No. 20-107

In the

# Supreme Court of the United States

CEDAR POINT NURSERY and FOWLER PACKING COMPANY, INC.,

*Petitioners*,

v.

VICTORIA HASSID, in her official capacity as Chair of the Agricultural Labor Relations Board; ET AL.,

*Respondents.*

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

## BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JEFFREY REDFERN
*Counsel of Record*
DANA BERLINER
ROBERT MCNAMARA
INSTITUTE FOR JUSTICE
*901 North Glebe Road*
*Suite 900*
*Arlington, VA 22203*
*(703) 682-9320*
jredfern@ij.org

*Counsel for* Amicus Curiae

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases

Other Authorities

## BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

### INTEREST OF THE *AMICUS CURIAE*

Founded in 1991, the Institute for Justice (IJ) is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. As part of that mission, IJ has litigated cases challenging the use of eminent domain to seize an individual's private property and give it to other private parties. Among the cases that IJ has litigated are *Kelo* v. *City of New London*, 545 U.S. 469 (2005), in which this Court held that the U.S. Constitution allows government to take private property and give it to others for purposes of "economic development," and *City of Norwood* v. *Horney*, 853 N.E.2d 1115 (Ohio 2006), in which the Ohio Supreme Court expressly rejected *Kelo* and held that the Ohio Constitution provides greater protection for private property than does the U.S. Constitution. IJ continues to litigate important statutory and constitutional questions in eminent domain cases around the country, both as amicus and as counsel for property owners.

IJ agrees that certiorari is warranted for the reasons proffered in the Petition. IJ submits this brief to offer an additional reason to grant the Petition: The decision below neglects the crucial doctrinal difference between government action that causes a physical invasion of private property and government action that merely restricts an owner's use of proper-

ty. As this brief explains, the latter is sometimes a taking; the former presumptively a taking.[1]

## INTRODUCTION

Farmers in California are required by state law to allow labor organizers onto their property up to three times per day, up to 120 days per year. A Ninth Circuit panel below recognized that this law had created an uncompensated easement of indefinite duration. Yet, because the easement did not allow for 24-hour access, 365 days per year, the court held that the easement did not effect a per se taking.

Petitioner persuasively demonstrates that an easement, even one that is limited to certain times of the day or week, is a "permanent physical occupation" within the meaning of this Court's precedents and that, accordingly, the California law at issue is a per se taking. The Institute for Justice submits this brief, however, to highlight another way that the court below erred. The panel held that if petitioner was unable to establish a per se taking, then the only available theory was a regulatory taking, which petitioner intentionally did not advance. Yet this Court has consistently recognized that *temporary* physical invasions are a distinct category of taking, different from both permanent physical occupations and regulatory takings. And unlike regulatory takings, which are extremely difficult to prove, temporary physical occupations are *usually* takings. Only the briefest

---

[1] In accordance with Rule 37.6, amicus affirms that no counsel for a party authored this amicus brief in whole or in part and that no person other than amicus or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Both parties have consented to the filing of this brief.

physical invasions can escape the Fifth Amendment's just compensation requirement.

Unfortunately, the Ninth Circuit is not alone in conflating temporary physical invasions with regulatory takings: The First, D.C, and Federal Circuits have also misapplied this Court's precedents in ways that make it much more difficult for owners to receive compensation when the government physically invades their property. This Court should grant review to clarify that physical invasions, even if they do not qualify for per se treatment, are presumptively takings.

## ARGUMENT

### I. The Ninth Circuit's decision fails to recognize that temporary physical invasions are subject to a different and far more stringent level of review than regulatory actions that merely restrict an owner's use of property.

The court below began its takings analysis by stating that there are "three categories" of government action in this Court's takings jurisprudence. *Cedar Point Nursery* v. *Shiroma*, 923 F.3d 524, 530–31 (9th Cir. 2019). According to the court, those three categories are (1) "permanent physical invasions," (2) "regulations that completely deprive an owner of all economically beneficial use of her property," and (3) "the remainder of regulatory actions, which are governed by the standards set forth in *Penn Central*[.]" *Ibid.* The first two categories, the court noted, are *per se* takings, whereas the third is subject to a balancing test. After the court concluded that the California law at issue did not effect a per se taking under *Loretto*—which, as petitioner correctly explains, is incorrect—the court stated that the only other kind

of taking was regulatory. Yet, the court noted, petitioner had never advanced such a theory. Instead, petitioner had consistently argued "that the access regulation involved a physical invasion, as opposed to a regulatory taking." *Id.* at 534.

