No. _____

In The
Supreme Court of the United States

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

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

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

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

Parties

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

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

Corporate Disclosure Statement

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

Related Proceedings

The proceedings in federal district and appellate courts identified below are directly related to the above-captioned case in this Court.

Cedar Point Nursery v. Gould, No. 1:16-CV-00185-LJO-BAM, 2016 WL 1559271 (E.D. Cal. Apr. 18, 2016).

Cedar Point Nursery v. Gould, No. 1:16-CV-00185-LJO-BAM, 2016 WL 3019277 (E.D. Cal. May 26, 2016).

Cedar Point Nursery v. Gould, No. 1:16-CV-00185-LJO-BAM, 2016 WL 3549408 (E.D. Cal. June 29, 2016).

Cedar Point Nursery v. Shiroma, 923 F.3d 524 (9th Cir. 2019).

Cedar Point Nursery v. Shiroma, 956 F.3d 1162 (9th Cir. 2020).

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Petition for a Writ of Certiorari

Petitioners Cedar Point Nursery and Fowler Packing Company, Inc., respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions

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

Jurisdiction

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

Constitutional and Statutory Provisions at Issue

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

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

> Accordingly the Board will consider the rights of employees under Labor Code Section 1152 to include the right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support, subject to the following regulations:
>
> (1) When Available.
>
> (A) Access under this section onto an agricultural employer's property shall be available to any one labor organization for no more than four (4) thirty-day periods in any calendar year. [1]

Introduction

The Ninth Circuit upheld a regulation that allows union organizers to invade the private property of agricultural growers in California for up to three hours per day, 120 days per year. *See* Cal. Code Regs. tit. 8, § 20900(e). Union organizers invoked this

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

regulatory authority 62 times in the year preceding this lawsuit, and conducted disruptive protests at 5:00 a.m. on the property of Petitioner Cedar Point Nursery. Pet. App. G-9, G-18–G-22. According to eight judges on the Ninth Circuit, the panel's decision "creates a circuit split, disregards binding Supreme Court precedent, and deprives property owners of their constitutional rights." Pet. App. E-32.

The issue in this case is whether the government may avoid the Fifth Amendment's requirement to pay just compensation for the appropriation of an easement merely by placing time restrictions on the easement. Under the Ninth Circuit's decision, the government may eviscerate a landowner's right to exclude unwanted persons from her property, so long as it does not require her to grant access all day, every day. In the process, the Ninth Circuit downgraded the right to exclude from its previous position as "a fundamental element of the property right," *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979), to merely one twig in the "bundle of sticks." If broadly accepted, this extraordinary treatment of the right to exclude would significantly weaken property rights and greatly expand the ability of governments at all levels to extract easements on demand.

Although this Court has repeatedly held that an easement cannot be taken without just compensation, *see Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987); *Kaiser Aetna*, 444 U.S. at 180, the federal courts of appeals are now split as to whether an easement that is limited in time is subject to the same categorical rule. *See Hendler v. United States*, 952 F.2d 1364, 1377–78 (Fed. Cir. 1991). As Judge Ikuta

explained in her dissent from denial of rehearing en banc, "[t]he Federal Circuit's holding that activity involving 'temporally intermittent' intrusions onto private property effects a taking is inconsistent with the majority's view that there is no taking of an easement unless 'random members of the public [can] unpredictably traverse the[] property 24 hours a day, 365 days a year.'" Pet. App. E-28 (citations omitted). And at least one other circuit has indicated that *Hendler*'s reading of this Court's precedents is persuasive. *Knick v. Twp. of Scott*, 862 F.3d 310, 328 (3d Cir. 2017), *vacated on other grounds*, 139 S. Ct. 2162 (2019). Certiorari is necessary to resolve this circuit split.

The Ninth Circuit's decision also undermines this Court's physical takings precedents. Through its holding that time-limited easements must be evaluated under the "ad hoc, factual inquiry" of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), the decision below ignored the clear distinction between regulatory and physical takings. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321–22 (2002). The effects of this confusion unfold throughout the court's opinion, which treated a time-limited easement as if it were a restriction on property use rather than a physical invasion. In the process, the Ninth Circuit also downgraded the fundamental right to exclude trespassers to one of many competing considerations in a multifactor evaluation. This petition presents the opportunity to clarify the meaning of "permanent physical invasion" as it relates to easements and reaffirm that *per se* rules

govern physical takings cases no matter the extent of the intrusion.

This case presents the Court with a clean vehicle to resolve this important issue. There is no dispute that an easement has been taken, and this Court's resolution of the question presented is outcome-determinative. Further, widespread adoption of the Ninth Circuit's rule would have significant consequences in agriculture and many other contexts. Since access easements are not uniformly valuable throughout the day or year, the decision below invites governments to evade their categorical duty to pay just compensation by limiting access to particularly high-value times. After all, the right to enter Petitioners' properties during nighttime hours when no workers are present would be useless to the union. The same is true for beach access easements, which governments would be happy to limit to daylight hours if they could evade a categorical duty to compensate by doing so. The rule adopted below would permit governments to seize all sorts of easements without compensation, so long as the easements include any time restriction. Without this Court's intervention, Petitioners and many others will be left with no practical remedy when governments require them to grant unwanted members of the public access to their property.

