No. 20-107

In The
Supreme Court of the United States

CEDAR POINT NURSERY
and FOWLER PACKING COMPANY, INC.,
Petitioners,

v.

VICTORIA HASSID, in her official capacity as Chair of the Agricultural Labor Relations Board; et al.,
Respondents.

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

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

California law forces agricultural businesses to allow labor organizers onto their property three times a day for 120 days each year. The regulation provides no mechanism for compensation. A divided panel below held that, although the regulation takes an uncompensated easement, it does not effect a per se physical taking of private property because it does not allow "24 hours a day, 365 days a year" occupation. As an eight-judge dissent from denial of rehearing en banc noted, the panel "decision not only contradicts Supreme Court precedent but also causes a circuit split."

The question presented is whether the uncompensated appropriation of an easement that is limited in time effects a per se physical taking under the Fifth Amendment.

PARTIES

Petitioners are: Cedar Point Nursery and Fowler Packing Company, Inc.

Respondents are: Victoria Hassid, in her official capacity as Chair of the Agricultural Labor Relations Board; Santiago Avila-Gomez, in his official capacity as Executive Secretary of the Agricultural Labor Relations Board; and Isadore Hall III, in his official capacity as Board Member of the Agricultural Labor Relations Board. Pursuant to Rule 35(3), Chair Hassid is substituted for former Chair Genevieve Shiroma, who was a Respondent below.

CORPORATE DISCLOSURE STATEMENT

Cedar Point Nursery and Fowler Packing Company, Inc. have no parent corporations and no publicly held company owns 10% or more of the stock of either business.

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INTRODUCTION

The issue presented in this case—whether the taking of a permanent albeit time-limited easement effects a physical taking—has divided the circuits and now the judges of the Ninth Circuit. Nevertheless, the issue can be resolved through a straightforward application of this Court's existing precedents. An easement is a standalone and separately alienable real property interest, and the appropriation of a real property interest by the government merits per se treatment as a physical taking. Moreover, this Court has recognized that regular and predictable governmental invasions of private property—even if not 24/7—receive per se treatment because they function as if the government had taken an easement. Accordingly, whenever the government expresses the intent—either by force of law or through a course of conduct—to appropriate a time-limited easement, it effects a per se taking.

By that standard, Petitioners Cedar Point Nursery and Fowler Packing Company should win. They have been made subject to a regulation that denies them the right to exclude union organizers for 120 days a year. By taking this fundamental property right from Petitioners without compensation, the Agricultural Labor Relations Board has violated the core of the protections afforded by the Takings Clause. This Court should hold that where a government regulation infringes the right to exclude in the form of an easement, the uncompensated taking of that easement violates the Fifth Amendment.

OPINIONS

The panel opinion of the court of appeals, including Judge Leavy's dissent, is published at 923 F.3d 524 (9th Cir. 2019), and included in Petitioners' Appendix (Pet. App.) at A. The court of appeals' denial of the petition for rehearing en banc, including the opinion of two concurring judges and the opinion of eight dissenting judges, is published at 956 F.3d 1162 (9th Cir. 2020), and included at Pet. App. E. The decisions of the district court are unpublished but included here at Pet. App. B, Pet. App. C, and Pet. App. D.

JURISDICTION

The district court had jurisdiction over this case under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. The district court granted the defendants' motion to dismiss on June 29, 2016. Petitioners filed a timely appeal to the Ninth Circuit. On May 8, 2019, a panel of the Ninth Circuit affirmed the district court's dismissal. Petitioners then filed a timely petition for rehearing en banc. The petition failed to receive the votes of a majority of the judges and was denied on April 29, 2020. The petition for writ of certiorari was filed on July 29, 2020, and granted on November 13, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the U.S. Constitution provides, in relevant part, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

Cal. Code Regs. tit. 8, § 20900(e) provides, in pertinent part:

> Accordingly the Board will consider the rights of employees under Labor Code Section 1152 to 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, subject to the following regulations:
>
> (1) When Available.
>
> (A) Access under this section onto an agricultural employer's property shall be available to any one labor organization for no more than four (4) thirty-day periods in any calendar year.[1]

STATEMENT OF THE CASE

A. Factual Background

1. The Access Regulation – Operation

In 1975, California enacted the Agricultural Labor Relations Act. *See* Cal. Lab. Code § 1140, *et seq*. The Act does not authorize access for union organizers on private property. *See id.* § 1152. But the Agricultural Labor Relations Board (Board) immediately promulgated an emergency access regulation, which took effect the following day. Cal.

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[1] The full text of the regulation at issue is provided in the Appendix at Pet. App. F.

Code Regs. tit. 8, § 20900 (Access Regulation); Pet. App. G-5–G-6 ¶ 15. Roughly three months later, the Board certified the regulation, allowing it to remain in effect indefinitely. *Id.*

The Access Regulation allows union organizers to enter 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). Union organizers need not obtain the employer's consent before entering the employer's property.[2] Instead, they may access an agricultural employer's property after filing two copies of a written notice of intention to take access with the Board, together with proof of service of a copy of the written notice served to a person at the employer's business who is entitled to accept service. *Id.* § 20900(e)(1)(B); *see also id.* § 20300(f) (explaining how to effectuate service upon the employer).[3]

The filing of the notice triggers the 30-day period for the union organizers to "access" private property. *Id.* § 20900(e)(1)(B). Each union is allowed to enter private property for 120 days each year. *Id.* § 20900(e)(1)(A) (providing that access to "agricultural employer's property shall be available to any one labor organization for no more than four (4) thirty-day

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[2] Although the Access Regulation allows the union and employer to reach "voluntary agreements on access," it does not require them to do so. Cal. Code Regs. tit. 8, § 20900(e)(2). Further, no attempts to reach an agreement "shall be deemed grounds for delay in the taking of immediate access once a labor organization has filed its notice of intent to take access." *Id.*

[3] This process may be accomplished the same day; indeed, other provisions of the Access Regulation make clear that labor organizations may take "immediate access." *Id.* § 20900(e)(2).

periods in any calendar year"). Access is given for three hours per day. *Id.* § 20900(e)(3) (providing for union access an hour before work, an hour after work, and an hour during the lunch period). The union organizers can designate the places where they will take access so long as it is an area where employees "congregate before and after working," *id.* § 20900(e)(3)(A), or a location where employees eat their lunch. *Id.* § 20900(e)(3)(B).

