property and therefore misinterpreted what constitutes a seizure. This Court should thus reverse the lower court's dismissal of the property owners' claims.

ARGUMENT

California's Access Regulation granted union organizers an easement onto private property that extinguished the owners' right to exclude—thus creating a seizure for Fourth Amendment purposes.

I. The Text and History of the Fourth Amendment Show That an Invasion of Property Rights Must Be Given Due Consideration When Analyzing Whether a Search or Seizure Has Occurred

The Fourth Amendment provides that "the right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[2] The text "reflects its close connection to property, since otherwise it would have been referred simply to 'the right of the people to be secure against unreasonable searches and seizures.'" *United States v. Jones*, 565 U.S.

[2] While not an issue raised below, it should be noted that the Fourth Amendment protects business and commercial property, not just dwellings. *City of L.A. v. Patel*, 135 S. Ct. 2443, 2452 (2015) (citing *Marshall v. Barlow's, Inc.*, 436 U. S. 307, 312 (1978)) ("This rule 'applies to commercial premises as well as to homes.'").

400, 405 (2012). By explicitly listing property interests in the first clause of the Fourth Amendment, the Framers made it clear that they were employing the common-law understanding that people's property rights are the touchstone of the protections against unlawful searches and seizures. *Id.*; *see also* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1185 (2016) ("The Amendment prohibited the government from entering into any home, warehouse, or place of business against the owner's wishes to search for or to seize persons, papers, and effects, absent a specific warrant. The only exception was when law enforcement or citizens were in active pursuit of a known felon.") (citation omitted).

As the Supreme Court pointed out in *Jones*, the foundational common-law case *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765)—which was "undoubtedly familiar to every American statesman" and considered to be "the true and ultimate expression of constitutional law with regard to search and seizure"—explicitly focused on property rights as the underlying purpose of the law's protection. *Id.* (internal quotation marks and citations omitted); *see also Florida v. Jardines*, 133 S. Ct. 1409 (2013); *Boyd v. United States*, 116 U.S. 616 (1886).

In *Entick*, Lord Camden described in plain terms the idea that property rights are at the heart of our social structure: "The great end for which men entered into society was to secure their property." 95 Eng. Rep. at 817. Furthermore:

> [O]ur law holds the property of every man so sacred, that no man can set foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.

Id. In *Boyd*—the first Supreme Court case to thoroughly address the Fourth Amendment's foundations—the Court distilled the essence of Lord Camden's opinion:

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes [*sic*] of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and *private property*[.]

Boyd, 116 U.S. at 630 (emphasis added). *See also Olmstead v. United States*, 277 U.S. 438, 464 (1928) ("The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the

proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized.") (emphasis in original).

Of course, as technology and modern life progressed, the Court found that a purely property-based approach to the Fourth Amendment was inadequate. *See Katz v. United States*, 389 U.S. 347 (1967). *Katz*, however, did not supplant the protection of property rights in the Fourth Amendment analysis. Instead, it enhanced the protections to include privacy interests as well as property rights. While many have argued that property rights were no longer at the heart of the protections of the Fourth Amendment after *Katz*, the Supreme Court has thoroughly discredited this argument, explicitly stating in *Katz* that the expectation-of-privacy test supplements—but does not replace—the Fourth Amendment's protection of property rights. *Jones*, 565 U.S. at 406-407 ("Fourth Amendment rights do not rise or fall with the *Katz* formulation . . . for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ["persons, houses, papers, and effects"] it enumerates. *Katz* did not repudiate that understanding."); *id.* at 413 ("[A] search within the meaning of the Fourth

Amendment occurs, at a minimum, '[w]here, as here, the Government obtains information by physically intruding on a constitutionally protected area.'") (Sotomayor, J., concurring) (citing majority opinion); *Jardines*, 133 S. Ct. at 1414 ("When 'the Government obtains information by physically intruding' on persons, houses, papers, of effects, 'a search within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'") (citations omitted); *Soldal v. Cook Cty.*, 506 U.S. 56, 62 (1992) ("our cases unmistakably hold that the Amendment protects property as well as privacy.").

Thus, any analysis under the Fourth Amendment must necessarily give great weight to whether property rights have been invaded by the government or by someone acting under color of law through a government-enacted regulation.

