No. 20-107

In the Supreme Court of the United States

CEDAR POINT NURSERY AND FOWLER PACKING CO.,
Petitioners,

v.

VICTORIA HASSID, IN HER OFFICIAL CAPACITY AS CHAIR OF THE CALIFORNIA AGRICULTURAL LABOR RELATIONS BOARD, ET AL.,
Respondents.

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

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February 5, 2021

QUESTION PRESENTED

This case involves a state regulation affording union organizers a limited right to access property on which agricultural employees are working. The regulation restricts the time, duration, and purpose of the access. It also requires organizers to give advance notice to employers, limits the number of organizers who may be present on the property, and prohibits them from disrupting employers' business operations. The question presented is:

Whether the access regulation effects a *per se* taking of petitioners' property under the Fifth Amendment.

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INTRODUCTION

In applying the National Labor Relations Act (NLRA), this Court has authorized union organizers to access employers' property when conditions preclude them from communicating with employees through other means. The California Agricultural Labor Relations Board adopted a regulation giving effect to that same principle for farmworkers, who are excluded from the NLRA but covered by a similar state labor relations statute. The Board heard evidence that farmworkers are typically inaccessible to organizers through other channels: most are highly migratory, moving to follow the harvest every few weeks or months; they often live in temporary housing, sometimes on their employer's property; they frequently lack access to modern telecommunications technology; many speak only indigenous languages; and many are illiterate even in their native language. The Board's regulation authorizes a limited number of organizers to access the property of agricultural employers, for brief periods, during non-work hours, solely for the purpose of discussing organizing with employees, and only after notifying the Board and the employer.

Petitioners have sued to halt enforcement of that regulation. They note that the Board proceeded by regulation instead of by "case-by-case determination," in contrast to the NLRA access right. Pet. Br. 7. But they did not pursue any state administrative law challenge on that basis. Nor did they challenge the regulation under the standard framework this Court uses for assessing whether a regulation effects a taking, which examines all the relevant circumstances, including the nature of the regulation and the burdens it imposes on property owners. Either of those claims

would have allowed petitioners to press their contention that the Board's regulation is "the product of a bygone era" and insufficiently "tailored," Pet. Br. 6, 7—while allowing the Board to show that the regulation serves a continuing and important purpose because, to this day, the unique circumstances of the agricultural workforce in California typically prevent effective communication with farmworkers through alternative means.

Instead, petitioners urge the Court to embrace a sweeping new *per se* takings theory: that any regulation authorizing intermittent access to property effects a taking if it is analogous to an easement under state property law. That theory is contrary to this Court's precedent, which recognizes only two narrow categories of *per se* regulatory takings, encompassing regulations that are the functional equivalent of a direct physical appropriation of property. It would convert the constitutional takings analysis into a complex and indeterminate inquiry into state law on nonpossessory interests. And it would imperil an array of state and federal policies authorizing limited access to private property for a variety of purposes, including health and safety inspections, social welfare visits, utility repairs, and hunting and fishing. The flaws in petitioners' theory are underscored by the fact that the United States ignores it, preferring to advance its own *per se* theory—which is just as problematic.

This Court's longstanding precedent demonstrates that the Board's access regulation does not effect a *per se* taking because it does not authorize a permanent physical occupation of property or any other action that is the functional equivalent of a direct appropriation or ouster. That does not mean that petitioners or

other agricultural employers are precluded from challenging it under the Takings Clause. It only means that any such challenge should be subject to the standard regulatory takings analysis, which examines the particular circumstances of each case to determine whether a regulation forces property owners to bear unduly onerous public burdens.

STATEMENT

A. Legal Background

The NLRA excludes "agricultural laborer[s]." 29 U.S.C. § 152(3). In 1975, the California Legislature enacted the Agricultural Labor Relations Act (the Act) to create a similar state law regime for farmworkers. *See* Cal. Labor Code §§ 1140 *et seq*. The Legislature found that the absence of labor protections had created "unstable and potentially volatile condition[s]" on the State's farms, resulting in widespread labor disputes and even violence. *Agric. Labor Relations Bd. v. Superior Court (Pandol & Sons)*, 16 Cal. 3d 392, 398 (1976); *see* Levy, *The Agricultural Labor Relations Act of 1975*, 15 Santa Clara Law. 783, 783-785 (1975). The federal and state statutes contain functionally identical provisions affording employees "the right to self-organization," "to bargain collectively," and to "engage in other concerted activities for . . . mutual aid or protection." 29 U.S.C. § 157; Cal. Labor Code § 1152.

The Act established the California Agricultural Labor Relations Board, which "possesses authority and responsibilities comparable to those exercised by the National Labor Relations Board." *J.R. Norton Co. v. Agric. Labor Relations Bd.*, 26 Cal. 3d 1, 8 (1979); *see* Cal. Labor Code § 1141. The state Board may promulgate "such rules and regulations as may be necessary to carry out" the Act and the Board's policies, Cal.

Labor Code § 1144, and it "shall follow applicable precedents of the" NLRA, *id.* § 1148.

While the Act and NLRA are similar in many respects, the two statutes differ in their provisions concerning union elections. *Compare* Cal. Labor Code §§ 1156-1159, *with* 29 U.S.C. § 159. Elections in California's agricultural sector present unique challenges because farm work "is a seasonal occupation for a majority of agricultural employees." Cal. Labor Code § 1156.4. Farmworkers in California "typically work for several employers during the course of the year." *Harry Carian Sales v. Agric. Labor Relations Bd.*, 39 Cal. 3d 209, 239 (1985); *see also San Clemente Ranch, Ltd. v. Agric. Labor Relations Bd.*, 29 Cal. 3d 874, 890-891 (1981). To ensure that any union election accurately reflects the sentiment of employees, the Act authorizes elections only when the number of workers present is at least "50 percent of the employer's peak agricultural employment for the current calendar year." Cal. Labor Code § 1156.3(a)(1). In practice, that occurs only during harvest season, which typically lasts a few weeks or less. Organizing activity and elections must therefore take place during that short period, when "the union petitioning for the election" must "gather the necessary employee signatures" and "explain their positions to the workers." *Pandol & Sons*, 16 Cal. 3d at 416.

After the Legislature adopted the Act, the Board commenced a rulemaking proceeding to address the concern that many California farmworkers lacked access to the information necessary to exercise their organizational rights. The Board heard evidence regarding "the special characteristics of agricultural labor" that made communication with employees uniquely difficult. *Carian v. Agric. Labor Relations*

Bd., 36 Cal. 3d 654, 666 (1984). For instance, the evidence showed "that many farmworkers are migrants; they arrive in town in time for the local harvest, live in motels, labor camps, or with friends or relatives, then move on when the crop is in." *Pandol & Sons*, 16 Cal. 3d at 414-415. Those circumstances made it "impossible" to reach such workers through "home visits, mailings, or telephone calls." *Id.* at 415.

The evidence also indicated that the physical characteristics of agricultural worksites impeded efforts to communicate with farmworkers. Unlike "large factories," agricultural properties rarely have "public or 'nonworking' areas" like parking lots where workers congregate. *Pandol & Sons*, 16 Cal. 3d at 417. Instead, "the cultivated fields begin at the property line, and across that line is either an open highway or the fields of another grower." *Id.* at 415. Nor do California farms typically have "cafeterias or lunchrooms where the employees assemble for their midday meal"; rather, workers generally eat their lunch in the fields. *Id.* at 417.

The Board heard additional testimony regarding "language and literacy barriers" to communication. *Carian*, 36 Cal. 3d at 666. The evidence "established that a significant number of farmworkers read and understand only Spanish" or other foreign languages, or were "illiterate, unable to read even in" their native language. *Pandol & Sons*, 16 Cal. 3d at 415. It was "evident that efforts to communicate with such persons by advertising or broadcasting in the local media," or through "handbills" or "mailings," were "futile." *Id.*[1]

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[1] As discussed below, *see infra* pp. 27-28, these and other unique

In light of this evidence, and after public hearings, the Board adopted the access regulation at issue here. *See Pandol & Sons*, 16 Cal. 3d at 400 & n.3. The Board noted that, in interpreting the NLRA, this Court had recognized that "organizational rights are not viable in a vacuum" and "depend[] in some measure on the ability of employees to learn the advantages and disadvantages of organization from others." Cal. Code Regs. tit. 8, § 20900(b). Thus, the Board found that "[w]hen alternative channels of effective communication are not available to a union, organizational rights must include a limited right to approach employees on the property of the employer." *Id.*; *cf. NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112-113 (1956).