The Court should grant the petition for certiorari.

Statement of the Case

A. Factual Background

1. The Access Regulation

California law includes a provision, materially identical to Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, that guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities." Cal. Lab. Code § 1152. Forty-five years ago, California's Agricultural Labor Relations Board (the Board) promulgated a regulation interpreting Section 1152 as granting union organizers the right to access the private property of agricultural employers "for the purpose of meeting and talking with employees and soliciting their support." Cal. Code Regs. tit. 8, § 20900(e). Under the implementing regulations, union organizers are not required to seek or secure the consent of the employer before taking access; they need only file a Notice of Intent to Take Access with the Board. *Id.* § 20900(e)(1)(B). Once the notice is filed, union organizers may descend upon an employer's property for three hours per day for up to 120 days each year. *See id.* § 20900(e)(3) (one hour before work, one hour during lunch, and one hour after work); *id.* § 20900(e)(1)(A)–(B) (four thirty-day periods). All agricultural employers in California are subject to this access requirement.

California growers immediately challenged the Access Regulation in state court on a takings theory—and initially won in two separate superior courts. *See*

Agric. Labor Relations Bd. v. Superior Court (Pandol & Sons), 16 Cal. 3d 392, 398 (1976). But a divided California Supreme Court reversed. The majority held that "employers' property rights must give way" when they conflict with employees' right to self-organization. *Id.* at 406 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)). On the contrary, a three-judge dissent would have held that the Access Regulation effected "an impermissible invasion on constitutionally protected property rights." *Id.* at 429 (Clark, J., dissenting).

2. The Petitioners

Cedar Point Nursery is an Oregon corporation whose nursery is located a few miles across the border in California. Pet. App. G-4 ¶ 8. It raises strawberry plants that it sells nationally. *Id.* The business employs approximately 100 full-time workers and 400 seasonal workers, none of whom live on the business's property. Pet. App. G-9 ¶¶ 26–27. Its seasonal workers are housed in hotels nearby where they may be reached by union organizers and activists. *Id.*

At 5:00 a.m., during the height of Cedar Point's harvesting season, union activists entered Cedar Point's property under the authority granted by the Access Regulation. *Id.* ¶ 30. With bullhorns in hand, the activists entered the trim sheds, where hundreds of Cedar Point's employees were delicately preparing fledgling strawberry plants for shipment. *Id.* While some seasonal workers joined the activists, the majority of Cedar Point's employees did not leave their work stations. Pet. App. G-10 ¶ 31. Because of the union's lack of success in recruiting Cedar Point's employees, Cedar Point remains vulnerable to similar

activity by union organizers in the future. But for the Access Regulation, Cedar Point would exercise its right to exclude union activists from its property during work hours. *Id.*

Fowler Packing Company is a California Corporation with its headquarters in Fresno. Pet. App. G-4 ¶ 9. It is one of the nation's largest growers of fresh produce, shipping more than five million boxes of table grapes and fifteen million boxes of citrus from its Fresno headquarters each year. *Id.* Fowler employs 1,800–2,500 workers in its field operations and approximately 500 workers at its packing facility in Fresno. Pet. App. G-11 ¶ 36. Like Cedar Point, none of Fowler's employees live on premises, and all of its workers are fully accessible to union organizers when they are not at work. *Id.* ¶ 37.

For three consecutive days, union organizers attempted to enter Fowler's property in Fresno. Pet. App. G-4–G-5 ¶ 9. Fowler denied access, and subsequently the union filed a charge against Fowler with the Board. *Id.* The charge alleged that Fowler had refused to grant the union access to its property as required by the Access Regulation. *Id.* But for the Access Regulation, Fowler would oppose union access to its property and exercise its right to exclude union activists from its property. Pet. App. G-11 ¶ 40.

B. Legal Background

1. The District Court Proceedings

Following the disruption of their businesses caused by the Access Regulation, Petitioners brought this suit seeking declaratory and injunctive relief

against members of the Board. Petitioners sought to halt enforcement of the Access Regulation on the grounds that it effects an uncompensated taking under the Fifth and Fourteenth Amendments to the United States Constitution. Petitioners alleged that the Access Regulation "imposes an easement across the private property of Cedar Point and Fowler for the benefit of union organizers." Pet. App. G-4 ¶ 7. Because the easement was taken "without consent or compensation," Petitioners alleged that "it cause[d] an unconstitutional taking." Pet. App. G-15 ¶ 58. The district court dismissed the complaint on the ground that Petitioners failed to state a plausible takings claim.[2] *See* Pet. App. B-8–B-10; D-9–D-15.

