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

BRIEF OF AMICUS CURIAE SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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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.

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INTEREST OF AMICUS CURIAE[1]

Southeastern Legal Foundation. Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates for constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates often before the Supreme Court. For over 40 years, SLF has advocated for the protection of private property interests from unconstitutional governmental takings. SLF regularly represents property owners challenging overreaching government actions in violation of their property rights. Additionally, SLF frequently files amicus curiae briefs in support of property owners. *See*, *e.g.*, *Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The brief will aid the Court in its consideration of the petition by explaining why the mere lack of metaphysical "permanence" should not affect the takings analysis. The nature of owner's property rights and the impact on those rights by the physical occupation is more important than any unworkable categorical rule that requires "24/7" occupation. SLF urges the Court to grant certiorari to address the important issue presented by the petition.

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1. In accordance with this Court's Rule 37.2(a), all counsel of record for the parties received timely notice of the intention to file this brief. Petitioners and Respondent have consented to this brief. No counsel for any party authored any part of this brief, and no person or entity other than amicus made a monetary contribution intended to fund its preparation or submission.

SUMMARY OF ARGUMENT

This case presents the Court a clean vehicle to resolve a long-standing issue that has confounded the lower courts, and more importantly, which has over the decades since this Court decided *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1987), deprived countless owners of their right to compensation for physical invasions of their property merely because the incursion is not deemed "permanent" enough. How long must a property owner tolerate a physical invasion in order to be compensated under *Loretto*'s *per se* rule? The panel majority (joined by the judges concurring in the Ninth Circuit's denial of *en banc* review) drew an unwarranted—but very bright—line, pointing out that the challenged California regulation does not permit union organizers to invade and occupy Petitioner's property all the time. Thus, the court below concluded, no taking. This brief makes three points:

1. The Ninth Circuit's rule focuses on the wrong thing—the duration of the invasion—and not the interference with the owner's fundamental property right to exclude.

2. Eminent domain law has never limited compensation to "permanent" takings.

3. The Ninth Circuit's conclusion is impractical because a rule based on the permanence of an invasion invites a pointless metaphysical search, when very little in this world truly is permanent.

The Court should grant review.

ARGUMENT

I. The Duration of an Invasion Is Less Important Than The Interference With The Owner's Right to Exclude

As John Maynard Keynes famously pointed out, nothing truly is "permanent," and after all, "[i]n the long run we are all dead." John M. Keynes, *A Tract on Monetary Reform* 80 (1923). Be patient enough, and *everything* is temporary. Thus, while recognizing that invasions assumed to be permanent do not require a case-specific inquiry into the public interest supporting the action and do not require a physically large intrusion, *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (permanent "minute" intrusions require compensation), this Court has never fixated on an artificial distinction between "permanent" and "temporary" invasions to determine liability, much less adopted the Ninth Circuit's absolute rule that invasions that can be deemed "permanent" are takings, while those that are less than round-the-clock are not. *See id.* (citing *United States v. Causby*, 328 U.S. 256, 265 n.10 (1946); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979)). In neither of those two cases, for example, were the invasions permanent. This Court should reject the Ninth Circuit's formulation that draws the bright-line in in the wrong place, and instead should reaffirm the rule that any direct and substantial physical invasion of private property is a taking, and requires compensation even if it is not "permanent."

When private property is pressed into public service—either by an exercise of eminent domain or by regulation under some other power—the Fifth and Fourteenth Amendments require the government to provide just compensation. The overarching purpose

of the takings doctrine is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). While the paradigmatic government action triggering compensation is an affirmative exercise of eminent domain, for nearly a century this Court has expressly recognized that if government acts under its authority to protect the public health, safety, and welfare under the police power, if the action goes "too far," it will also trigger just compensation *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). This Court has frequently cautioned against creating and applying categorical rules in all but a very narrow category of situations. *See*, *e.g.*, *Andrus v. Allard*, 444 U.S. 51, 64-65 (1979) ("[t]here is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate").

But in an area of law in which the Court generally eschews bright-line rules, *see Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) ("The temptation to adopt what amount to *per se* rules in either direction must be resisted."),[2] two categories of government actions nonetheless result in *per se* liability under the Takings Clause. First, a taking occurs when the effect of the government action deprives property of its economically beneficial uses. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Second, perhaps the brightest of the bright-line rules is that in cases of physical invasion—a distinct species of public

[2] *See Arkansas Game and Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012) ("In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules.").

use of private property—the loss of use, if any, is not a part of the takings equation. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U. S. 302, 322 (2002) ("When the government physically takes possession of an interest in property for some public purpose, it has a *categorical* duty to compensate the former owner.") (emphasis added) (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)). Rather, it is the invasion of property rights itself which is *mala in se*. Thus, when the government has "compel[led] the property owner to suffer a physical 'invasion' of his property," the government must pay just compensation. *Lucas*, 505 U.S. at 1015 (citing *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (imposition of navigational servitude on private waterway was a taking); *Loretto*, 458 U.S. at 421 (requirement that property owner "permanently" allow installation of small cable TV box a taking); *Causby*, 328 U.S. at 265 & n.10 (frequent invasion of airspace)). *See also Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (exaction requiring an easement allowing the public to walk across land). The compensation owed for a relatively minor invasion may be correspondingly minor, but that is a question of valuation, not of takings liability.