The Access Regulation prohibits organizers from engaging in "conduct disruptive of the employer's property or agricultural operations, including injury to crops or machinery or interference with the process of boarding buses." *Id.* § 20900(e)(4)(C). Yet "[s]peech by itself shall not be considered disruptive conduct" and "[d]isruptive conduct by particular organizers shall not be grounds for expelling organizers not engaged in such conduct, nor for preventing future access." *Id.*

By contrast, the Access Regulation provides serious enforcement mechanisms to ensure property owners' compliance. For example, a property owner who interferes with a union organizer's attempt to enter the property is subject to an unfair labor practice charge under the California Labor Code. *Id.* § 20900(e)(5)(C). "Interference" has been interpreted by the Board to include such innocuous actions as "observing" union organizers as they take access. *See J.R. Norton Co. v. Agric. Labor Relations Bd.*, 238 Cal. Rptr. 87, 105–06, 107 (Ct. App. 1987) (overruling Board's determination that employer committed unfair labor practice by "engaging in surveillance of union activities"). Further, other Board regulations allow any person to file a charge, accompanied by a

brief statement of facts, against any other person for engaging in such practices. Cal. Code Regs. tit. 8, § 20201.

An unfair labor practice charge triggers an investigation by the Board's regional director, who determines whether the property owner has, in fact, committed such a practice. *Id*. § 20216. If the regional director finds that there is no reasonable cause for the charge, the charging party may seek review by the Board's general counsel, who may issue a complaint on behalf of the Board. *Id*. §§ 20219–20220. A complaint drags the property owner into a litigation-like proceeding before an Administrative Law Judge. *Id*. §§ 20220–20278. If the judge finds that an unfair labor practice has been committed, the judge may compel "affirmative action by the respondent" to facilitate the policies of the Agricultural Labor Relations Act, and order other sanctions.[4]

2. The Access Regulation – History

The significant measures imposed by the Access Regulation are the product of a bygone era. In the

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[4] The Board has leeway to craft powerful remedies when it has found that an employer has engaged in an unfair labor practice. *See Harry Carian Sales v. Agric. Labor Relations Bd.*, 703 P.2d 27, 42–43 (Cal. 1985). These remedies may include forced bargaining orders, *id.*, back pay or wages, *Superior Farming Co. v. Agric. Labor Relations Bd.*, 198 Cal. Rptr. 608, 623 (Ct. App. 1984), make-whole relief, *Bertuccio v. Agric. Labor Relations Bd.*, 249 Cal. Rptr. 473, 485 (Ct. App. 1988), interest on make-whole relief, *id.*, requiring the employer to mail or read notices to workers, *Tex-Cal Land Mgmt., Inc. v. Agric. Labor Relations Bd.*, 595 P.2d 579, 591 (Cal. 1979), and requiring the employer to provide unions with the names and addresses of all employees, *Pandol & Sons v. Agric. Labor Relations Bd.*, 159 Cal. Rptr. 584, 588 (Ct. App. 1979).

decades before the Board promulgated the Access Regulation, workers sometimes lived on the property of their employer with little to no access to the outside world. *See, e.g.*, *NLRB v. Lake Superior Lumber Corp.*, 167 F.2d 147, 148 (6th Cir. 1948) (employees lived in remote camps 18 miles from the nearest town); *NLRB v. S & H Grossinger's Inc.*, 372 F.2d 26, 29 (2d Cir. 1967) (employees lived on the premises and left "only rarely for brief visits to the neighboring village").

Nevertheless, the Access Regulation is neither tailored to agricultural businesses with employees living on-site, nor even more generally to situations where employees are inaccessible. *See* Cal. Code Regs. tit. 8, § 20900(d). The regulation explicitly eschews a case-by-case determination, which it proclaims would cause "uncertainty and instability." *Id.* Instead, it appropriates an easement across the property of all agricultural businesses in California, irrespective of the accessibility of their employees. *See id.* By imposing a categorical requirement that every agricultural business in California open its property to union organizers, the Access Regulation differs markedly from the access permitted under the National Labor Relations Act (NLRA), which is limited to situations "when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

The Access Regulation raised constitutional questions at the outset. Agricultural businesses immediately challenged the regulation in California state court under a variety of theories including the Takings and Due Process Clauses of the United States

Constitution. *See Agric. Labor Relations Bd. v. Superior Court (Pandol & Sons)*, 546 P.2d 687, 690–91 (Cal. 1976). Two state superior courts ruled in the businesses' favor and temporarily enjoined the Board from enforcing the regulation. *Id.* at 692–93. The California Supreme Court, however, vacated the injunction in a divided 4–3 decision. The majority held that the constitutionality of a broad easement across all agricultural businesses was compelled by this Court's decision in *Babcock & Wilcox*, and that a prerequisite finding that workers are inaccessible through usual channels was not necessary to make the regulation consistent with the Takings Clause. *See Pandol & Sons*, 546 P.2d at 698 ("We deem [*Babcock & Wilcox*] dispositive of the issue of the federal constitutionality of access to agricultural property . . . ."). The dissent, on the other hand, read *Babcock & Wilcox* to require a case-by-case finding of inaccessibility as a prerequisite under the NLRA. *Id.* at 712 (Clark, J., dissenting). Because the Access Regulation failed that standard, it necessarily constituted "an unwarranted infringement on constitutionally protected property rights." *Id.* at 706 (Clark, J., dissenting).[5]

[5] The dissent was correct regarding the scope of the access right under the NLRA. Sixteen years after the California Supreme Court's decision in *Pandol & Sons*, this Court announced that "*Babcock*'s teaching is straightforward: § 7 simply does not protect nonemployee union organizers *except* in the rare case where 'the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.'" *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992) (quoting *Babcock & Wilcox*, 351 U.S. at 112) (emphasis in original).

Forty-five years since the Access Regulation was first promulgated, union organizers continue to use the easement that the regulation authorized. *See* Pet. App. G-18–G-25. In the year preceding this lawsuit, the United Farm Workers (UFW) filed 62 notices of intent to take access. *See id.* Yet circumstances today differ drastically from those that prompted the Access Regulation in 1975.[6] As conditions at Petitioners Cedar Point Nursery and Fowler Packing demonstrate, agricultural workers do not generally live on the property of their employer,[7] can speak either English or Spanish,[8] and have access to union advertisements through smartphones, radio, and other means of communication.[9] In addition, UFW

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[6] Of course, labor organizers have always had the right—and continue to have the right—to disseminate information on the public spaces immediately outside the private property of agricultural businesses.

