No. 20-107

In the Supreme Court of the United States

CEDAR POINT NURSERY, ET AL., PETITIONERS

v.

VICTORIA HASSID, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

California Code of Regulations title 8, § 20900 (2020), requires agricultural employers to admit labor union organizers onto the employers' property for up to three hours per day, 120 days per year, on an indefinite basis, for the purpose of organizing the agricultural employees on the property. The question presented is whether the regulation effects a per se physical taking under the Fifth and Fourteenth Amendments to the United States Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, and regulations:

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INTEREST OF THE UNITED STATES

This case concerns whether a state regulation that requires property owners to grant access to union organizers is a per se taking under the Takings Clause of the Fifth Amendment. The United States has a substantial interest in the preservation of constitutional rights and the sound development of the relevant Fifth Amendment principles. It also has a substantial interest in the application of those principles in the context of the state regulation here, given the wide range of federal statutes and regulations that also require access to private property in certain circumstances.

STATEMENT

A. Statutory And Regulatory Background

1. The California Agricultural Labor Relations Act (ALRA or Act), Cal. Lab. Code §§ 1140 *et seq.*, guarantees agricultural employees in California "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Cal. Lab. Code § 1152 (West 2020).[1] Section 1153(a) of the Act makes it an unfair labor practice for an agricultural employer in California "[t]o interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152." Cal. Lab. Code § 1153(a).

The California Agricultural Labor Relations Board (ALRB or Board) is an administrative body created by the Act and tasked with its implementation and enforcement. Cal. Lab. Code § 1141; see *ALRB* v. *Superior Court*, 546 P.2d 687, 691-692 (Cal.) (*Pandol & Sons*), appeal dismissed, 429 U.S. 802 (1976). The Board is empowered to investigate and adjudicate charges of unfair labor practices, *Pandol & Sons*, 546 P.2d at 691; see Cal. Lab. Code §§ 1149, 1151-1151.6, and to issue cease-and-desist orders or "such other relief as will effectuate the policies" of the Act, Cal. Lab. Code § 1160.3. The Act further authorizes the Board to "make, amend, and rescind * * * such rules and regulations as may be necessary to carry out" the Act. *Id.* § 1144.

2. Shortly after the Act's enactment, the ALRB issued the regulation at issue here, California Code of

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[1] Unless otherwise indicated, all references to Cal. Lab. Code are to the West 2020 current version.

Regulations title 8, § 20900 (1975) (the access regulation), which governs access by nonemployee union organizers to the property of agricultural employers for the purpose of organizing agricultural employees. *Pandol & Sons*, 546 P.2d at 692. The Board reasoned that the effectiveness of agricultural employees' organizational rights "depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others." Cal. Code Regs. tit. 8, § 20900(2) (1975). It determined that, "[w]hen alternative channels of effective communication are not available," the ALRA requires that "accommodation be made between the right of unions to access and the legitimate property and business interests of the employer." *Ibid.* And the Board concluded that the policies of the ALRA would "best be served" by the adoption of categorical access rules for agricultural employees, rather than the "[r]elegation of the issues to case-by-case adjudication." *Id.* § 20900(4). The Board thus announced that it would "consider the rights of employees under [the ALRA] to include the right of access by union organizers to the premises of an agricultural employer for the purpose of organizing," subject to certain conditions. *Id.* § 20900(5).

Under the access regulation, in its current form, agricultural union organizers for any particular labor organization are permitted entry onto an agricultural employer's property for up to four 30-day periods in any calendar year. Cal. Code Regs. tit. 8, § 20900(e)(1)(A) (2020). Each period begins when the labor organization serves the property owner with, and files with the ALRB, a "notice of intention to take access onto the described property." *Id.* § 20900(e)(1)(B). If a petition for election is filed with the Board during the 30-day period, the right of access does not terminate until after

the fifth day following the completion of the ballot count. *Id.* § 20900(e)(1)(B)-(C). The right of access then recommences either 30 days or 13 months prior to when another election may be directed, depending on the source of the election bar. *Id.* § 20900(e)(1)(C).

During each period of access, union organizers may enter the employer's property each day for one hour before the start of the work day, one hour after the end of the work day, and one hour during the lunch period "for the purpose of meeting and talking with employees." Cal. Code Regs. tit. 8, § 20900(e)(3) (2020). Unions may bring "two organizers for each work crew on the property," as well as "one additional organizer for every 15 additional workers" in a crew consisting of more than 30 workers. *Id.* § 20900(e)(4)(A).

In granting such categorical access rights, the ALRB departed from the approach this Court has taken under similar provisions of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.* In *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), this Court held that, as a general matter, the NLRA does *not* afford nonemployee union organizers the ability to enter onto an employer's property. *Id.* at 112. Like the ALRB, the Court recognized the need for employees to "learn the advantages of self-organization from others." *Id.* at 113. But as relevant here, the Court held that proper respect for employers' property rights dictated that, under the NLRA, the employer's "right to exclude" yields to its employees' organizational rights only "when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels" and only "to the extent needed to permit communication of

information on the right to organize." *Id.* at 112; see *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527 (1992).

