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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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INTRODUCTION AND STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus the Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. One important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases of concern to the nation's business community.

This is such a case. Without providing just compensation, California's "Access Regulation" undercuts the right of businesses to exclude trespassers and protect their workplaces from disruptions. That uncompensated seizure of the most basic property rights cannot be reconciled with the text, history, or purpose of the Takings Clause, or with this Court's precedents.

The Chamber files this brief not only to urge the Court to reverse the Ninth Circuit's contrary view, but also to explain that doing so will not threaten reasonable governmental inspections of private property to ensure product or workplace safety. Such inspections are generally lawful under the doctrine of unconstitutional conditions, which permits the government to

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amicus*, its members, and its counsel made a financial contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

condition the grant of a license on the licensee's willingness to allow reasonable inspections, or under the Fourth Amendment, which permits the government to conduct reasonable searches in furtherance of preventing potential harm from criminal or dangerous activity.

STATEMENT

California's "Access Regulation" gives third-party union organizers the right to enter "the premises of an agricultural employer for the purposes of meeting and talking with employees and soliciting their support." Cal. Code Reg. tit. 8, § 20900(e). That right is broad: Unions may access such properties three hours a day, 120 days a year, year after year. *Id*. § 20900(e)(3). What does California give farmers and ranchers in exchange for allowing access to their land? Nothing.

Weary of union organizers—bullhorns in hand—attempting to enter their properties, petitioners Cedar Point Nursery (a strawberry farm) and Fowler Packing Company (a fruit distributor) filed suit. They alleged that the Access Regulation, in granting a permanent easement over their property, effected a taking. The district court ruled for respondents (Pet. App. B-13), and a divided Ninth Circuit panel affirmed, treating the case as one involving a "regulatory action." Pet. App. A-14. Judge Leavy dissented, explaining that the case involves "a physical, not regulatory, occupation." Pet. App. A-29.

En banc review was denied. As Judge Ikuta, writing for eight judges in dissent, put it: "California property law and Supreme Court precedent make clear that an easement is private property protected by the Takings Clause"; and when the state allows people to enter others' private property, its actions are not just

"regulation," they are a per se taking requiring just compensation. Pet. App. E-10.

SUMMARY OF ARGUMENT

I. California's Access Regulation effects a per se taking requiring payment of just compensation. The text, history, and purpose of the Takings Clause all confirm that the Access Regulation unconstitutionally seizes an easement from petitioners, and the Ninth Circuit's contrary view conflicts with this Court's decisions in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *Nollan* v. *Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

I.A. The Takings Clause is foundational to fostering the business and investment needed for national prosperity. Making the government pay just compensation for takings ensures both that private property owners are treated fairly and that policymakers balance the benefits of public use against the costs to private owners. As James Madison and the other founders understood (see Federalist No. 62), absent a rule requiring the public to pay when the public benefits, factional politics run amok and farmers and manufacturers cannot invest with confidence. Only a categorical requirement of just compensation for physical takings provides this assurance.

I.B. The Takings Clause embodies "principles of Magna Carta" that "[t]he colonists brought" "with them to the New World, including that charter's protection against uncompensated takings." *Horne* v. *Dep't of Agric.*, 576 U.S. 350, 358 (2015). Applying those principles, the Takings Clause historically was invoked "against a direct appropriation of property" by the government. *Id.* at 360.

Consistent with the text and history of the Takings Clause, this Court has long recognized that government-mandated physical invasions of property constitute a taking requiring just compensation, even when the government does not formally seize title and even when the physical invasion is not continuous or "not frequent[]." *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U.S. 327, 329–330 (1922). Classifying the government's action as a mere "regulatory taking"—meaning a use restriction—misunderstands the fundamental nature of takings jurisprudence. Whereas restrictions on the use of property are subject to the nebulous standards of *Pennsylvania Coal* v. *Mahon*, 260 U.S. 393 (1922), *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978), and *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), actual physical invasions trigger an absolute right to compensation. The frequency and the degree of injury are relevant to the amount of compensation, not to whether compensation is due.

I.C. The Ninth Circuit held that the limited duration of union organizers' access to petitioners' property obviated the need for compensation. But that approach confuses the *scope* of the easement with the question whether an easement exists. Because "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied," the "*extent* of the occupation" is instead "one relevant factor in determining the compensation due." *Loretto*, 458 U.S. at 436–437. Year after year, petitioners here must surrender their right to exclude third parties from their agricultural businesses during designated periods—a classic easement. To be sure, the easement is limited in scope—as easements typically are—but that is relevant to the

amount petitioners would be owed as compensation, not the existence of a per se taking.

I.D. The Ninth Circuit erred in extending *Prune-Yard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), a case addressing free speech rights in shopping malls open to the general public, to this case, which involves private property closed to others. This Court should vindicate petitioners' right to receive compensation when the government imposes an easement of access benefitting third parties. See *Kaiser Aetna* v. *United States*, 444 U.S. 164, 180 (1979).