[7] According to a 2005 study on the Board's website, "[n]early all workers (96%) reported living off-farm in a property not owned or administered by their present employer." Aguirre International, *The California Farm Labor Force: Overview and Trends from the National Agricultural Workers Survey* 30, *available at* https://www.alrb.ca.gov/wp-content/uploads/sites/196/2018/05/CalifFarmLaborForceNAWS.pdf; *see also* Pet. App. G-9 ¶ 27 (none of Cedar Point's workers live on premises; *id.* at G-11 ¶ 37 (none of Fowler Packing's employees live on premises).

[8] The record shows that only one percent of the employees at Fowler Packing and none of the employees at Cedar Point lack the ability to converse in either English or Spanish. *See* Appellants' Excerpts of Record (ER), 9th Cir. Dkt. 8-2, at ER 60 (Rodriquez Decl. ¶ 5) (Fowler); ER 96 (Halpenny Decl. ¶ 4) (Cedar Point).

[9] Employees at both Fowler Packing and Cedar Point have cellular phones or smart phones. ER 88 (Sanders Decl. ¶ 5); ER

runs a multi-channel and multi-state radio network—Radio Campesina—which disseminates worker-related information.[10] The network operates at least three radio stations in California—KUFW (106.3 FM—Visalia), KMYX (92.5 FM—Bakersfield), and KSEA (107.9 FM—Salinas)—that broadcast the union's message to its target audience in heavily agricultural areas of California. *See* Amicus Br. of Cal. Farm Bureau in support of Petition for Certiorari, 20-107, at 12. In all, although the Access Regulation imposes the same extraordinary measures, the conditions that prompted those measures no longer exist today.

3. Petitioners

Petitioners Cedar Point Nursery and Fowler Packing Company are California agricultural growers that have been subjected to the Access Regulation.

a. Cedar Point Nursery

Cedar Point Nursery is a strawberry plant producer nestled in the mountains near the California-Oregon border. Pet. App. G-4 ¶ 8. Cedar Point ships its strawberry plants to producers nationwide. *Id.*

Cedar Point employs more than 400 seasonal workers and about 100 full-time workers at its Dorris, California nursery. Pet. App. G-9 ¶ 26. None of those

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99 (Arias Decl. ¶ 5); ER 93 (McEwen Decl. ¶ 5); ER 90 (Garcia Decl. ¶ 5); *see also* Amicus Br. of Cal. Farm Bureau in support of Petition for Certiorari, 20-107, at 13 (citing Union field coordinator's statements that agricultural workers all have smartphones, and generally use Facebook).

[10] *See* ER 67 (Desormeaux Decl. Exh. A).

workers live on premises. *Id.* ¶ 27. Instead, Cedar Point pays for housing for its seasonal workers in nearby hotels in Klamath Falls, Oregon. Cedar Point compensates its workers at or above market rates and provides them with complementary meals on the premises. *Id.* ¶ 28.

During the height of Cedar Point's harvesting season in October 2015, union protesters entered at 5:00 a.m., without any prior notice of intent to access the property. *Id.* ¶ 30. The union protesters moved through the trim sheds with bullhorns, distracting and intimidating many of the hundreds of employees who were preparing strawberry plants. *Id.*

Cedar Point filed a charge against UFW with the Board, alleging that it violated the Access Regulation. Pet. App. G-10 ¶ 34. UFW also filed a charge against Cedar Point, alleging that Cedar Point committed an unfair labor practice. *Id.* The Board dismissed both charges. If not for the Access Regulation, Cedar Point would exercise its right to exclude union organizers from its property. *Id.* ¶ 35.

b. Fowler Packing Company

Petitioner Fowler Packing Company is a large-scale shipper of table grapes and citrus headquartered in Fresno, California. Pet. App. A-11. Fowler employs 1,800 to 2,500 people in its field operations and around 500 people at its Fresno packing facility. *Id.* Its employees do not live on premises and are fully accessible to the union when they are not at work. Pet. App. G-11 ¶ 37.

Fowler takes the well-being of its employees seriously. It provides free, wholesome meals for its employees on premises, and maintains a medical

clinic that serves employees and their family members free-of-charge. *Id.* ¶ 36. Fowler gives all employees a card with a "hotline" number, which they may use to anonymously report any signs of abuse, misconduct, harassment, or unsafe working conditions. *Id.*

In 2015, UFW filed an unfair labor practices charge, which alleged that Fowler Packing interfered with the UFW's access rights for three days in July. *Id.* ¶ 38. Fowler Packing denied the charge, and UFW withdrew it without explanation on the eve of this litigation. *Id.* ¶ 39. If not for the Access Regulation, Fowler Packing would exercise its right to exclude union organizers from its property. *Id.* ¶ 40.

4. Procedural History

In February 2016, Petitioners filed their complaint for declaratory and injunctive relief under 42 U.S.C. § 1983 against several members of the Board and the Board's Executive Secretary, all of whom were sued in their official capacities. Pet. App. A-11. Petitioners sought to halt enforcement of the Access Regulation on the grounds that it takes an easement without compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.[11] Petitioners alleged that the Access Regulation "imposes an easement across the private property of Cedar Point and Fowler for the benefit of union organizers." Pet. App. G-4 ¶ 7.

[11] Petitioners also brought a claim under the Fourth and Fourteenth Amendments to the United States Constitution that the Access Regulation constituted an unlawful seizure of their property. Pet. App. G-15–G-16 ¶¶ 59–65. The district court dismissed Petitioners' Fourth Amendment claim, Pet. App. B-10–B-13, and Petitioners have not sought this Court's review of that claim.

Because the Access Regulation takes an easement "without consent or compensation," Petitioners alleged that "it causes an unconstitutional taking." Pet. App. G-15 ¶ 58. The district court granted the Board's motion to dismiss the case on the ground that Petitioners had failed to state a plausible takings claim. *See* Pet. App. B-8–B-10; D-9–D-15.