The Board concluded that "unions seeking to organize agricultural employees" in California generally "do not have available alternative channels of effective communication" because the alternative channels that "have been found adequate in industrial settings do not exist or are insufficient in the context of agricultural labor." Cal. Code Regs. tit. 8, § 20900(c). The Board accordingly determined that the rights of agricultural employees to organize and engage in collective action must include some "right of access by union organizers to the premises of an agricultural employer" for the limited "purpose of meeting and talking with employees and soliciting their support." *Id.* § 20900(e). The Board proceeded by regulation, rather than through "case-by-case adjudication" of access issues, to "provide clarity and predictability to all parties" and to reduce the risk of "delay in the final determination of elections," *id.* § 20900(d), which is

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obstacles to effective communication with agricultural employees persist today.

particularly important in light of the short timeframe during which union elections can occur, *supra* p. 4.

In *Babcock*, this Court observed that "[a]ccommodation between" property rights and organizational rights "must be obtained with as little destruction of one as is consistent with the maintenance of the other." 351 U.S. at 112. The Board thus tailored the access regulation to the unique circumstances of California farm employment, to facilitate effective communication with farmworkers while minimizing the burden on employers.

For instance, the Board limited organizers' access to non-work times and to locations that are most comparable to the parking lots or other gathering places where organizers commonly contact workers in industrial settings. Organizers may enter an employer's property only for one hour before the start of work, one hour during the employees' lunch break, and one hour after the completion of work. Cal. Code Regs. tit. 8, § 20900(e)(3)(A)-(B). And access is limited to the parts of the property where "employees congregate before and after working" (for the hour before and after work) and where "employees eat their lunch" (for the hour during the lunch break). *Id.*

The regulation includes additional provisions designed to prevent interference with employers' business operations. Organizers may not engage in "conduct disruptive of the employer's property or agricultural operations, including injury to crops or machinery." Cal. Code Regs. tit. 8, § 20900(e)(4)(C). The regulation limits the number of organizers allowed on the property, *id.* § 20900(e)(4)(A), and organizers must "identify themselves by name and labor organization to the employer or his agent," *id.* § 20900(e)(4)(B).

Other provisions are tailored to the unique nature of union elections under the Act. As initially adopted, the regulation placed no specific limitation on the number of days of access permitted. In response to comments from employers, however, the Board limited access to "periods of seasonal peak," since those are the only periods during which organizing activity and elections can occur. *Carian*, 36 Cal. 3d at 666; *see also Henry Moreno*, 3 ALRB No. 40, at 4-6 (1977).[2] As amended, the regulation specifies that access is limited to "no more than four (4) thirty-day periods in any calendar year." Cal. Code Regs. tit. 8, § 20900(e)(1)(A). Each period commences when a union files with the Board a notice of intent to access the property along with proof of service on the employer. *Id.* § 20900(e)(1)(B). If a petition for a union election is filed, access terminates five days after the ballot count is completed, *id.* § 20900(e)(1)(C), and a new petition cannot be filed until at least twelve months after an election, *see* Cal. Labor Code § 1156.3(a)(2).

Any organizer who violates the regulation's restrictions, and any labor organization whose organizers repeatedly violate the restrictions, "may be barred from exercising the right of access . . . for an appropriate period of time." Cal. Code Regs. tit. 8, § 20900(e)(5)(A). They may also be subject to an unfair labor practice charge. *Id.* § 20900(e)(5)(B). Any employer who believes a union has violated the regu-

[2] *Available at* https://www.alrb.ca.gov/wp-content/uploads/sites/196/2018/05/3_40-1977-ocr.pdf.

lation may invoke an expedited administrative procedure before the Board to bar the union from accessing the employer's property.[3]

After the Board adopted the access regulation, certain employers challenged it in state court on statutory, due process, and Takings Clause grounds. *Pandol & Sons*, 16 Cal. 3d 392. The California Supreme Court rejected those claims, *id.* at 402-411, and this Court dismissed a subsequent appeal "for want of a substantial federal question," *Pandol & Sons v. Agric. Labor Relations Bd.*, 429 U.S. 802 (1976).

In practice, labor organizers invoke the access regulation sparingly. For example, the Board received just 14 notices of intent to access per year in the fiscal year spanning 2014-2015, 52 in 2015-2016, zero in 2016-2017, 18 in 2017-2018, 24 in 2018-2019, and 5 in 2019-2020.[4] Repeated access is even less frequent: during that same 6-year period, there were only 13 occasions when a union filed more than one notice of intent to access the property of a particular employer

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[3] Few claims of this sort are filed; the Board most recently resolved one in 2008. *See Sun Pac. Coop. Inc.*, 34 ALRB No. 5, at 1 (2008), *available at* https://www.alrb.ca.gov/wp-content/uploads/sites/196/2018/05/34_5-2008.pdf. When such claims have been filed and substantiated, however, the Board has denied access to organizers. *See, e.g.*, *Ramirez Farms*, 23 ALRB No. 3, at 3 (1997), *available at* https://www.alrb.ca.gov/wp-content/uploads/sites/196/2018/05/23_3-1997-ocr.pdf.

[4] *See* Cal. Agric. Labor Relations Bd., Annual Reports to the Legislature and to the Governor—Fiscal Years 2014-2015 through 2019-2020, *available at* https://www.alrb.ca.gov/forms-publications/reports.

within the same year.[5] By contrast, there are more than 16,000 agricultural employers in California.[6]

B. Proceedings Below

1. Petitioners are two agricultural employers in California. Cedar Point Nursery grows strawberry plants in Dorris, California, near the Oregon border. Pet. App. G4. It alleges that union organizers entered its property on October 29, 2015. *Id.* at G9. Cedar Point filed a charge with the Board against the union, alleging that the union failed to provide the required notice. *Id.* at G10. The union also filed an unfair labor practice charge against Cedar Point. *Id.*

Fowler Packing Company packs and ships grapes and citrus fruit at its facility in Fresno. Pet. App. G4, G11. It was the subject of an unfair labor practice charge filed with the Board in 2015, alleging that the company blocked organizers from accessing its property in violation of the access regulation. *Id.* at G11. The union withdrew the charge in January 2016. *Id.*

2. Petitioners sued the Board in federal district court. Pet. App. G. They alleged that, as applied to them, the access regulation constituted a *per se* taking of their property without just compensation in violation of the Fifth Amendment. *Id.* at G13-G15. Petitioners sought declaratory and injunctive relief preventing the Board from enforcing the regulation against them. *Id.* at G15.

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[5] *See id.*

[6] *See* Martin et al., *Employment and Earnings of California Farmworkers in 2015*, 72 Cal. Agric. 107, 109 (2017), *available at* https://tinyurl.com/y3ljceet.

The district court denied petitioners' motion for a preliminary injunction and granted the Board's motion to dismiss. Pet. App. B, C, D. It reasoned that the regulation did not result in a "'permanent physical occupation' in a manner that has been recognized by the Supreme Court." *Id.* at D10; *see id.* at B8. The court explained that the access required by the regulation is "limited to certain times and locations," "depend[s] on what kind of business is conducted at the location," and "is for a very specific reason." *Id.* at D10, D14. The court also noted that petitioners had not attempted to establish a taking under the multifactor test laid out in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and had not alleged that the regulation "had any negative economic impact on them at all." Pet. App. B9-B10 (emphasis omitted).

3. The court of appeals affirmed. Pet. App. A. It observed that petitioners "base[d] their [takings] argument entirely on the theory that the access regulation constitutes a permanent physical invasion of their property and therefore is a per se taking" under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Pet. App. A15.[7] The court reasoned that the regulation did not result in a *per se* taking under that framework because it "significantly limits organizers' access to [petitioners'] property." *Id.* at

[7] Petitioners assert that "the courts['] rulings below operate on the assumption that the Access Regulation takes an easement under California law." Pet. Br. 20 n.13. That is incorrect. While the lower courts acknowledged petitioners' characterization of the regulation as "creating an easement," Pet. App. A15; *see id.* at A20, B8, B10, D13-D15, the courts did not assume that characterization to be correct or suggest that it informed the analysis of petitioners' *per se* takings theory.

A17. And the regulation was unlike the public easement requirement in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), which had "allow[ed] random members of the public to unpredictably traverse" a homeowner's beachfront "property 24 hours a day, 365 days a year." Pet. App. A17-A18. The court explained that although the limitations on petitioners' right to exclude would be relevant under *Penn Central*, petitioners had declined to raise any such theory. *Id.* at A19-A20 & n.8; *see also id.* at A21-A22 & n.9 (noting that petitioners did not bring any "challenge[] to the access regulation under" state law).

Judge Leavy dissented. Pet. App. A26-A31. He would have reversed the district court's dismissal of petitioners' takings claim in light of their "alleg[ation] that no employees reside on [petitioners'] property, and that alternative methods of effective communication are available to the nonemployee union organizers." *Id.* at A26, A30 (citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537-539 (1992)).

The court of appeals denied petitioners' request for rehearing en banc. Pet. App. E. Judge Ikuta, joined by seven other judges, dissented from that denial. *Id.* at E10-E32. Judge Paez, joined by Judge Fletcher, concurred in the denial and wrote separately to respond to Judge Ikuta's dissent. *Id.* at E4-E10.

