No. 20-107

IN THE
Supreme Court of the United States

CEDAR POINT NURSERY, ET AL.,
Petitioners,

v.

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

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

BRIEF FOR THE SERVICE EMPLOYEES INTERNATIONAL UNION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Service Employees International Union (SEIU) submits this brief *amicus curiae* with the parties' consent.[1] SEIU is an international labor organization representing 2 million workers belonging to more than 150 local union affiliates. SEIU and its affiliates often seek access to employer property for purposes of organizing new workers and representing existing workers under access rules whose constitutionality would be called into doubt if Petitioners' interpretation of the Takings Clause were accepted.

STATEMENT

Shortly after California passed the Agricultural Labor Relations Act (ALRA), which for the first time extended to farmworkers the right to form unions and the right to engage in collective bargaining to better their working conditions, the California Agricultural Labor Relations Board (ALRB) held hearings to determine whether and to what extent California's farmworkers would be in a position to learn about these rights and the advantages of exercising them. *See Henry Moreno*, 3 A.L.R.B. No. 40, at 4 (1977). The ALRB found that California's farmworkers, nearly all of whom are seasonal workers who move from employer to employer as different crops become ready to harvest—and many of whom do not speak English and are illiterate even in their native tongues—were, as a

[1] No counsel for a party authored this amicus brief in whole or in part and no person other than SEIU has made any monetary contributions intended to fund the preparation or submission of this brief. Both parties consented to the filing of this brief.

practical matter, inaccessible to union organizers interested in communicating with them about the advantages of self-organization. *See Agric. Labor Rels. Bd. v. Superior Ct.*, 546 P.2d 687, 702 (Cal. 1976). Even among those farmworkers who did not live on the land of their employers, many lived in transient dwellings such as motels. *Id.*

To balance the interest in informing farmworkers about the advantages of self-organization with the property interests that agricultural employers have in their open fields, the ALRB promulgated the regulation at issue here. Cal. Code Regs. tit. 8, § 20900. The regulation allows union organizers a restricted right of access to those parts of the fields owned by agricultural employers where the employers themselves allow their employees to congregate before and after work and for lunch. *Id.* § 20900(e). The access right may be exercised for no more than four 30-day periods per year, and for no more than three one-hour periods per day (one hour before work, one after, and one during lunch). *Id.* §§ 20900(e)(1), 20900(e)(3). Organizers may use the access right only to speak to employees about the advantages of exercising their statutory rights, and may not engage in disruptive behavior. *Id.* § 20900(e)(4)(C). The regulation thus limits access "in purpose, in time and place." *Agric. Labor Rels. Bd.*, 546 P.2d at 692.

SUMMARY OF ARGUMENT

Petitioners ask this Court to adopt a "simple" rule that would classify as a "per se taking" any regulation requiring landowners to provide periodic access to their property to third parties whom the owner otherwise could have excluded. They say that all such

regulatory access requirements—even if sharply restricted in area, in time, and in purpose—require the government to pay compensation to the landowner for the taking of what Petitioners define as an "easement in gross."

Petitioners' proposed rule should be rejected for three reasons.

First. The proposed rule is inconsistent with decades of precedents under the National Labor Relations Act, including precedents of this Court. The National Labor Relations Board, from the inception of the NLRA, has held (i) that the property right that an employer would otherwise possess to exclude off-duty employees from its premises must yield to the employees' statutory right to communicate with their fellow employees; and (ii) that this same employer property right must yield, albeit in a much narrower range of circumstances, to employees' right to hear about the advantages of unionization on employer property from nonemployee organizers.

If Petitioners' theory as to what constitutes a Fifth Amendment "taking" were applied to the NLRA access rules just described, those rules—which have been enforced with this Court's approval from the 1940s forward—would be unconstitutional, as they would effectuate "per se" takings. Though Petitioners do not acknowledge this reality, perhaps out of a recognition that to do so would reveal how radical their takings theory truly is, their "simple" proposed

rule cannot be reconciled with this Court's NLRA access jurisprudence.

Second. Petitioners' proposed rule is inconsistent with this Court's takings jurisprudence.

While Petitioners' position is that any state law that would authorize a person to periodically enter the land of another to take some action effectuates a "per se" taking, this Court, in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), unanimously upheld a law that did precisely that. The law required shopping center owners to allow onto their property individuals who were not there for the owner-authorized purposes of shopping, dining, strolling, or working but instead were there, over the owner's objection, to engage in speech and petitioning activities directed to those who were on the property at the owner's invitation. In upholding that law, the Court applied its *regulatory* takings jurisprudence and did not treat the right of access for speech and petitioning that the law created as a "per se" taking.