B. The Present Controversy

1. Petitioner Cedar Point Nursery operates a nursery in Dorris, California, raising strawberry plants. Pet. App. A9, G4. The nursery employs approximately 100 year-round workers and 400 seasonal workers, none of whom lives on company property. *Id.* at A9, G9. Petitioner Fowler Packing Company engages in grape farming and packing operations in Fresno, California. *Id.* at A11, G4. Fowler employs 1800-2500 people in its field operations and 500 people in its packing facility in Fresno. *Id.* at A11, G11. Fowler's employees likewise do not live on company property. *Ibid.*

Cedar Point alleges that, in 2015, after entering the company's property and distracting and intimidating its workers, the United Farm Workers union served Cedar Point with written notice of intention to take access under the access regulation. Pet. App. A10, G9-G10. Fowler alleges that the same union filed a charge with the Board asserting that Fowler unlawfully blocked union organizers from entering Fowler's property under the access regulation, after the union provided the required notice of intention to take access. *Id.* at A11, G11. Both Cedar Point and Fowler allege that, but for the access regulation, they would exclude union organizers from their property. *Id.* at G10-G11.

2. a. In February 2016, petitioners filed suit in the Eastern District of California against several members of the ALRB in their official capacity, contending that the access regulation effects an uncompensated taking of their property rights, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. Pet.

App. G1-G25. Petitioners asked the court for a declaration that the access regulation is unconstitutional as applied to them and an order enjoining respondents from enforcing the regulation against them. *Id.* at G16-G17. The district court denied a motion for a preliminary injunction and dismissed petitioners' claims. *Id.* at D1-D20 (denying preliminary injunction on takings claim); *id.* at B1-B14 (dismissing complaint).

b. The court of appeals affirmed. Pet. App. A1-A31. The court reasoned that this Court's cases recognize "three categories of regulatory action * * * 'that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain'": first, a regulation that "'requires an owner to suffer a permanent physical invasion of her property'"; second, a regulation that "'completely deprives an owner of "*all* economically beneficial us[e]" of her property'"; and third, a regulation of property that constitutes a taking under the multifactor standard set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978). Pet. App. A14-A15 (citation omitted). The court rejected petitioners' contention that the access regulation effects an uncompensated taking by requiring petitioners to suffer a permanent physical invasion of their property. *Id.* at A15.

The court of appeals recognized that this Court had previously held in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), that requiring a property owner to grant a permanent easement across its beachfront property for the public would constitute a permanent physical occupation requiring compensation. Pet. App. A17 (quoting *Nollan*, 483 U.S. at 832). But the court of appeals concluded that the access regulation

did not impose a similar invasion. It reasoned that, although the regulation grants access rights without any "'contemplated end-date,'" it does not grant union organizers a "'continuous right to pass to and fro,'" and thus "does not allow random members of the public to unpredictably traverse [petitioners'] property 24 hours a day, 365 days a year," as did the easement in *Nollan*. *Id.* at A17-A18 (quoting *Nollan*, 483 U.S. at 832).

Judge Leavy dissented. Pet. App. A26-A31. In his view, the takings analysis should be informed by this Court's decision in *Babcock & Wilcox* and its progeny. *Id.* at A28-A29. Judge Leavy observed that neither *Babcock & Wilcox* nor any other decision from this Court has ever recognized a right of nonemployee labor organizers to enter an employer's private property where none of the employees lived on the employer's premises such that they were not accessible through non-trespassory means. *Id.* at A26. And he reasoned that, absent such inaccessibility, granting union organizers such "ongoing access * * * multiple times a day for 120 days a year" imposed "a physical, not regulatory, occupation" that amounts to an unconstitutional uncompensated taking. *Id.* at A29; see *id.* at A26.

c. The court of appeals denied a petition for rehearing en banc by a deeply divided vote. Pet. App. E1-E32.

Judge Paez, joined by Judge Fletcher, both members of the panel majority, concurred in the denial of rehearing en banc. Pet. App. E4-E10. In defending the panel's decision, Judge Paez reiterated the panel's conclusion that "a 'permanent physical invasion' occurs [only] when the state grants the public a 'permanent and continuous right to pass to and fro, so that the real property may continuously be traversed.'" *Id.* at E7 (citation omitted).

Judge Ikuta, joined by seven other judges, dissented from the denial of rehearing en banc. Pet. App. E10-E32. Judge Ikuta explained that, in her view, the access regulation granted union organizers an "easement in gross" to enter the property of agricultural employers. *Id.* at E23; see *id.* at E23-E24. She explained that an easement in gross is a "'personal interest'" in property that "'gives its owner a right to do something on the land of another.'" *Id.* at E17 (citations omitted). She reasoned that the various restrictions on the union's right of access did not alter that the regulation appropriated an easement in gross because restrictions are a common feature of easements. *Id.* at E23-E24. And she concluded that because the access regulation had appropriated an interest in real property, it constituted "a per se taking that requires just compensation." *Id.* at E23 (citation omitted).

SUMMARY OF ARGUMENT

The indefinite legal authorization to invade private property, even intermittently, is a per se taking, absent circumstances not present here.

A. To determine whether regulatory action short of formal appropriation effects a taking of property, this Court ordinarily applies an ad hoc, factual approach under the standard articulated in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978). The Court has long recognized, however, that even under that approach, government-authorized physical invasions impose a unique burden on landowners that favors finding a taking of property. In a pair of more recent cases, that recognition has crystallized into a per se rule that, when the government permanently authorizes such invasions, it categorically effects a taking.

