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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Petitioners propose a narrow rule: The appropriation of an access easement effects a per se taking. Any time limitation on the authorized physical invasion goes to the just compensation due, not whether a taking occurred. That rule is consistent with this Court's precedents, protects the right to exclude, and gives both governments and courts clear guideposts.

In rejecting Petitioners' arguments, the Ninth Circuit endorsed a rule breathtaking in its scope: a government-authorized physical invasion of private property constitutes a per se taking only where it permits access "24 hours a day, 365 days a year." Pet. App. A-18. Not even the Board defends that holding. Instead, the Board concedes that the Access Regulation authorizes a physical invasion of private property and that a grant of access limited to daylight hours "might very well qualify" as a categorical taking. Resp. Br. at 25–26. Although the Board criticizes Petitioners' rule as unworkable, it fails to provide any distinction between the daylight hours easement that it concedes might qualify for per se analysis and the 3-hours-a-day, 120-days-a-year easement in this case, which it insists does not.

Petitioners' rule is sound, and has been consistently applied by the Federal Circuit. *See, e.g.*, *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1355–57 (Fed. Cir. 2002); *McKay v. United States*, 199 F.3d 1376, 1382 (Fed. Cir. 1999); *Hendler v. United States*, 952 F.2d 1364, 1378 (Fed. Cir. 1991). More importantly, Petitioners' rule is grounded in this Court's precedents, which recognize that "a physical invasion is a government intrusion of an unusually

serious character." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982). A physical invasion amounts to a taking irrespective of economic impact, "even if the Government physically invades only an easement in property." *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979). Whenever "the government physically takes possession of an interest in property . . . 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). Petitioners invoke these principles; the Board seeks to limit them.

Ultimately, the Board would render the physical takings doctrine largely irrelevant. It would have courts evaluate most physical invasions under the ad hoc multifactor test of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). This approach ignores the longstanding distinction between physical invasions and regulatory use restrictions. It would force *Penn Central*'s ambiguous test into cases where it is ill-suited, exacerbating confusion among lower courts. *See Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, No. 20-54, 2021 WL 666361, at *1 (U.S. Feb. 22, 2021) (Thomas, J., dissenting from denial of certiorari) ("A know-it-when-you-see-it test is no good if one court sees it and another does not."). In short, the Board would carve out an exception to the per se rule that would authorize government to physically invade private property up to some undefined limit.

The question presented here is a narrow one: does the government effect a per se taking when it authorizes third-party access to private property for three hours per day, 120 days per year? Because the

Access Regulation takes a discrete property interest for the benefit of union organizers, the answer is yes. This Court should reverse the judgment of the Ninth Circuit and remand the case for further proceedings.

ARGUMENT

I.

The Taking of a Discrete Property Interest Triggers Per Se Treatment

Where the government appropriates a discrete property interest, it effects a per se taking and must provide compensation. In *Tahoe-Sierra*, the Court recognized the "longstanding distinction" between government actions that take an interest in property and those that regulate property use. 535 U.S. at 322–23. Access easements fall within the former category. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) ("To 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.").

That the Access Regulation—like many easements—limits the time, place, and manner of access does not transform it from a property interest into a use restriction. Such limitations certainly affect the *value* of the interest taken, but they do not change its nature. The minimal invasion in *Loretto* did not change that it was a taking, but only limited the amount of compensation required. *See Loretto*, 458 U.S. at 437 ("Once the fact of occupation is shown, of course, a court should consider the extent of the occupation as one relevant factor in determining the

compensation due.").[1] That is not to say the occupation presented here is minimal—it is not[2]—but to explain that the financial value of the property interest is irrelevant to the question of whether an interest has been taken.

A. Continuous Access Is Not Required for Per Se Treatment

The Board objects that the Access Regulation authorizes only "temporary and limited" access to Petitioners' property, short of the public access easement in *Nollan* and the cable box in *Loretto*. Resp. Br. at 22–23. But it concedes, as it must, that the facts of *Nollan* and *Loretto* do not "define the universe of regulations that authorize 'permanent physical occupations.'" *Id.* at 25. The Board even concedes that a daylight-hours easement "might very well qualify" as a per se taking. *Id.* at 25–26. These concessions undermine its repeated arguments that access must be "permanent" or "continuous" before categorical treatment is appropriate. The difference between an all-hours easement, a daylight-hours easement, and

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[1] The cable equipment in *Loretto* occupied such a minimal space that the New York Court of Appeals upheld a one-time payment of one dollar as sufficient compensation for the physical invasion. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 446 N.E.2d 428 (N.Y. 1983); *see also A $1 Cable Fee For TV Hookup Upheld By State*, N.Y. Times, May 9, 1983, at B-3, https://www.nytimes.com/1983/05/09/nyregion/a-1-cable-fee-for-tv-hookup-upheld-by-state.html.