Nor does the outcome here turn on dictum from *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956). There, after holding that the company defendant had a right to exclude union organizers from its parking lots, the Court stated that the outcome might be different "if reasonable efforts by the union through other available channels of communication" would not "enable it to reach the employees with its message." *Id.* at 112. That dictum identified unique concerns about communicating with employees that live on their employers' land and cannot be reached by other modes of communication. This is analogous to an easement by necessity. Those concerns are not present here; nor, given modern means of communication, are they ever likely to recur.

II. Ruling for petitioners here would not endanger the many longstanding health and safety inspection regimes enforced by the federal government and the States.

II.A. The doctrine of unconstitutional conditions, which applies in a wide variety of contexts, generally permits the government to condition government benefits on the waiver of a constitutional right, provided

that waiver is "germane[]" to the benefit's purpose. *E.g.*, *South Dakota* v. *Dole*, 483 U.S. 203, 208 (1987). In the land use context, the Court asks whether "there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599 (2013) (citation omitted).

Reasonable health and safety regulations in industries where market entry is heavily regulated by the government are likely to satisfy the germaneness requirement. For example, Congress may insist on reasonable physical access to private manufacturing facilities as a condition of federal approval to market agricultural or pharmaceutical products. The purpose of federal food and drug regulation is to facilitate licenses to market safe foods and drugs (the benefit); and the government's ability to inspect the licensed products (the condition) is directly related to that regulatory objective.

Likewise, Congress may require federally licensed power plants to submit to inspections by federal regulators. The purpose of such regulation is to facilitate safe generation of electricity, and the government's need to inspect those plants is, again, directly related to its regulatory objective. In short, requiring a sacrifice of the right to exclude third parties during the conduct of reasonable government inspections that benefit property owners will likely satisfy the doctrine of unconstitutional conditions.

By contrast, when a condition is essentially unrelated to any benefit conferred on the property owner, the requirement to grant an easement or other property interest is a bald exaction that requires compensation. In *Nollan*, for example, the easement effected

a taking because it was "impossible to understand" how a lateral easement on beachfront property was related to the burden that the new development might impose on "visual access" to the beach. 483 U.S. at 838. As *Nollan* and similar cases demonstrate, the unconstitutional conditions doctrine separates germane conditions from unrelated demands, and ruling for petitioners would not alter that framework.

II.B. Reasonable searches and inspections are also likely to be upheld under existing Fourth Amendment precedent. That body of law provides courts with an established framework for determining the conditions under which administrative searches—particularly those designed to protect health or safety—are lawful.

Although searches and seizures are "ordinarily unreasonable" absent "individualized suspicion of wrongdoing," this Court's decisions recognize "limited circumstances in which the usual rule does not apply." *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 37 (2000). For instance, when administrative searches outside of closely regulated industries raise "considerations of health and safety," "the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken." *Camara* v. *Municipal Court*, 387 U.S. 523, 538 (1967). For closely regulated industries, the bar is even lower; under the *Colonnade-Biswell* doctrine, "owner[s] of commercial premises in a 'closely regulated' industry" such as liquor sales or firearms dealing may be required, under certain conditions, to submitted to warrantless searches. *New York* v. *Burger*, 482 U.S. 691, 700–701 (1987) (discussing *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970) (liquor); *United States* v. *Biswell*, 406 U.S. 311 (1972)

(firearms)). Neither of those frameworks would be upset by a ruling for petitioners, who object to trespasses by non-governmental third parties. By reversing, therefore, the Court can vindicate business owners' property rights without endangering public safety.

ARGUMENT

I. California's requirement that petitioners grant others physical access to their property violates the Takings Clause.

This is a straightforward case as a matter of first principles of takings law and this Court's precedents. California's Access Regulation gives unwelcome third parties the right to enter petitioners' property at defined times and with no end date—a classic easement. Under the Takings Clause, the government may not seize such property interests without paying just compensation. That the scope of the easement is "limited" —to three hours per day and 120 days per year, year after year—goes to the *scope* of the property invasion and the amount of compensation owed, not the existence of a taking. *Loretto*, 458 U.S. at 436–437.

PruneYard and *Babock & Wilcox* are not to the contrary. *Pruneyard* turned on the fact that the mall owner had "opened his property to the general public." *Nollan*, 483 U.S. at 832 n.1. Here, petitioners have never opened their land to the public at large—and they would like to keep it that way. *Babcock*'s dictum concerned employees who live on their employers' property and cannot easily be contacted—concerns absent here. This Court should reverse.

A. Stable and consistent interpretation of the Takings Clause is essential for business and investment.

No provision of the Constitution is more essential than the Takings Clause for fostering the business and investment necessary for national prosperity. As James Madison wrote, "What farmer or manufacturer will lay himself out for the encouragement given to any particular cultivation or establishment, when he can have no assurance that his preparatory labors and advances will not render him a victim to an inconstant government?" The Federalist No. 62 381–382.