Loretto is perhaps the most famous example. The Court was presented with an physical invasion of the most trivial kind: a regulation which mandated that Ms. Loretto and other private property owners allow installation of a television cable "slightly less than one-half inch in diameter and of approximately 30 feet in length," "directional taps," and "two large silver boxes" (about "18" x 12" x 6") on their apartment buildings. *Loretto*, 458 U.S. at 422, 438 n.16. The Court held that the invasion was a taking:

> Teleprompter's cable installation on appellant's building constitutes a taking under the traditional test. The installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall.

Id. at 438 (footnote omitted).

The Court rejected the dissent's argument that "a taking of about one-eighth of a cubic foot of space is not of constitutional significance." *Id*. at 438 n.16. Instead, the Court held that the magnitude of the invasion is "not critical: whether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox." *Id*. The Court reaffirmed "[t]he traditional rule" that a physical invasion is a taking without regard to its magnitude. The Court held that even small invasions are "qualitatively more severe than a regulation of the use of property" because "the owner may have no control over the timing, extent, or nature of the invasion." *Id*. at 436. There was no allegation (or proof) that the installation of the cable equipment resulted in any loss of Loretto's use of the roof or her building, and indeed a good argument could have been made that cable television service to Loretto's tenants actually enhanced her uses and the value of her building. *See id*. at 437 n.15 (noting the dissent's argument that the regulation "likely increases both the building's resale value and its attractiveness on the rental market"). Instead, the Court viewed the invasion itself as the constitutional wrong, and presumed that the equipment installation deprived Loretto of her uses to the extent of the invasion, even though she was free to use the rest of her property without interference:

> Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Id. at 436 (citing *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)). *See also Nat'l Bd. of YMCA v. United States*, 395 U.S. 85, 92 (1969) ("Ordinarily, of course, government occupation of private property deprives the private owner of his use of the property, and it is this deprivation for which the Constitution requires compensation"); *Pumpelly v. Green Bay & Mississippi Canal Co*., 80 U.S. (13 Wall.) 166, 167 (1871) (erection of a dam across a river by a canal company raised the level of a lake, flooding Pumpelly's property; the Court concluded that where property is invaded by water, the flood effectually destroys or impairs its usefulness, and a taking occurs); *United States v. Cress*, 243 U.S. 316, 328 (1917) (even where a property is only affected by intermittent floodwaters, a taking may still occur).

But despite *Loretto*'s inexact language about "*permanent* physical occupation," *see Loretto*, 419 U.S. at 421 (emphasis added),[3] this Court has never focused

[3] Imprecise *dicta* in takings opinions has been pointed out by this Court before, so great care should be taken here. *See*, *e.g*.,

solely on the duration of the trespass as the dispositive question.[4] Instead, the analysis has focused on the intrusion on the owner's right to exclude (the "stick" in the "sticks in a bundle" property metaphor). It is the entry and breach—the trespass "*quare clausum fregit*" in common law terms—that result in this Court's physical invasion rule, where only in unusual circumstances will a trespass not be considered to a taking. For example, in *Nat'l Bd. of YMCA v. United States*, 395 U.S. 85 (1969) this Court concluded that the government was not liable for a taking after rioters damaged a building after military troops temporarily occupied it. The occupation was not planned and was extremely brief—the troops occupied the building for a single night—and the rioters had caused the majority of the damage to the building prior to the government occupation. Moreover, the troops did not actually interfere with the owner's use of the building, since it was already under siege by the rioters. *Id.* at 93. Consequently, the Court held that there was no taking because "the temporary, unplanned occupation of petitioners' buildings in the course of battle does not constitute direct and substantial enough government involvement to warrant compensation under the Fifth Amendment." *Id.* The rule to be gleaned from *YMCA* is that government invasions that are not emergencies, and that are "direct and substantial" interferences

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Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 542 (2005) ("Although *Agins*' reliance on due process precedents is understandable, the language the Court selected was regrettably imprecise.").

[4] As Justice Blackmun's *Loretto* dissent notes, the record in that case did not contain evidence of the size of the cable boxes on the roof, or even their existence. *See Loretto*, 458 U.S. at 443 n.2 (Blackmun, J., dissenting).

with an owner's right to exclude are takings and require compensation. This Court's opinion in *Arkansas Game* relied upon and reinforced that rule. There, the fact that the flooding of the property was recurring and not "permanent" was no bar to recovery. *Arkansas Game*, 568 U.S. at 31.