[2] The Access Regulation represents a significant infringement of the property rights of California growers. *See* Cal. Farm Bureau Br. at 1–3. Moreover, as the episode at Cedar Point Nursery demonstrates, union organizers do not merely set up a table and hand out leaflets explaining labor rights; their aim is to intimidate. Pet. App. G-9 ¶ 30.

the Access Regulation is not a difference in kind, but only of degree.

United States v. Causby, 328 U.S. 256 (1946), and *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922), further undermine the Board's argument, as neither case involved continuous invasions. The Board says these cases are not examples of categorical takings because the Court described some measure of economic harm that occurred as a result of those easements. But this Court has always understood *Causby* and *Portsmouth Harbor* to be physical takings cases. *Kaiser Aetna* cited both cases to support its holding that an easement cannot be taken without compensation. *See* 444 U.S. at 180. *Loretto* cited *Portsmouth Harbor* for the proposition that "permanent" occupations "are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land." 458 U.S. at 430. And *Tahoe-Sierra* listed *Causby* as an example of a physical taking to distinguish it from examples of use restrictions. 535 U.S. at 322. Just as importantly, the Court in both cases described its holding in terms of the property interest taken, not the economic impact to the property owner. *See Portsmouth Harbor*, 260 U.S. at 330 (takings claim may proceed based on allegations that "a servitude has been imposed"); *Causby*, 328 U.S. at 261–62 (takings claim may proceed upon allegations of "an easement of flight").

The Board next argues that the Access Regulation is not "permanent," but "permanence" (at least as the Board defines it) cannot be the standard. As Judge Ikuta noted, "[t]he word 'permanent' has carried a

variety of different meanings in takings jurisprudence, and its meaning has changed over time." Pet. App. at E-30 n.12. The Board relies on this malleable meaning of permanence when it cites *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23 (2012), as an example of the Court applying a balancing test to a "non-permanent" government invasion. But *Arkansas Game & Fish* held "simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." 568 U.S. at 38.

The Board's reliance on a separate passage from *Arkansas Game & Fish* is misplaced. In that passage, the Court proposed several factors the Federal Circuit may consider on remand in deciding whether a taking has occurred. To the extent that discussion has any force here, it establishes a distinction between intermittent incursions of *finite duration*, *see id.* at 27, and intermittent incursions that impose a "permanent condition" on a parcel of land, *see United States v. Cress*, 243 U.S. 316, 327 (1917). The latter is unequivocally a per se taking under *Cress*. And the Access Regulation, like the flooding in *Cress*, imposes a permanent condition on Petitioners' land, not one of finite duration.

Regardless, the Court should be cautious not to read more into *Arkansas Game & Fish* than was intended. Indeed, the Federal Circuit on remand in *Arkansas Game & Fish* found a physical taking because the intermittent flooding caused "an invasion, in the form of a temporary flowage easement." *Ark. Game & Fish Comm'n v. United States*, 736 F.3d 1364, 1372 (Fed. Cir. 2013). That is consistent with *Causby*,

which found a taking of an overflight easement. *See* 328 U.S. at 267–68. After all, nothing is truly permanent—"'permanent' does not mean forever, or anything like it." *Hendler*, 952 F.2d at 1376. "A taking can be for a limited term—what is 'taken' is, in the language of real property law, an estate for years, that is, a term of finite duration as distinct from the infinite term of an estate in fee simple absolute." *Id.*

The intermittent nature of the access authorized here does not render the burden any less "permanent," either conceptually or under this Court's cases. The Access Regulation imposes a permanent burden on Petitioners' property—the scope of that burden goes to the amount of compensation required, not to whether there is a taking.