SUMMARY OF ARGUMENT

Takings Clause challenges to regulations are generally subject to an inquiry that considers the relevant circumstances in each case, such as the nature of the regulation, the degree of any interference with the right to exclude, and the regulation's economic impact. This Court has repeatedly recognized that this ad hoc

inquiry is the appropriate way to review the vast majority of regulations, including regulations that authorize intermittent access to property. The Court has identified only two narrow categories of *per se* regulatory takings, encompassing government actions that are functionally equivalent to a direct physical appropriation of property or the ouster of a property owner.

Petitioners argue that the Board's access regulation fits into one of those *per se* rules, for regulations that authorize a "permanent physical occupation" of property. That is not correct. The Court has applied that *per se* rule twice: to a statute authorizing the permanent installation of equipment on property, and to a permit condition requiring a property owner to grant a deeded and recorded easement allowing continuous public passage across his land. The Board's access regulation is not remotely equivalent to those *per se* takings. It strictly limits who may access the property of agricultural employers, when they may do so, for what purpose, and in what manner. While the regulation may interfere with property owners' right to exclude certain organizers for the brief periods of authorized access, it is not comparable to a permanent physical occupation. Indeed, this Court has already recognized that the NLRA access right—on which the Board based its access regulation—falls outside the same *per se* rule.

In this case, petitioners have forsaken any challenge to the Board's regulation under the standard regulatory takings framework, which would have allowed the courts to consider the need for the access regulation and any alleged burden on petitioners. Petitioners instead invite the Court to expand the *per se* rule for permanent physical occupations to cover every

access regulation that can be analogized to an easement under state property law. That approach finds no support in precedent or history. Instead of evaluating regulations based on the constitutional principles articulated in this Court's prior cases, it would transform the regulatory takings inquiry into a complex and indeterminate analysis of state law. And it would imperil an array of longstanding state and federal policies, such as health and safety inspection regimes, that have never before been understood to effect *per se* takings.

The United States conspicuously does not endorse petitioners' proposal. Instead, it offers its own novel theory: that any regulatory access right without a defined end date constitutes a *per se* taking, subject to an array of amorphous exceptions apparently intended to cabin the reach of that broad *per se* rule. That approach is just as unsupported and problematic as petitioners' theory. It would expand what this Court has repeatedly described as a narrow *per se* rule into a far-reaching doctrine and prompt endless litigation over the contours of the proposed exceptions. The Court has already identified the proper standard for reviewing a takings challenge to a business access regulation of the type at issue here; it requires careful consideration of all the relevant circumstances, not categorical treatment.

ARGUMENT

I. THE ACCESS REGULATION DOES NOT EFFECT A *PER SE* TAKING

The Takings Clause directs that private property shall not "be taken for public use, without just compensation." U.S. Const. amdt. V. Its purpose "is to prevent the government from forcing some people

alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) (internal quotation marks omitted).

A "classic taking is one in which the government directly appropriates private property for its own use." *Horne v. Dep't of Agric.*, 576 U.S. 350, 357 (2015) (alterations omitted). At the time of the founding, "'it was generally thought that the Takings Clause reached only a direct appropriation of property, or the functional equivalent of a practical ouster of the owner's possession,' like the permanent flooding of property." *Murr*, 137 S. Ct. at 1942 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992)). Since then, however, the Court has recognized that certain government regulations short of physical appropriations may also effect a taking. The Court has mostly "refrained from elaborating this principle through definitive rules," instead conducting "ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances." *Id.*; *see Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). That sort of case-specific inquiry is the proper framework for evaluating the regulation challenged here, which creates a narrow right of intermittent access to the property of agricultural employers, subject to detailed limitations and restrictions.

A. Only Narrow Categories of Regulatory Actions Qualify as *Per Se* Takings

The doctrine of regulatory takings reflects the principle that "'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'" *Murr*, 137 S. Ct. at 1942 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). The Court "ha[s] generally eschewed any 'set

formula' for determining how far is too far." *Lucas*, 505 U.S. at 1015. It has recognized only "two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint." *Id.*; *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). First, a government regulation that authorizes a "permanent physical occupation" of property, no matter how small, constitutes a taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Second, a regulation that "deprive[s] a landowner of all economically beneficial uses" of his property, *Lucas*, 505 U.S. at 1018, is also subject to "categorical treatment," *id.* at 1015. "Outside these two relatively narrow categories" of *per se* takings, "regulatory takings challenges are governed by the standards set forth in *Penn Central*[.]" *Lingle*, 544 U.S. at 538.[8]

1. Petitioners do not contend that the access regulation deprives their property of any economically beneficial use, let alone all of them, so the only basis for treating the regulation as a *per se* taking would be the rule described in *Loretto*. That case involved a statute authorizing "a minor but permanent physical occupation of an owner's property." *Loretto*, 458 U.S. at 421. It required landlords to allow a cable television company to access their property and "install its cable facilities upon [the] property." *Id.* Although that equipment "occup[ied] only relatively insubstantial amounts of space," *id.* at 430, it nevertheless "permanently appropriate[d] appellant's property," *id.* at 438,

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[8] *See, e.g.*, *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002) (the *Lucas* "categorical rule would not apply if the diminution in value were 95% instead of 100%"; that situation "would require the kind of analysis applied in *Penn Central*") (citing *Lucas*, 505 U.S. at 1019-1020 n.8).

and the Court held that a *per se* taking had occurred on that basis, *see id.* at 438-440.

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court considered a development permit that was conditioned on the property owner's providing the public an "easement across their beach-front property" and "their recordation of a deed restriction granting the easement." *Id.* at 827-828. The Court held that "a 'permanent physical occupation' has occurred, for purposes of" the *Loretto* rule, "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Id.* at 832. And while the Court reasoned that the government might conceivably condition a permit on "a permanent grant of continuous access to the property" without effecting a taking, the Court held that the easement condition before it contravened the Takings Clause due to the "lack of nexus between the condition and the original purpose of the building restriction" necessitating the permit. *Id.* at 836-837.

Both decisions make clear that the *per se* rule for "a permanent physical occupation of property" is a "very narrow" one. *Loretto*, 458 U.S. at 441. In *Nollan*, the Court expressly distinguished regulations that did not require the type of "continuous" and "permanent" access associated with the "classic right-of-way easement" before it. 483 U.S. at 832 & n.1.

And in *Loretto*, the Court underscored the "distinction between a permanent physical occupation" and "a physical invasion short of an occupation." 458 U.S. at 430. The Court recognized that a regulation authoriz-

ing the latter is subject to "an ad hoc inquiry" considering a range of factors. *Id.* at 432 (citing *Penn Central*, 438 U.S. at 124). But a regulation authorizing a "permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Id.* It "effectively destroys" the owner's rights "to possess, use and dispose of" the property. *Id.* at 435. The property "owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space." *Id.* The regulation "denies the owner any power to control the use of the property" and prevents him from making any "nonpossessory use of" it. *Id.* at 436. And while "the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value." *Id.*; *see also Horne*, 576 U.S. at 360. Thus, a *per se* taking under *Loretto* "is functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539.

2. As *Loretto* recognized, regulations that lack those extreme effects, including regimes that allow only intermittent access to property, are subject to an ad hoc inquiry. Of particular relevance here, *Loretto* discussed "labor cases requiring companies to permit access to union organizers" under the NLRA. 458 U.S. at 434 n.11 (citing, *inter alia*, *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)). The Court rejected an attempt to analogize that access right to a permanent occupation warranting *per se* treatment. It reasoned that the NLRA access right "is both temporary and limited." *Id.* In particular, "the access is limited to (i) union organizers; (ii) prescribed non-working areas of

the employer's premises; and (iii) the duration of the organization activity." *Id.* Such an access right, which involves a "temporary limitation[] on the right to exclude" but does "not absolutely dispossess the owner of his rights to use, and exclude others from, his property," is subject to a "balancing process to determine whether" it effects a taking. *Id.* at 435 n.12.

Loretto also described prior decisions that declined to treat intermittent access regulations as *per se* takings. *See* 458 U.S. at 433-434. In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), for example, state law required the owner of a shopping center to allow members of the public to exercise free speech and petition rights on the property. *Id.* at 76, 82-84. Justice Rehnquist's opinion for the Court noted that "the right to exclude others" is "one of the essential sticks in the bundle of property rights," but concluded that while the challenged regulation did "literally [cause] a 'taking' of that right," that factor alone "cannot be viewed as determinative." *Id.* at 82, 84. Instead of applying a *per se* rule, the Court inquired into the *Penn Central* factors and held that the regulation did not effect a taking, principally because there was no evidence the activity would "unreasonably impair the value or use of the[] property as a shopping center." *Id.* at 83; *see also Loretto*, 458 U.S. at 434 (describing the access in *PruneYard* as "temporary and limited in nature").