The Ninth Circuit affirmed in a divided opinion. According to the panel majority, the taking of an easement was not a "classic taking in which government directly appropriates private property." Pet. App. A-14. The panel reasoned that because the Access Regulation did not "allow random members of the public to unpredictably traverse their property 24 hours a day, 365 days a year" it could not be a per se physical taking. Pet. App. A-17–A-18. The panel also noted that the Access Regulation could not effect a per se taking "because the sole property right affected by the regulation is the right to exclude." Pet. App. A-18. Judge Leavy dissented. In his view, "the Access Regulation" facilitates a "physical, not regulatory, occupation because the 'right to exclude' is 'one of the most fundamental sticks' in the bundle of property rights." Pet App. A-29 (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979)).

The Ninth Circuit denied Petitioners' request for rehearing en banc over the dissent of eight judges. Writing for the dissenters, Judge Ikuta explained that the panel decision "creates a circuit split, disregards binding Supreme Court precedent and deprives property owners of their constitutional rights," Pet. App. E-32. In the dissent's view, the Ninth Circuit "should have taken this case en banc so that the

Supreme Court will not have to correct us again." Pet. App. E-10.

Judge Ikuta's dissent invoked cases and treatises showing that the Access Regulation took an easement under longstanding principles of California law. Pet. App. E-17–E-23. Judge Ikuta stressed that the taking of an easement by the government is a per se physical taking, regardless of whether the easement allows for access "24 hours a day, 365 days a year." Pet. App. E-23–E-26.

The judges in the panel majority concurred in the denial of rehearing en banc. The concurring judges disagreed that the taking of an easement constitutes a per se physical taking, Pet App. E-5, and reiterated their view that the "majority opinion correctly held that [Petitioners] have not suffered a 'permanent and continuous' loss of their right to exclude the public from their property." Pet. App. E-9.

SUMMARY OF ARGUMENT

A regulation promulgated by California's Agricultural Labor Relation's Board authorizes the taking of an access easement from every agricultural business in the state for the benefit of union organizers. Cal. Code Regs. tit. 8, § 20900(e)(1)(A). Under the terms of the Access Regulation, organizers may invade the businesses' private property for three hours each day, 120 days each year. The easement persists even when their employees are easily accessible to union organizers through other means. As a result, Petitioners Cedar Point Nursery and Fowler Packing Company cannot exclude the organizers from their private property.

The question here is whether this access easement effects a per se physical taking despite the time limitations placed on the organizers' access. It does. The Access Regulation creates an easement in gross—a real property interest—under California law. "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002). On that basis alone, the Court should hold that the imposition of the Access Regulation effects a per se taking.

Per se treatment is particularly appropriate when, as here, the property interest taken by the government is an easement. This Court has repeatedly recognized that the taking of an easement is a permanent physical invasion of property that triggers a categorical duty of compensation. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831–32 (1987); *Kaiser Aetna*, 444 U.S. at 180. This Court's categorical rule does not depend on all day, every day accessibility. Rather, there is "little doubt" that the organizers' right of access to the growers' property, "even though temporally intermittent, is not 'temporary.'" *Hendler v. United States*, 952 F.2d 1364, 1378 (Fed. Cir. 1991). Several of this Court's decisions say the same. *United States v. Cress*, 243 U.S. 316, 327–28 (1917); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329–30 (1922); *United States v. Causby*, 328 U.S. 256, 261–62, 267–68 (1946). Once the property owner establishes that a physical invasion is an easement, it is a taking. The scope of the easement goes only to the amount of compensation due. *Causby*, 328 U.S. at 267–68.

The Ninth Circuit held that per se treatment was unwarranted and would have required Petitioners to litigate their takings claim under the multifactor balancing test of *Penn Central Transportation Co v. City of New York*, 438 U.S. 104 (1978). But the Ninth Circuit and the Board "confuse [the] inquiry concerning per se takings with [the] analysis for regulatory takings." *Horne v. Dep't of Agric.*, 576 U.S. 350, 364 (2015). The "taking of a property interest" is a categorical taking while "a mere restriction on its use" is generally not. *Nollan*, 483 U.S. at 831; *see also Tahoe-Sierra*, 535 U.S. at 321–22. And per se treatment is particularly warranted here because the taking of an easement deprives the property owners of the right to exclude trespassers from their property, a right that is "universally held to be a fundamental element of the property right." *Kaiser Aetna*, 444 U.S. at 179–80. The taking of the right to exclude merits categorical treatment apart from *Penn Central*'s consideration of economic impact. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982).

Petitioners' proposed rule is simple—the government violates the Takings Clause when it appropriates an easement across private property for the benefit of third parties without compensation. The scope of the easement, including any time restrictions on access, is relevant only to the amount of compensation, not the determination that a taking has occurred. This rule is consistent with the Court's precedent and limits the need for arbitrary line-drawing that would be required if only the appropriation of certain easements were considered per se takings. The rule also protects the fundamental right of property owners to exclude trespassers from

their property. The right to exclude is too important to be left at the mercy of government officials who will inevitably seek as much public access as possible without paying for it. Property rights "cannot be so easily manipulated." *Horne*, 576 U.S. at 365 (quoting *Loretto*, 458 U.S. at 439 n.17).

For the reasons that follow, Petitioners respectfully ask this Court to vacate the judgment below and remand the case for further proceedings, applying the rule that the appropriation of an easement permitting access to private property for 3 hours each day for 120 days per year is a per se physical taking.

ARGUMENT

I.

The Access Regulation Effects a Physical Taking and Violates the Fifth Amendment Because It Takes an Easement From Petitioners Without Compensation

By authorizing union organizers to access and use the private property of California growers, the Access Regulation's imposition results in the taking of a discrete property interest from Petitioners—namely, an easement in gross. The uncompensated appropriation of an interest in real property is sufficient on its own to establish a physical taking. That the property interest taken in this case is an easement only makes the discrete property interest more obvious, as this Court has consistently held that the government must always provide just compensation for the taking of an easement. That holds true even where an easement does not authorize around-the-clock access.

In holding that the easement taken by the Access Regulation did not justify categorical treatment, the panel majority below misunderstood the nature of easements and the distinction between physical and regulatory takings. Correctly understood, an easement—including a time-limited easement—is a discrete property interest under California law that authorizes a physical invasion of private property. The appropriation of the access easement here is properly analyzed as a physical, not a regulatory taking.