B. The Access Regulation Takes an Access Easement Across Petitioners' Property

The Board worries that Petitioners' position would require this Court to make nuanced determinations of state property law. It is true that property rights are generally creatures of state law. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029–30 (1992). But none of the Court's physical invasion cases—from *Portsmouth Harbor* to *Causby* to *Kaiser Aetna* to *Loretto* and *Nollan*—required the Court to discern the scope of the right to exclude in any particular state. For good reason. The right to exclude is fundamental and universal in American law. It is therefore reasonably presumed that no state's law of property would countenance so substantial an impingement on that right as an "easement" would impose. Ultimately, however, what matters is not the label one uses but rather whether

the right to exclude has been impinged in a way that amounts to more than a series of trespasses.[3]

Petitioners' discussion of the Access Regulation's nature as an easement under California law, Pet. Br. at 17–28, highlights the impact on the right to exclude and why a per se test is appropriate.[4] This Court has characterized systematic access as an "easement" to conceptualize the property interest taken. *See, e.g.*, *Portsmouth Harbor*, 260 U.S. at 330; *Causby*, 328 U.S. at 261–62; *Kaiser Aetna*, 444 U.S. at 180. The same is true of the Federal Circuit in *Hendler*. *See* 952 F.2d at 1378 ("The evidence before the court . . . reflected a situation in which the Government behaved as if it had acquired an easement not unlike that claimed in *Kaiser Aetna*."). Those cases demonstrate that a line may be drawn between a systematic invasion and a series of non-compensable trespasses without reference to the peculiarities of state law.

It does not matter that the access required here does not bear *all* the hallmarks of an easement, *i.e.*, that it is not recorded and not transferrable. After all, neither were the easements in *Portsmouth Harbor*, *Causby*, *Kaiser Aetna*, or *Hendler*. Nor, as the Board concedes, does it matter whether the particular

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[3] To be sure, the specific contours of state law may be relevant in determining whether the claimed property right exists at all. The background principles of a state's property law shape the rights of every property owner in that state. *See Lucas*, 505 U.S. at 1029–30. *See also infra* at 17–19 (discussing government's inherent authority to undertake reasonable searches).

[4] It's not just Petitioners who describe the Access Regulation as an easement. As Judge Ikuta wrote about the Access Regulation, "[t]he right to enter onto the land of another to take some action is the epitome of an easement in gross." Pet. App. E-23.

interest at issue here is described as an easement or an irrevocable license. *See* Resp. Br. at 35–36. What matters is that the Access Regulation takes a discrete property interest without just compensation.

Ultimately, the importance of the easement (or irrevocable license) designation lies in drawing the line between cases where "the government physically takes possession of an interest in property," *Tahoe-Sierra*, 535 U.S. at 322, and those where the incursions are best characterized as mere trespasses. While a trespass may be compensable as a tort, even a series of trespasses often cannot be said to take an interest in property, in much the same way one does not burden her neighbor's land by cutting through the grass on occasion during an evening run. Here, however, the organizers' access right is a "permanent condition" on Petitioners' land. *Cress*, 243 U.S. at 327. It is a discrete property interest under any definition.

C. The Board Misunderstands the "Narrow" Nature of the Per Se Rule

The Board leans on the *Loretto* Court's qualification that its holding was "very narrow." 458 U.S. at 441. The per se rule for physical takings is indeed narrow, and that is why liability disputes in physical takings are rare. *See Tahoe-Sierra*, 535 U.S. at 322 n.17 ("When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed."). Within the context of a physical invasion, this Court has been unequivocal that the uncompensated appropriation of an easement is a per se taking. It has also made clear that once a physical invasion is found, the extent of the invasion matters only to determining compensation. It follows that the uncompensated

taking of an easement limited in time is also a categorical taking.

To the extent *Loretto* discussed easements at all, its analysis of *Kaiser Aetna* did not survive *Nollan*.[5] *See* Pet. App. E-21. It is also inconsistent with *Kaiser Aetna* itself, which, although nominally decided under *Penn Central*, categorically declared that "even if the Government physically invades only an easement in property, it must nonetheless pay just compensation." *Kaiser Aetna*, 444 U.S. at 180. Once it is understood that the taking of an easement is evaluated under the per se framework, it follows that *all* easements, even limited ones, are entitled to categorical treatment.