The problem with the Ninth Circuit's analysis is that, by holding that a taking must be either a permanent physical occupation or a regulatory taking, the court failed to recognize that *temporary* physical invasions can also lead to takings and, crucially, that they are not analyzed under the same standards as regulatory takings. This Court has held that "[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 * * * *even though that use is temporary*." *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (emphasis added).

To be sure, the fact that physical invasions are distinct from regulations does not mean that every temporary physical invasion is a taking. This "Court [has] * * * said that "temporary limitations are subject to a more complex balancing process to determine whether they are a taking."' *Arkansas Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 36 (2012). Crucially, however, the "balancing process" for temporary occupations is not the same as the deferential review that courts apply in regulatory takings cases. Quite the contrary.

This Court has consistently recognized that physical invasions, even if temporary, are subject to a different and more stringent analysis than mere regulations of an owner's use of property. And the basis for that distinction comes from "[t]he text of the Fifth Amendment itself." *Tahoe-Sierra*, 535 U.S. at

321–22; *Horne* v. *Dep't of Agric.*, 576 U.S. 350, 361 (2015) (recognizing the "longstanding distinction" between physical invasions and regulations of property). Indeed, the distinction between physical invasions and regulations is so sharp that this Court has said it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a regulatory taking." *Tahoe-Sierra*, 535 U.S. at 323. And the reverse is obviously true as well.[2]

### A. Regulatory takings doctrine presents a higher bar for property owners than physical invasions.

Prevailing on a regulatory takings claim is difficult. Although courts look to a number of factors, the most important question, by far, in regulatory takings cases is the diminution of value caused by the regulation at issue. See *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 497 (1987) ("our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property"). Obviously, as

---

[2] Part of the confusion appears to stem from the fact that *Penn Central* is sometimes treated as synonymous with regulatory takings. Yet *Penn Central* actually distinguishes between physical invasions and regulations. In addressing the first *Penn Central* factor, the "character of the government action," this Court explained that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government." *Penn Cent. Transp. Co.* v. *City of New York*, 438 U.S. 104, 124 (1978). Subsequent physical invasion cases have typically not treated *Penn Central* as setting out a controlling formula, except inasmuch as it indicates that courts should look to all of the facts and circumstances in takings cases. See *Arkansas Game and Fish*, 568 U.S. at 38–40.

this Court has held, a 100% reduction in value always constitutes a taking. *Lucas* v. *S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). That follows logically from the long recognized principle that a regulation effects a taking when it goes "too far." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). If a regulation destroys all of a property's value, it could not go any further. But short of a complete wipeout, courts have tolerated very significant diminutions of value without finding that takings have occurred. See, *e.g.*, *Colony Cove Properties, LLC* v. *City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018) (holding that 24.8% reduction in value was "far too small to establish a regulatory taking"). Indeed, regulations that destroy even 95% of a property's value have been blessed by courts (though not this Court). See, *e.g.*, *William C. Haas & Co.* v. *City & Cty. of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979) (value reduced from $2 million to $100,000).

No precise lines have emerged in regulatory takings cases, but this Court has explained that a regulation only effects a taking when it is truly "onerous." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). This Court has also noted that "[t]he attempt to determine when regulation goes so far that it becomes, literally or figuratively, a 'taking' has been called the 'lawyer's equivalent of the physicist's hunt for the quark.'" *Williamson Cty. Reg'l Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U.S. 172, 200 n.17 (1985) (quoting C. Haar, Land-Use Planning 766 (3d ed. 1976)), overruled by *Knick* v. *Township of Scott, Penn.*, 139 S. Ct. 2162, 2170 (2019). Accordingly, it is widely understood that "challenges to regulatory takings are difficult for property owners to mount." *Piedmont Triad Reg'l*

*Water Auth.* v. *Unger*, 572 S.E.2d 832, 835 (N.C. App. 2002).