A. The Uncompensated Appropriation of a Discrete Property Interest Is a Physical Taking

The Ninth Circuit's error arises from a misunderstanding of the "longstanding distinction" between physical and regulatory takings. *Horne*, 576 U.S. at 361 (quoting *Tahoe-Sierra*, 535 U.S. at 323). This Court's physical takings doctrine is "as old as the Republic" and rooted in the text of the Fifth Amendment. *Tahoe-Sierra*, 535 U.S. at 322. While the "paradigmatic" physical taking involves direct government appropriation of private property for a governmental use, *see Lingle v. Chevron, U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (citing *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951)), it has long been understood that the government may also violate the Takings Clause through the physical invasion of private property. *See Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. (13 Wall.) 166, 181 (1871) ("where real estate is actually invaded . . . it is a taking, within the meaning of the Constitution"). The rule is straightforward: "[w]hen the government physically takes possession of an interest in property

for some public purpose, it has a categorical duty to compensate" the owner. *Tahoe-Sierra*, 535 U.S. at 322.

While physical takings cases involve "the taking of a property interest," regulatory takings cases involve restrictions on the use of property. *See Nollan*, 483 U.S. at 831. Because the government does not take a discrete property interest when it regulates use, such cases are subject to "complex factual assessments." *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992). Under the multifactor test set out in *Penn Central*, courts must consider the economic impact of a regulation on the entire affected parcel, the owner's investment-backed expectations, and the character of the government action. *Penn Central*, 438 U.S. at 124. A regulatory use restriction rises to the level of a categorical taking only when it deprives the property owner of "all economically beneficial or productive use" of her parcel. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

The clearest distinction between physical and regulatory takings is in the evaluation of economic impact. A regulatory use restriction must have a significant economic impact on the owner's parcel before it is considered a taking.[12] Not so for physical

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[12] Rarely will an easement of any kind diminish the value of a parcel by 50%, much less by 90% or more—a common threshold in *Penn Central* cases. *See William C. Haas & Co., Inc. v. City & Cty. of S.F.*, 605 F.2d 1117, 1120–21 (9th Cir. 1979) (holding a 95% diminution in value insufficient); *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377, 1386–90 (N.J. 1992) (90% diminution in value inadequate to state a claim); *Animas Valley Sand & Gravel, Inc. v. Bd. of County Comm'rs*, 38 P.3d 59, 67 (Colo. 2001) (*Penn Central* requires a showing that "land has

takings. When the government physically takes a property interest, the duty to compensate is categorical "regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Tahoe-Sierra*, 535 U.S. at 322. While the extent of a use restriction determines whether it is a taking, the mere fact that the government has invaded a property interest, no matter how small, establishes a physical taking. The "*extent* of the occupation" is relevant only "in determining the compensation due." *Loretto*, 458 U.S. at 437.

In short, when the government takes a discrete property interest, it is evaluated as a physical, not a regulatory, taking.

B. The Access Regulation Effects a Physical Taking Because It Appropriates an Easement in Gross Without Compensation

By refusing to apply the physical takings doctrine, the Ninth Circuit effectively treated the Access Regulation as a mere use restriction. However, the Access Regulation takes a discrete property interest from Petitioners. An easement in gross is a recognized real property interest in California. *See Los Angeles Terminal Land Co. v. Muir*, 68 P. 308, 312 (Cal. 1902).[13] And as Judge Ikuta explained, the Access

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[only] a value slightly greater than de minimis."); *Noghrey v. Town of Brookhaven*, 48 A.D.3d 529, 532–33 (N.Y. App. Div. 2008) (declaring that *Penn Central*'s economic impact factor "requires a loss in value which is 'one step short of complete'").

[13] From the beginning, Petitioners have characterized the Access Regulation as an easement. Pet. App. G-14–G-15 ¶¶ 51–58. The Board has never denied that characterization, and the courts rulings below operate on the assumption that the Access

Regulation's grant to union organizers of the right to enter and use Petitioners' land "is the epitome of an easement in gross" under California law. Pet. App. E-23.

Further, this Court has long demonstrated particular concern about the uncompensated taking of easements. Universally, the Court has affirmed the principle that "[e]ven if the Government physically invades only an easement in property, it must nonetheless pay just compensation." *Kaiser Aetna*, 444 U.S. at 180. Even before the advent of modern takings law, the Court recognized that "[p]roperty is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that . . . a servitude has been acquired either by agreement or in course of time." *United States v. Dickinson*, 331 U.S. 745, 748 (1947). This rule is consistent with the common law and the nature of easements. *See Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93, 104–05 (2014).

The Court's view remained the same after *Loretto*, which held that a "permanent physical invasion" of property establishes a per se physical taking. *Loretto*, 458 U.S. at 426. Tellingly, while *Loretto* noted in passing that the "easement of passage" taken in *Kaiser Aetna* was not a "permanent occupation of land," *id.* at 433, *Nollan* rejected any implication that an easement might not be "permanent" enough to qualify as a per se taking under *Loretto*'s standard. Instead, *Nollan* held that an easement *does* amount to a "permanent physical occupation" under *Loretto*

Regulation takes an easement under California law. Pet. App. A-15–A-22; D-10–D-15.

"even though no particular individual is permitted to station himself permanently upon the premises." *Nollan*, 483 U.S. at 832. Similarly, in *Dolan*, 512 U.S. at 393, the Court recognized that the appropriation of easements for public storm-drainage improvements and a pedestrian/bicycle pathway would effect a physical taking. Subsequent precedent reaffirms that the relevant inquiry is whether a *property interest* has been taken. *Tahoe-Sierra*, 535 U.S. at 322.[14] In short, this Court's precedent leaves no doubt that the appropriation of an easement effects a per se taking.

C. The Access Regulation's Time Limits Do Not Exempt It From Categorical Treatment

Given that the taking of an easement is a physical taking, the Board's (and Ninth Circuit's) conclusion that the Access Regulation does not effect a physical taking rests solely on the proposition that the time-limited nature of the access changes the analysis. In other words, the appropriation of an easement rises to the level of a per se taking only if it permits access all day, every day. *See* Pet. App. A-17–A-18. But as Judge Ikuta aptly noted, "there is no support for the . . . claim that the government can appropriate easements free of charge so long as the easements do not allow for access '24 hours a day, 365 days a year.'" Pet. App. E-26. That is true for several reasons.

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[14] More recently, this Court has reiterated that the government appropriation of an interest in property constitutes a per se taking that requires just compensation. *Horne*, 576 U.S. at 358. It explicitly rejected the argument that a per se taking occurs only where every property interest is destroyed by government action. *Compare id.* at 363, *with id.* at 381 (Sotomayor, J., dissenting).