II. The Right to Exclude Is One of the "Most Essential Sticks" in Property's "Bundle of Rights," so Courts Must Carefully Scrutinize Any Law that Overrides It

The Fourth Amendment explicitly protects property rights, but it is of no consequence whether this Court builds on that idea or prefers to confine itself to the privacy theory announced in *Katz*. The right to exclude protects both interests. The right to exclude is not just a

fundamental element of property; it is a basic principle of human freedom. This was reflected in the common law and has been inexorably intertwined with our basic liberties ever since.

Blackstone's definition of property was tethered to the right to exclude: "[property is] that sole and despotic dominion which one . . . 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 *2 (emphasis added). Indeed, as William Pitt—one of the foremost defenders of the colonies in England during the time of the Revolution—said during a speech before Parliament:

> The poorest man may, in his cottege [*sic*], bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.

Thomas K. Clancy, *What Does The Fourth Amendment Protect: Property, Privacy, or Security*?, 33 Wake Forest L. Rev. 307, 351-352 (1998) (citations omitted).

This common-law understanding of the centrality of the right to exclude continues in modern times. *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) ("The right to exclude others" is "'one of the most

essential sticks in the bundle of rights that are commonly characterized as property'") (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)); *see also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1044 (1992) (Powell, J., dissenting) ("Petitioner still can enjoy other attributes of ownership, such as the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'") (citing *Kaiser Aetna*, 444 U.**S**. at 176).

While those cases concern the Fifth Amendment's Takings Clause, the right to exclude is a central consideration in applying the Fourth Amendment's property-rights framework. *See, e.g.*, *Rawlings v. Kentucky*, 448 U.S. 98, 112 (1980) ("[The] 'right to exclude' often may be a principal determinant in the establishment of a legitimate Fourth Amendment interest.") (Powell, J. concurring); *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) ("One of the main rights attaching to property is the right to exclude others, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.") (citations omitted).

Courts must thus scrutinize any situation when the government infringes on property owners' right to exclude. This is true whether the government is taking property or "merely" trying to search or seize it.

III. California's Access Regulation Deputizes Trespassers by Granting Union Organizers an Easement onto Private Property, Extinguishing the Right to Exclude and Constituting a Seizure under the Fourth Amendment

Under any interpretation of the common-law definition of trespass, union organizers trespassed when they came onto the appellants' private property. The question is whether an obvious trespass can become lawful given the whims of a legislature that wants to give special privileges to certain groups—that is, whether the legislature can deputize trespassers and immunize them from Fourth Amendment concerns. Acting under color of law, union organizers here were essentially granted an easement that extinguished appellants' right to exclude others from their property. It should go without saying that extinguishing a fundamental tenet of someone's property right is a "meaningful interference" with the possessory interest of the property owners. For those who disagree, *amicus* suggests a test: open up your house for three hours a day, 120 days a year—as the Access Regulations dictate—and see if it "meaningfully interferes" with your rights.

A seizure of property occurs whenever "there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). When the court below analyzed whether a seizure had occurred, however, it found that "the existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated . . . for an actual trespass is neither necessary nor sufficient to establish a constitutional violation." *Cedar Point Nursery v. Gould*, U.S. Dist. LEXIS 84780, at *12 (E.D. Cal. June 29, 2016) (citing *United States v. Karo*, 468 U.S. 705, 712-13 (1984)).

But *Karo* does not stand for the proposition that property rights are irrelevant to whether a search or seizure occurred. It simply states that a "technical trespass" is neither necessary nor sufficient to constitute a meaningful interference with a property right. *See Karo*, 468 U.S. at 712-713. In *Karo*, the Court had found that merely placing a beeper inside of a container that was subsequently moved onto private property with the consent of the defendant could not be regarded as a meaningful interference, if it was a trespass at all. *Id*. ("*At most*, there was a technical trespass on the space occupied by the beeper.")