2. The Ninth Circuit's Divided Panel Decision

The Ninth Circuit affirmed the district court's decision by a divided vote. The majority first held (without explanation) that the easement was not a "classic taking in which government directly appropriates private property." Pet. App. A-14. It further held that the Access Regulation could not constitute a *per se* physical taking because it does not authorize a permanent physical invasion, *i.e.*, it "does not allow random members of the public to unpredictably traverse their property 24 hours a day, 365 days a year." Pet. App. A-17–A-18. The majority opinion explained that the Access Regulation could

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[2] Petitioners also brought a Fourth Amendment claim alleging that the Access Regulation effected an unlawful seizure of their property. Pet. App. G-15–G-16 ¶¶ 59–65. The district court dismissed that claim, Pet. App. B-10–B-13, and Petitioners do not seek certiorari on it.

not effect a *per se* taking "because the sole property right affected by the regulation is the right to exclude," and absent a complete taking of the right to exclude, the appropriation of an easement is not a physical taking. Pet. App. A-18.

Judge Leavy dissented. Pet. App. A-26. He would have reversed the district court, because he could find "no Supreme Court case holding that non-employee labor organizers may enter an employer's nonpublic, private property for substantial periods of time, when none of the employees live on the employer's premises." *Id.* Quoting *Dolan* and *Kaiser Aetna*, Judge Leavy explained that "the Access Regulation allowing ongoing access to Growers' private properties, multiple times a day for 120 days a year . . . is a physical, not regulatory, occupation because the 'right to exclude' is 'one of the most fundamental sticks' in the bundle of property rights." Pet. App. A-29 (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994); *Kaiser Aetna*, 444 U.S. at 179–80).

3. The En Banc Vote

Petitioners' petition for rehearing en banc was denied over the dissent of eight judges. Writing for the dissenters, Judge Ikuta would have granted review because the panel opinion "creates a circuit split, disregards binding Supreme Court precedent, and deprives property owners of their constitutional rights." Pet. App. E-32.

The dissenters would have held, first, that under longstanding principles of California law, the Access Regulation took an easement from the Petitioners. Pet. App. E-17–E-23. Second, under this Court's

precedents, the taking of an easement by government is a *per se* physical taking. Pet. App. E-23–E-24. Third, the dissenters argue that there "is no support for the majority's claim that the government can appropriate easements free of charge so long as the easements do not allow for access '24 hours a day, 365 days a year.'" Pet. App. E-26. Finally, the dissenters would have ruled that because the Board has failed to pay just compensation for the easement, Petitioners have "plausibly allege[d] that their rights under the Takings Clause were violated." Pet. App. E-24.

Both judges in the panel majority concurred in the denial of rehearing en banc. Writing for the concurrence, Judge Paez voted to deny en banc review because, in his view, no Supreme Court case holds that the taking of an easement is a *per se* taking. Pet. App. E-5. The concurring judges reiterated that the panel "majority opinion correctly held that the Growers have not suffered a 'permanent and continuous' loss of their right to exclude the public from their property." Pet. App. E-9.

C. Basic Legal Framework

1. Easements in Gross

The eight-judge dissent from denial en banc described the property rights at stake. "For well over a century, California has recognized that easements are a type of real property." Pet. App. D-16. (citing *L.A. Terminal Land Co. v. Muir*, 136 Cal. 36, 48 (1902)). "An affirmative easement gives its owner a right to do something on the land of another, such as a right of way to pass over the other person's land." 6 Miller & Starr, Cal. Real Est. § 15:9 (4th ed. 2019).

One type of affirmative easement is the easement in gross, which confers "[t]he right to enter onto the land of another to take some action." Pet. App. E-23 (citing Cal. Civ. Code § 802). And "[t]here is a 'long line of California cases holding that an easement in gross is real property.'" Pet. App. E-18 (quoting *Balestra v. Button*, 54 Cal. App. 2d 192, 197 (1942)).

2. Takings Background

For most of the 20th century, takings law was characterized primarily by Justice Holmes' observation that a government regulation that "goes too far" in restricting property rights effects a taking for which the government must compensate the property owner. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). This Court's decision in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), was most notably an attempt to come up with a standard to determine how far is "too far." Zygmunt J.B. Plater & Michael O'Loughlin, *Semantic Hygiene for the Law of Regulatory Takings, Due Process, and Unconstitutional Conditions—Making Use of a Muddy Supreme Court Exactions Case*, 89 U. Colo. L. Rev. 741, 770 (2018). The *Penn Central* framework directed lower courts to conduct an "ad hoc, factual inquiry" into a regulation's economic impact, effect on the property owner's "reasonable investment backed expectations," and the "character of the governmental action." *Penn Central*, 438 U.S. at 124.

But not long after announcing this inquiry, the Court began to recognize that the character of certain impositions on property rights was so "unusually serious" that the intrusions amounted to takings without regard to the *Penn Central* multifactor test.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). One of these serious invasions of property rights is a physical taking, "where government requires an owner to suffer a permanent physical invasion of her property—however minor." *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 538 (2005). Categorical treatment is also appropriate where a regulatory use restriction "completely deprive[s] an owner of '*all* economically beneficial us[e]' of her property." *Id.* at 538 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)). This case involves the first category—physical invasions—which, unlike regulatory use restrictions, are not subject to *Penn Central*'s multifactor test. Instead, physical takings—however small—require compensation.