Loretto, read in the context of the Court's other physical takings cases, supports per se treatment for easements that authorize physical invasions by people. The Board focuses on footnote 12, which, citing *Kaiser Aetna* and *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), says that "[t]he permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude." *Loretto*, 458 U.S. at 435 n.12. Neither case stands for that proposition. As this Court later explained, the taking of an "easement of passage" *is* a permanent occupation of land, *see Nollan*, 483 U.S. at 831, and *PruneYard* is limited to already publicly-accessible property, *id.* at 832 n.1; *see also Horne v. Dep't of Agric.*, 576 U.S. 350, 364 (2015)

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[5] The Court decided *Kaiser Aetna* before announcing the modern per se rules in *Loretto* and *Lucas*, so it necessarily viewed *Penn Central* as the starting point. But the *Kaiser Aetna* Court reasoned its way to a categorical rule anyway, in large part because the taking of an easement was "an actual physical invasion of the privately owned marina." 444 U.S. at 180.

(describing *PruneYard* as holding "that a law limiting a property owner's right to exclude certain speakers from an already publicly accessible shopping center did not take the owner's property"). Neither do the "intermittent flooding cases" support the Board's position. *Loretto*, 458 U.S. at 435 n.12. As noted above, at most those cases suggest that intermittent flooding for a term of years may require further fact-finding to determine whether a flowage easement was taken. *Loretto* understandably focused on the permanent nature of the structure attached to the apartment building, but later cases emphasized that the key inquiry is whether a *property interest* has been taken. *Nollan*, 483 U.S. at 831; *Tahoe-Sierra*, 535 U.S. at 322. *Nollan*, *Kaiser Aetna*, *Causby*, *Portsmouth Harbor*, and *Cress* all found physical takings despite the lack of a "permanently" fixed object.

Perhaps this explains why the Board is not quite willing to endorse its own reading of footnote 12, but instead concedes that at least *some* noncontinuous easements are per se takings. Yet on what principled basis? A physical invasion never morphs into a use restriction. The *Loretto* Court rejected such line-drawing in the context of a structure, even as the dissent would have held that "the incremental governmental intrusion caused by [a] 4- to 6-foot wire, which occupies the cubic volume of a child's building block, is a *de minimis* deprivation entitled to no compensation." *Loretto*, 458 U.S. at 448 n.6 (Blackmun, J., dissenting). The same must be true of the Access Regulation. It cannot be true of some physical invasions but not others.

Lastly, the Board's argument that *Penn Central* could provide relief to Petitioners is spun from whole

cloth. Once *Penn Central* governs, a court would have to consider the economic impact *relative to the entire parcel*. *See Penn Central*, 438 U.S. at 130–31. And neither the Ninth nor the Federal Circuit knows of *any Penn Central* case "in which a court has found a taking where diminution in value was less than 50 percent." *Colony Cove Properties, LLC v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018) (quoting *CCA Assocs. v. United States*, 667 F.3d 1239, 1246 (Fed. Cir. 2011)). No easement—even the "permanent" access easement in *Nollan*—is likely to diminish the value of a parcel by half. Accordingly, the vague line the Board proposes to draw is not merely between a per se taking and *potential* taking under *Penn Central*, but between a taking and no taking.

* * *

Petitioners propose a simple rule grounded in this Court's precedent: the uncompensated appropriation of an access easement effects a per se taking. The Board does not defend the Ninth Circuit's holding that an easement must require all day, every day access to merit per se treatment, and fails to propose its own workable rule. This Court should reverse the Ninth Circuit's judgment and hold that the Access Regulation effects a per se taking of Petitioners' property.

II.

Petitioners' Rule Protects the Right to Exclude

Petitioners' proposed rule protects "a fundamental element of the property right." *Kaiser Aetna*, 444 U.S. at 179–80. As Petitioners detailed in their opening brief, the fundamental import of the right to exclude is well established, from Blackstone

and Madison through modern decisions of this Court. Pet. Br. at 28–35. A holding that the taking of a time-limited easement is entitled to per se treatment would protect this right against government intrusions. Most importantly, it would prevent gamesmanship by governments seeking to evade their duty to provide just compensation by placing time-limits on third-party access.