In *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court held that whenever the government authorizes a "permanent physical occupation of real property," however minimal, it effects a taking. *Id.* at 427. The Court thus found that a state regulation permitting the installation of a one-half-inch-diameter cable on the roof of a landlord's property effected a per se taking. And in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), the Court applied the same per se rule to the permanent authorization for third parties to continuously invade private property, even absent literal permanent occupation—there, a public right of access through private beachfront property. *Id.* at 831.

B. By imposing an indefinite access right, the access regulation effects a taking under the same per se rule. Although the regulation authorizes intermittent third-party access (up to three hours per day, 120 days per year), rather than continuous (24 hours, 365 days), that distinction is immaterial under this Court's takings jurisprudence. Providing indefinite authorization for even intermittent physical invasions by third parties still deprives property owners of not only the right to exclude, but also the right to possess and use the portions of their property while invaded by those third parties. And even if intermittent, those invasions cause the same special kind of injury provoked by the intrusion of a stranger. As a practical matter, a per se rule for any such indefinite legal access right avoids line-drawing problems that would be presented in determining what level of access short of round-the-clock would effect a taking, leaving such considerations to properly inform compensation.

C. The per se rule articulated in *Loretto* and *Nollan* is narrow. Temporary invasions not authorized pursuant to an indefinite legal access right fall outside the rule altogether. Thus, neither the NLRA's inaccessibility exception nor government-induced temporary floodings are per se takings. See *Loretto*, 458 U.S. at 434 n.11; *Arkansas Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 38-39 (2012). Moreover, this Court has recognized that even when a per se rule would otherwise apply, there are certain circumstances where just compensation is not required. The Court should make clear that the same is true here. If an access right merely reflects a limitation on property rights consistent with background principles of law, it does not qualify as a taking at all. See *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). And separately, the government may condition the performance of certain activities on the uncompensated cession of property rights. See, *e.g.*, *Nollan*, 483 U.S. at 836. But none of those doctrines saves the regulation here.

ARGUMENT

INDEFINITE LEGAL AUTHORIZATION TO PHYSICALLY INVADE PRIVATE PROPERTY, EVEN INTERMITTENTLY, IS A PER SE TAKING, ABSENT CIRCUMSTANCES NOT PRESENT HERE

The Takings Clause, as incorporated against the States by the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V; see *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 827 (1987). Whether a government regulation of property rights effects such a taking is typically determined by the multifactor balancing test set out in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978).

Government-authorized physical invasions, however, impose a particularly serious burden on property rights, and a permanent authorization to physically invade real property effects a taking "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-435 (1982). Because California's access regulation legally authorizes physical invasions of agricultural employers' property by labor organizers on an indefinite basis, it effects such a per se taking even if the invasions are intermittent. To be clear, however, the per se rule applied here is narrow. It does not encompass temporary invasions in the absence of an indefinite legal access right. And this Court has correctly recognized that government-authorized invasions are not per se takings when they are justified by background principles of state property or tort law or imposed as valid conditions on regulated conduct. No such doctrine justifies the access regulation, however, and so the Ninth Circuit's decision should be reversed.

A. Permanent Legal Authorization To Physically Invade Real Property Is A Per Se Physical Taking

The paradigmatic application of the Takings Clause involves a "'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (citations omitted; brackets in original). Such a taking typically occurs, for example, when the government formally takes title to an interest in property, see, *e.g.*, *United States* v. *General Motors Corp.*, 323 U.S. 373, 375 (1945), or when the government physically takes possession of property, see, *e.g.*, *United States* v. *Pewee Coal Co.*, 341 U.S. 114,

115 (1951). The Takings Clause, however, also constrains regulatory actions short of classic takings. Absent such protection, the Court has observed that "the natural tendency of human nature" would be to exercise an unconstrained authority to redefine property interests "more and more until at last private property disappears." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922).

To determine whether regulation of property has gone "too far," the Court has generally "engage[d] in 'essentially ad hoc, factual inquiries'" into the circumstances presented in each case. *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002) (citation omitted). Even under that standard, the Court has long recognized that government-authorized physical invasions—as opposed to restrictions on the use of property—impose distinctive burdens and can, in important respects, resemble classic takings involving physical appropriation. In more recent decades, that recognition has crystallized into a per se rule that, when a government *permanently* authorizes physical invasions as the access regulation does here, it categorically effects a taking.

1. Government-authorized physical invasions impose harms distinct from government restrictions on the use of property

Under the familiar *Penn Central* standard for regulatory takings, the Court considers (1) "[t]he economic impact of the regulation on the claimant"; (2) "the character of the government action"; and (3) "the extent to which the regulation has interfered with distinct investment-backed expectations." 438 U.S. at 124. And although those factors represent "important guideposts" for the Court's consideration, *Palazzolo* v. *Rhode*

Island, 533 U.S. 606, 634 (2001) (O'Connor, J., concurring), the Court has also looked to "the purpose of the regulation" and, more broadly, whether "the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." *Yee* v. *City of Escondido*, 503 U.S. 519, 523 (1992).

The Court has made clear in applying that standard, however, that government-authorized physical invasions are a particularly serious intrusion on property rights. The Court has explained that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Loretto*, 458 U.S. at 433 (quoting *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979)). Thus, "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124 (citation omitted); see, *e.g.*, *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 488 & n.18 (1987) ("Many cases before and since [*Mahon*] have recognized that the nature of the State's action is critical in takings analysis.").