Petitioners seek to distinguish *PruneYard* on the ground that the shopping center in that case was already open to the public. Pet. Br. 32; *see also* U.S. Br. 24-25. But the Court viewed that as just one consideration in its case-specific takings analysis—not as the basis for declining to apply a *per se* rule. *See PruneYard*, 447 U.S. at 83. Indeed, that same Term,

the Court also applied *Penn Central*'s ad hoc approach to a government-mandated right of access to a privately owned marina, holding that it effected a taking in light of the particular circumstances of that case. *See Kaiser Aetna v. United States*, 444 U.S. 164, 174-175, 178-180 (1979). As *Loretto* later described it, the "the easement of passage" in *Kaiser Aetna*, "not being a permanent occupation of land, was not considered a taking *per se*." 458 U.S. at 433.[9]

After *Loretto*, the Court followed a similar approach in *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23, 38-39 (2012), applying a case-specific analysis to intermittent and recurring government flooding of property. That flooding occurred repeatedly over a seven-year period; it "damaged or destroyed more than 18 million board feet of timber and disrupted the ordinary use and enjoyment of the [plaintiff's] property." *Id.* at 26. The Court held that relevant factors for evaluating such a takings claim include the "duration" and "[s]everity" of the flooding, "the character of the land at issue and the owner's 'reasonable investment-backed expectations,'" and "the degree to which the invasion is intended" or "foreseeable." *Id.* at 38-39. In adopting that test, the Court emphasized that *Loretto* had "distinguished permanent physical occupations from temporary invasions of property, expressly including flooding cases, and said that 'temporary limitations are subject to a more complex balancing process to determine whether

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[9] *Nollan* also discussed *Kaiser Aetna*, noting that the analysis in that case was "affected by traditional doctrines regarding navigational servitudes" and that (unlike in *Nollan*) the case did not "involve[] . . . a classic right-of-way easement." 483 U.S. at 832 n.1.

they are a taking.'" *Id.* at 36 (quoting *Loretto*, 458 U.S. at 435 n.12).

The test adopted in *Arkansas Game* built on prior cases involving government-induced flooding, which had reasoned that a *per se* taking occurs only when such flooding results in a "permanent invasion of the land" or the land is "subjected permanently to frequent overflows." *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924); *see United States v. Cress*, 243 U.S. 316, 328 (1917); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177-178 (1871) (applying Wisconsin Constitution). Outside those narrow contexts, takings claims arising from government flooding must be evaluated based on "case-specific features." *Arkansas Game*, 568 U.S. at 34.[10]

3. Petitioners invoke the Court's earlier cases involving recurring invasions of a property owner's airspace. Pet. Br. 15, 24-26. Those cases predate the development of this Court's current takings framework, but in any event they cannot reasonably be understood as applying a *per se* approach.

In *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922), the plaintiff claimed that the government effected a taking by firing projectiles from coastal defense guns over its hotel, inflicting a "serious loss" because "the public ha[d] been frightened off the premises." *Id.* at 329. The Court held that the plaintiff had alleged sufficient facts to survive a

[10] Petitioners attempt to distinguish *Arkansas Game* on the ground that the access regulation here authorizes "systematic yearly access" to their properties. Pet. Br. 25-26 & n.16. But in *Arkansas Game* the flooding actually occurred on an annual basis for seven successive years, 568 U.S. at 27-28, whereas here the actual instances of access to the property of petitioners and other agricultural employers are rare and sporadic, *see supra* pp. 9-10.

demurrer. *Id.* at 330. It explained that a taking would result if the guns were repeatedly fired across the plaintiff's land "with the result of depriving the owner of its profitable use." *Id.* at 329. "[W]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove it." *Id.* at 329-330. "Every successive trespass adds to the force of the evidence." *Id.* at 330.

Similarly, in *United States v. Causby*, 328 U.S. 256 (1946), the Court held that "frequent and regular flights of army and navy aircraft over respondents' land at low altitudes" would effect a taking if they were so disruptive as to "limit the utility of the land and cause a diminution in its value." *Id.* at 258, 262; *see id.* at 266 ("so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land"). Again, the fact of "[f]lights over private land" alone was not determinative. *Id.* at 266. As in *Portsmouth Harbor*, the Court called for a context-specific inquiry that considered the severity of the invasion and its economic impact. *Cf. Preseault v. ICC*, 494 U.S. 1, 24 (1990) (O'Connor, J., concurring) (distinguishing *Causby* and *Portsmouth Harbor* from *Nollan* because the earlier cases involved "[t]he Government's appropriation of other, lesser servitudes").

B. The Access Regulation Does Not Fall Within Any Category of *Per Se* Takings

The regulation challenged here authorizes only temporary and limited access to the property of agricultural employers, subject to substantial safeguards and restrictions. *Supra* pp. 7-9. It is properly reviewed under the standard regulatory takings inquiry, which "allow[s] careful examination and weighing of all the relevant circumstances." *Murr*, 137 S. Ct. at

1942; *see Penn Central*, 438 U.S. at 123-128; *supra* p. 15.

Petitioners and their amici disagree, arguing that this regulation effects a *per se* taking under *Loretto* or *Nollan*. Pet. Br. 16, 21-22; U.S. Br. 16. But it is quite unlike the government actions addressed in those cases. It does not authorize anyone to "permanently appropriate" or "occupy[]" petitioners' property or any portion of it. *Loretto*, 458 U.S. at 438. Nor does it force petitioners to grant the public "a permanent and continuous right to pass to and fro" across their property. *Nollan*, 483 U.S. at 832. And any effects on petitioners' rights "to possess, use and dispose of" their property, *Loretto*, 458 U.S. at 435, are not remotely equivalent to those caused by the government actions in those cases.

To be sure, like any intermittent access right, the Board's regulation temporarily constrains petitioners' right to exclude during any brief periods of authorized access. But that alone does not warrant *per se* treatment, *see, e.g.*, *Loretto*, 458 U.S. at 432-436 & n.12, and the regulation does not otherwise interfere with the right to possess. The regulation restricts access to certain union organizers, for the sole purpose of communicating with employees regarding their organizational rights, for no more than three hours a day, during non-work times, in a maximum of four 30-day periods each year. *See* Cal. Code Regs. tit. 8, § 20900(e). In practice, the regulation is invoked sparingly and for far shorter durations. *See supra* pp. 9-10. It does not prevent petitioners from possessing their property, from excluding other members of the public who are not union organizers, or from excluding organizers when their presence is not authorized.

Nor does the access regulation restrict petitioners' ability to use their property for agriculture or any other purpose. Indeed, it is specifically designed to prevent any interference with petitioners' ability to use their properties for farming: it prohibits conduct disruptive of employers' business operations, Cal. Code Regs. tit. 8, § 20900(e)(4)(C), and limits access to spaces where workers gather during lunch and before and after work, *id.* § 20900(e)(3)(A)-(B). Petitioners have not alleged that the access regulation has adversely affected their business operations in any way. Pet. App. B9-B10. Their complaint identifies just one instance, for each petitioner, of attempted access by union organizers. *Id.* at G9-G11. And if petitioners or their successors at some point choose to make some other use of their land, then the regulation will no longer apply to them.

Finally, unlike the "permanent occupation of . . . space by a stranger," which will ordinarily "empty" the right to dispose of the property "of any value," *Loretto*, 458 U.S. at 436, the Board's access regulation does not impair that right. Petitioners have not alleged that the regulation has reduced the market value of their farms, let alone that it has precluded them from selling their property altogether. Nor is there any reason to believe the access regulation has eliminated, or even materially diminished, the value of other agricultural property in California. Over the last six years, the annual aggregate number of access notices under the regulation has ranged from a high of 52 to a low of zero—out of 16,000 employers in California. *Supra* pp. 9-10. Neither petitioners nor their amici identify any recurring problems with organizers disregarding the regulation's limitations or safeguards.