Requiring the government to pay just compensation for takings is not just a matter of fairness, but a practical guarantee that policymakers will objectively weigh the benefits of public use against the costs to private owners. When the public gets the benefit, the public must pay the cost; there is no political gain from overstating one or understating the other. But if policymakers could require those who happen to own desirable property to bear the entire cost, then factional politics, not dispassionate balancing, would be the rule, and farmers and manufacturers would be unable to invest with any confidence.

Only the categorical requirement of just compensation for physical takings provides this assurance. The nebulous four-part test for so-called "regulatory takings" is infinitely malleable. When the Ninth Circuit slaps the label of "regulatory action" on the creation of an easement, as here, or on the seizure of personal property, as in *Horne*, this does not just substitute one doctrinal "test" for another—it effectively drowns the takings claim in the murky swamp of *Penn*

Central. As explained below, the Constitution prohibits that result.

B. The Access Regulation effects a per se Takings Clause violation.

1. The Takings Clause states that "private property" shall not "be taken for public use, without just compensation" (U.S. Const., amend. V), and that rule is "incorporated against the States by the Fourteenth Amendment" (*Nollan*, 483 U.S. at 829). The Clause embodies the "principles of Magna Carta" that "[t]he colonists brought" "with them to the New World, including that charter's protection against uncompensated takings." *Horne*, 576 U.S. at 358.

The principle of just compensation is deeply embedded in both the common law and natural law traditions. Blackstone insisted that when the legislature requires landowners to surrender property for the common good, it must give them "a full indemnification and equivalent for the injury thereby sustained." 1 William Blackstone, Commentaries *139. Grotius, Montesquieu, Pufendorf, Burlamaqui, Vattel, and Van Bynkershoek agreed.[2] With limited exceptions—takings of undeveloped land for roads, wartime requisitions, and seizure of the property of Tory Loyalists—

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[2] 2 J. Burlamaqui, The Principles of Natural and Politic Law pt. III, ch. 5, §§ XXIV-XXIX (Nugent trans., 4th ed. 1792) (1747); E. de Vattel, The Law of Nations 112 (J. Chitty trans. 1870) (1758); H. Grotius, The Law of War and Peace 385, 807 (F. Kelsey trans. 1925) (1646); Montesquieu, The Spirit of the Laws, bk. 26, ch. 15 (1748); 2 S. Pufendorf, The Law of Nature and Nations 1285 (C. & W. Oldfather trans. 1934) (1688); C. van Bynkershoek, *Quaestionum juris publici libri duo* 218–24 (T. Frank trans. 1930) (1737).

the colonies customarily paid compensation when taking property for public use. William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 579–583 (1972); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 787–788 & n.28 (1995) (calling compensation "the norm" but noting exceptions).

Building on that understanding, early cases such as *VanHorne's Lessee* v. *Dorrance* described the principle of just compensation as fundamental to "reason, justice and moral rectitude." 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795).[3] *Baxter* v. *Taber*, 4 Mass. 361 (1808), is particularly instructive. The statute there appeared to authorize the courts to define prison yards in a manner that gave those imprisoned for debts the right to enter "every man's house, and garden" to socialize or transact business—all "without being a trespasser." *Id*. at 365, 368. The Supreme Judicial Court of Massachusetts rejected any such reading, however, explaining that it "would have been unconstitutional, as it would have been an appropriation

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[3] See also *Bowman* v. *Middleton*, 1 Bay 252, 252 (S.C. 1792) ("It was against common right, as well as against magna charta, to take away the freehold of one man and vest it in another, and that, too, to the prejudice of third persons, without any compensation."); *Gardner* v. *Village of Newburgh*, 2 Johns. Ch. 162, 166 (N.Y. Ch. 1816) (the principle of "fair compensation" is "adopted by all temperate and civilized governments, from a deep and universal sense of its justice"); *Beckman* v. *Saratoga & S. R.R.*, 3 Paige Ch. 45, 73 (N.Y. Ch. 1831) ("property shall not be taken for the public use without just compensation").

of private property to public uses without compensation to the proprietors." *Id.* at 365. *Baxter* thus confirms the founding-era understanding that the Takings Clause bars the government from granting private persons a right to enter private property without paying for it.

Until the Fifth Amendment was adopted, however, compensation was generally made pursuant to specific statutes or via judicial decisions, not as a matter of constitutional right.[4] As of 1789, only Vermont and Massachusetts had included just compensation requirements in their constitutions.

No State included a Takings Clause in its list of items to be included in a Bill of Rights, and there is no direct evidence illuminating James Madison's reasons for including one. But we may reasonably surmise that the decision to do so was a product of the heightened concern for protecting property in both the liberal and republican traditions, which combined to inspire the new Constitution. From a republican point of view, property was considered essential to undergird an independent citizenry; from a liberal perspective, property was—along with life and liberty—one of the triad of inalienable individual rights.

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[4] As late as 1822, for example, courts held that just compensation was a "fundamental principle of government," such that "any law violating that principle must be deemed a nullity, as it is against natural right and justice," even though the Fifth Amendment did not bind the States. *Bradshaw* v. *Rogers*, 20 Johns. R. 103, 106 (N.Y. Sup. Ct. 1822). But see *Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (dismissing for lack of jurisdiction because the Takings Clause applied only to the federal government).