First. A time-limited easement effects a per se physical taking because when the government takes a discrete property interest, "it has a categorical duty to compensate the former owner." *Tahoe-Sierra*, 535 U.S. at 322. Property interests are created and recognized by state law.[15] *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998). California law is clear that an easement is a discrete property interest. *Muir*, 68 P. at 312. It is equally clear that such a right of use is an easement even where limited in time. *See, e.g.*, *Willard v. First Church of Christ, Scientist*, 498 P.2d 987, 988 (Cal. 1972) (easement for "church hours"); *Collins v. Gray*, 86 P. 983, 984 (Cal. Ct. App. 1906) (easement for water for "four days of each month during the irrigating season"); *Citizens for Open Access to Sand & Tide, Inc. v. Seadrift Ass'n*, 71 Cal. Rptr. 2d 77, 81–82 (Ct. App. 1998) (easement excluded "the period from 10:00 . . . at night until one hour before sunrise"); *Scher v. Burke*, 192 Cal. Rptr. 3d 704, 719 (Ct. App. 2015) ("12 light hours"), *aff'd*, 395 P.3d 680 (Cal. 2017); *Surfside Colony, Ltd. v. Cal. Coastal Comm'n*, 277 Cal. Rptr. 371, 375 (Ct. App. 1991) ("daylight hours"). Indeed, limitations are inherent to easements, *see* 12 Witkin, Summary 11th Real Prop. § 396 (2020) (the holder of an easement is entitled to "a limited use or enjoyment of the other's land"), and the scope of an easement is limited to the terms of the instrument that created it. Cal. Civ. Code § 806; *see also Atchison, T. & S. F. Ry. Co. v. Abar*, 79 Cal. Rptr. 807, 813 (Ct. App. 1969); *Union Pacific Railroad Co.*

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[15] However, the State—or the Board—does not have unlimited power to redefine property rights. *Loretto*, 458 U.S. at 439. The government, "by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

v. Santa Fe Pacific Pipelines, Inc., 180 Cal. Rptr. 3d 173, 196–97 (Ct. App. 2014). The limitations on access contained in the Access Regulation are typical, and do not make the easement any less of a property interest. It therefore may not be taken without compensation

Second. This Court treats easements as physical takings even where they do not authorize continuous occupation. As early as 1913, the Court recognized that the allegation of repeated artillery firings over private property could amount to the "imposition of . . . a servitude" that "would constitute an appropriation of property for which compensation should be made." *Peabody v. United States*, 231 U.S. 530, 538 (1913). Although the Court found the allegations in *Peabody* insufficient, nine years later it allowed a similar takings claim to proceed based upon allegations of the government's repeated firing of heavy coast defense guns. *Portsmouth Harbor Land & Hotel Co.*, 260 U.S. at 329–30. "Every successive trespass," the *Portsmouth Harbor* Court said, "adds to the force of the evidence" that "a servitude has been imposed." *Id.* at 330. Similarly, *Causby* held that repeated low overflights could—and did—take an "easement of flight" which was the "equivalent of a fee interest." 328 U.S. at 261–62. This Court remanded the case to the Court of (Federal) Claims to determine the value of the easement for the purposes of compensation. *Id.* at 267–68.

Another example is *United States v. Cress*, 243 U.S. at 327. There, the Court found a categorical taking where the government's maintenance of a lock and dam resulted in intermittent but nevertheless continual flooding of the property owner's land. It made no difference that the land was not continuously

submerged, nor that the value of the property had not been completely destroyed. Rather, the Court emphasized—in language anticipating *Loretto*—that the flooding was "a permanent condition" and "the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, [is what] determines the question whether it is a taking." *Id.* at 327–28. The interest taken, "an easement in the United States to overflow [the property] with water as often as necessarily may result from the operation of the lock and dam," differed from permanent overflow only in degree, not in kind. *See id.* at 328–29. "[O]n principle, the right to compensation must arise in the one case as in the other." *Id.* at 328.[16]

None of these easements involved *uninterrupted*, 24/7 access to land, such that the property would *always* have the potential to be occupied. Indeed, the

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[16] *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23 (2012), is further support. There, the Court rejected the Federal Circuit's holding that "temporary" flooding cases were exempt from takings liability. *Id.* at 38 ("We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection."). On remand, the Federal Circuit explained that, following this Court's decision, "the government's argument is necessarily limited to the contention that the flooding was not sufficient in duration to constitute an appropriation of the Commission's property rights." *Ark. Game & Fish Comm'n v. United States*, 736 F.3d 1364, 1369 (Fed. Cir. 2013). The Federal Circuit rejected that argument—it held instead that the flooding caused "an invasion, in the form of a temporary flowage easement." *Id.* at 1372. In any event, *Arkansas Game & Fish* is largely inapplicable to this case because, the servitude authorized by the Access Regulation is a "permanent condition" on Petitioners' land. *Cress*, 243 U.S. at 327.

Causby Court expressly held that a *temporary* easement would be compensable, while *Cress* held that "intermittent but inevitably recurring" flooding was just as much a taking as a total, permanent washout.[17] These cases suggest that appropriation of an easement permitting "intermittent public use" effects a per se physical taking. *See Hendler*, 952 F.2d at 1377–78.

The easements taken in *Portsmouth Harbor*, *Causby*, and *Cress* differ from that authorized by the Access Regulation in one meaningful way—they were easements acquired by repeated trespasses, whereas the Access Regulation's easement, like the easement in *Nollan*, is expressly authorized by law. But that difference only helps Petitioners. Because the Access Regulation authorizes systematic yearly access to Petitioners' properties, it is a "permanent condition" on the land, *see Cress*, 243 U.S. at 327—or at least as permanent as any condition can be, *see Hendler*, 952 F.2d at 1376 ("'[P]ermanent' does not mean forever, or anything like it."). That fact alone means the government's duty to compensate is categorical.[18] It also means that there is no danger that this case involves a handful of "occasional torts," *Portsmouth Harbor*, 260 U.S. at 330, rather than an easement. *Cf. Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1355–57 (Fed. Cir. 2002).

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[17] *Loretto* later characterized *Causby*, *Cress*, and *Portsmouth Harbor* as permanent physical invasions. *Loretto*, 458 U.S. at 428, 430–31.