Third. If taken at face value, Petitioners' proposed rule would imperil numerous common types of access regulations previously considered uncontroversial, thereby seriously weakening the ability of government at all levels to function effectively to advance the public interest.

We say "if taken at face value," because even the Petitioners' most prominent amici—the United States and the Chamber of Commerce—recoil at the implications of Petitioners' rule in its proposed form. These amici urge the Court to recognize a pair of amorphous exceptions to Petitioners' proposed rule—a "police

power" exception and a "constitutional conditions" exception—that presumably would function as affirmative defenses.

These exceptions are so indeterminate and so poorly explained by amici that it is (a) unclear why the ALRB regulation at issue here would *not* be saved from invalidation by the proposed exceptions, and (b) equally unclear why the sorts of longstanding and popular health-and-safety regulations that amici wish to preserve *would* be saved by them.

Moreover, it is unclear as to how amici's proposed exceptions would apply to other types of regulation. As one example, consider a law providing that private schools must allow deaf students to bring a sign-language interpreter into classrooms with them if they are willing to pay the cost of the interpreter's time. It is impossible to say whether this law would be saved by amici's proposed exceptions.

This Court has stressed that regulations falling into the "per se" takings category are relatively rare. But even when the first Restatement of Torts was published in 1934, regulations providing governmental representatives and private parties with periodic access to others' property were so ubiquitous that the authors devoted Section 211, captioned "Entry Pursuant to Legislative Authority or Duty," to that topic, and observed in the commentary that "[w]hether the actor is a public official or a private person is immaterial to the existence of the privilege." Restatement (First) of Torts § 211 & cmt. d (1934).

While regulations of this kind, if they go too far in restricting a property owner's right to exclude, are

subject to invalidation under the regulatory takings doctrine, they are not categorically unconstitutional.

ARGUMENT

Petitioners ask this Court to adopt a rule that would classify as a "per se taking" any "law" or governmental "course of conduct" requiring landowners to provide periodic access to their property to third parties whom the owner otherwise could have excluded. Pet'rs' Br. 1. Petitioners' proposed "per se" classification would apply even where the access is sharply restricted in area, in time, and in purpose: *in area*, only to that portion of the property where the owner, for its commercial advantage, already allows other third parties to congregate; *in time*, only to those hours in the day when those other third parties are expected to be congregating on the premises; and *in purpose*, only to allow the access recipient to meet and talk with those other third parties pursuant to the exercise of a statutory right—here, the right accorded to farmworkers to learn about the advantages of self-organization from a union.

According to Petitioners, *all* periodic-access regulations—no matter how restricted in area, time, and purpose—"function as if the government had taken an easement." Pet'rs' Br. 1. From that premise, Petitioners ask the Court to adopt the following categorical rule: "whenever the government expresses the intent—either by force of law or through a course of conduct—to appropriate a time-limited easement, it effects a per se taking." *Id.* Petitioners treat the breadth and sweep of their proposed rule as a virtue, touting it as a "simple," "bright-line," and "easy to apply" standard for determining when a law or

regulation providing for time-limited access to property is unconstitutional if no compensation is paid to the property owner. Pet'rs' Br. at 16, 29, 33, 35.

Petitioners say that "[b]y that standard, Petitioners Cedar Point Nursery and Fowler Packing Company should win." Pet'rs' Br. 1. At the same time, however, Petitioners make *no* claim that they should win under the multi-factor test applicable to *regulatory* takings. That test requires courts to consider the character of the government action, the impact of the action on the property owner's parcel, and the impact on the owner's investment-backed expectations. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

As we will show, Petitioners' proposed categorical rule is inconsistent with decades of precedents under the National Labor Relations Act, including NLRA precedents of this Court. The proposed rule is inconsistent as well with this Court's takings jurisprudence. And, if taken at face value, the proposed rule would not only require jettisoning established precedents, it would imperil numerous common types of access regulations previously considered uncontroversial, thereby seriously weakening the ability of government at all levels to function effectively to advance the public interest.