### B. Temporary physical invasions are presumptively takings.

By contrast, when the case involves a physical invasion, the analysis is far simpler, and the property owner is far more likely to prevail. Indeed, this Court has even stated in dicta that temporary physical invasions *always* require compensation. *Tahoe-Sierra*, 535 U.S. at 322 ("[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 * * * *even though that use is temporary*.") (emphasis added). This Court has since clarified that temporary physical invasions are not quite *per se* takings, *Arkansas Game & Fish*, 568 U.S. at 36, but at the very least it is fair to say that physical invasions—even temporary ones—are "presumptive takings." See *Hilton Washington Corp.* v. *D.C.*, 593 F. Supp. 1288, 1291 (D.D.C. 1984), aff'd, 777 F.2d 47 (D.C. Cir. 1985).[3]

Crucially, diminution of value is irrelevant to the question of whether there is a taking in a physical invasion case (though it is of course relevant to damages). See *Murr* v. *Wisconsin*, 137 S. Ct. 1933, 1944, (2017) (noting "the contrast between regulatory tak-

---

[3] Analogizing to antitrust jurisprudence, as this Court has done before, see *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 n. 12 (1982) ("In the antitrust area, similarly, this Court has not declined to apply a *per se* rule simply because a court must, at the boundary of the rule, apply the rule of reason and engage in a more complex balancing analysis."), one might say that temporary physical invasions are subject to the "quick look" review applied to actions that are usually unlawful. *California Dental Ass'n* v. *F.T.C.*, 526 U.S. 756, 763 (1999).

ings, where the goal is usually to determine how the challenged regulation affects the property's value to the owner, and physical takings, where the impact of physical appropriation or occupation of the property will be evident."); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179–80 (1979) ("And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation."); *First English Evangelical Lutheran Church of Glendale* v. *Los Angeles Cty., Cal.*, 482 U.S. 304, 329–30 (1987) (Stevens, J., dissenting) ("This diminution of value inquiry is unique to regulatory takings."). Rather, in physical invasion cases, the most important question is the duration of the invasion. See *Arkansas Game and Fish*, 568 U.S. at 38–39.

Typically, courts will always find that there has been a taking in physical invasion cases unless the invasion was a brief, one-time incursion. For instance, in *YMCA* v. *United States*, 395 U.S. 85 (1969), this Court held that a "temporary, unplanned occupation" of property during "the course of battle" did not constitute a taking. *Id*. at 93. Similarly the California Supreme Court has held that there is no taking when government agents enter private property for the purpose of one-time groundwater testing. See *Prop. Reserve, Inc.* v. *Superior Court*, 375 P.3d 887, 923 (Cal. 2016). (Though, the installation of groundwater monitoring equipment on private property does effect a taking. See *Hendler* v. *United States*, 952 F.2d 1364, 1371 (Fed. Cir. 1991).) And the Third Circuit found that there was no taking when police officers physically occupied a property for just two hours while conducting a lawful search. *Jones* v. *Philadelphia Police Dep't*, 57 F. App'x 939, 942 (3d Cir. 2003). These types of cases were aptly explained by the Federal Circuit in one of its leading

cases on physical invasions: Cases in which physical invasions do not lead to takings are those in which "government's activity was so short lived as to be more like the tort of trespass than a taking of property." *Hendler*, 952 F.2d at 1371.

Once an invasion is extended beyond such brief incursions or trespasses, however, takings are usually found. See *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U.S. 327, 329–30 (1922) ("[W]hile a single act may not be enough [to establish a taking], a continuance of them in sufficient number and for a sufficient time may prove it. Every successive trespass adds to the force of the evidence."). In *Caquelin* v. *United States*, 959 F.3d 1360 (Fed. Cir. 2020), a recent case applying *Arkansas Game and Fish*, the Federal Circuit held that a property owner was entitled to $900.00 as compensation for the government's extending a private easement over the owner's property for 180 days. Such an invasion, the trial court had noted, was not "the mere parked truck of the lunchtime visitor." *Caquelin* v. *United States*, 140 Fed.Cl. 564, 579 (Fed. Cl. 2018) (citing *Hendler*, 952 F.2d at 1376), aff'd, 959 F.3d 1360 (Fed. Cir. 2020); see also *Primetime Hosp., Inc.* v. *City of Albuquerque*, 206 P.3d 112, 123 (N.M. 2009) (awarding damages for 142 days of temporary physical invasion). So unlike an alleged regulatory taking, where the deck is stacked against the property owner, a physical invasion, even a temporary one, "may be characterized as a presumptive taking." *Hilton Washington Corp.* v. *D.C.*, 593 F. Supp. 1288, 1291 (D.D.C. 1984), aff'd, 777 F.2d 47 (D.C. Cir. 1985); see also Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165,

1226 (1967) (noting that physical invasions have a "doctrinal potency" in takings analysis).