[18] Stated differently, because this Court mandates per se treatment for *de facto* easements that allow intermittent use, *de jure* easements that authorize intermittent use must also be subject to per se rules.

Third. Nothing in *Loretto* or *Nollan* warrants a contrary result. Neither case considered the question of time-limited easements where those easements are properly characterized as real property interests under state law. *Loretto*'s permanence inquiry surely does not mean that a physical invasion must persist *forever* before it would be compensable. *See Hendler*, 952 F.3d at 1376. And it is hard to imagine that *Nollan* would have come out the other way "had the government restricted the easements to daytime use." Gregory C. Sisk, *Returning to the* PruneYard*: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech*, 32 Harv. J.L. & Pub. Pol'y 389, 410 (2009). Indeed, soon after *Nollan*, a California court found a taking where the appropriated easement was only for daylight hours. *Surfside Colony*, 277 Cal. Rptr. at 374–75, 376–77; *see also Knick v. Twp. of Scott*, 862 F.3d 310, 328 (3d Cir. 2017) ("The fact that the Ordinance only mandates public access during daylight hours does not change the fact that land must be accessible every day, indefinitely."), *vacated on other grounds*, 139 S. Ct. 2162 (2019).

In the easement context especially, the "permanence" inquiry is a red herring. *See* Pet. App. E-30–E-31 n.12. (recognizing that "permanent" has borne quite a few different meanings in takings law). Easements are discrete property interests that are, by their very nature, limited to the use of a fee. Despite time-limitations, easements are plainly compensable property interests when appropriated by the government. *See Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1352 (Fed. Cir. 2003) ("It is well established that the government may not take an easement without just compensation."). The time limits imposed by the Access Regulation are typical of

easements and do not affect the physical takings analysis in any meaningful way.

* * *

At bottom, this Court's precedents largely answer the question presented. It is well-established that the taking of a discrete property interest triggers a categorical duty to compensate the owner. It is equally settled that the appropriation of an easement is a physical invasion requiring compensation. The only question the Court must answer is whether the government may avoid per se treatment of its uncompensated appropriation of private property simply by placing time limits on the easement it appropriates. But California law is clear that easements are often limited in time, and this Court's precedent has treated recurring intermittent invasions as per se takings. The Access Regulation deserves the same per se treatment. A time limitation does not change the character of an easement, and it should not change this Court's analysis. The Court should hold that the appropriation of a time-limited easement is a per se taking under the Fifth Amendment.

II.

A Per Se Rule Is Needed to Protect the Right to Exclude

As the preceding section demonstrates, the taking of any discrete property interest, and particularly an easement, merits per se treatment under this Court's physical takings doctrine. But there is perhaps a more fundamental reason the uncompensated appropriation of a time-limited easement deserves categorical treatment: the uncompensated

appropriation of even a limited easement deprives the property owner of his basic "right to exclude . . . all the world" from his property and the "concomitant right to use it exclusively for his own purposes." *United States v. Karo*, 468 U.S. 705, 729 (1984) (Stevens, J., concurring in part and dissenting in part). History shows that the right to exclude is "so universally held to be a fundamental element of the property right" that it cannot be infringed without compensation. *Kaiser Aetna*, 444 U.S. at 179–80. Only a bright-line rule against the uncompensated appropriation of any easement can adequately protect such an important property right.

A. The Right to Exclude Is Fundamental

Just as this Court's physical takings jurisprudence is "as old as the Republic," *Tahoe-Sierra*, 535 U.S. at 322, so too is the recognition of the fundamental right to exclude. Indeed, in correspondence immediately following the ratification of the Bill of Rights, James Madison quoted William Blackstone's exposition that property "means that dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." James Madison, Property, Nat'l Gazette, Mar. 27, 1792, *in* 14 J. Madison, *The Papers of James Madison* 266 (R. Rutland & T. Mason eds. 1983); *see* 2 William Blackstone, *Commentaries on the Laws of England* *2 (1766).

State courts in the first century after the founding recognized it too; as one court put it, "[f]rom the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto*, taking the owner's 'property.'"

Eaton v. Boston, C. & M.R.R., 51 N.H. 504, 511 (1872); *see also Walker v. Old Colony & N. Ry. Co.*, 103 Mass. 10, 14 (1869) ("One of the valuable incidents of the ownership of land is the right and power of exclusion. So far as the value of the property, depending on this right and power, is affected by its abridgment, compensation therefor should be included in the damages."); *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, 320–21 (1874) ("And among the incidents of property in land, or anything else, is not the right to enjoy its beneficial use, and so far to control it as to exclude others from that use, the most beneficial, the one most real and practicable idea of property, of which it is a much greater wrong to deprive a man, than of the mere abstract idea of property without incidents?"). There is no question that the right to exclude unwanted persons from private property is "deeply rooted in our legal tradition." *Washington v. Glucksburg*, 521 U.S. 702, 722 (1997).

Modern courts—and especially this Court—have continued to regard the right to exclude with special solicitude. Owing to the "unusually serious character" of a government action depriving a property owner of the right to exclude, this Court has required compensation even for occupations of "relatively insubstantial amounts of space" that "do not seriously interfere with the landowner's use of the rest of his land." *Loretto*, 458 U.S. at 430, 433. And in *Kaiser Aetna* as well as *Nollan*, the Court recognized that abridgment of the right by an easement—although an easement often does not burden the entire parcel and is unlikely to be in continuous use—is a per se taking. *Nollan*, 483 U.S. at 831; *Kaiser Aetna*, 444 U.S. at 180. Other courts have followed this Court's lead. *See* David L. Callies & J. David Breemer, *The Right to*

Exclude Others From Private Property: A Fundamental Constitutional Right, 3 Wash. U. J.L. & Pol'y 39, 44–46 (2000) (collecting cases).