The court of appeals thus correctly declined to treat the access regulation as a *per se* taking. And it was in good company: other courts have also refused to apply a categorical rule to similar policies authorizing intermittent access. For example, the Sixth Circuit refused to give *per se* treatment to an ordinance requiring scrap metal dealers to allow theft victims to inspect their premises, emphasizing that the law "authorizes a small class of individuals to temporarily enter the scrap dealers' premises during normal business hours for a single enumerated purpose." *Tenn. Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442, 454 (6th Cir. 2009). Likewise, the Federal Circuit held that temporary but recurring entries onto property by federal officials to survey owls did not result in a *per se* taking in light of the "limited and transient nature of the intrusion." *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1357 (Fed. Cir. 2002).[11]

That does not mean that a government access regulation must "allow for access '24 hours a day, 365 days a year'" to qualify as a *per se* taking, Pet. Br. 22, or that the facts of *Loretto* or *Nollan* define the universe of regulations that authorize "permanent physical occupations." As petitioners suggest, for example, a requirement that landowners grant an easement otherwise identical to the one in *Nollan* but limited to "daylight hours" (Pet. Br. 27), might very well qualify

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[11] *See also, e.g.*, *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1357 (Fed. Cir. 2006) ("[T]he transient entry of persons via government authority on a plaintiff's property is generally not 'permanent.'"), *aff'd on other grounds*, 552 U.S. 130 (2008); *Klemic v. Dominion Transmission, Inc.*, 138 F. Supp. 3d 673, 692-693 (W.D. Va. 2015) (statute authorizing temporary entry of surveyors onto private land not a *per se* taking because the access was "temporary, not permanent," "limited to natural gas companies," and "for the sole purpose of" surveying).

as "a taking without regard to other factors that a court might ordinarily examine." *Loretto*, 458 U.S. at 432; *see also* U.S. Br. 22; *cf. Surfside Colony, Ltd. v. Cal. Coastal Comm'n*, 226 Cal. App. 3d 1260, 1266, 1269 (1991). But there is no basis in precedent for extending *per se* treatment to a business regulation like the one here, which authorizes only limited and intermittent access for a narrow purpose.

C. *Penn Central* Provides the Appropriate Framework for Evaluating a Takings Clause Challenge to the Access Regulation

Although *Penn Central* is the proper framework for analyzing any takings challenge to the Board's regulation, petitioners chose not to pursue any argument under that framework. *See* Pet. i; Pet. App. A20, B9-B10. As a result, the question whether the Board's regulation effects a taking under *Penn Central* is not before the Court. *See Yee v. City of Escondido*, 503 U.S. 519, 535-538 (1992).

When plaintiffs do avail themselves of that framework, it allows courts to strike an appropriate "balance between property owners' rights and the government's authority to advance the common good," ensuring that owners are "compensated for particularly onerous regulatory actions, while governments maintain the freedom to adjust the benefits and burdens of property ownership" in a reasonable manner. *Murr*, 137 S. Ct. at 1951 (Roberts, C.J., dissenting); *accord id.* at 1943 (majority opinion). That kind of "situation-specific factual inquir[y]" applies to "most takings claims," *Arkansas Game*, 568 U.S. at 32, and is "more fitting" for the "vast array of regulations that lack such an extreme effect" as to qualify for *per se* treatment, *Murr*, 137 S. Ct. at 1952 (Roberts, C.J., dis-

senting). It enables courts to identify whether the government is "'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Id.* at 1943 (majority opinion).

In a case like this one, that kind of inquiry would allow the court to consider a variety of relevant factors including the nature, duration, and severity of the constraint on the right to exclude, and the extent of any interference with reasonable investment-backed expectations. *See, e.g.*, *Arkansas Game*, 568 U.S. at 38-39; *Penn Central*, 438 U.S. at 124. It would also consider the purpose of the Board's regulation and the interest it serves: effectuating the *Babcock* access principle to ensure that agricultural employees are informed about their organizing rights. *See* Cal. Code Regs. tit. 8, § 20900(a)-(c); *supra*, pp. 6-7. That consideration, among others, would be relevant to evaluating whether the regulation "goes too far." *Murr*, 137 S. Ct. at 1942. The challengers would be free to press any argument that the regulation exceeds the scope of the *Babcock* principle, *cf.* Pet. Br. 7-8 & n.5; and the Board would have an opportunity to address the "unique obstacles" that continue to preclude effective communication with workers in agricultural settings in California absent a limited access right, *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 541 (1992).[12]

While those are questions for another day, a properly developed factual record would confirm that the access regulation is a necessary mechanism for ensuring that California farmworkers can be advised of

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[12] If petitioners believe the access regulation is at odds with this Court's NLRA precedent, they also could have pursued a state administrative law challenge on that basis. *Cf.* Cal. Labor Code § 1148. They did not. *See* Pet. App. A21-A22 & n.9.

their organizational rights. Unique obstacles precluding effective communication with farmworkers persist today, and in some respects have worsened. For instance, growing numbers of farmworkers speak neither English nor Spanish, only indigenous languages, some of which have no written form.[13] Illiteracy is widespread, with most farmworkers having received, at most, an elementary school education.[14] Farmworkers typically move frequently, often crowding into temporary camps or other makeshift housing; many continue to live on the employer's property or in other inaccessible locations.[15] And "modern technology," Pet. App. E12 n.1 (Ikuta, J., dissenting from denial of rehearing en banc), often cannot surmount these barriers. Many farmworkers lack smartphones or computers.[16] Even when employees have such devices, many are unable to afford data plans, lack the literacy or technological sophistication to use text messages or email, or are located in rural regions of the State where internet and cellphone service are unavailable or unreliable.[17] Petitioners' litigation decisions have

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[13] *See, e.g.*, C.A. Dkt. 30 at 5, 15 (2015 memorandum prepared by Board staff after public hearings); Mines et al., California's Indigenous Farmworkers: Final Report of the Indigenous Farmworker Study to the California Endowment 39-43 (2010), *available at* https://tinyurl.com/y8bmtjn8.

[14] *See, e.g.*, C.A. Dkt. 30 at 12-13; C.A. Dkt. 34 at 10 (amicus brief of United Farm Workers).

[15] *See, e.g.*, Mines, *supra*, at 64-70; C.A. Dkt. 34 at 7-8; Kandel, U.S. Dep't of Agric., A Profile of Hired Farmworkers 28-30 (2008), *available at* https://tinyurl.com/y4479t3c.

[16] *See, e.g.*, Gould, *Some Reflections on Contemporary Issues in California Farm Labor*, 50 U.C. Davis L. Rev. 1243, 1259-1261 (2017); C.A. Dkt. 30 at 10-14; C.A. Dkt. 34 at 8-9.

[17] *See, e.g.*, Gould, *supra*, at 1260-1261; C.A. Dkt. 30 at 13-15.

afforded no opportunity for record development or judicial factfinding on these matters, which should inform the analysis of any Takings Clause challenge premised on the existence of alternative channels of communication with agricultural employees.

II. THE *PER SE* THEORIES ADVANCED BY PETITIONERS AND THEIR AMICI ARE UNSOUND

Petitioners and their amici offer a variety of rationales for treating the Board's access regulation as a *per se* taking. Those rationales are contrary to this Court's precedent. They would present serious administrability challenges for lower courts. And they would unduly expand the reach of what the Court has emphasized is a "narrow" *per se* rule, *Loretto*, 458 U.S. at 441, while casting constitutional doubt on a range of longstanding access policies that have never previously been understood to effect *per se* takings.

A. Petitioners' Theory That Any Access Right Akin to an Easement Effects a *Per Se* Taking Is Unsupported and Unworkable

Petitioners assert that the access regulation "creates an easement in gross—a real property interest—under California law," Pet. Br. 15, and argue that it effects "a per se physical taking" on that basis alone, *id.* at 17. That approach lacks any foundation in the Court's precedent or in historical practice. And while petitioners characterize their proposed rule as "simple," *id.* at 16, a closer examination reveals that it is anything but that.

1. According to petitioners, "the government violates the Takings Clause when it appropriates an easement across private property for the benefit of third parties without compensation." Pet. Br. 16. They principally rely on *Loretto* and *Nollan* as support

for that proposed rule. *See, e.g.*, Pet. Br. 15-16, 21-22. But *Loretto* turned on the fact that a statute authorized a permanent physical occupation; it did not characterize that statute as appropriating an easement or analogize it to any type of nonpossessory interest under state property law. *See* 458 U.S. at 425-441. In *Nollan*, it was undisputed that the government was requiring the landowners to "record[] . . . a deed restriction granting [an] easement." 483 U.S. at 828. What prompted the Court to treat that requirement as a *per se* taking, however, was the scope of the easement—"a permanent and continuous right" for the public "to pass to and fro" across the property—and "the lack of nexus" between the requirement and the underlying building restriction. *Id.* at 832, 837. Neither case suggests that a *per se* rule applies whenever an access right can be analogized to an easement under state property law.

And petitioners do not identify any other decision from this Court that supports their sweeping theory. The Court has recognized that state law plays an important role in "defin[ing] the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments." *Lucas*, 505 U.S. at 1030; *see Murr*, 137 S. Ct. at 1944-1945. But the Takings Clause analysis "focuses directly upon the severity of the burden that government imposes upon private property rights." *Lingle*, 544 U.S. at 539.[18] While the Court has occasionally described particularly burdensome physical invasions as easements, *see, e.g.*, *Kaiser*

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[18] *See also* Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 Yale L.J. 203, 238 (2004) ("The Court has focused on developing categorical rules that apply to takings claims without regard to underlying state law."); *id.* at 248-249 (describing the *Loretto* principle as one such rule).