This petition directly presents the question of whether the appropriation of an easement, permanent in duration but limited in time, effects a *per se* physical taking.

Reasons for Granting the Petition

I.

Certiorari Should Be Granted to Resolve a Conflict Between the Courts of Appeals

The panel opinion below created a clear circuit split. The Ninth Circuit's opinion conflicts directly with the Federal Circuit's decision in *Hendler v. United States*, 952 F.2d 1364 (Fed Cir. 1991), on the dispositive issue of whether a continual, but time-limited easement qualifies as a "permanent" physical

invasion under *Nollan*, *Loretto*, and *Kaiser Aetna*. *See* Pet. App. E-26–E-27.

In *Hendler*, the federal government placed "ground water wells and associated equipment" on properties near an EPA Superfund site. 952 F.2d at 1367. The property owners successfully argued that the placement of the wells *and* the intermittent invasion of their property by government employees servicing the wells effected uncompensated takings. *See id.* at 1375–77 (the wells themselves); *id.* at 1377–78 (employees servicing the wells).

With respect to the government employees and equipment that periodically invaded the plaintiffs' land to service the wells, the *Hendler* court held that "the concept of permanent physical occupation does not require that in every instance the occupation be exclusive, or continuous and uninterrupted." *Id.* at 1377. The court had "little doubt" that, under *Nollan* and *Kaiser Aetna*, appropriation of an easement is the "taking of the plaintiffs' right to exclude, for the duration of the period in which [the easement exists]." *Id.* at 1378. Following *Kaiser Aetna*, the court concluded that an easement permitting "intermittent public use" demands just compensation, even though it may not affect the other sticks in the bundle of property rights. *Id.* at 1377–78. In short, *Hendler* recognized that where "Government vehicles and equipment entered upon plaintiffs' land from time to time, without permission, for purposes of installing and servicing . . . various wells[,]" the government has appropriated an easement and must pay just compensation. *Id.* at 1377. It was enough that the government vehicles "remained on the land for

whatever duration was necessary to conduct their activities, and then left, only to return again when the Government desired." *Id.*

In finding that an easement need not "be exclusive, or continuous and uninterrupted," *id.*, to merit categorical treatment, the *Hendler* court rejected a narrow interpretation of *Loretto*'s "permanent physical invasion" test. The panel's holding below—namely, that an easement is not "permanent" unless it confers a right to traverse over private property "24 hours a day, 365 days a year"—did the opposite. It contradicted *Hendler* primarily through an extraordinarily narrow view of the word "permanent" and reimagined *Nollan* as applying only to continuously accessible easements. Accordingly, the Ninth Circuit's conclusion that the Access Regulation "does not meet *Nollan*'s definition of a permanent physical occupation," Pet. App. A-17, sets up a clear circuit split over the meaning of "permanent" in the context of appropriated easements.

The easement the Access Regulation grants to union organizers is quite similar to the one taken in *Hendler*. Neither easement must be continuously accessed, but both are permanent in the sense that they lack a specified end date.[3] If anything, the easement here is more definite than the one in *Hendler*. After all, the government here has granted union organizers a statutory right of access to private

[3] Indeed, even the lack of an end date may not be required for a physical invasion to be "permanent." As *Hendler* explained, "'permanent' does not mean forever, or anything like it." *Hendler*, 952 F.2d at 1376. "A taking can be for a limited term[.]" *Id.*

property for a particular use, whereas *Hendler*'s easement was implied, described only by the actual actions of the government employees who invaded the property to service the wells. Thus, there should be no doubt that panel majority's failure to apply *Hendler*'s rule to this situation effected a circuit split.

A clear circuit split on such a fundamental question of property rights is reason enough to grant the petition. But this Court's guidance is now imperative. Until last year, most takings claims could not be filed in federal court due to the "state litigation" requirement of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194–97 (1985). *See Knick*, 139 S. Ct. at 2167 (overruling *Williamson County*'s state-litigation requirement for takings claims).[4] With the demise of the state-litigation requirement, federal courts are now in a primary position to hear takings cases. This question—which has already divided the only circuits to hear it—is in need of immediate clarification by this Court. The urgency is only heightened by the Ninth Circuit's ruling, which invites state and local governments to appropriate easements on demand by merely adding time limitations to avoid a categorical duty to compensate property owners.

Knick itself involved the appropriation of an easement without just compensation. *Id.* at 2168. There, the township passed an ordinance that denied Ms. Knick the right to exclude members of the public from her property "during daylight hours." *Id.* While the Third Circuit ultimately dismissed Ms. Knick's

[4] *Hendler* arose in the Federal Circuit only because it involved takings claims against the federal government. 952 F.2d at 1367.

takings claim under *Williamson County*, the court's view of the merits of Ms. Knick's claim—that the daylight-hours easement likely effected a physical taking—accords with *Hendler*, suggesting the immediate possibility that the current circuit split will only deepen. The Third Circuit commented that "*Knick* relies on a *straightforward application* of the Supreme Court's decision in *Nollan v. California Coastal Commission*, which found it 'obvious' that an easement for public access across private property constituted a permanent physical taking." *Knick*, 862 F.3d at 328 (emphasis added). The Third Circuit also cited *Hendler* for the proposition that a time limitation on an easement does not change the nature of the property right taken. *Id.* (citing *Hendler*, 952 F.2d at 1377).

