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

REPLY BRIEF OF PETITIONERS

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The California Agricultural Labor Relations Board's access regulation gives union organizers the right to invade the private property of agricultural employers for three hours per day, 120 days per year. The Board does not dispute that, under California law, the regulation takes an easement from Petitioners. They disagree only that the appropriation of that easement effects a *per se* physical taking. According to the eight-judge dissent from denial of rehearing en banc, the panel decision created a circuit split with the Federal Circuit and deviated from this Court's precedent. This case presents a clean vehicle to decide the question presented—one that will affect the rights and responsibilities of property owners and government agencies across the country. The Court should take this opportunity to settle the debate.

I.

The Parties' Disagreement on the Merits Underscores the Need for This Court's Review

The Board focuses much of its response on disputing Petitioners' interpretation of this Court's takings precedents—particularly *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Its discussion amplifies the need for this Court's review. The debate over the proper interpretation of these seminal takings cases has divided the Ninth Circuit and now divides the States as well. *See* Brief of Oklahoma, et al., as Amici Curiae, at 4. Even if the Board's argument on the merits were ultimately correct, the

state of the disagreement demonstrates the need for certiorari. This Court should grant the petition to add much-needed clarity and certainty to a critical area of takings law.

In any event, the Board's arguments on the merits are unpersuasive. Perhaps most importantly, the Board obscures the panel opinion's actual holding—that appropriation of an easement is not a *per se* taking unless access is permitted all day, every day—and attempts to re-characterize it as the *rejection* of a bright-line rule. *See* Opposition Brief at 13–14. But the panel below left no doubt that it thought an easement must permit 24/7/365 access before it will be considered a *per se* physical taking. App. A-17–18 (panel opinion); App. E-26 (opinion dissenting from denial of rehearing en banc) ("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.'" (citing App. A-17–18 (panel opinion))).

This Court evaluates the taking of an easement under the physical takings framework. *Kaiser Aetna* established the general rule that "even if the Government physically invades only an easement in property, it must nonetheless pay just compensation." 444 U.S. at 180. *Loretto* established that a permanent physical occupation of property, no matter how small, amounts to a *per se* taking. 458 U.S. at 434–35. *Nollan* then clarified that an easement—like the one taken in *Kaiser Aetna*—qualifies as a permanent physical occupation under *Loretto*. *Nollan*, 483 U.S. at 831–32. To make this analytical leap, the *Nollan* Court relied on *Kaiser Aetna*'s holding that the fundamental right to exclude others from private property "falls within

this category of interests that the Government cannot take without compensation." *Kaiser Aetna*, 444 U.S. at 180; *see Nollan*, 483 U.S. at 831. Since imposition of an easement takes the right to exclude, *Nollan* reasoned that it must qualify as a *per se* taking. *Nollan*, 483 U.S. at 831–32. As a result, *Loretto*'s characterization in dicta of the "easement of passage" in *Kaiser Aetna* as a mere temporary occupation could not have survived *Nollan*.

The Board's misreading of *Nollan* and its predecessors mirrors the panel's. Like the panel, the Board posits that *Nollan*'s holding is limited to the appropriation of easements that grant "permanent" or "continuous" access to private property.[1] Yet nothing in *Nollan* suggests—much less *requires*—this limitation. To be sure, the Court understood the easement in *Nollan* to be applicable all day, every day. *See id.* at 832. But, for good reason, it never held that all day, every day access was necessary to trigger application of the physical takings rule.[2] Such a requirement would be contrary to the nature of

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[1] The Board's interpretation of *Nollan* suggests that it *does* in fact view the panel opinion as establishing a "bright-line rule" that any occupation less than all day, every day is not a *per se* taking.

[2] The Board argues that in distinguishing *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), *Nollan* adopted its view of permanence. More likely, the footnote in *Nollan* simply sought to put some daylight between the facts of that case and *PruneYard*. *See Nollan*, 483 U.S. at 832 n.1. In future cases, the Court has not relied on any lack of permanent access to distinguish *PruneYard*. *See Horne v. Dep't of Agric.*, 576 U.S. 350, 364 (2015) (characterizing *PruneYard* as holding that "a law limiting a property owner's right to exclude certain speakers from an already publicly accessible shopping center did not take the owner's property").

easements, which often restrict the time, place, and manner of access. *See* Brief of Oklahoma, et al., as Amici Curiae at 8–12. An easement that is limited in these ways is nevertheless a significant "property interest" under the law of most states, including California. *Nollan*, 483 U.S. at 831; *see also* App. E at 16–18 (dissent from denial of rehearing en banc); Brief of Oklahoma at 8–12; *Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560, 1571–72 (Fed. Cir. 1994) (explaining that the taking of a property interest requires compensation); *Surfside Colony, Ltd. v. Cal. Coastal Comm'n*, 226 Cal. App. 3d 1260, 1266, 1269 (1991) (applying *Nollan* to a daylight-hours beach access easement). *Nollan* does not permit the government to avoid takings liability simply by placing a restriction on the easement it takes.