Because the federal government did not exercise the power of eminent domain until after the Civil War and state constitutions only rarely contained takings clauses, few early decisions interpret the scope of the just compensation principle. In particular, scholars disagree about whether use restrictions that "went too far" and vitiated the value of property should be regarded as Fifth Amendment takings.

There is no serious scholarly disagreement, however, that physical invasions going beyond mere episodic torts required compensation. It was not necessary that the government take title; if the government authorized the invasion of property by trespassers—including water,[5] airplanes,[6] gunfire,[7] cable TV cables,[8] boats,[9] bikers,[10] or members of the public[11]—this was uncontroversially a taking. Treanor, *supra*, at 11, at 792, 804 n.117, 806–807; see *Dolan*, 512 U.S. at 406 (Stevens, J., dissenting) ("There was nothing problematic about that interpretation in cases * * * that involved the actual physical invasion of private property."). In *Portsmouth Harbor*, for example, this Court found that an unconstitutional taking would result if the United States repeatedly (though not continuously) fired gunshots over private property without providing compensation. 260 U.S. at 229–230.

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[5] *Pumpelly* v. *Green Bay Co.*, 80 U.S. 166 (1871).

[6] *United States* v. *Causby*, 328 U.S. 256 (1946).

[7] *Portsmouth Harbor*, 260 U.S. at 330.

[8] *Loretto*, 458 U.S. at 419.

[9] *Kaiser Aetna*, 444 U.S. at 164.

[10] *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994).

[11] *Nollan*, 483 U.S. at 825.

Likewise, in *Causby* the Court held that the government, in making "frequent and regular flights" over private property "at low altitudes," took an "easement" —a "direct invasion" of the land requiring compensation. 328 U.S. at 258, 262. The Ninth Circuit's notion that physical invasions do not constitute compensable takings if they are less than continuous and do not destroy the property's entire value lacks support in history or precedent.

2. The categorical entitlement to compensation for physical invasions fully applies to easements like the one here. As this Court recognized in *Nollan*, "to say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest" would be "to use words in a manner that deprives them of all their ordinary meaning." 483 U.S. at 831. As with other takings, government-imposed easements disrupt the "right to exclude"—"one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Ibid.* (quoting *Loretto*, 458 U.S. at 433); see also *Causby*, 328 U.S. at 268 (involving an "easement").

These settled precedents lead inexorably to the conclusion that the Access Regulation takes an easement in petitioners' property, requiring compensation. The Regulation requires petitioners to surrender their right to exclude at defined times, so union organizers can "meet[] and talk[] with employees and solicit[] their support" on company property. Cal. Code Regs. tit. 8, § 20900(e). The Regulation has no end date, making the imposition permanent, yet petitioners have received no compensation for compelled access to their property. In short, California has effected an unconstitutional taking.

C. The duration of the organizers' invasion of petitioners' property goes to the extent of compensation required, not the existence of a per se Takings Clause violation.

1. The conclusion that California's Access Regulation effects a taking is not altered merely because the easement has a "limited" scope. The scope of a physical invasion goes not to whether a taking has occurred, but rather to the amount of compensation due.

Because "constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied," the "*extent* of the occupation" is instead "one relevant factor in determining the compensation due." *Loretto*, 458 U.S. at 436–437. Even when limited in scope, "any permanent physical occupation is a taking." *Id*. at 432 (emphasis omitted). In *Portsmouth Harbor*, for example, "the imposition" of "a servitude" from the firing of government artillery "constitute[d] an appropriation of property for which compensation should be made"—even if the landowner's property was "not frequently" entered. 260 U.S. at 329–330 (citation omitted). Likewise, in *Causby*, the "amount of the award" required by the Constitution turned on whether "the easement taken [wa]s a permanent or a temporary one." 328 U.S. at 268. Accordingly, on remand there, the Court of Claims awarded damages from "the exercise of the easement taken," even though the government had then abandoned the easement. *Causby* v. *United States*, 75 F. Supp. 262, 264 (Ct. Cl. 1948). As these decisions confirm, once the taking of an easement has been proven, any limitation on the scope of the easement affects only the amount of compensation.

2. Those settled principles compel reversal here. California law mandates that, year after year, petitioners must open their property to union organizers, overriding petitioners' ordinary right to exclude third parties—a quintessential easement. That this ongoing easement is limited to "just" three hours a day and 120 days a year—as opposed to 24-7-365—is relevant to the compensation owed. But it does not change the fact that California has taken petitioners' valuable property interests. As in *Causby*, petitioners suffer a "frequent and regular" "direct invasion" of their property. 358 U.S. at 259, 265. The effect of the Ninth Circuit's decision is to sanction government seizures of private property without just compensation. That result is untenable for business owners, particularly those whose businesses depend on maintaining a controlled workspace, free from the invasive presence of third parties.