Cases like *Knick* will continue to test the boundaries of the government's obligation to compensate property owners for a taking of the right to exclude. Granting this petition would forestall the inevitable confusion among the lower courts and give this Court the opportunity to state a clear rule.

II.

Certiorari Should Be Granted Because the Decision Below Undermines This Court's Precedents and Sows Confusion in Takings Law

Apart from opening a circuit split, the decision below threatens to undermine this Court's physical takings precedents. At the core of the Takings Clause is the requirement that the government pay just compensation when it physically takes possession of

an interest in property. *See Nollan*, 483 U.S. at 831. Such direct intrusions on property trigger a categorical duty to provide just compensation "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 831–82 (quoting *Loretto*, 458 U.S. at 434–35).

The majority opinion below refused to analyze the appropriation of the easement under this Court's physical takings doctrine for two reasons. First, the panel concluded that because the easement is not accessible by union organizers "24 hours a day, 365 days a year," it was not "permanent" as that term is used in takings law. Pet. App. A-17–A-18. Second, the panel opined that because the "only" right taken was the right to exclude, the physical takings doctrine is categorically inapplicable. Pet. App. A-18. Both holdings significantly undermine this Court's prior physical takings precedents and ought to be rejected. This Court has never allowed government to evade the robust protections of the physical takings framework simply by placing time limitations on direct appropriations of property. Nor has this Court ever cabined the right to exclude as "just another stick in the bundle." Yet the decision below did both, and forces property owners facing direct and persistent invasions of their property to rest their hopes on the amorphous multifactor balancing test of *Penn Central*.[5]

[5] The technical availability of a *Penn Central* claim where categorical treatment is denied is little consolation for Petitioners—or property owners generally. The vast majority of easements would have little chance to qualify as a taking under

A. The Ninth Circuit's Refusal to Treat the Access Regulation as a *Per Se* Physical Taking Contradicts and Confuses This Court's Precedents

The panel erred by limiting the physical takings doctrine to only those appropriated easements that permit access to private property all day, every day. Perhaps most fundamentally, the panel decision treats the appropriation of time-limited easements as mere regulatory use restrictions. *But see Nollan*, 483 U.S. at 831 ("To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather . . . 'a mere restriction on its use,' is to use words in a manner that deprives them of all their ordinary

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Penn Central. The Ninth and Federal Circuits have both indicated that, with respect to *Penn Central*, they are "aware of no case in which a court has found a taking where diminution in value was less than 50 percent." *Colony Cove Properties, LLC v. City of Carson*, 888 F.3d 445, 451 (9th Cir. 2018) (quoting *CCA Assocs. v. United States*, 667 F.3d 1239, 1246 (Fed. Cir. 2011)). Rarely will an easement of any kind diminish the value of a parcel by 50%, much less by 90% or more—a threshold often effectively required in *Penn Central* cases. *See William C. Haas & Co., Inc. v. City and Cty. of S.F.*, 605 F.2d 1117, 1120–21 (9th Cir. 1979) (holding a 95% diminution in value insufficient); *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377, 1386–90 (N.J. 1992) (90% diminution in value inadequate to state a claim); *Animas Valley Sand & Gravel, Inc. v. Bd. of County Comm'rs*, 38 P.3d 59, 67 (Colo. 2001) (*Penn Central* requires a showing that "land has [only] a value slightly greater than de minimis."); *Noghrey v. Town of Brookhaven*, 48 A.D.3d 529, 532–33 (N.Y. App. Div. 2008) (declaring that *Penn Central*'s economic impact factor "requires a loss in value which is 'one step short of complete,'" that it is not enough if the value is "substantially reduced;" "the proper inquiry is whether the regulation left only a 'bare residue' of value" (citations omitted)).

meaning." (citation omitted)). Such reasoning conflicts with this Court's repeated holdings that physical and regulatory takings are analytically distinct. *Tahoe-Sierra*, 535 U.S. at 321–22; *Murr v. Wisconsin*, 137 S. Ct. 1933, 1944 (2017). Unlike regulatory use restrictions—which are usually evaluated under *Penn Central* unless the regulation at issue involves a deprivation of all economically beneficial use of an entire parcel—physical takings involve the appropriation "of an interest in property for some public purpose," and, "for the most part . . . the straightforward application of *per se* rules." *Tahoe-Sierra*, 535 U.S. at 321–22. While the extent of a regulatory restriction largely determines whether the restriction effects a taking under either *Penn Central* or *Lucas*, the mere fact of a physical invasion, "no matter how small," triggers a categorical duty to provide just compensation. *Tahoe-Sierra*, 535 U.S. at 322 (citing *Loretto* and *United States v. Causby*, 328 U.S. 256 (1946)). The severity of a physical invasion is relevant only in determining the *amount* of just compensation that must be provided. *See Loretto*, 458 U.S. at 437 ("Once the fact of occupation is shown, of course, a court should consider the *extent* of the occupation as one relevant factor in determining the compensation due."). An easement remains an interest in property even where it does not permit third-party access to private property all day, every day—it does not morph into a regulatory use restriction when limited in time. The taking of a time-limited easement must be evaluated under the physical takings doctrine.