In *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U.S. 327 (1922), for example, the Court considered whether the United States' physical invasion of another's property by gun fire amounted to a taking. The petitioner alleged that the United States had taken a servitude across its property located between the government's land and the ocean, by "set[ting] up heavy coast defense guns with the intention of firing them over [petitioner's] land" and doing so on several occasions. *Id.* at 329; see *id.* at 328. Although the Court

noted that, standing alone, the occasional invasion of the petitioner's land would be considered at most a trespass, not a taking, the Court explained that a more systematic intrusion warranted different treatment. *Id.* at 329-330. The Court reasoned that, if the government had acted "with the purpose and effect of subordinating [a] strip of land * * * to the right and privilege of the Government to fire projectiles directly across it * * * whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made." *Id.* at 329 (citation omitted). Indeed, if the United States had the "admitted intent to fire across the claimants' land at will" and fired even "a single shot," the "taking of a right would be complete." *Ibid.*

United States v. *Causby*, 328 U.S. 256 (1946), is similar. In that case, the United States entered into a month-to-month lease with a private airport for use during World War II. *Id.* at 258-259. During the leasehold, the government frequently and regularly flew heavy bombers, transports, and fighter jets in and out of the airport. *Ibid.* The respondents owned and operated a commercial chicken farm on their nearby land, and the flight path from one runway passed directly over their property at a height of 83 feet. *Id.* at 258. The respondents filed an inverse-condemnation suit. *Ibid.*

This Court treated it as clear that, if the flights had rendered the land unusable, "there would be a taking compensable under the Fifth Amendment." *Causby*, 328 U.S. at 261. Such an "easement of flight," if "permanent and not merely temporary, normally would be the equivalent of a fee interest." *Id.* at 261-262. The Court found "no material difference" in the fact that the

"enjoyment and use of the [respondents'] land" was "not completely destroyed." *Id.* at 262. For physical intrusions, "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." *Id.* at 266 (citation omitted). Because "the frequent, low-level flights" plainly damaged the respondents' property, the Court determined that "a servitude ha[d] been imposed" for which compensation was required. *Id.* at 267.

Finally, in *Kaiser Aetna* v. *United States*, *supra*, the Court considered whether the government's creation of a "right of access to what was once [a] private pond" effected a taking that required compensation. 444 U.S. at 166. There, a real-estate developer had undertaken improvements to a private pond in order to convert it into a marina. *Id.* at 166-167. After the developer increased the average depth of the access channel and connected the pond to the ocean, the government argued that the pond had become "a navigable water of the United States." *Id.* at 168; see *id.* at 167-168. As a result, the government claimed that the developer was precluded from denying public access to the marina. *Id.* at 168; see *id.* at 170.

This Court held that granting such a public access right would effect a taking. The Court agreed that the improvements to the pond rendered it "navigable waters" within "the boundaries of Congress' regulatory authority under the Commerce Clause," and thus "Congress *could* assure the public a free right of access to the [marina] if it so chose." *Kaiser Aetna*, 444 U.S. at 172, 174 (emphasis added). But the Court concluded that doing so would "go[] so far beyond ordinary regulation * * * as to amount to a taking." *Id.* at 178. It

explained that "the right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 176. And it found that, because the "navigational servitude" would "result in an actual physical invasion of the privately owned marina," it would cause a substantial "devaluation of petitioners' private property." *Id.* at 180. The Court reasoned that even if the government would take "only an easement in property, it must nonetheless pay just compensation." *Ibid.*

2. Permanent legal authorization to physically invade real property warrants per se treatment

This Court's cases have thus repeatedly made clear that government-authorized physical invasions impose an unusually serious burden on landowners for purposes of determining whether there is a taking. In two more recent cases—*Loretto* v. *Teleprompter Manhattan CATV Corp.*, *supra*, and *Nollan* v. *California Coastal Commission*, *supra*—the Court has crystallized that principle into a per se rule that applies when, as here, a government provides permanent legal authorization to physically invade real property.

a. In *Loretto*, the Court considered whether "a minor but permanent physical occupation of an owner's property authorized by government" constituted a "taking." 458 U.S. at 421. To facilitate tenant access to cable television, New York law required landlords to "permit a cable television company to install its cable facilities" on the landlord's property. *Id.* at 421, 423. The company had "'installed a cable slightly less than one-half inch in diameter'" along the side of the landlord's building and "two large silver boxes" on the roof. *Id.* at 422 (citation omitted). New York courts rejected the

landlord's takings claim. *Id.* at 424-425. This Court reversed. *Id.* at 421.

The Court began by observing that, ordinarily, to determine "whether compensation is constitutionally due for a government restriction of property, * * * the Court must engage in 'essentially ad hoc, factual inquiries.'" *Loretto*, 458 U.S. at 426 (quoting *Penn Central*, 438 U.S. at 124). Surveying its precedents, the Court noted that, while it had "long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause," temporary invasions or "government action[s] outside the owner's property that cause[d] consequential damages within"—*e.g.*, through flooding—call for such a fact-specific approach. *Id.* at 426, 428. But the Court noted that "[t]he one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership." *Id.* at 427 n.5 (citation omitted); see *id.* at 427-432.