This Court has recognized the fundamental nature of the right to exclude even in cases involving union access on terms significantly more limited than those provided by the Access Regulation. *Lechmere*, 502 U.S. at 538, for instance, emphatically rejected the NLRB's interpretation of Section 7 of the NLRA because it impermissibly balanced the employer's right to exclude with the right to organize under the NLRA. Instead, the Court recognized that the employer's right to exclude trumped nonemployee access rights in all but the exceptional case in which the employees live on the employer's property and would otherwise have no other way to learn about their Section 7 rights. *Id.* at 540.[19]

The fundamental nature of the right to exclude is so well established that the only case cited below in opposition is *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). *PruneYard* rejected a shopping center owner's claim that California's requirement that he permit certain expressive speech on his

[19] Even the extremely limited right of access permitted under this Court's interpretation of Section 7 is easily distinguishable from this case. For one, the limited access permitted under the NLRA cannot reasonably be characterized as an easement. *See id.* at 537 (rejecting the proposition that the NLRA permits even "reasonable" trespasses). Moreover, the limitation of the access right to those cases where employees are truly inaccessible to the outside world suggests that the right is more akin to the "necessity" defense to a trespass action at common law. *See* Note, *Necessity As An Excuse for a Trespass Upon Land*, 22 Harv. L. Rev. 296 (1909) (collecting cases). A ruling for Petitioners here need not disturb the narrow access allowed by the NLRA.

property effected a taking. Indeed, the panel majority below relied heavily on *PruneYard* in holding that an easement must permit access at all times before it is a per se taking. Pet. App. A-15–A-22. But subsequent decisions of this Court have effectively limited *PruneYard* to its facts, consistently emphasizing that it applies only to property already publicly accessible. *See, e.g.*, *Loretto*, 458 U.S. at 434 (in *PruneYard*, "the owner had not exhibited an interest in excluding all persons from his property"); *Nollan*, 483 U.S. at 832 n.1 (*PruneYard* was inapplicable "since there the owner had already opened his property to the general public"); *Horne*, 576 U.S. at 364 (noting that *PruneYard* concerned an "already publicly accessible shopping center"). At bottom, *PruneYard* is an anomaly in American law. *See Fashion Valley Mall, LLC v. NLRB*, 172 P.3d 742, 756–60 (Cal. 2007) (Chin, J., dissenting) (noting that California is "virtually alone" in recognizing free speech rights on private property); Gregory C. Sisk, *supra*, at 407 (*PruneYard* "rested uneasily within the Court's case law from the beginning"). Against the tide of decisions proclaiming the right to exclude as fundamental, *PruneYard* stands alone. It certainly provides no support to limit a private company's right to exclude nonemployees from its non-public property.

B. Only a Per Se Rule for All Easements Adequately Protects the Right to Exclude

Petitioners' proposed rule is simple—where an infringement on the right to exclude takes the form of an easement, the uncompensated appropriation of that easement violates the Fifth Amendment. Such a rule is necessary to provide sufficient protection for "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna*, 444 U.S. at 176. Without a clear pronouncement from this Court, the fundamental right to exclude will remain at the mercy of government demands for access, a treatment ill-befitting of such an important aspect of property rights.

The Ninth Circuit took a different approach toward the right to exclude. It held that physical takings protections are unavailable where "the sole property right affected by the regulation is the right to exclude." Pet. App. A-18. Instead, per se treatment for access easements would be allowed only where access is granted continuously and without interruption. *Id.* It is easy to see how such a rule would diminish the right to exclude beyond recognition. Governments under this regime would be free to abridge the right to exclude, so as long as they left some hours or days free from interference. And while property owners would still be able to challenge the imposition of such easements under *Penn Central*'s multifactor test, *Penn Central*'s reliance on such factors as economic impact render it poorly suited to protect the right to exclude.

Unlike the per se analysis in physical takings cases, success under *Penn Central*'s regulatory takings inquiry effectively requires the property owner to demonstrate that nearly all of her property has been taken. *See Horne*, 576 U.S. at 364 ("A regulatory restriction on use that does not entirely deprive an owner of property rights may not be a taking under *Penn Central*."). Consideration of economic impact is inconsistent with the nature of the injury occasioned by a deprivation of the right to exclude, which this Court has recognized is so distinct from monetary or economic harm that even "the installation of a cable box on a small corner" of a rooftop is a per se taking. *Id.* at 363. By routing all time-limited easements through *Penn Central*, adoption of the Ninth Circuit's rule would relegate the fundamental right to exclude to second-class status. *Cf. Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2169 (2019) (overruling the state-litigation requirement of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), because it "relegate[d] the Takings Clause 'to the status of a poor relation' among the provisions of the Bill of Rights" (quoting *Dolan*, 512 U.S. at 392)); *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) ("Municipal respondents, in effect, ask us to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause.").

A potential third way—a requirement that an easement rise to a certain level of severity before it is considered a per se taking—is also untenable. Courts have already demonstrated the ability to differentiate between an easement and a series of occasional

trespasses. *Compare Hendler*, 952 F.2d at 1377–78, *with Boise Cascade*, 296 F.3d at 1355–57; *see also Portsmouth Harbor*, 260 U.S. at 330. But a severity requirement would require courts to draw *another* line—indeed, an "arbitrary and unprincipled line"—between easements that qualify for per se treatment and those that do not. *See Apple, Inc. v. Pepper*, 139 S. Ct. 1514, 1522 (2019) (rejecting a proposed rule on such grounds in another context). Not only do courts lack any readily available standards for applying such a rule, the distinction that such a rule would operate on makes no sense in the context of easements, which by their very nature regularly contain time limitations. The difference between a time-limited access easement and one available all day, every day is only a matter of degree. *Cress*, 243 U.S. at 328. Such a rule would place the right to exclude at the mercy of courts balancing private and public interests, a task that should be rare when dealing with a fundamental right.

In short, Petitioners' proposed rule is simple, easy to apply, consistent with takings precedent, and works to protect the fundamental right to exclude trespassers from private property. The Court should hold that where an infringement on the right to exclude takes the form of an easement, the uncompensated appropriation of that easement violates the Fifth Amendment.

CONCLUSION

For the reasons stated herein, Petitioners respectfully ask this Court to vacate the judgment below and remand the case for further proceedings.

DATED: December 2020.

Respectfully submitted,

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No. 20-107

In the
Supreme Court of the United States

CEDAR POINT NURSERY and FOWLER PACKING COMPANY, INC.,

Petitioners,

v.

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

Respondents.

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

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Petitioners' Brief on the Merits contains 9,401 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 December 27, 2020.

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AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 31st day of December, 2020, send out from Omaha, NE 1 package(s) containing 3 copies of the PETITIONERS' BRIEF ON THE MERITS in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

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Subscribed and sworn to before me this 31st day of December, 2020.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

GENERAL NOTARY-State of Nebraska
RENEE J. GOSS
My Comm. Exp. September 5, 2023

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