The Ninth Circuit reached a contrary result by misunderstanding this Court's precedents. Most

significantly, the panel's conclusion was premised on a strained reading of the word "permanent" in *Loretto*. 458 U.S. at 426 (concluding that a "permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve"). The panel majority concluded that the Access Regulation did not authorize a "permanent physical invasion" because it did not allow for *continuous* use of Petitioners' property. Pet. App. A-18. But as the eight-judge dissent from denial of rehearing en banc recognized, there is "no support for the majority's claim that the government can appropriate easements free of charge so long as the easements do not allow for access '24 hours a day, 365 days a year.'" Pet. App. E-26. Not only is the panel opinion incorrect, but leaving it undisturbed would sow unnecessary confusion among the lower courts over what constitutes a "permanent" physical invasion. *See* Pet. App. E-30 n.12 (noting how the word "permanent" has changed meanings in takings law). Although, as Judge Ikuta aptly noted, any confusion caused by dicta from *Loretto* should have been "dispelled by *Nollan*,"[6] Pet. App. E-21, the panel

[6] *Loretto*'s dicta regarding easements is a prime example of this confusion. *Loretto* characterized the property interest in *Kaiser Aetna* as an "easement of passage" that, "not being a permanent occupation of land, was not considered a taking *per se*." *Loretto*, 458 U.S. at 433. But *Kaiser Aetna* itself spoke in categorical terms; the government could not require public access to a private marina without compensating the property owner. *See Kaiser Aetna*, 444 U.S. at 179-80. *Nollan* clarified that a public access easement—an "easement of passage," in *Loretto*'s words—is indeed a permanent occupation of land. *See Nollan*, 483 U.S. at 831.

decision makes it perfectly clear that the confusion will persist without this Court's intervention.

Nollan involved an access easement like the one here. *See Nollan*, 483 U.S. at 831. In finding that California could not compel a property owner to dedicate a beach access easement without compensation, *Nollan* stressed that the character of an "appropriation of a public easement across a landowner's premises" required *per se* treatment. *Id.* Unable to entirely avoid *Nollan*'s holding, the panel instead limited *Nollan* to easements permitting access all day, every day. Pet. App. A-17–A-18. But time limits do not change the character of an easement as a physical invasion—and nothing in *Nollan* suggests otherwise. After all, as the *Nollan* dissent noted, even the easement taken there did not permit continuous public access. *Nollan*, 483 U.S. at 854 (Brennan, J., dissenting) (noting that "public passage for a portion of the year would either be impossible or would not occur on appellant's property" due to "high-tide line shifts throughout the year").

Contrary to the panel's suggestions, *Nollan* "surely would not have turned the other way had the government restricted the easements to daytime use." Gregory C. Sisk, *Returning to the* PruneYard*: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech*, 32 Harv. J. L. & Pub. Pol'y 389, 410 (2009). Consistent with this view, the California Court of Appeal shortly thereafter relied on *Nollan* to find a taking where a property owner was required to dedicate a vertical beach access easement for use only during daylight hours. *Surfside Colony, Ltd. v. Cal. Coastal Comm'n*, 226 Cal. App. 3d 1260, 1266, 1269

(1991). Simply put, this Court "has never held that a government has free rein to take easements, without paying for them, so long as the easements do not allow for access '24 hours a day, 365 days a year.'" Pet. App. E-27 (quoting panel opinion). In concluding otherwise, the panel effectively "engraft[ed] a 'continuous use' requirement onto the Takings Clause." *Id.*

What is more, a line of cases beginning with *Portsmouth Harbor Land & Hotel Co. v. United State*s, 260 U.S. 327 (1922), further suggests that a physical invasion need not be all day, every day to be "permanent." In *Portsmouth Harbor*, the Court permitted the plaintiff's takings claim to proceed upon allegations of the government's repeated firing of heavy coast defense guns. *Id.* at 329–30. The repetition of firing over many years, "even if not frequently," triggered a takings claim despite the fact that, presumably, guns were not fired most days. *See id.* at 330. *Causby* invoked a similar principle. There, the Court recognized that a taking occurs when government aircraft flights "over private land . . . are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." 328 U.S. at 266. Recognizing that invasions of airspace over a plaintiff's property are "in the same category as invasions of the surface," *id.* at 265, the Court rejected a multifactor analysis, and instead adopted a categorical approach, holding that the overflights took an easement, and the government owed the landowners just compensation, *id.* at 267. Indeed, the *Causby* Court thought a remand was necessary because the lower court did not describe the easement in terms of "frequency of flight, permissible altitude, or type of airplane[,]" *id.*, implying that even

non-constant low overflights can amount to a *per se* physical taking.[7] Tellingly, despite the lack of an all day, every day occupation, *Loretto* itself later characterized the government action in both *Portsmouth Harbor* and *Causby* as a permanent physical invasion. *Loretto*, 458 U.S. at 430–31.