"In short," the Court observed, when the government authorizes or effects "a permanent physical occupation" of real property, its cases "uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto*, 458 U.S. at 434-435. "In such a case, 'the character of the government action' not only is an important factor in resolving whether the action works a taking but also is determinative." *Id.* at 426.

As the Court explained, there are good reasons for treating permanent physical occupations as categorically distinct from temporary invasions or other, less-intrusive government regulations. "[A] permanent physical occupation of another's property * * * is perhaps the most serious form of invasion of an owner's property interests," because it does not "take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Loretto*, 458 U.S. at 435. When the government authorizes such a permanent occupation, "the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space." *Ibid.*

In addition, "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property." *Loretto*, 458 U.S. at 436. Property law, the Court observed, "has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property." *Ibid.* A law that permits another to permanently occupy one's land thus "is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner." *Ibid.*; see *id.* at 440 (affirming that States have "broad power to regulate * * * the landlord-tenant relationship," but may "not require the landlord to suffer the physical occupation of a portion of his building by a third party").

Finally, as a practical matter, the Court observed that a categorical rule "avoids otherwise difficult line-drawing problems," reasoning that "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied." *Loretto*, 458 U.S. at 436-437. The Court also

noted that determining "whether a permanent physical occupation has occurred presents relatively few problems of proof," because "[t]he placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute." *Id.* at 437. Beyond that fact, the Court reasoned, the extent of the occupation is properly considered in determining the compensation due, not whether there was a taking "in the first instance." *Id.* at 438.

b. In *Nollan*, the Court extended *Loretto*'s per se rule to a permanent authorization for third parties to physically invade real property. Rather than authorizing a permanent physical occupation, in the literal sense of a cable installation, the State there had required, as a condition of a building permit, that the owners of beachfront property grant a right of access "across their beachfront available to the public on a permanent basis." *Nollan*, 483 U.S. at 831. The property owners argued that the condition imposed an uncompensated taking that violated the Takings Clause. *Id.* at 827. This Court agreed. *Id.* at 841-842.

Before considering whether the requirement was a valid permitting condition, see p. 31, *infra*, the Court expressed "no doubt" that, had California simply required the owners to grant the public a right of access, it would have amounted to a taking. *Nollan*, 483 U.S. at 831. In the Court's view, "[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." *Ibid.* (citation omitted). It noted that, "[i]ndeed, one of the principal uses of the eminent domain power is to assure that the government be able to

require conveyance of just such interests, so long as it pays for them." *Ibid.*

The Court acknowledged that, "[p]erhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it," but concluded that "our cases' analysis of the effect of other governmental action leads to the same conclusion." *Nollan*, 483 U.S. at 831. The Court observed that it had "repeatedly held that, as to property reserved by its owner for private use, the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Ibid.* (brackets and internal quotation marks omitted). And it explained that a "'permanent physical occupation' has occurred, for purposes of th[e *Loretto*] rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Id.* at 832.

B. By Imposing An Indefinite Access Right, The Access Regulation Grants Permanent Legal Authorization To Physically Invade Real Property

Under the logic of this Court's precedents, the access regulation is a per se taking. It requires agricultural employers to permit union organizers onto their private property for up to three hours per day, 120 days per year, as long as the property remains a place of agricultural employment, with no "contemplated end-date." Pet. App. A17; see pp. 3-4, *supra*. In so doing, it creates a permanent authorization for third parties to physically invade the employers' land. And while the access it authorizes is intermittent, rather than round-the-

clock, that is immaterial. The court of appeals' contrary analysis is unpersuasive.

1. Under *Loretto* and *Nollan*, a regulation like the one here that indefinitely authorizes physical invasions onto real property effects a per se taking, even if the authorized access is intermittent. As the Court recognized in *Loretto*, "[t]he one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership." 458 U.S. at 427 n.5 (citation omitted). *Loretto* endorsed that rule in the context of a permanent "occupation," and *Nollan* makes clear that the same rule applies to government-mandated third-party access rights imposed "on a permanent basis," "even though no particular individual is permitted to station himself permanently upon the premises." 483 U.S. at 831, 832.

Moreover, as in *Loretto*, a per se takings rule for any indefinite authorization to physically invade private property "has more than tradition to commend it." 458 U.S. at 435. Nearly all of the reasons offered in *Loretto* and *Nollan* for a per se rule apply equally here. As with a permanent occupation, any time the government provides permanent authority for even intermittent physical invasions, it "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Ibid.* The property owner loses its ability to occupy his property himself to the extent of any invasion because it loses the "power to exclude" third parties "from possession and use of th[at] space." *Ibid.*

As with a permanent occupation, an indefinite authorization to physically invade real property also subjects the property owner to the "special kind of injury" caused by a "*stranger* directly invad[ing] and occup[ying] the owner's property." *Loretto*, 458 U.S. at 436. The common law has long recognized that any intentional physical invasion of land causes an independent harm to the owner, even if the invasion "causes no harm to the land, its possessor, or to any thing or person in whose security the possessor has a legally protected interest." Restatement (Second) of Torts § 163 (1965) (Restatement). If anything, the intrusion is more offensive when the deprivation of the right to exclude pertains to *individuals*—let alone individuals asserting interests adverse to the property owner—rather than a minor, physical installation like a cable along the roof of an apartment building.