Aetna, 444 U.S. at 180; *Causby*, 328 U.S. at 261-262, it has never suggested that every regulatory access right analogous to an easement under state property law effects a categorical taking on that basis alone.

2. Petitioners argue that the "[h]istory" of "the right to exclude" supports their *per se* rule. Pet. Br. 29; *see id.* at 29-32. The right to exclude is undoubtedly "a fundamental element of the property right." *Kaiser Aetna*, 444 U.S. at 179-180. Since the founding, however, States have enacted a variety of regulatory access policies that temporarily interfere with that right.

For example, legislatures in the early nineteenth century sometimes authorized agents of the government or private corporations to enter property to survey or undertake other exploratory activities. Those statutes generally required compensation for the *permanent* occupation of lands and for property damage, but not for entry onto "lands affording a temporary use for passage." *Jerome v. Ross*, 7 Johns. Ch. 315, 343 (N.Y. Ch. 1823); *see also Rubottom v. M'Clure*, 4 Blackf. 505, 507-508 (Ind. 1838). Similar statutes authorized entry onto private land to explore for mineral deposits. *See, e.g.*, Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U. L. Rev. 1099, 1120-1121 (2000) (discussing Virginia law).

Other founding-era laws limited property owners' right to exclude in order to facilitate hunting and fishing access. Beginning in the seventeenth century, Massachusetts law provided that "any man . . . may pass and repass on foot through any man's propriety" in order to access "great ponds" for the purpose of fishing or fowling, so long as the entry did not damage the property. *See* Colonial Ordinance of 1641-47, § 4, *reprinted in* 28B Pill, Mass. Practice Series, Real Estate

Law § 50:17 (4th ed.); Paulus, *Reflections on Takings: The Watuppa Ponds Cases*, 17 W. New Eng. L. Rev. 29, 37 (1995). States also authorized limited entry onto private property to maintain fisheries, *see Peables v. Hannaford*, 18 Me. 106, 108 (1841), or to hunt game, *see McConico v. Singleton*, 9 S.C.L. (2 Mill) 244, 1818 WL 787, at **1 (S.C. 1818). Indeed, early American legislatures and courts were nearly unanimous in abrogating the common law right to exclude to the extent of allowing public hunting or fishing on unenclosed land. *See* Sawers, *The Right to Exclude from Unimproved Land*, 83 Temp. L. Rev. 665, 678 (2011). Each of these laws undoubtedly interfered with "the right to exclude unwanted persons from private property," Pet. Br. 30, but the historical record provides no indication that they were viewed as effecting uncompensated takings.

3. In addition to lacking support in precedent or history, petitioners' proposed rule is not nearly as "simple" (Pet. Br. 16) as they suggest. They posit that a regulation effects a *per se* taking whenever it "appropriates an easement." *Id.*; *see id.* at 17, 33. They plainly intend that rule to extend beyond situations where the government appropriates a "classic" easement, *Nollan*, 483 U.S. at 832 n.1, that is "deed[ed]" and "record[ed]," *id.* at 828, and to include access regulations that are analogous to easements. *See* Pet. Br. 31 n.19. But they offer no guidance on how to determine whether any particular regulation meets that standard. They merely assert that courts would look to state property law. *See id.* at 20-21, 23-24. That approach would present serious problems.

To begin with, as the latest Restatement observes, the law of easements and servitudes is "one of the most complex and archaic bodies of 20th century American

law." Restatement (Third) of Property: Servitudes, Introduction (2000). Courts have recognized that "it is increasingly difficult and correspondingly irrelevant to attempt to pigeonhole" nonpossessory interests "as 'leases,' 'easements,' 'licenses,' 'profits,' or some other obscure interest in land devised by the common law[.]" *Golden West Baseball Co. v. City of Anaheim*, 25 Cal. App. 4th 11, 36 (1994). Indeed, the Restatement "[a]ttempt[s] to simplify this doctrinal thicket," *Gamerberg v. 3000 E. 11th St., LLC*, 44 Cal. App. 5th 424, 433 (2020), by "eliminat[ing] needless distinctions, archaic terminology, and obsolete requirements," Restatement (Third), *supra*, Introduction.

Petitioners' proposal would effectively constitutionalize this murky and evolving body of state law. And it would ensure substantial variation in the application of a federal constitutional right across state lines. For example, with respect to the many federal statutes and regulations authorizing limited access to private property, *see infra* pp. 42-46, the Takings Clause analysis would vary depending on whether the access could be analogized to an easement under a particular State's laws. *See Preseault*, 494 U.S. at 8 (noting that "applicable state law" regarding easements "var[ies]"); *compare, e.g.*, *R.I. Mobile Sportfishermen, Inc. v. Nope's Island Conservation Ass'n*, 59 A.3d 112, 121 (R.I. 2013) ("long-continued use by footpassers . . . cannot establish an easement" (internal quotation marks omitted)), *with Key v. Allison*, 70 So. 3d 277, 282 (Ala. 2010) (pedestrian use of boardwalk for 20 years created prescriptive easement). At the same time, petitioners' rule could empower state legislatures to determine what is (and is not) a *per se* taking by defining (or re-defining) what qualifies as an easement under state law.

And even if petitioners' approach were workable, it would be ill-suited to identifying *per se* takings. Whether a particular regulation is analogous to an easement under state law will often bear no relationship to the "severity of the burden that government imposes upon private property rights," or to whether the government's action is "functionally equivalent" to a direct physical appropriation or ouster. *Lingle*, 544 U.S. at 539. As petitioners acknowledge, for example, easements can be extremely limited in duration, territorial extent, or purpose. *See* Pet. Br. 23; *see also, e.g.*, *Crane v. Crane*, 683 P.2d 1062, 1064 n.1 (Utah 1984) (easement allowed access "one day in the spring of each year and up to ten days in the fall of each year"). Petitioners' approach offers no apparent mechanism for differentiating between narrow access rights and unduly burdensome ones.

4. The circumstances of this case illustrate the difficulties with petitioners' proposed rule. It is doubtful, to say the least, that the Board's access regulation is properly analogized to an easement under California law.

Of course, like all access regulations, the Board's regulation is similar to an easement insofar as it affords union organizers a "nonpossessory right to enter" the property of agricultural employers. *Main St. Plaza v. Cartwright & Main, LLC*, 194 Cal. App. 4th 1044, 1053 (2011); *cf.* Restatement (Third), *supra*, § 1.2. In other respects, however, it lacks the hallmarks of an easement. An easement in gross under California law is an interest in real property that generally may be assigned or transferred. *See City of Anaheim v. Metropolitan Water Dist.*, 82 Cal. App. 3d 763, 767-768 (1978). But no union or organizer could as-

sign or transfer the access right conferred by the regulation. The burden of an easement in gross is appurtenant to "the real property of another." *Balestra v. Button*, 54 Cal. App. 2d 192, 197 (1942); *see* Restatement (Third), *supra*, § 1.2(3). The access regulation, in contrast, does not burden any particular parcel of property; it applies to any property that is used for agricultural employment at a given time. An easement may also be recorded with a county to provide public notice. *See* Cal. Gov't Code § 27280(a). As county officials have explained, however, "no sober government lawyer would record" an access regulation like the one challenged here. Nat'l Ass'n of Counties Br. 15; *see generally* 4 Miller & Starr, Cal. Real Estate § 10:4 (4th ed.).[19]

If it were necessary to find a state property law analogue for the access regulation, the more apt one would appear to be some form of license. A license allows the holder to "enter" and "do an act or series of acts on the land of another." *Eastman v. Piper*, 68 Cal. App. 554, 560 (1924). Like the access regulation, it is not an interest in real property and cannot be assigned or transferred; it is a "personal right" that merely "makes lawful an act that otherwise would constitute a trespass." *Gamerberg*, 44 Cal. App. 5th at 429. While most licenses are revocable by the property owner at will, California also recognizes irrevocable licenses. *See Golden West Baseball Co.*, 25 Cal. App. 4th

[19] *See also Property Reserve, Inc. v. Superior Court*, 1 Cal. 5th 151, 196 & n.18 (2016) ("It is questionable" whether recurring, intermittent property access for a limited and specific purpose constitutes a "temporary easement[.]").

at 36. And governments occasionally authorize compulsory licenses to enter property even over a property owner's objection.[20]

To be sure, "the distinction between a license and an easement is often subtle and difficult to discern." *Eastman*, 68 Cal. App. at 560; *accord Golden West Baseball Co.*, 25 Cal. App. 4th at 35-36. And if "a license is determined to be irrevocable, it is treated, for most purposes, as an easement[.]" 6 Miller & Starr, *supra*, § 15:2. But that just highlights the difficulties inherent in petitioners' proposed rule—which would identify *per se* takings based on imperfect analogies to the evolving formalities of state property law, rather than evaluating regulations based on the constitutional principles articulated in this Court's prior cases.