The Board says that historically, the right to exclude has not been absolute. That's true as far as it goes, but it simply demonstrates that background principles of state law help define the scope of the property right. For example, the Board relies on early decisions to demonstrate that third parties could enter private property to hunt or fish under certain circumstances. Resp. Br. at 31–32. However, as the article cited by the Board explains, Resp. Br. at 32, the right to hunt and fish on unenclosed private lands was universally established before the Founding. Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 Temp. L. Rev. 665, 675–79 (2011). So-called "open range" and "right to roam" rules persisted well into the 20th century. *See id.* at 679–81. Such rules are the quintessential "background principles" of state law, *see Lucas*, 505 U.S. at 1029, as no landowner had the right to exclude third parties from unenclosed land. Landowners only gained that right as the range was closed.[6] Here, however, there is no background

[6] A case cited by the Board for a different proposition, Resp. Br. at 46, makes this point explicitly. *See Benson v. South Dakota*, 710 N.W.2d 131, 147 (S.D. 2006) ("[T]he law concerning hunting regulation upon private property . . . has been an evolution from no regulation commencing at statehood in 1889 to that of increasing regulation and criminal restrictions upon hunters to protect private landowners.").

principle of California law that would authorize systematic, third-party occupations for 120 days each year.

The other early cases the Board cites are similarly unconvincing. *Jerome v. Ross*, 7 Johns. Ch. 315 (1823), was a trespass action by a property owner against government officials who were authorized by statute to enter onto private land for the purposes of building a canal. The court distinguished between temporary and permanent use only in noting that the state would have to acquire through eminent domain property used permanently, while it could separately compensate each trespass. *See id.* at 343–44. The same was true of *Rubottom v. McClure*, 4 Blackf. 505 (Ind. 1838), a similar trespass action against Indiana officials. *See id.* at 509 ("[W]e conclude that a statute of this State, which authorizes the appropriation of private property for the public benefit, and provides for a subsequent compensation for property so applied, is constitutional."). Neither case demonstrates that the right to exclude was anything but fundamental. Quite the opposite: both cases contemplated compensation even for a one-time incursion.

The Access Regulation does not merely authorize trespass like the statutes contemplated in *Jerome* and *Rubottom*. Nor does it codify an existing common law principle. Instead, it places a permanent condition on Petitioners' land denying them the right to exclude for 3 hours per day, 120 days per year, every year as long as Petitioners remain in agriculture. Such systematic access cannot be taken without compensation.

The right to exclude requires the strong protection that only a per se rule can provide. *Loretto*, 458 U.S.

at 435 (describing the right as "one of the most treasured strands in an owner's bundle of property rights"). *Penn Central*'s unworkable multifactor test is inadequate to protect the right from government interference. The absence of a per se rule will simply encourage governments to push the envelope and demand more access. Petitioners' rule, by contrast, respects the right to exclude without limiting public rights, as governments may still condemn an access easement for public use where appropriate.

III.

Petitioners' Rule Would Not Imperil the NLRA or Government Inspections

The Board warns of drastic consequences it believes could ensue if the Court finds that the Access Regulation effects a per se physical taking. Resp. Br. at 42–47. The Board's parade of horribles is unfounded. Not every entry onto private property is a physical taking. Some entries onto private property are mere trespasses that may not be compensable. *See Portsmouth Harbor*, 260 U.S. at 330 ("The repetition of those acts . . . may be found to show an abiding purpose . . . or they may be explained as . . . occasional torts."). Other entries onto land may not be takings at all because they are justified under a background principle of state property law. *See Lucas*, 505 U.S. at 1029–30. And otherwise per se takings may be constitutionally exacted in exchange for a government benefit. *See Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984); *see also* Chamber of Commerce Br. at 19–23. In short, none of the examples cited by the Board would be implicated by Petitioners' rule. The Access Regulation takes a broad, annual, 3 hours a day, 120 days a year

easement by force of law. That is a per se physical taking under this Court's precedents without implicating other lawful and non-compensable entries onto private property.

First. The Board argues that the access authorized under the NLRA would be suspect under Petitioners' proposed rule. Resp. Br. at 42–43. But there exists a wide gulf between access permitted under only extremely narrow circumstances at the rare employer and access that is granted annually, continually, and categorically for four 30-day stretches at all agricultural businesses irrespective of employee accessibility. *Compare Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992), *with* Cal. Code Regs. tit. 8, § 20900(e)(1)(B). The latter takes a discrete property interest, the former does not. *See NLRB v. Babcock & Wilcox Co.*, 222 F.2d 316, 319 (5th Cir. 1955), *aff'd*, 351 U.S. 105 (1956) (recognizing that if the NLRA permitted union access outside these narrow confines, it would "impos[e] against the [employer], in favor of a particular union, a *servitude* on its property") (emphasis added).