In addition, as a practical matter, a categorical rule applying to any indefinite access right similarly "avoids otherwise difficult line-drawing problems." *Loretto*, 458 U.S. at 436. Even respondents agree that, if the government mandates "round-the-clock access by the general public" to private property, a physical taking has occurred. Br. in Opp. 13. But the situation would not be materially different if the right of access applied indefinitely throughout the year except certain holidays, or only during peak months of growing seasons—just as *Nollan* would have been no different if the beachfront easement had applied only during warm months or daytime hours. "[C]onstitutional protection for the rights of private property," *Loretto*, 458 U.S. at 436, should not depend on the number of hours or days that a permanent right of access is or may be used by uninvited third parties.

Finally, whether such an indefinite access right has been imposed "presents relatively few problems of proof." *Loretto*, 458 U.S. at 437. Just as the "placement of a fixed structure on land * * * is an obvious fact," so is the imposition of an indefinite legal access right to private property, even if only for certain periods of every day or every year. *Ibid.* As with a permanent occupation, the extent of the permanently authorized access should be a "relevant factor in determining the compensation due." *Ibid.* But because that is so, "there is less need to consider the extent of the [invasion] in determining whether there is a taking in the first instance." *Id.* at 437-438.[2]

2. The court of appeals' contrary analysis is unpersuasive. The court principally relied on its view that, unlike the easement in *Nollan*, an indefinite legal right for intermittent access "does not allow random members of the public to unpredictably traverse the[] property 24 hours a day, 365 days a year." Pet. App. A17-A18; see *id.* at E8 (Paez, J., concurring in denial of rehearing en banc) (noting that "the Access Regulation does not authorize 'continuous' access to the Growers' property"). That reasoning is misplaced.

The critical feature of the easement in *Nollan* was not that anyone could or did exercise the access right

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[2] In 1976, this Court dismissed "for want of substantial federal question" a direct appeal from the California Supreme Court, presenting a takings challenge to the access regulation. *Pandol & Sons* v. *ALRB*, 429 U.S. 802, 802. "The Court gives less deference to such summary dispositions," *Ashland Oil, Inc.* v. *Caryl*, 497 U.S. 916, 920 n.* (1990) (per curiam), particularly where, as here, they have been "severely undermined" by subsequent decisions. *Avery* v. *Midland County*, 390 U.S. 474, 479 n.4 (1968); see, *e.g.*, *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 644 n.7 (1984) (finding it "necessary not to follow such a precedent when the issue [wa]s given plenary consideration").

around the clock. As the Court recognized, the easement did not permit any "particular individual * * * to station himself permanently upon the premises." *Nollan*, 483 U.S. at 832. And as the dissent observed, it was not clear that as a practical matter anyone *could* access the Nollans' property 365 days a year. See *id.* at 854 (asserting that, "for a portion of the year," shifting tides would make "public passage" through the property owners' beachfront "impossible"). Instead, the decisive aspect of the regulations in both *Loretto* and *Nollan* was that the right of third parties to invade was indefinitely granted. See *Loretto*, 458 U.S. at 439 ("So long as the property remains residential and a CATV company wishes to retain the installation, the landlord must permit it."). Here too, as long as the property is used for agricultural employment, the employer must permit access by nonemployee union organizers during the times specified in the regulation.

This Court's decision in *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), is not to the contrary. There, the California Supreme Court interpreted the California Constitution to prohibit the owner of a shopping center generally open to the public from adopting "a policy not to permit any visitor or tenant to engage in any publicly expressive activity, including the circulation of petitions, that [wa]s not directly related to [the shopping center's] commercial purposes." *Id.* at 77; see *id.* at 77-78. The Court rejected the owner's takings claim under the *Penn Central* framework. *Id.* at 82-85.

That holding does not govern here. The property owner in *PruneYard* had already invited members of the general public onto its property, so long as they did not engage in particular expressive activity once there. As a result, the California Supreme Court's holding did

"not authorize an unwanted physical occupation," but rather regulated only the owner's "*use* of [its] property." *Yee*, 503 U.S. at 532. The Court has consistently rejected attempts to characterize regulations of the relationship between property owners and their invitees as per se physical takings. See *ibid.* (rejecting a similar challenge to a rent control ordinance on a mobile home park); *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 252 (1987) (rejecting a claim that "it is a taking under *Loretto* for a tenant invited to lease at a rent of $7.15 to remain at the regulated rent of $1.79"). As the Court explained in those cases, "it is the invitation * * * that makes the difference." *Yee*, 503 U.S. at 532 (citation omitted). Indeed, *Nollan* distinguished *PruneYard* in part on this very ground, emphasizing that "the owner had already opened his property to the general public." 483 U.S. at 832 n.1. Petitioners have extended no such invitation here.