Taken together, these cases demonstrate that the appropriation of an easement for "intermittent public use" does not absolve government of its categorical duty to pay compensation. *Hendler*, 952 F.2d at 1377. The Ninth Circuit's decision to the contrary was not a simple application of *Nollan* and *Loretto*, but a significant limitation of the principle that "even if the Government physically invades only an easement in property, it must nonetheless pay just compensation." *Kaiser Aetna*, 444 U.S. at 180. Such a result threatens to eviscerate this Court's physical takings doctrine. If government could evade its duty to compensate by placing modest time limitations on its (or a third party's) incursions, the core protections of the Takings Clause would be relegated to cases in which government was too unimaginative to do so. "Property rights 'cannot be so easily manipulated.'" *Horne v. Dep't of Agric.*, 576 U.S. 350, 365 (2015) (quoting *Loretto*, 458 U.S. at 439 n.17).

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[7] Because they were based upon the government's actual conduct rather than a statutory authorization, cases like *Portsmouth Harbor* and *Causby* required additional fact-finding to determine the scope of the easement actually taken—and in the case of *Portsmouth Harbor*, whether the intrusions amounted to an easement or perhaps a series of torts. No such issue exists here, since the Access Regulation defines the scope of the easement.

B. The Ninth Circuit's Decision Disregarded This Court's Traditional Respect for the Right to Exclude

The Ninth Circuit's failure to apply the physical takings doctrine in this case represents a significant departure from this Court's traditional respect for the fundamental right to exclude trespassers from private property. Far from being merely one "strand" of property rights subject to regulation, the denial of the right to exclude is the quintessential element that triggers application of the physical takings doctrine. The Court in *Kaiser Aetna* declared the right to exclude "a fundamental element of the property right" that "the Government cannot take without compensation." 444 U.S. at 179–80. *Nollan* likewise relied on the primacy of the right to exclude to conclude that California could not appropriate a public beach access easement without compensation. 483 U.S. at 831. "[A]s to property reserved by its owner for private use," the *Nollan* Court declared, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Id.* (quoting *Loretto*, 458 U.S. at 433). By rejecting *per se* treatment because "the sole property right affected by the regulation is the right to exclude," Pet. App. A-18, the Ninth Circuit's decision significantly discounted this Court's precedents. There is no support for the Ninth Circuit's demotion of such a fundamental aspect of property ownership.[8]

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[8] The panel instead echoed the sole dissent in *Horne*, which argued that "[t]o qualify as a *per se* taking under *Loretto*, the governmental action must be so completely destructive to the

As particularly relevant here, this Court has also recognized the fundamental nature of the right to exclude as it arises in labor relations. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539–40 (1992) (refusing to permit union organizers to access private employer property pursuant to Section 7 of the National Labor Relations Act unless employees live on the employer's property and are otherwise inaccessible to the union). In this context, as in others, the Court recognizes the long common law tradition that protects one's "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 William Blackstone, *Commentaries on the Laws of England* *2 (1766). To date, lower federal courts and state appellate courts follow that tradition, and consistently acknowledge the fundamental nature of the right to exclude. *See* David L. Callies & J. David Breemer, *The Right to Exclude Others From Private Property: A Fundamental Constitutional Right*, 3 Wash. U. J.L. & Pol'y 39, 44–48 (2000) (collecting cases).

The panel majority charted a different course. In particular, the panel's heavy reliance on *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), reveals the extent to which the right to exclude would be diminished under the rule adopted below.

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property owner's rights—all of them—as to render the ordinary, generally applicable protections of the *Penn Central* framework either a foregone conclusion or unequal to the task." *Horne*, 576 U.S. at 379 (Sotomayor, J., dissenting). Even assuming that an easement can be said to take only "one strand" of property rights, that "one strand" is universally regarded as the fundamental aspect of property ownership. Under the panel's reasoning, *Kaiser Aetna* and *Nollan* were necessarily wrongly decided.

PruneYard—which rejected a shopping center owner's claim that California's requirement that he permit certain expressive speech on his property effected a taking—represents the low-water mark for the right to exclude. *See* Sisk, *supra*, at 407 (*PruneYard* "rested uneasily within the Court's case law from the beginning"). And this Court has repeatedly emphasized that *PruneYard*'s holding is limited to publicly accessible places like shopping malls and does not apply to property reserved for the owner's private use. *See, e.g.*, *Loretto*, 458 U.S. at 434 (in *PruneYard*, "the owner had not exhibited an interest in excluding all persons from his property"); *Nollan*, 483 U.S. at 832 n.1 (*PruneYard* was inapplicable "since there the owner had already opened his property to the general public"); *Horne*, 576 U.S. at 364 (noting that *PruneYard* concerned an "already publicly accessible shopping center"). Were *PruneYard* the rule rather than an extremely limited exception, little would remain of the right to exclude.