The distinctions go beyond the NLRA's limitation of access to instances where the workers are otherwise inaccessible. *See Lechmere*, 502 U.S. at 537. Even if the NLRA allowed access where employees were accessible outside of work, it would be less of an affront to the right to exclude than the Access Regulation, which takes the right to exclude for far longer periods and does so annually without exception. As the Court noted in *Loretto*—and later reaffirmed in *Lechmere*—the access permitted by the NLRA is extremely limited and the burden to trigger *any* right of access is "heavy." *See Loretto*, 458 U.S. at

434 n.11; *Lechmere*, 502 U.S. at 540. The Court's limiting construction of the NLRA is likely necessary to avoid serious constitutional concerns. *See, e.g.*, *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956); *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 544–45 (1972); *Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*, 436 U.S. 180, 205 (1978); *Lechmere*, 502 U.S. at 533–35; *see also Marshall v. Barlow's, Inc.*, 436 U.S. 307, 314 (1978) (describing *Babcock* as a case where "the private property rights of an owner prevailed over the intrusion of nonemployee organizers"). But most importantly for this case, it suffices to distinguish the NLRA from the systematic, yearly access easement taken by the Access Regulation.

Second. The Board argues that applying a per se takings rule to the Access Regulation would imperil a host of regulatory inspections authorized under state and federal law. Resp. Br. at 43–47. It would not. Inspections are "searches" limited by the Fourth Amendment, not "takings" of discrete property interests analyzed under the Fifth Amendment.

The Fourth Amendment—and state analogs—recognize the inherent power of governments to undertake reasonable searches. *See* U.S. Const. amend. IV; Cal. Const. art. I, § 13. For a search to be reasonable, it must be narrow in scope. That is, a search must be "specific" rather than general. It must also comport with the Fourth Amendment's Warrant Clause, either by delivering due process through a cause-based judicial petition that results in a particularly circumscribed warrant, or in the context of administrative searches, through "a constitutionally adequate substitute for a warrant."

See New York v. Burger, 482 U.S. 691, 703 (1987). A search—whether by law enforcement or administrators—that comports with these demands cannot take a property interest.

Property owners hold title subject to the background principles of property law. *Lucas*, 505 U.S. at 1029. Because government at common law—and under the California Constitution—had the power to undertake reasonable searches, the property owner never had the right to exclude the searcher in the first instance.[7] *See Hurtado v. United States*, 410 U.S. 578, 588 (1973) ("[T]he Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed."). To be sure, some courts have taken this reasoning too far, claiming that any lawful exercise of the police power is categorically exempt from takings liability. *See Lech v. Jackson*, 791 F. App'x 711, 715 (10th Cir. 2019), *cert. denied*, 141 S. Ct. 160 (2020). In its brief, the United States cabins this approach by saying only "core exercises" of the police power are insulated from takings scrutiny. United States Br. at 29–30.[8] A better approach—consistent with this Court's takings jurisprudence and sufficient to resolve this case—is to recognize that government can undertake reasonable

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[7] The limitations on government searches codified in the Fourth Amendment originated in the common law rights to the security of property and due process. *See United States v. Jones*, 565 U.S. 400, 404 (2012) (discussing the origins of the Fourth Amendment and its relation to common law trespass).

[8] The United States no longer supports the reasoned arguments made in its brief. *See* Letter from the Acting Solicitor General notifying the Court of the United States' change in position (Feb. 12, 2021).

searches without implicating the Takings Clause because those limited intrusions on the right to exclude are inherent in one's title so long as they comply with the Fourth Amendment.

Moreover, the Fourth Amendment's prohibition of "general" searches prevents reasonable searches from becoming takings. *See Payton v. New York*, 445 U.S. 573, 586–87 (1980). It imposes significant constraints even on administrative inspections, narrowing their time, scope, and manner in stark contrast to the broad grant to invade agricultural businesses authorized by the Access Regulation. *See Burger*, 482 U.S. at 702 (recognizing three-pronged test for administrative searches including limits on the scope of officers' search powers); *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967). A broad grant to invade property generally for 120 days a year untethered to any investigative purpose—like the Access Regulation—could never survive constitutional scrutiny as a valid exercise of the government's power to search. *See Burger*, 482 U.S. at 702 (requiring warrantless searches be necessary to a specific regulatory purpose and limited in time, scope, and manner to that end). Because the constitutionality of a search expires when it extends beyond its narrowly defined and justified scope, it could never be general enough to take a property interest without first failing the strictures of the Fourth Amendment.