Like all property owners, businesses are protected by the Fifth Amendment's requirement of just compensation for government takings. And the rule that "even if the Government physically invades only an easement in property, it must nonetheless pay just compensation," applies equally to all property owners. *Kaiser Aetna*, 444 U.S. at 180. If the State could give union organizers a free pass-key to petitioners' property, it could do so for any other state-favored private parties: election canvassers, charitable solicitors, social workers, promoters of government programs, or even sales representatives. The Ninth Circuit's theory has no principled limit.

D. Neither *PruneYard Shopping Center* v. *Robins* nor *NLRB* v. *Babcock & Wilcox Co.* supports granting union organizers physical access to petitioners' private property.

1. *PruneYard* is not to the contrary. As this Court explained in *Nollan*, the mall owner there "had already opened his property to the general public." 483 U.S. at 832 n.1. Indeed, that was the Court's explicit basis for distinguishing *PruneYard* from cases where the government, in requiring landowners to open their properties to third parties, effects the taking of an easement. *Ibid.* Similarly, the Court in *Dolan* declined to extend *PruneYard* to the imposition of a "permanent recreational easement" that would "eviscerate" the plaintiff's right to exclude. 512 U.S. at 394.

Here, unlike in *PruneYard*, petitioners have not opened up their properties to the public at large. As Judge Ikuta recognized, that critical difference means "*PruneYard* is simply inapplicable." Pet. App. E-31.

2. Finally, affirmance is not warranted by *NLRB* v. *Babcock & Wilcox Co.*, where this Court addressed whether the National Labor Relations Act required a manufacturer to provide union organizers with access to the company's parking lots (so the organizers could pass out pro-unionization literature). 351 U.S. at 107 (citing 29 U.S.C. § 158(a)(1)). The Court there in fact held that the company had the right to exclude the union, while suggesting in dictum that its answer might be different "if reasonable efforts by the union through other available channels of communication" would not "enable it to reach the employees with its message." *Id.* at 112.

This case does not require examining that fact pattern. Since *Babcock* was decided, the Court has stated

that its dictum there potentially applies "only where 'the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them.'" *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 539 (1992) (quoting *Babcock*, 351 U.S. at 113). Here, petitioners' employees do not live on petitioners' property. Nor are they cut off from modern means of communication. Indeed, those means of communication likely render the requirements for applying the dictum in *Babcock*, issued some 65 years ago, unattainable. The Court therefore need not address this scenario, which in all events is extremely unlikely to arise.

II. A holding that California effected a per se taking here would not threaten traditional regulatory regimes that call for governmental inspectors to access private property.

This Court need not be concerned that reversing the Ninth Circuit would invalidate core governmental functions such as inspecting property to ensure product or workplace safety. Reasonable government inspections are generally lawful under either the unconstitutional conditions doctrine, which permits the government to condition grants of licenses on grantees' willingness to allow reasonable inspections, or the Fourth Amendment, which permits the government to conduct reasonable searches in furtherance of unearthing potential criminal or dangerous activity. Indeed, in some circumstances both sources of law may support reasonable government inspections.

Here, however, California is not attempting to inspect petitioners' property under a licensing regime, and no one suggests that petitioners have engaged in (or are suspected of engaging in) unlawful activity, let

alone criminal or dangerous behavior. Nor does the property owner receive any implicit benefit in return. Accordingly, this case is squarely governed by the general rule that, if the government grants third parties a right to enter or use others' private property over their objections, it must pay for it.

A. Under the doctrine of unconstitutional conditions, being required to admit government inspectors onto private property is frequently a reasonable condition of a government-issued license.

A ruling that California's Access Regulation violates the Takings Clause would not upend traditional regulatory regimes that call for the government to conduct safety inspections on private property. Such inspections generally satisfy the requirements of the doctrine of unconstitutional conditions.

1. In general, whether requiring someone to sacrifice a constitutional right in exchange for a public benefit violates the doctrine of unconstitutional conditions turns on whether the requirement is "germane[]" to the purpose of the benefit received. *E.g.*, *Dole*, 483 U.S. at 208. In the specific context of land use regulation, this Court asks whether "there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz*, 570 U.S. at 599 (citation omitted).

It follows that land use conditions requiring that landowners "bear the full costs of their proposals" will generally be upheld as germane to the government's approval of the proposed projects. *Id.* at 606 (quoting *Nollan*, 483 U.S. at 837). By contrast, "'out-and-out * * * extortion' that would thwart the Fifth Amendment right to just compensation" is prohibited. *Ibid.*

Naturally, there can be hard cases in between. But the common sense of this doctrine is that the government may not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

2. The germaneness requirement of the unconstitutional conditions doctrine is easily satisfied where the relevant benefit is a government-issued license to sell products or services. For example, Congress may insist on reasonable physical access to private manufacturing facilities as a condition of U.S. Food & Drug Administration (FDA) approval to market pharmaceuticals. See 21 U.S.C. § 374(a)(1) (authorizing FDA to inspect "any factory, warehouse, or establishment in which food, drugs, devices, tobacco products, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or after such introduction"). The Food Drug & Cosmetic Act's inspection provisions reflect the reality that as "governmental regulation of business enterprise" "mushroom[s]," so too does "the need for effective investigative techniques to achieve the aims of such regulation." *See* v. *City of Seattle*, 387 U.S. 541, 543 (1967) (citing 21 U.S.C. § 374). If a pharmaceutical manufacturer objected that FDA inspections effected a taking, that claim would not fare well under settled law. The purpose of FDA regulation is to facilitate licenses to market safe drugs (the benefit), and government access to inspect the licensed drugs (the condition) is directly and reasonably related to that regulatory objective.