B. Petitioners' Amici Identify No Persuasive Alternative Rationale for Applying a *Per Se* Rule

The United States does not defend petitioners' novel *per se* takings theory. But the alternative theory it advances is just as unsound and unworkable.

1. The United States acknowledges that regulatory restrictions on property rights are "generally" governed by *Penn Central*'s analysis of "the circumstances presented in each case," U.S. Br. 12; *see id.* at 10-16, and that the relevant question here is whether the Board's access regulation falls within the "narrow" *per se* rule applied in *Loretto* and *Nollan*, *id.* at 11; *see id.* at 16-23. But the United States characterizes that

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[20] *See, e.g.*, Mich. Comp. Laws Ann. § 460.571 (limited license to enter for preconstruction activity related to electric transmission line); N.Y. Real Prop. Acts. Law § 881 (license to enter neighboring property to make repairs or improvements).

rule as one that applies whenever "a government provides permanent legal authorization to physically invade real property," *id.* at 16—and it defines "permanent legal authorization" to include any access regulation or statute that is "[i]ndefinite" in the sense that it has no "'contemplated end-date,'" *id.* at 20.

Loretto and *Nollan* say no such thing. Neither decision considered a regulation providing for limited, intermittent access like the one here. Both involved government actions granting permanent and continuous access: the installation of physical equipment in *Loretto* and the deeded easement allowing unrestricted public passage in *Nollan*. Both decisions recognized that more limited access rights—even some that are of indefinite duration and impose "a government intrusion of an unusually serious character"—do not effect a "a taking *per se*." *Loretto*, 458 U.S. at 433; *see Nollan*, 483 U.S. at 832 n.1. Neither decision supports the United States' position that it is "immaterial" whether a regulation authorizes "intermittent" access. U.S. Br. 20-21. To the contrary, the "permanent" and "continuous" nature of the occupation and access authorized by the government was central to the Court's decision to apply a *per se* rule in each case. *Nollan*, 483 U.S. at 832; *see Loretto*, 458 U.S. at 434.[21]

2. The broad *per se* rule proposed by the United States would appear to encompass numerous state

[21] The United States suggests that petitioners have temporarily lost the ability to possess or use the space literally occupied by union organizers while they are on the property. U.S. Br. 26. Of course, that would be equally true of any regulatory limitation on the right to exclude.

and federal access regulations that authorize intermittent property access with no contemplated end date—and that have never previously been understood (by the United States or the courts) to effect *per se* takings. *See infra* pp. 42-46.[22] Perhaps with those difficulties in mind, the United States proposes several complex exceptions to its *per se* rule.

First, it says that "[s]poradic, temporary invasions" would "fall outside the per se rule because they are not indefinite." U.S. Br. 26; *see id.* at 27 ("[E]ven recurrent temporary invasions are not covered unless they take place pursuant to an indefinite legal right of access."). The United States' understanding of "indefinite" is nebulous. It argues that the "NLRA's inaccessibility exception" recognized in *Babcock* and *Lechmere* is not "indefinite." U.S. Br. 27. But there is no defined end date on that access right: it is available so long as the employees remain inaccessible, *see Lechmere*, 502 U.S. at 534-535; and the NLRB often requires access on an indefinite basis, *see, e.g.*, *Nabors Alaska Drilling, Inc.*, 325 N.L.R.B. 574, 583, 588-589 (1998), *enforced*, 190 F.3d 1008, 1013-1014 (9th Cir. 1999). The United States also contends that "temporary flooding caused by government conduct" is not indefinite, pointing to this Court's decision in *Arkansas Game*. U.S. Br. 27. But that case involved an "unbroken string of annual" decisions by the Army Corps of Engineers to flood plaintiff's property; the flooding was "planned" and took place "each year," beginning in 1993; and it did

[22] Indeed, the United States' position in this case is a sharp departure from its prior approach to *per se* takings and understanding of *Loretto* and *Nollan*. *See, e.g.*, U.S. Br. 37-42, *Arkansas Game*, No. 11-597 (U.S.), 2012 WL 3680423 (Aug. 27, 2012); U.S. Br. in Opp. 15, *Boise Cascade Corp. v. United States*, No. 02-862 (U.S.), 2003 WL 21698036 (Feb. 7, 2003).

not cease until the Corps discontinued the practice in 2000. *Arkansas Game*, 568 U.S. at 27-28. If that practice was not "indefinite," it is hard to imagine what would be.

Moreover, the United States does not explain why repeated intrusions carried out on a "[s]poradic" basis (U.S. Br. 26) should be evaluated differently from those carried out pursuant to express statutory or regulatory authorization. If enshrined in constitutional law, that distinction could discourage lawmakers and agencies from providing transparent notice of property access regimes, as the Board has sought to do here. *See* Cal. Code Regs. tit. 8, § 20900(d). That dynamic could create a greater burden on property owners than the existence of codified regimes authorizing limited access to property subject to explicit limitations and protections.

Next, the United States says its *per se* rule would not apply "[i]f an access right merely reflects a limitation on property rights consistent with background principles of law." U.S. Br. 10; *see id.* at 28-31; *see also* Oklahoma Br. 18-22. In discussing that exception, the United States observes that "not all pre-existing state-law limitations on property rights [would] qualify," *id.* at 30; that this Court's precedent does "not specify what counts," *id.* at 28; and that the inquiry in any particular case would look to whether a limitation is "deeply rooted in state property and tort law," based on the "common, shared understandings of permissible limitations derived from a State's legal tradition," *id.* The only thing that discussion makes clear is that adopting a *per se* constitutional rule bounded by this exception would—like petitioners' proposal—mire the courts in endless litigation over state law issues.

And the United States offers little guidance on how it thinks that litigation might play out. While it allows that this exception could encompass some of the "various [common law] privileges to access private property in certain situations," as well as "certain core exercises of the police power," it does not even begin to describe "the universe of background limitations" that would qualify. U.S. Br. 29. Here, the Board's access regulation is undoubtedly an exercise of the police power, which "embraces regulation to promote the economic welfare, public convenience, and general prosperity of the community." *McKay Jewelers v. Bowron*, 19 Cal. 2d 595, 600 (1942) (citing *Chicago, Burlington, & Quincy Ry. Co. v. Illinois*, 200 U.S. 561, 592 (1906)) (internal quotation marks omitted). The United States apparently does not view the Board's regulation as a "core" exercise, but it does not explain how that amorphous standard would apply here or in other cases. *See* U.S. Br. 29-30.

The last exception the United States proposes would apply where the government "condition[s] the performance of certain activities on the uncompensated cession of property rights." U.S. Br. 10; *see id.* at 31-33; *see also* Chamber of Commerce Br. 19-23. This Court has recognized that the government may impose certain conditions on a license or permit if an "'essential nexus' exists between the 'legitimate state interest' and the permit condition" and the condition is roughly proportional "both in nature and extent to the impact of the proposed" use of the property. *Dolan v. City of Tigard*, 512 U.S. 374, 386, 391 (1994). But that inquiry should apply after it is demonstrated that a regulatory condition would otherwise effect a taking, *see, e.g.*, *Nollan*, 483 U.S. at 834-837; it is not a justification for substantially expanding *per se* treatment to every "indefinite" regulatory limitation on the right

to exclude. The United States' approach offers no apparent advantage in terms of administrability: it would merely replace the *Penn Central* analysis with a complex inquiry into nexus and proportionality. And it would encourage the proliferation of otherwise unnecessary permitting and licensing regimes, as governments attempt to insulate access rights from constitutional challenge by transforming them into conditions on "the performance of certain activities." U.S. Br. 10.

Each of the suggested exceptions is in substantial tension with a central argument offered by the United States for its position: that "a per se rule for any . . . indefinite legal access right avoids line-drawing problems." U.S. Br. 9. Of course, this Court has generally "refrained from elaborating" bright-line rules in the regulatory takings context, preferring "to allow careful examination and weighing of all the relevant circumstances." *Murr*, 137 S. Ct. at 1942. But even if it were desirable to have a broad bright-line rule, the United States' approach would not accomplish that objective. The exceptions it proposes would create more challenging line-drawing problems than any that result from applying this Court's existing takings precedent.

3. Additional limitations proposed by other amici are similarly problematic. Oklahoma and the Chamber of Commerce suggest that many access regulations could be justified under the Fourth Amendment. *See* Oklahoma Br. 15-17; Chamber of Commerce Br. 23-31. But the Fourth Amendment is an independent constraint on government power, *see* U.S. Br. 29, not a source of it. And it normally requires government officials to obtain a judicial warrant before a search. *See, e.g.*, *Riley v. California*, 573 U.S. 373, 382 (2014). It is

difficult to see how the Fourth Amendment would provide a sustainable basis for upholding the "typical[]" access regulation. Chamber of Commerce Br. 23; *see also* Oklahoma Br. 16 ("The harder issue is how far this power to use warrantless inspections extends.").