(emphasis added). Justice Stevens—the author of *Jacobsen*—disagreed with the majority, however, and would have found a seizure on the basis of a deprivation of the right to exclude:

> The owner of property, of course, has a *right to exclude* from it all the world, including the Government, and a concomitant right to use it exclusively for his own purposes. When the Government attaches an electronic monitoring device to that property, it infringes that exclusionary right; in a fundamental sense it has converted the property to its own use. Surely *such an invasion is an "interference"* with possessory rights; the *right to exclude*, which attached as soon as the can respondents purchased was delivered, had been infringed. That interference is also *"meaningful"*; *the character of the property is profoundly different* when infected with an electronic bug than when it is entirely germ free.

Karo, 468 U.S. at 729 (Stevens, J., dissenting) (emphasis added).

And, while *Karo* may have been a close call, as shown by Justice Stevens's dissent, there is no close call here. This case does not involve a "technical trespass." As appellants point out in their complaint, the union organizers "trespassed across Cedar Point's property to the trim sheds, where hundreds of employees were preparing Cedar Point's strawberry plants. The protesters disrupted work by moving through the trim sheds with bullhorns, distracting and intimidating workers . . . the union claims that the access regulation grants it access rights to

Cedar Point's property." Compl. ¶ 33, 35. Union organizers invaded Cedar Point's property—interfering with their possessory rights and significantly altering the nature of their property—while claiming that the state authorized such trespass. That is, this Fourth Amendment violation would not have occurred if the Access Regulation did not force easements onto private property, extinguishing the right to exclude.

The district court also misconstrued *Presley v. City of Charlottesville*, 464 F.3d 480 (4th Cir. 2006), the case that appellants rely on. The district court reasoned that, because no "constant physical occupation" occurred in this case, there was no meaningful interference with Cedar Point's property interest. *Cedar Point Nursery*, U.S. Dist. LEXIS 84780, at *13 (citing *Presley*, 464 F.3d at 487). This reasoning ignored the part of *Presley* that cited the rule that the Fourth Amendment also governs temporary or partial seizures. *Presley*, 464 F.3d at 487 (citing *United States v. Place*, 462 U.S. 696, 705 (1983)) ("The intrusion on possessory interests occasioned by a seizure of one's personal effects can vary both in its nature and extent.").

Moreover, the court in *Presley* stated that an interference with possessory interests is "meaningful" when it becomes "disruptive,

stressful, and invasive." *Id.* The *Presley* court further found that when the owner had been "deprived of the use of part of her property due to the regular presence of a veritable army of trespassers who freely and regularly traverse her yard, littering, making noise, damaging her land . . . [t]his constant physical occupation *certainly* constitutes a 'meaningful interference' with Presley's 'possessory interests' in her property." *Id.* (emphasis added).

As a matter of law—as well as common sense—a "constant physical occupation" is not required for there to be a meaningful interference with the possessory interest of property rights. Borrowing a car without permission is a meaningful interference even if it is only for a few hours. Running back and forth between the street and a neighbor's front porch is only an intermittent physical occupation, but it is certainly a meaningful interference. And if the Siskiyou County police department decided to walk onto Cedar Point's property with bullhorns to distract and intimidate workers—for much less time than three hours a day, 120 days a year—this would constitute, at the very least, a Fourth Amendment seizure. That the legislature deputized union organizers to do the same thing changes nothing. Constant occupation

is merely the high end of what will constitute a seizure when those acting under color of law invade property rights.

"Although private actions generally do not implicate the Fourth Amendment, when a private person acts as an agent of the Government or with the participation or knowledge of any governmental official, then the private person's acts are attributed to the government." *Id* (citing *Jacobsen*, 466 U.S. at 113 (internal quotation marks omitted). The seizure Cedar Point incurred here was done with the permission and encouragement of the state government.

CONCLUSION

This Court should find the UFW's actions to be a Fourth Amendment violation attributable to the Agricultural Labor Relations Board and its Access Regulation—and thus reverse the court below.

Respectfully submitted,

Ilya Shapiro
Counsel of Record
Frank Garrison (admission pending)
CATO INSTITUTE
1000 Mass. Ave., NW
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Dated: December 8, 2016

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 3,180 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. Civ. P 32(a)(5) and the type style requirements of Fed. R. Civ. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Century Schoolbook.

Dated: December 8, 2016

s/Ilya Shapiro
Ilya Shapiro

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: December 8, 2016

s/Ilya Shapiro
Ilya Shapiro