The same is true of inspections conducted by the U.S. Department of Agriculture's Food Safety Inspection Service (FSIS), which enforces a host of "health

and safety constraints on the meat processing industry." *Windy City Meat Co.* v. *U.S. Dep't of Agric.*, 926 F.2d 672, 675 (7th Cir. 1991) (discussing the Federal Meat Inspection Act, 21 U.S.C. §§ 601–695 (1988), the Poultry Products Inspection Act, 21 U.S.C. §§ 451–470 (1988) and the Agricultural Marketing Act of 1946, 7 U.S.C. §§ 1621–1629 (1988)). In adopting the Federal Meat Inspection Act, for example, Congress required FSIS to inspect "all meat food products prepared for commerce in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment." 21 U.S.C. § 606. Unsafe meat poses a public health risk, and permitting the government to inspect meat production facilities is a germane condition on market entry.

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) likewise provides for reasonable inspections to ensure that licensed pesticides pose no undue risk to people or the environment. FIFRA entitles EPA to enter "any establishment or other place where pesticides or devices are held for distribution or sale for the purpose of inspecting and obtaining samples" and the like. 7 U.S.C. § 136g(a)(1)(A). Those inspections are reasonably related to EPA's need to "prevent unreasonable adverse effects on the environment" and its agreement to register pesticides for sale (the benefit). *Id.* § 136a(a).

Compliance inspections of power plants such as those conducted by the Nuclear Regulatory Commission (NRC) and Federal Energy Regulatory Commission (FERC) provide other ready examples of lawful government entry onto private property. The NRC, for instance, is authorized to conduct "inspections" "to assure a [nuclear power] licensee's compliance with

the Atomic Energy Act and with Commission regulations necessary for retention of the license" (*Mississippi Power & Light Co.* v. *U.S. Nuclear Regulatory Comm'n*, 601 F.2d 223, 231 (5th Cir. 1979) (citing 42 U.S.C. § 2201(o)))—all to the end of "protecting the public's health and safety." *Thermal Sci., Inc.* v. *U.S. Nuclear Regulatory Comm'n*, 184 F.3d 803, 804 (8th Cir. 1999) (citing 42 U.S.C. § 2201). For similar reasons, Congress has charged FERC with licensing, and assessing the safe operation of, liquid natural gas terminals and private hydroelectric projects, making violations punishable by civil and other penalties. 15 U.S.C. §§ 717b, 717m, 717(s-t); see also 16 U.S.C. §§ 797(e), 823b (similar Federal Power Act provisions).

Although the product for sale in these industries is electricity, rather than meat, pharmaceuticals, or pesticides, the government's ability to access the regulated entity's private property to conduct reasonable safety or compliance inspections is no less a germane condition on market participation. Thus, any sacrifice of the right to exclude third parties from one's property entailed in allowing such inspections would satisfy the doctrine of unconstitutional conditions. In sum, there is no basis to the notion that ruling for petitioners would hobble the government's ability to ensure public safety by requiring access to private property as a reasonable condition of licensing.

3. By contrast, when a condition is essentially unrelated to any benefit conferred on the landowner, the requirement to grant an easement or other property interest is a bald exaction requiring compensation.

In *Nollan*, for example, the California Coastal Commission conditioned a "coastal development per-

mit" on the requirement that the property owners provide "additional lateral access to the public beaches in the form of an easement across their property." 483 U.S. at 828–829. That restriction effected a taking because it was "impossible to understand" how a lateral access easement was related to the burden that the new development might impose on "visual access" to the beach. *Id.* at 838. Likewise, while the city in *Dolan* had a legitimate interest in flood control, it was "difficult to see why" allowing "recreational visitors" to "trampl[e] along petitioner's floodplain easement" was "sufficiently related to the city's legitimate interest in reducing flooding problems." 512 U.S. at 393. And in *Koontz*, this Court held that the same principles apply "whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so," as well as when the government uses "so-called 'monetary exactions'" that direct "the owner of a particular piece of property to make a monetary payment." 570 U.S. at 612–613.

As these cases demonstrate, the unconstitutional conditions doctrine is designed to separate germane conditions from "[e]xtortionate demands" (*id.* at 605) —and ruling for petitioners here would not alter that framework.

B. When the government enforces criminal or regulatory prohibitions, it typically has Fourth Amendment authority to conduct reasonable searches of private property.

Nor would a holding that California's actions here effect a taking interfere with the government's ability to search private property when enforcing ordinary criminal law or civil regulatory prohibitions.