Finally, the court of appeals reasoned that petitioners could not show a per se taking because "the sole property right affected by the regulation is the right to exclude." Pet. App. A18. But that reasoning gives short shrift to this Court's repeated recognition that the right to exclude is an "*essential* stick[] in the bundle of rights." *Nollan*, 483 U.S. at 831 (emphasis added; citation omitted). While it is undoubtedly true that the deprivation of other rights in the bundle—like the right to certain uses—in many cases is not "independently sufficient to establish a taking," *Loretto*, 458 U.S. at 436, this Court's cases demonstrate that the deprivation of the right to exclude imposes a unique burden. And the insight of *Loretto* and *Nollan* is that when such a deprivation ripens to a permanent legal access right, a property owner has not been deprived of *only* its right to

exclude. Any such indefinite authorization to physically invade real property "chops through the bundle, taking a slice of every strand." *Loretto*, 458 U.S. at 435. To the extent of the invasion, the landowner is deprived not only of the right to exclude, but also his ability to use and "possess the occupied space himself." *Ibid.* The union organizer and the employer (or its employees) cannot occupy and use the same physical space, just as the landlord in *Loretto* could not occupy and use the same physical space as the cable box and wires on his building. The court of appeals erred in ignoring that reality.

C. Other Takings Doctrines Justify Certain Indefinite Legal Access Rights, But None Applies Here

The per se rule applied here is "narrow." *Loretto*, 458 U.S. at 441. Temporary invasions that are not pursuant to a permanent access right do not fall within the scope of the rule at all. In addition, this Court has recognized certain circumstances where even a permanent access right would not qualify as a taking. If a permanent access right merely reflects a limitation on property rights consistent with background principles of law that inhere in the title itself, it will not qualify as a taking. And separately, the government may condition the performance of certain activities on the uncompensated concession of property rights. The Court should make clear that its decision here does not call into question any of these doctrines, none of which justifies the access regulation.

1. At the threshold, the per se rule applies only to permanent physical occupation or permanent legal authorization to physically invade real property. Sporadic, temporary invasions thus fall outside the per se rule because they are not indefinite. See, *e.g.*, *Portsmouth*, 260 U.S. at 329-330 (bullets); *Montana Co.* v. *St.*

Louis Mining & Milling Co., 152 U.S. 160, 169 (1894) (inspections). And even recurrent temporary invasions are not covered unless they take place pursuant to an indefinite legal right of access.

This Court has thus rightly held that the NLRA's inaccessibility exception recognized in *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956), is not a per se taking. See *Loretto*, 458 U.S. at 434 n.11. That "temporary and limited" exception does not grant access to any employer's property on a permanent basis. *Ibid.* (citation omitted). Rather, it applies only after the union "show[s] that no other reasonable means of communicating its organizational message to the employees exists" and only "to the extent" of that necessity. *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 534-535 (1992) (citations and emphasis omitted). When the necessity ends, so does the access right. By contrast, the California regulation does not require any comparable showing of necessity.

Similarly, temporary flooding caused by government conduct outside the property, even if recurring, is not a per se taking. In contrast to the access regulation—which functionally appropriates a limited easement for third parties—such invasions involve complex questions of causation, are subject to a multifactor takings analysis, and are often properly regarded as merely potential torts. See *Arkansas Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 38-40 (2012); *Loretto*, 458 U.S. at 428 ("distinguish[ing] between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other").

2. In addition, the Takings Clause has no role to play "if the logically antecedent inquiry into the nature of the owner's estate shows" that the asserted property rights "were not part of his title to begin with." *Lucas*, 505 U.S. at 1027-1028. In *Lucas*, the Court explained that restrictions that background principles of state law "already place upon land ownership" "inhere in the title itself." *Id.* at 1029. Where government action reflects such a limitation, no compensation is owed because the government has not taken anything in the first place. Thus, even in the context of a "'permanent physical occupation' of land," this Court has noted that it "assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the land-owner's title." *Id.* at 1028.

Although *Lucas* did not specify what counts as a "pre-existing" limitation on title, 505 U.S. at 1028, the Court has suggested that those limitations deeply rooted in state property and tort law qualify. The *Lucas* Court observed that a State could prohibit activities that were "*always* unlawful," noting that "it was open to the State at *any point* to make the implication of those background principles of nuisance and property law explicit." *Id.* at 1030 (emphasis altered). Similarly, in *Palazzolo*, the Court described the concept "in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition." 573 U.S. at 630.

The main background limitation described in *Lucas* was the prohibition on nuisance activities. The *Lucas* Court observed that a government regulation designed to abate nuisances would not be subject to takings scrutiny so long as it did "no more than duplicate the result that could have been achieved in the courts—by adjacent

landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally." 505 U.S. at 1029. But nuisance does not exhaust the universe of background limitations relevant to a takings analysis. The *Lucas* Court noted, for example, that the government may be absolved "of liability for the destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' or to forestall other grave threats to the lives and property of others." *Id.* at 1029 n.16 (citation omitted).

As relevant here, the common law also recognized various privileges to access private property in certain situations. A classic example was the privilege to enter private property to engage in various law-enforcement activities, like effectuating an arrest or preventing serious crime. See, *e.g.*, Restatement §§ 204-205. In the same vein, 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. See, *e.g.*, *Bennis* v. *Michigan*, 516 U.S. 442, 452 (1996) (holding, in a forfeiture case, that "[t]he government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain"); *Lech* v. *Jackson*, 791 Fed. Appx. 711, 715-719 (10th Cir. 2019), cert. denied, 141 S. Ct. 160 (2020); cf. *Hurtado* v. *United States*, 410 U.S. 578, 588-589 (1973) (reasoning that the government need not "pay for the performance of a public duty it is already owed," and

that "there is in fact a public obligation to provide evidence"). A permanent codification of such background principles would not effect a taking.