Since the Board agrees that the access regulation takes an easement from Petitioners, the dispositive question here is whether the limited nature of the easement renders the rules of physical takings inapplicable. It does not.[3] This Court's precedents establish that physical takings are categorically distinct from regulatory use restrictions—not in the least because a physical invasion takes a discrete

[3] The Board suggests that the expiration of access rights after the conclusion of a certification election materially limits the rights of union organizers. It does not. If the union is certified, the provision on post-election union access essentially becomes obsolete because unions can access employers for non-organizational purposes. *See* Cal. Code Regs., tit. 8, § 20900(e)(1)(c). If the union is not certified, the union may access the property 30 days prior to the following election, which can be held 12 months after the previous election. *See id.*; Cal. Lab. Code Ann. § 1156.5. In all events, any time-limits the Board may place on the easement goes toward compensation, not whether there has been a taking in the first place.

property interest, whether in the form of a permanent structure or an access easement, and deprives the property owner of the fundamental right to exclude trespassers. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321–22 (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 . . . regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof."); *Kaiser Aetna*, 444 U.S. at 179–80 ("the 'right to exclude,' . . . falls within this category of interests that the Government cannot take without compensation"). The physical invasion itself establishes a taking—the extent of the invasion determines the amount of compensation due. *Loretto*, 458 U.S. at 437.

Indeed, were the Board correct that some limited easements should be evaluated as regulatory takings under the ad hoc inquiry of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), there would be no principled way for courts to identify which easements merit *per se* treatment. Such an approach would encourage more confusion in the lower courts and leave property owners and governments in the dark as to their rights and responsibilities. Petitioners' proposed rule requires no such judicial guesswork and is based on the traditional understanding of property interests.

This Court's review is necessary to settle the weighty disagreement between the parties, the states, and the judges of the Ninth Circuit. Only this Court can provide the authoritative reading of the Takings Clause and provide clarity to property owners and

government agencies alike. While Petitioners disagree with the Board's framing of the relevant precedents, the legal dispute between the parties amplifies the need for certiorari on the important question presented in this case.

II.

The Panel Decision Created a Clear Circuit Split on the Question Presented

The Board next attempts to obscure the division between the panel opinion below and the Federal Circuit's decision in *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991), but the conflict is clear. The *Hendler* court considered two discrete potential takings, both under the "[t]raditional [p]hysical [o]ccupation [t]heory." *Id.* at 1375. The first involved the government's placing of wells on the property. There, the Federal Circuit rejected the argument that because the wells would not be on the plaintiffs' property permanently, their placement did not rise to the level of a *per se* taking. The court limited "temporary" occupations to "those governmental activities which involve an occupancy that is transient and relatively inconsequential, and thus properly can be viewed as no more than a common law trespass *quare clausum fregit*." *Id.* at 1377. Since the wells were permanent under this understanding, the court found their presence to effect a physical taking under *Loretto*. *Id.*

The *Hendler* court then *independently* considered whether the government's asserted right of access to periodically service the wells effected a *per se* physical taking. *See id.* at 1377–78. The court held that the periodic access was akin to "an easement not unlike

that claimed in *Kaiser Aetna*." *Hendler*, 952 F.2d at 1378. *Kaiser Aetna* and *Nollan*, it said, compelled the conclusion that "such activity, even though temporally intermittent, is not 'temporary.' It is a taking of the plaintiffs' right to exclude, for the duration of the period in which the wells are on the property and subject to the Government's need to service them." *Hendler*, 952 F.2d at 1378. It is this holding—that appropriation of an easement permitting intermittent access to private property effects a *per se* taking—that the Ninth Circuit disagreed with in the panel opinion below. *See* App. E-21–22 & n.8 (dissent from denial of rehearing en banc).

In its attempt to minimize the import of *Hendler* and the resulting circuit split, the Board cites the Federal Circuit's later decision in *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1355–57 (Fed. Cir. 2002). But *Boise Cascade* involved "extremely limited and transient" incursions of spotted owl surveyors, *see id.* at 1357, precisely the type of "transient and relatively inconsequential" invasions the *Hendler* court qualified as "temporary" because they amount to "no more than a common law trespass." *Hendler*, 952 F.2d at 1377. The *Hendler* court, on the other hand, specifically noted that the "Government behaved as if it had acquired an easement" to access the plaintiffs' property. *Id.* at 1378. Since the government's much narrower incursions in *Boise Cascade* did not amount to the taking of an easement, *Hendler* did not apply.