For centuries before the Bill of Rights was enacted, the common law recognized the authority of magistrates to issue warrants entitling officers of the state to enter private property and seize papers and effects (and recognized occasions when, because of various exigent circumstances, such warrants were unnecessary). When the framers of the Bill of Rights separately enacted the Fourth and Fifth Amendments, they recognized that legitimate law enforcement searches were governed by the reasonableness requirements of the former, and not the compensation requirement of the latter. In modern times, this Court has interpreted the Fourth Amendment flexibly in the context of administrative searches, while preserving the core distinction between reasonable searches and compensable takings.

1. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *City of Los Angeles* v. *Patel*, 576 U.S. 409, 419 (2015) (quoting U.S. Const. amend. IV). Reasonable searches may be conducted if supported either by warrants based on probable cause or, in the case of "brief investigatory stops of persons or vehicles that fall short of traditional arrest," by reasonable suspicion. *United States* v. *Arvizu*, 534 U.S. 266, 273 (2002).

Although "a search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing," this Court's decisions recognize "limited circumstances in which the usual rule does not apply." *Edmond*, 531 U.S. at 37. Most obviously, this Court has traditionally allowed the government to conduct "prompt inspections, even without a warrant," in "emergency situations" such as those calling for "seizure of unwholesome food," "summary destruction of

tubercular cattle," or enforcing a "health quarantine." *Camara*, 387 U.S. at 538 (collecting citations). In addition, however, the government may conduct "searches for certain administrative purposes without particularized suspicion of misconduct, provided that those searches are appropriately limited"—including searches of business properties in closely regulated industries. *Edmond*, 531 U.S. at 37 (discussing *New York* v. *Burger*, 482 U.S. 691, 702 (1987)).

Two lines of this Court's precedent address when the Fourth Amendment allows the government to search private commercial property. The first line, summarized in *Burger*, outlines the conditions under which the government may require a "closely regulated" business to submit to a warrantless search. 482 U.S. at 700. As the Court there held, warrantless inspections in such industries must satisfy three criteria: (1) warrantless inspections must serve "a 'substantial' government interest," (2) "the warrantless inspections must be necessary to further the regulatory scheme," and (3) "the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant." *Id*. at 702–703.

Burger built on precedent addressing "the 'unique' problem of inspections of 'closely regulated' businesses in two enterprises that had 'a long tradition of close government supervision'": liquor and guns. *Id*. at 700 (citation omitted). For instance, the Court in *Colonnade Catering Corp*. v. *United States*, 397 U.S. 72, 77 (1970), disapproved of a warrantless search of a catering business operating under federal revenue statutes authorizing inspection of the premises of liquor dealers (in part because the statute imposed sanctions when entry was refused, and in part because it

did not authorize entry without a warrant as an alternative in this situation), but recognized that "the liquor industry [was] long subject to close supervision and inspection."

Likewise, the Court in *United States* v. *Biswell*, 406 U.S. 311 (1972), upheld the warrantless inspection of a pawnshop federally licensed to sell guns under the Gun Control Act of 1968, 18 U.S.C. § 921 et seq. Noting that the inspection "pose[d] only limited threats to the dealer's justifiable expectations of privacy," the Court stated: "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." *Id.* at 316–317. The Court further reasoned that, in some closely regulated industries, "the prerequisite of a warrant could easily frustrate inspection," making "unannounced, even frequent, inspections * * * essential" to provide "a credible deterrent" to violating the law. *Id.* at 316. And if the Court rules for petitioners, this line of cases, dubbed the "*Colonnade-Biswell*" doctrine in *Burger* (482 U.S. at 700), will continue to govern warrantless inspections of closely regulated industries.[12]

In a second line of cases, this Court has held that *Colonnade-Biswell* addresses "exceptions" arising in "relatively unique circumstances," and that warrants

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[12] The *Colonnade-Biswell* doctrine is not strictly limited to liquor or gun sales. For example, in *Donovan* v. *Dewey* this Court upheld "warrantless inspections made pursuant to the Federal Mine Safety and Health Act," reasoning that coal mining was a "'closely regulated' industry." *Burger*, 482 U.S. at 700 (quoting *Donovan*, 452 U.S. 594, 598–599 (1981)).

(or their equivalent) may be required before the government may inspect entities that are *not* closely regulated. *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 313 (1978). Even then, however, where "considerations of health and safety are involved," "the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken." *Camara*, 387 U.S. at 538. For example, in *Camara*, which involved fire code inspections, the Court stated: "Experience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained. The passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of warrant. The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought." *Ibid.* (citation omitted).

2. As these now-familiar principles confirm, when the government itself is enforcing criminal provisions or civil regulatory provisions involving potentially unsafe activities, conditions, products, or services, the Fourth Amendment permits it to make reasonable searches (with or without warrants, depending on the circumstances).