The access regulation, however, does not embody any of the traditional background limitations on property rights. It does not authorize access to abate a nuisance, prevent imminent harm to life or property, or engage in law-enforcement activities. Nor have respondents identified any other background principle that could support the access regulation. At most, California courts have suggested that "[a] duty or authority imposed or created by legislative enactment carries with it the privilege to enter land in the possession of another for the purpose of performing or exercising such duty or authority in so far as the entry is reasonably necessary to such performance or exercise." *Property Reserve, Inc.* v. *Superior Court*, 375 P.3d 887, 909 n.15 (Cal. 2016) (quoting Restatement § 211). But not all pre-existing state-law limitations on property rights qualify as the kind of deeply rooted background principles described in *Lucas* and *Palazzolo*. And even if the privilege described in *Property Reserve* qualifies, it is inapplicable in this case by its terms.

As the California courts have long recognized, the access regulation—in contrast to the NLRA access right—applies in cases where "access might in fact have been *unnecessary*." *Pandol & Sons*, 546 P.2d at 699 (emphasis added). That overbreadth is illustrated by this as-applied challenge, where it is undisputed that none of petitioners' employees lives on site—the typical circumstance where access to the employer's property is necessary for organizing. See Pet. App. G9, G11; cf. *Lechmere*, 502 U.S. at 533-534 (explaining that the NLRA access right applies only where "the location of

a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them") (citation omitted).

3. The government may also require private parties to cede property rights as a condition of using their property in certain ways. In *Nollan* itself, after determining that if California had simply *required* the Nollans to permanently make their beachfront available to the public, it would have been an uncompensated taking, the Court went on to consider whether that request was permissible as a *condition* of a building permit. 483 U.S. 834. The Court recognized that the State could theoretically deny the permit outright to advance the public interest (such as the interest in preventing beach congestion) without effecting a taking under *Penn Central*. *Id.* at 835-836. And it held "that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." *Id.* at 836. The Court subsequently clarified that to avoid a taking, the permit condition must bear an "essential nexus" and "rough proportionality" to the impact of the proposed use of the property. *Dolan* v. *City of Tigard*, 512 U.S. 374, 386, 391 (1994) (citation omitted).

The Court adopted a similar, but distinct, conditions doctrine in *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984). That case involved a federal statute regulating insecticides and permitting the government to disclose certain trade secrets submitted by the manufacturer as a condition of registering an insecticide to sell domestically. *Id.* at 994-995, 1006. In rejecting a takings challenge to that regime, the *Monsanto* Court reasoned that

the manufacturer voluntarily "chose to submit the requisite data" in exchange for "a valuable Government benefit." *Id.* at 1006-1007. Notably, *Monsanto* required a looser fit between the regulation and the potential harms caused by the regulated activity than did *Nollan*. See *id.* at 1007 (holding that registration "conditions" must be "rationally related to a legitimate Government interest"). As this Court later explained, the government enjoys greater leeway to set the conditions on operating in certain potentially dangerous, highly regulated industries, than it does to impose conditions on "basic and familiar uses of property." *Horne* v. *Department of Agric.*, 576 U.S. 351, 365-366 (2015) (selling raisins) (citation omitted); see *Nollan*, 483 U.S. at 833 n.2 (building a house); *Loretto*, 458 U.S. at 439 n.17 (acting as a landlord).

Neither *Monsanto* nor *Nollan* sustains the access regulation. The access regulation is not imposed as a condition on a governmental benefit that might trigger the relaxed germaneness requirements under *Monsanto*. In contrast to certain potentially dangerous activities on land, the right to employ agricultural workers on one's own property, "although certainly subject to reasonable government regulation," is not a "special governmental benefit" that the government may offer only upon "the waiver of constitutional protection." *Horne*, 576 U.S. at 366; see *Nollan*, 483 U.S. at 833 n.2 (similar). The Court's holding in *Loretto* that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation," 458 U.S. at 439 n.17, applies with equal force here.

Nollan is similarly unavailing. The predicate for *Nollan* is absent here, as respondents have not suggested that, in the absence of the access regulation, they would categorically bar a landowner from engaging workers in commercial agriculture because its employees might not receive information pertaining to labor organizing through the usual non-trespassory means. And it is highly questionable whether they even *could* impose such a categorical bar without effecting a taking pursuant to *Penn Central*. Moreover, in contrast to the limited NLRA access right, California's access regulation does not represent a proportionate response to the risk that petitioners' employees may not receive information pertaining to labor organizing, given that those employees are accessible to labor organizers off-site. See p. 5, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 2021

Nos. 20-107

IN THE SUPREME COURT OF THE UNITED STATES

CEDAR POINT NURSERY, ET AL. PETITIONERS

v.

VICTORIA HASSID, ET AL.

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF REVERSAL**, via e-mail and first-class mail, postage prepaid, this **7th day of January, 2021**.

[See Attached Service List]

As required by Supreme Court Rule 33.1(h), I certify that the document contains **8955** words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d). I declare under penalty of perjury that the foregoing is true and correct.
Executed on **January 7, 2021.**

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January 7, 2021

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Supervisor, Case Management, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Goodwin's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

20-0107
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