The taking of the right to exclude in the form of an easement merits *per se* treatment because an easement, even with limitations, is a distinct property interest. That is precisely how the Federal Circuit in *Florida Rock* characterized *Hendler*'s dual holdings.

See Fla. Rock, 18 F.3d at 1572 (noting that the *Hendler* court had no difficulty "finding *a property interest taken*—if it needs a label, call it a limited co-tenancy *with an easement for access*—when the Government sank wells on an owner's property and periodically entered to service the wells and to make tests of the water." (emphases added)). A trespass, on the other hand, is not the taking of a property interest. *Hendler* and *Boise Cascade* simply fall on opposite sides of the line between an easement and a trespass. *See Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 330 (1922) (discussing the difference between incursions rising to the level of the taking and those that are "only occasional torts").

In short, the lesson of *Hendler* is that if incursions rise to the level of an easement, the easement need not permit continuous access to qualify as a *per se* taking. *See Knick v. Twp. of Scott*, 862 F.3d 310, 328 (3d Cir. 2017), *rev'd on other grounds by* 139 S. Ct. 2162 (2019) (citing *Hendler* for the proposition that the appropriation of a limited easement constitutes a physical occupation). *Boise Cascade* involved a disparate factual scenario, invasions so limited that they could hardly be characterized as an implied easement. It casts no doubt on the existence of a circuit split between the Ninth and Federal Circuits in this case.

III.

This Case Presents a Clean Vehicle To Resolve the Question Presented

For several reasons, this case is the ideal vehicle for the Court to resolve the question presented. The parties' dispute is entirely a matter of law, resolution of that legal dispute would effectively resolve the case, and there are no other claims that would complicate this Court's review. The case concerns the regulation of agriculture in the nation's largest agricultural state. And the dissents filed at both the panel and en banc stage ensure that the lower courts have thoroughly vetted the issue and this Court will have no shortage of perspectives to consider at the merits stage.

The Board maintains that "[t]here is no indication that the access regulation poses a significant problem for California farms."[4] Opposition Brief at 20. California's largest agricultural organization, a federation of 53 county Farm Bureaus which together have more than 24,000 agricultural members, disagrees and has spent its resources opposing the access regulation for over 40 years. *See* Brief for California Farm Bureau Federation as Amicus Curiae at 2–3. It views the access regulation as "a usurpation of [farmers'] private property rights and a nullification of trespass laws that otherwise apply to their farms." *Id.* at 4. The State's requirement that

[4] Of course, such a general assertion irrelevant to the merits of Petitioners' takings claim—the character of a physical invasion of property is such that even minor intrusions merit compensation.

agricultural employers cede property rights to union organizers imposes a special burden on farmers.

The Board suggests that the recent *Knick* decision should counsel this Court to wait for more cases to further flesh out the issue. Opposition Brief at 18–19. But further percolation is unlikely to do anything other than add to the confusion already evident by the various opinions in this case. There is no reason to wait for further uncertainty to develop. What is more, the Ninth Circuit's opinion is likely to sow further confusion into state takings cases, since the law of many States requires compensation for the taking of a limited easement. *See* Brief for Oklahoma, et al., at 12 ("In states like many of the Amici States, this case would be a clear taking. Our courts prohibit the taking of a valuable property interest without just compensation, and a time-limited easement is a valuable property interest. Thus, if this taking had occurred in our states, it would require just compensation.").

Next, the Board contends that this Court could wait for a beach-access easement case rather than resolve the question presented in the context of the access regulation. This case, the Board says, "turns on the specific limitations on agricultural property access under the Board's regulation." Opposition Brief at 20. While the impact of the regulation on California growers warrants granting the petition, the legal question in this case is not dependent on the specific agricultural context presented here. Rather, the Court's ultimate disposition of this case will affect whether agencies like the California Coastal Commission may extract easements from coastal

landowners free of charge simply by placing some restrictions on access.[5]

Finally, the Board argues that because California law requires it to adhere to the precedents under the National Labor Relations Act, Petitioners may have a claim that the access regulation exceeds the Board's authority. But Petitioners did not raise such a claim, and the Board never raised this argument as a potential defense below. The access regulation has continued in force for nearly 30 years since this Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539–40 (1992). The Board may be able to raise this defense on remand, but the Ninth Circuit decided a question of federal takings law that is now before this Court.

This petition cleanly presents an important property rights question. The lower courts are divided. The judges of the Ninth Circuit are divided. Only this Court can resolve the debate and provide much needed clarity and certainty to Americans.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[5] None of the opinions in this case has explained how the easement in *Surfside Colony* might be distinguished from this one, particularly under the Ninth Circuit's bright-line rule. Should the Ninth Circuit's decision stand, there is no reason to believe the Commission will be bound by *Surfside Colony*.

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Respectfully submitted,

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