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The Court should grant the petition for certiorari to ensure that the right to exclude is recognized as the fundamental attribute of property ownership and to restore the force of its physical takings precedents.

III.

Certiorari Should Be Granted Because This Case Presents a Clean Vehicle to Address an Issue of Nationwide Importance

The question presented—whether government appropriation of a time-limited easement for the

benefit of favored third parties is a categorical taking—is outcome-dispositive here. Petitioners have consistently declined to press a regulatory takings claim, and instead rest their argument on the notion that the uncompensated taking of an easement constitutes a *per se* violation of the Takings Clause. As such, there is little question that Petitioners would have prevailed below had the panel not created an exception for the appropriation of easements that are limited in time.

The question presented is significant. California leads the nation in producing agriculture and is the sole producer of numerous crops such as almonds, pistachios, and walnuts. *See* U.S. Dep't of Agriculture Econ. Res. Serv., Cash Receipts by State.[9] Yet, as this case illustrates, the Access Regulation allows union organizers to enter private property of agricultural businesses and disrupt production. At last glance, union organizers used the Access Regulation to access the property of 62 agricultural businesses in one calendar year. Pet. App. G-18–G-25. And if the regulation stands merely because the organizers limit their access during busy harvest seasons, there is no reason to think that stampedes of third-party organizers will not return to Petitioners' property year after year.

The ramifications of the Ninth Circuit's rule will be felt in other contexts as well. Perhaps the longest-running property rights conflict is the fight between beachfront property owners and governments over

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[9] https://data.ers.usda.gov/reports.aspx?ID=17843#Pcb830fe12 4054416910e3a94ef0542dd_2_17iT0R0x5 (last accessed July 27, 2020).

beach access. *See generally* Deborah Mongeau, *Public Beach Access: An Annotated Bibliography*, 95 Law Lib. J. 515 (2003). In California, the Coastal Commission's official policy is "to maximize the public's access to and along the coast consistent with the rights of private property owners." *Greene v. Cal. Coastal Comm'n*, 40 Cal. App. 5th 1227, 1233–34 (2019). The Commission has long pushed the boundaries of the law in its zeal to increase public beach access. *See* J. David Breemer, *What Property Rights: The California Coastal Commission's History of Abusing Land Rights and Some Thoughts on the Underlying Causes*, 22 UCLA J. Envtl. L. & Pol'y 247, 255–82 (2004). In *Nollan*, this Court placed some important limits on the Commission's ability to use the development permitting process to effect what the Court labeled as "extortion" of property rights in exchange for a permit grant. *Nollan*, 483 U.S. at 837 (quoting *J.E.D. Assocs., Inc. v. Atkinson*, 432 A.2d 12, 14–15 (N.H. 1981)). But the Commission has found ways around *Nollan* and its successor, and continues to abuse the permitting process to obtain public access easements. *See* Breemer, *supra*, at 265–68 (detailing the Commission's reluctance to follow *Nollan* and *Dolan*). The panel opinion's rule excluding time-limited easements from categorical treatment would give the Commission another significant end-run around *Nollan* and *Dolan* by effectively allowing the appropriation of public access easements limited to high-value times—such as, for example, a Thursday through Sunday daylight hours passive recreation easement.[10]

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[10] As noted above, the California Court of Appeal once found a taking where the Commission exacted only a daylight-hours

This is not limited to California, either.[11] High-profile beach-access cases have been litigated in recent years along the Great Lakes. *See, e.g.*, *Glass v. Goeckel*, 703 N.W.2d 58, 75 (Mich. 2005) (public trust doctrine requires "limited" public easement between the low-water mark and the ordinary high-water mark of Lake Michigan); *State ex rel. Merrill v. Ohio Dep't of Nat. Res.*, 955 N.E.2d 935, 949 (Ohio 2011) (public trust extends to the "natural shoreline" of Lake Erie). Under the Ninth Circuit's rule, governments in these states could avoid the thorny conflict between alleged public and private rights to the lakeshore by simply declaring a public access easement across the lakeshore, applicable only to the daylight hours and summer months. Under such a regime, decisions such as *Nollan* and *Kaiser Aetna* might be rendered nullities.

Governments are always looking for inventive ways to avoid takings liability. *See San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 655–56 n.22 (1981) (Brennan, J., dissenting). A rule limiting the categorical treatment of easements to those applicable all day, every day, may top the list. If such a rule proliferates, property owners throughout much of the nation will see their rights greatly diminished as governments increasingly sanction invasions of their property without providing any mechanism for just compensation. Certiorari is warranted so that

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vertical access easement in exchange for a development permit. *Surfside Colony*, 226 Cal. App. 3d at 1266, 1269.

[11] Nor is it limited to coastal and labor contexts. As *Knick* and *Hendler* demonstrate, easements can be taken by government for a wide variety of purposes.

this Court may confront this burgeoning issue before the rule adopted below spreads any further.

Conclusion

This Court should grant the petition.

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Respectfully submitted,

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