It is the extent of the infringement on the owner's property rights that matter, not the duration, and there is no more fundamental right bound up in the notion of "property" than the right to exclude. *See Prune-Yard Shopping Center v. Robins*, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring) ("Indeed, our cases demonstrate that there are limits on governmental authority to abolish 'core' common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy."). *See also Lingle*, 544 U.S. at 539 ("[P]hysical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests.") (citing *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan*, 483 U.S. at 831-832; *Loretto*, 458 U.S. at 433; *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). By contrast, California's regulations diminish Petitioner's right to exclude as the most essential stick in the property bundle.

II. Eminent Domain Law Recognizes the Obligation to Provide Compensation For Less-than-Permanent Takings

Similarly, eminent domain law has never drawn a distinction between a permanent taking (compensable), and a temporary taking (noncompensable). The duration of the invasion is simply one of the factors to be considered when calculating the amount of just compensation. When condemning property, the government is not required to take an infinite fee simple absolute estate. Thus, the government is liable to pay compensation when it temporarily uses private property. *See*, *e.g.*, *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949). Compensation is also owed if the government abandons a taking, thus rendering it "temporary." Similar rules should govern inverse condemnation actions, since takings law is premised on the idea that in certain instances, the government is obligated to pay compensation even if it has not invoked its eminent domain power. *See First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 316 (1987) ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."). Any questions identifying the duration of the occupation should be questions of compensation, not liability:

> [The extent of impairment, like the duration of the intrusion, is not irrelevant. The greater the impairment, the more compensation required. If the owner's use of the property is not impaired at all, then maybe no compensation should be required. But that is not because the land was not

> taken. It is because justice may not require compensation for a taking that does not impair the owners use at all.

Alan Romero, *Takings by Floodwaters*, 76 N.D. L. Rev. 785, 789 (2000). *See also United States v. Cress*, 243 U.S. 316, 328 (1917) ("so long as the damage is substantial, that determines the question [of] whether there is a taking"). The "damage" referred to here is not the loss of value or the extent of the compensation owed. *Loretto* made that much clear. That case properly focused on the "relatively few problems of proof" the traditional bright-line takings rule entails, *Loretto*, 438 U.S. at 419, and concluded by noting that evidence about the extent of the invasion (in other words, the loss of the owner's use resulting from the invasion) was a matter of the just compensation owed, not the question of whether there had been a taking. *Id*. at 441 ("The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand.") (footnote omitted); *id*. 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."). So, too, with the temporal extent of the occupation.

III. Nothing is Truly "Permanent"

In addition to jurisprudential limitations, the search for "permanence" is a chimera. It is, ultimately, a fruitless metaphysical endeavor, more suited for philosophers than judges. This Court's decisions have reflected that: California surfers weren't crossing the Nollan property day and night, nor were they stopping for any length of time during their walk; Army Air

Corps B-25's were not circling farmer Causby's chickens 24/7; and even the CATV equipment affixed to Ms. Loretto's Upper West apartment building today is very likely not the same box and cables there when this Court considered them "permanent" in 1982.[5] The Court need look to a more recent case in which a cellular telephone company offered to remove its equipment from private property in response to a *Loretto* takings claim to see why "permanence" *vel non*, cannot be where the line is drawn between compensable and noncompensable physical invasions. *See Corsello v. Verizon New York, Inc.*, 908 N.Y.S.2d 57, 70 (N.Y. App. Div. 2010) ("Verizon responds that there can be no permanent physical occupation of the plaintiffs' property where it has offered to remove the equipment servicing other buildings. . . Moreover, even if Verizon's offer could be considered, it would still not preclude the trier of fact from finding that a de facto taking had occurred, since, where an appropriating entity has interfered with the owner's property rights to such a degree that the conduct amounts to a constitutional taking, it is required to purchase the property from the owner."), *aff'd*, 967 N.E.2d 1177 (N.Y. 2012).

The Ninth Circuit, however, adopted a contrary categorical rule: no compensation because California's regulations limit the time-place-manner of labor organizers' entries, even if there's no end date on Petitioner's loss of the right to exclude. This Court has never adopted such a crabbed, technical view of the temporal nature of the invasion. It is not so much the

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[5] Today, there are cables still affixed to the building at 303 West 105th Street. *See* Inversecondemnation.com, *Takings Pilgrimage, Upper West Side Edition*, https://www.inversecondemnation.com/inversecondemnation/2017/01/takings-pilgrimage-upper-west-side-edition.html.

length of the occupation that is important, but the duration of the loss of the property right infringed upon. California's regulations have imposed on Petitioner a perpetual easement-at-law, allowing public use of its property as a venue for organized labor speech, for free.

CONCLUSION

The Court should grant the petition to review this important question.

Respectfully submitted.

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