Take the Occupational Safety & Health Act, which imposes civil and criminal penalties on employers who fail to maintain a safe workplace. Congress there authorized the Secretary of Labor to promulgate regulations governing workplace health and safety (29 U.S.C. § 665), and the Secretary has delegated that authority to OSHA (77 Fed. Reg. 3912, 3912–3913

(Jan. 25, 2012)). If OSHA "determines upon investigation that an employer is failing to comply," it may "issue a citation" and assess "a monetary penalty." *Martin* v. *Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 147 (1991) (citing 29 U.S.C. §§ 658–659); see also 29 U.S.C. § 666(e) (imposing criminal penalties on employers who willfully violate OSHA safety rules and thereby cause an employee's death). But as this Court recognized in *Marshall* v. *Barlow's, Inc.*, one of the leading decisions in this area, "the probable cause justifying the issuance of a warrant" to conduct OSHA inspections "may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an * * * inspection are satisfied with respect to a particular [establishment].'" 436 U.S. 307, 320 (1978) (quoting *Camara*, 387 U.S. at 538).

In a similar vein, the Toxic Substances Control Act authorizes EPA to "inspect any establishment, facility, or other premises in which chemical substances, mixtures, or products * * * are manufactured, processed, stored, or held before or after their distribution in commerce." 15 U.S.C. § 2610(a). Applying *Marshall*, the lower courts have held that administrative warrants under the statute may be based on "a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment." *E.g.*, *United States* v. *M/V SANCTUARY*, 540 F.3d 295, 300 (4th Cir. 2008) (quoting *Marshall*, 436 U.S. at 320).

FDA's exercise of authority over food, drugs, and tobacco products is similar. For example, the Food Drug & Cosmetic Act contains both civil and criminal enforcement mechanisms that FDA may invoke in en-

forcing the Act's prohibitions on introducing adulterated food or drugs into interstate commerce. 21 U.S.C. § 331 (a)–(c). Similarly, the Family Smoking Prevention and Tobacco Control Act authorizes FDA to bring "civil and criminal enforcement action[s]" against anyone marketing tobacco products "without the appropriate authorization." *Vapor Tech. Ass'n* v. *FDA*, 977 F.3d 496, 498 (6th Cir. 2020) (citing 21 U.S.C. §§ 331(a)–(c), 332, 334, 387b(6)). FDA retains inspection authority to enforce all of these provisions. 21 U.S.C. § 374. And lower-court precedent confirms that the reasonable exercise of that authority will likely be upheld under the rationale of either *Marshall* or the "*Colonnade-Biswell* exception" for "warrantless searches and seizures" in "'closely regulated' industries." *United States* v. *Argent Chem. Labs., Inc.*, 93 F.3d 572, 575 (9th Cir. 1996) (upholding FDA search of a regulated veterinary drug manufacturer).

3. Indeed, this Court's precedents suggest that reasonable inspection regimes will sometimes be lawful under *both* the Fourth Amendment and the unconstitutional conditions doctrine. For example, in *Wyman* v. *James*, 400 U.S. 309, 326 (1971), this Court held that the Fourth Amendment did not prevent New York from conditioning certain family aid benefits on the beneficiary's agreement to allow case-workers to conduct home visits. The Court began by explaining that the program served the public interest in "protection and aid for the dependent child." *Id.* at 318. Then, reasoning that home visits served a "valid and proper administrative purpose" in discovering "information pertinent to the issue of [program] eligibility," the Court held that New York did not violate the Fourth Amendment in requiring consent to home visits as a condition of participation. *Id.* at 322–326.

Wyman thus turned on Fourth Amendment analysis, but the case likely would have come out the same way if the plaintiff there had asserted a takings claim and the Court had assessed it under the doctrine of unconstitutional conditions. As explained above (at 19–20), that doctrine would have required New York to show that requiring the plaintiff to waive her right to exclude caseworkers from her home was germane to the purpose of the family aid benefit she was receiving. Further, the Court's conclusion that the government's home visits served a "valid and proper administrative purpose" suggests that the "germaneness" requirement would have been satisfied.

Similarly, the result in *Biswell*—which upheld "inspections without warrant" of "federally licensed dealers in firearms" against a Fourth Amendment challenge (406 U.S. at 316)—likely would have been the same under the unconstitutional conditions doctrine. In exchange for the benefit of a federal license to sell firearms, the vendor could reasonably be expected to comply with the germane requirement of submitting to warrantless searches. *Wyman* and *Biswell* thus suggest that many reasonable governmental inspection regimes will satisfy both the Fourth Amendment and the doctrine of unconstitutional conditions—and thus do not raise Takings Clause concerns.

California's treatment of petitioners, however, stands in marked contrast to these criminal and regulatory regimes. No one suggests that giving third-party union organizers access to petitioners' property is necessary to address any potentially illegal activity —other than activity that, apart from the Access Regulation, would amount to resisting the union's unlawful trespass—let alone criminal or potentially dangerous activity. On the contrary, California has simply

granted other private citizens the right to enter petitioners' property so they can try to persuade employees to unionize. Unlike the reasonable government inspections discussed above, the third-party entry at issue here is not authorized by the Constitution—unless the government is willing to pay for it.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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