Third. While inspection regimes draw most of the Board's attention, it also cautions the Court that a ruling in Petitioners' favor could render suspect utility companies' access to survey and repair lines. *See* Resp. Br. at 46. But as the only case cited by the Board

explains, "it is clear that the common law recognizes, and state and federal courts have consistently upheld, the privilege to enter private property for survey purposes." *Klemic v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673, 690 (W.D. Va. 2015). The same is true of the common law right in certain states to enter adjoining property to make necessary repairs. *See Chase Manhattan Bank (Nat'l Ass'n) v. Broadway, Whitney Co.*, 294 N.Y.S.2d 416, 419 (Sup. Ct. 1968), *aff'd*, 249 N.E.2d 767 (N.Y. 1969) ("the statute is entirely compatible with the general body of real property law enunciated by the courts of this state over the past century").

The remaining horribles in the Board's parade concern straightforward applications of *Portsmouth Harbor* and *Causby*: a physical takings claim can be shown through course of conduct where there is no specific authorization for an easement. Some conduct will take an easement and merit per se treatment, other conduct will not. As the Court of Federal Claims explained—in another case cited by the Board—"whether a taking occurred in this case necessarily will depend on a fact-intensive inquiry as to the extent, frequency, and nature of the Border Patrol's activities." *Int'l Indus. Park, Inc. v. United States*, 80 Fed. Cl. 522, 529 (2008). That court was not interested in conducting a *Penn Central* inquiry, *i.e.*, assessing a diminution in value or evaluating the property owner's investment-backed expectations. The plaintiff brought a physical per se takings claim, and the "fact-intensive inquiry" was only to determine the extent of the invasion. *See also Benson*, 710 N.W.2d at 151 (finding no taking with respect to entries for hunting because the facts were "more analogous to the facts in *Peabody*" and less like *Portsmouth Harbor*).

Here, of course, there is no need to undertake an evaluation of the "extent, frequency, and nature" of the Board's activities. Because the easement was imposed by regulation, the property right taken is explicit. It's an access easement and it merits per se treatment under this Court's precedents. *See Portsmouth Harbor*, 260 U.S. at 329 ("If the United States, *with the admitted intent* to fire across the claimants' land at will should fire a single shot . . . the taking of a right would be complete.") (emphasis added).

* * *

Governments nationwide—including the federal government—already recognize that appropriating an intermittent access easement requires compensating the property owner. *See, e.g.*, *Cress*, 243 U.S. at 328 (intermittent flooding requires compensation); *City of Mission Hills v. Sexton*, 160 P.3d 812, 818 (Kan. 2007) (eminent domain proceeding to acquire a temporary access easement); *see also* Oklahoma Br. at 14 (explaining that *Wilkie v. Robbins*, 551 U.S. 537 (2007), hardly makes sense if the government could have simply taken an easement for free). And private parties have long negotiated and litigated perennial easements with similar time and scope limitations. *See* Pet. Br. at 23–24 (collecting cases); Oklahoma Br. at 9–13 (collecting cases). What's unique about this case is not the discrete property interest the Board has taken, but that the Board has taken it without compensating the owners.

CONCLUSION

For the foregoing reasons, the decision below should be reversed and remanded.

DATED: March 2021.

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 Reply Brief for Petitioners contains 5,769 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 March 4, 2021.

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and FOWLER PACKING COMPANY, INC.,
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of the Agricultural Labor Relations Board; et al.,
Respondents.

AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 5th day of March, 2021, send out from Omaha, NE 1 package(s) containing 3 copies of the REPLY BRIEF FOR PETITIONERS 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 5th day of March, 2021.
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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Attachments: Mar 2021 Cedar Point Affidavit of Service.pdf; FINAL 4-1550 Cedar Point Reply Brief.pdf; Cedar Point Cert of Compl Mar 2021.pdf

Attachments and email showing reply brief was also emailed to opposing counsel
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Attached is Petitioners' reply brief which was efiled today, March 5th. You will receive hard copies in the mail.

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