## II. This court should reaffirm the categorical difference between physical invasions and regulations of property use.

By conflating temporary physical invasions with regulatory takings, the decision below threatens to reverse the normal presumption that physical invasions are takings unless they are of an especially short duration. Under the Ninth Circuit's approach, owners whose properties are subject to actual, physical invasions will increasingly find themselves without recourse unless they can prove serious financial harm. This danger is not theoretical. For instance:

- In *Franklin Mem'l Hosp.* v. *Harvey*, 575 F.3d 121 (1st Cir. 2009), the First Circuit denied compensation to an owner whose property was subject to "periodic and intermittent" physical invasions, *id.* at 126 n.4, in part because the invasion at issue did not pose a "threat to [the owner's] economic viability." *Id.* at 127. Ye the court acknowledged that the property owner faced significant economic harm. *Ibid.*
- Similarly, in *Hilton Washington Corp.* v. *District of Columbia*, 777 F.2d 47 (D.C. Cir. 1985), the D.C. Circuit also denied compensation in a temporary physical invasion case because the property owner did not demonstrate that the invasion caused a "significant economic impact." *Id.* at 50.
- And in *Cienega Gardens* v. *United States*, 331 F.3d 1319 (Fed. Cir. 2003), the Federal Circuit held that a property owner subject to a

> physical invasion was required to show "serious financial loss" from the regulation at issue in order to prove a taking. *Id.* at 1338, 1340. Fortunately, the court in that case concluded that the property's 96% loss in value was sufficient to establish a taking, but it left open the question whether 35% would be sufficient. *Id.* at 1343 n.40.

Notwithstanding the clarity of this Court's precedents, the federal courts are confused about how to analyze temporary physical invasions. As a consequence, property owners are being denied the compensation due to them under the Fifth Amendment. In addition to the reasons stated in the Petition, this Court should grant review to clarify that the most important question in a takings case is not whether the challenged government action is a per se taking or subject to a balancing test. The crucial question is whether the government action constitutes a physical invasion. If it does, then it is presumptively a taking, regardless of whether it can be characterized as a permanent, per se taking.

## CONCLUSION

The Petition should be granted.

Respectfully submitted,

JEFFREY REDFERN
*Counsel of Record*
DANA BERLINER
ROBERT MCNAMARA
INSTITUTE FOR JUSTICE
*901 North Glebe Road*
*Suite 900*
*Arlington, VA 22203*
*(703) 682-9320*
*jredfern@ij*

SEPTEMBER 2, 2020.

**No. 20-107**

**Cedar Point Nursery, *et al.*,**

**Petitioners**

**v.**

**Victoria Hassid, *et al.*,**

## CERTIFICATE OF COMPLIANCE

In compliance with this Court's Rule 33.1(h), I hereby certify that the *Amicus Curiae* Brief in the above-captioned case complies with the typeface requirements of Supreme Court Rule 33.1(b) because it is prepared in Century Schoolbook font, size 12 point for the text and 10 point for the footnotes, and that this brief contains 2,945 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d).

Executed this 2nd day of September, 2020.

/s/ Jeffrey Redfern

Jeffrey Redfern

Counsel for Petitioners

**No. 20-107**

**Cedar Point Nursery, *et al.*,**

**Petitioners**

**v.**

**Victoria Hassid, *et al.*,**

## CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2020, I served the Reply Brief for Petitioner in the above-captioned matter on counsel for Petitioners and Respondents by both email and by third-party commercial carrier for delivery within 3 calendar days. Packages were plainly addressed to:

WENCONG FA

PACIFIC LEGAL FOUNDATION

930 G Street

Sacramento, CA 95814

Email: wfa@pacificlegal.org

JOSHUA PATASHNIK

CALIFORNIA DEPARTMENT OF JUSTICE

455 Golden Gate Ave., Suite 11000

San Francisco, CA 94102

Email: josh.patashnik@doj.ca.gov

Executed this 2nd day of September, 2020.

/s/ Jeffrey Redfern

Jeffrey Redfern

Counsel for *Amicus Curiae*