The Cato Institute argues that various access regimes—including the NLRA access right, but not the Board's access regulation—could be justified under a vague "harm-prevention principle." Cato Br. 20; *see id.* at 4, 12-26; Oklahoma Br. 21-22. That essentially reformulates a takings test this Court once articulated, which asked whether the challenged law "substantially advance[s] legitimate state interests." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). The Court abandoned that test in *Lingle*, noting "that it has no proper place in our takings jurisprudence." 544 U.S. at 540.

C. The *Per Se* Theories Advanced by Petitioners and Their Amici Would Imperil an Array of State and Federal Policies

Despite occasional efforts to describe these *per se* theories as "narrow," *e.g.*, U.S. Br. 10, 11, the new regimes proposed by petitioners and their amici would cast constitutional doubt on many long-established access regulations that have never before been regarded as effecting *per se* takings.

1. To begin with, those *per se* theories could jeopardize the right of access the Court has recognized under the NLRA, *see supra* pp. 6-7, 27, which this Court has "rightly held . . . is not a per se taking," U.S. Br. 27 (citing *Loretto*, 458 U.S. at 434 n.11). Petitioners suggest that their rule would not extend to the NLRA access right because it "cannot reasonably be characterized as an easement." Pet. Br. 31 n.19. But they offer no explanation for their assertion that the

Board's access regulation is analogous to an easement but the NLRA access right is not: no less than the state regulation, the NLRA right authorizes repeated entries onto private property and temporarily denies property owners "the right to exclude union organizers." *Id.* at 1.[23] And while the United States suggests that the NLRA right would survive under its *per se* rule, that is difficult to square with the United States' own definition of "permanent" as covering any legal authorization to enter private property that lacks a "contemplated end-date." U.S. Br. 20; *see id.* at 27; *supra* pp. 37-38.

2. The categorical rules proposed by petitioners and their amici would also imperil a wide variety of health- and safety-inspection regimes. These include, among many others, food and drug inspections, *see, e.g.*, 21 U.S.C. § 374(a)(1); Kan. Stat. Ann. § 65-6a21; occupational safety and health inspections, *see, e.g.*, 29 U.S.C. § 657(a); Mich. Comp. Laws Ann. § 408.1029; and home visits by social workers, *see, e.g.*, Ky. Rev. Stat. Ann. § 620.072; Wash. Rev. Code Ann. § 71A.12.320; *see also* Nat'l Ass'n of Counties Br. 19 & n.9. For more than a century, courts have rejected Takings Clause challenges to inspection regimes of this nature. *See, e.g.*, *Montana Co. v. St. Louis Mining & Milling Co.*, 152 U.S. 160, 169 (1894); *Tennessee Scrap*, 556 F.3d at 454-455; *Smith v. Town of Mendon*, 4 N.Y.3d 1, 12 n.8 (2004).

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[23] Petitioners and the dissents below regard the *Babcock* principle as a "potential defense" to a takings claim. Cert. Reply 11; *see* Pet. Br. 31 n.19; Pet. App. A31, E13 n.2. That is puzzling: presumably, the government cannot create a statutory defense to an otherwise meritorious *per se* takings claim.

Some of these provisions require frequent inspections; for example, underground mines must be inspected "at least four times a year." 30 U.S.C. § 813(a); *see also* Wash. Rev. Code Ann. § 71A.12.320(2)(b) (similar for home visits). They typically operate indefinitely and do not provide any specific temporal or other restrictions on the inspections, which may occur at "reasonable times, and within reasonable limits and in a reasonable manner." *E.g.*, 29 U.S.C. § 657(a)(2). Most inspection regimes involve access by government agents; but others, like the regulation challenged here, entail access by third parties. *See, e.g.*, 30 U.S.C. § 813(f) (union representative may participate in mine inspections); *Tennessee Scrap*, 556 F.3d at 454 (theft victims may access scrap metal yards). In any event, for purposes of evaluating a *per se* takings claim, it is immaterial "whether the State, or instead a party authorized by the State," is entering the property. *Loretto*, 458 U.S. at 432 n.9.

Petitioners do not even attempt to argue that inspection regimes would fall outside their proposed *per se* rule. The United States appears to acknowledge that its proposed *per se* rule would presumptively apply to this kind of regulation, while suggesting that at least some "health and safety inspection[]" regimes would be excepted because they qualify as "core exercises of the police power." U.S. Br. 29; *see also* Oklahoma Br. 18-22 (similar); *supra* p. 40. But even assuming one could find a principled basis for distinguishing "core" from "non-core" exercises of the police power, it is far from clear that governments would succeed in defending inspection regimes on that ground. For background limitations on property rights to defeat a takings claim, they must "inhere in the title itself"; that is, they must "do no more than duplicate the result that could have been achieved" in a state court

under longstanding state property or nuisance law. *Lucas*, 505 U.S. at 1029; *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 629-630 (2001). It is not evident whether particular inspection regimes would satisfy that standard.[24] And while some inspection regimes might be justified as reasonable conditions on a government-issued license, *see* Chamber of Commerce Br. 19-23, others exist independent of any licensing or permitting scheme.

3. Adopting a new *per se* rule here could also call into question certain entries onto land by law enforcement personnel. For instance, in cases involving repeated Border Patrol entries onto private property to enforce immigration laws, the Court of Federal Claims has held that "the determination of whether a taking occurred . . . necessarily will depend on a fact-intensive inquiry as to the extent, frequency, and nature of the Border Patrol's activities." *E.g.*, *Int'l Indus. Park, Inc. v. United States*, 80 Fed. Cl. 522, 529 (2008). The *per se* theories advanced here could foreclose that kind of case-specific inquiry.

At common law, entries onto private property to make arrests or enforce criminal laws were privileged. Restatement (Second) of Torts §§ 204-205; *see* U.S. Br. 29. But those privileges do not appear to apply to entries by Border Patrol agents to enforce noncriminal

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[24] For example, the Restatement catalogs various common law privileges for entries onto private land, *see* Restatement (Second) of Torts §§ 191-210 (1965), but none readily applies to health or safety inspections. The Restatement also recognizes that a "legislative enactment" may confer a "privilege to enter land in the possession of another for the purpose of performing or exercising [a] duty or authority" created by the enactment. *Id.* § 211. But "the constitutionality of [such] legislation" is "not within the scope of" that Restatement. *Id.* § 211 cmt. b.

immigration laws, or by other government officials to enforce other civil laws. And neither petitioners nor their amici identify any common law basis for entering private land for civil law enforcement that would qualify as a "background principle[] of nuisance and property law" under *Lucas*. 505 U.S. at 1030.

4. The *per se* theories proposed by petitioners and their amici could also upend a variety of other laws allowing third parties to access private property in limited circumstances. For example, many States authorize utility companies and similar entities to enter private property, even absent the owner's consent, for surveys, repairs, connections, and similar purposes. *See, e.g.*, Va. Code Ann. § 56-49.01; Neb. Rev. Stat. Ann. § 14-2148; N.Y. Pub. Serv. Law § 47. Courts have rejected takings claims challenging such provisions. *See, e.g.*, *Klemic*, 138 F. Supp. 3d at 691-693. Some States authorize property owners to enter adjacent property when necessary to make repairs. *See, e.g.*, N.Y. Real Prop. Acts. Law § 881; S.C. Code Ann. § 15-67-270. These provisions, too, have withstood takings suits. *See, e.g.*, *Chase Manhattan Bank (Nat'l Ass'n) v. Broadway, Whitney Co.*, 294 N.Y.S.2d 416, 418-419 (Sup. Ct. 1968), *aff'd*, 24 N.Y.2d 927 (1969). And other States allow limited access to private property to facilitate hunting or fishing. *See, e.g.*, Mass. Gen. Laws Ann. ch. 131, § 45; S.D. Codified Laws § 41-9-1.1(2); *State v. Benson*, 710 N.W.2d 131, 148-152 (S.D. 2006) (rejecting *per se* takings claim).

Each of these statutes appears to fall within petitioners' expansive theory of *per se* takings. And it is not clear whether they would qualify for any of the multitude of exceptions that the United States proposes as checks on the overbreadth of its separate *per se* theory. In any event, there should be no need for

the courts to wrestle with those issues. These access rights, and the Board's access regulation, fall outside of the "two relatively narrow categories" of *per se* regulatory takings this Court has recognized. *Lingle*, 544 U.S. at 538. That does not mean they are immune from constitutional challenge, only that they should be reviewed under the case-specific inquiry that is "more fitting" for the "vast array of regulations[.]" *Murr*, 137 S. Ct. at 1952 (Roberts, C.J., dissenting). Takings doctrine and the public interest "will be best served by relying on" that "familiar" inquiry "rather than by attempting to craft a new categorical rule." *Tahoe-Sierra*, 535 U.S. at 342.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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February 5, 2021