Even the Petitioners' most prominent amici—the United States and the Chamber of Commerce—recoil at the implications of Petitioners' proposed rule if taken at face value. Recognizing that application of the proposed rule in that form would lead to invalidation of common, longstanding, and widely accepted health-and-safety regulations, they devote considerable space to urging the Court to recognize a pair of

amorphous exceptions to Petitioners' proposed rule. These exceptions may mitigate some of the proposed rule's pernicious effects, but they also deprive it of the simplicity and predictability that Petitioners trumpet as its signal virtue. Worse, they raise the specter that the "rule" will simply become a vehicle through which unelected judges pick and choose access regulations for "per se" invalidation based on policy preferences, not on neutral property-law principles or in accordance with the time-tested factors used in this Court's regulatory takings jurisprudence.

A. Petitioners' Theory Is Inconsistent With This Court's NLRA Jurisprudence

1. Section 7 of the National Labor Relations Act guarantees to "[e]mployees" "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 for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8 of the Act protects those employee rights against employer "interfer[ence], restrain[t], or coerc[ion]." *Id.* § 158.

The NLRA's text makes no reference to property rights, whether in employer premises or otherwise. Under common-law property principles, employees are invitees of their employer but become trespassers both when they enter or remain on employer premises outside the periods authorized by the employer and when they engage in activities on employer property beyond the scope of those permitted by their employer. *See* Restatement (First) of Torts § 170 (1934) ("A consent given by a possessor of land to the actor's presence thereon during a specified period of time

does not create a privilege to enter or remain on the land at any other time."); *id.* § 168 ("A conditional or restricted consent to enter land creates a privilege to do so only in so far as the condition or restriction is complied with.").

2. Notwithstanding these common-law property principles, the National Labor Relations Board, with this Court's approval, has held from the inception of the NLRA that § 8 bars employers from adopting or enforcing rules that prohibit employees from entering employer property before their shift begins or remaining on the property after their shift ends for the purpose of soliciting other employees to join a union. The leading early case on this point is *Peyton Packing*, 49 N.L.R.B. 828 (1943), *enforced sub nom. NLRB v. Peyton Packing Co.*, 142 F.2d 1009 (5th Cir. 1944). In *Peyton Packing*, the Board held that because "[t]ime outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property," it is "not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property." *Id.* at 843. "Such a rule must be presumed to be an unreasonable impediment to self-organization." *Id.*

In *Republic Aviation v. NLRB*, 324 U.S. 793, 804 (1945), this Court approved the *Peyton Packing* rule, finding it to be grounded in a proper interpretation of § 7 of the NLRA. On that basis, the Court upheld an NLRB decision finding that an employer who prohibited its employees from distributing union literature

in its worksite parking lot before or after their assigned shifts had interfered with the employees' § 7 rights. *Id.* at 804-05. In so holding, the Court firmly established that § 7 vested off-duty employees with a new right of access to their employer's premises that they lacked under common-law property principles.

In a distinct but equally venerable line of cases, the NLRB has held, also with the approval of this Court, that, under circumstances much more limited than those applicable to *employees*, employers sometimes must provide access to employer property to *nonemployee* union organizers who wish to communicate with employees. *See NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 111, 113 (1956).

First, an employer must provide access to union organizers when the employer has granted access to similarly situated third parties. *NLRB v. Stowe Spinning Co.*, 336 U.S. 226, 233 (1949); *Lucile Salter Packard Children's Hosp. v. NLRB*, 97 F.3d 583, 587 (D.C. Cir. 1996). Second—and more directly pertinent to the instant case—if the location of a worksite and the living arrangements of the employees place the employees "beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property." *Babcock*, 351 U.S. at 113. Classic locations that meet this test are lumber camps and mountain resorts. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539-40 (1992) (citing *NLRB v. Lake Superior Lumber Corp.,* 167 F.2d 147 (6th Cir. 1948) (lumber camp), and *NLRB v. S & H Grossinger's Inc.*, 372 F.2d 26 (2d Cir. 1967) (resort)).

Nonemployees' access is limited to these particular circumstances because nonemployees are not themselves directly protected by § 7; their claim to access is one step removed, resting on the principle that the *employees'* § 7 "right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others." *Babcock*, 351 U.S. at 113. Put another way, the right that a nonemployee organizer has under the NLRA to speak to employees on an employer's property "is a derivative of the right of that employer's employees to exercise their organization rights effectively." *Sears, Roebuck & Co. v. San Diego Cnty. Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978). *Cf. Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (even speech communicated by speakers who are not covered by the First Amendment enjoys some protection, as "[i]t is now well established that the Constitution protects the right to receive information and ideas") (citing *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)).

3. If Petitioners' theory as to what constitutes a Fifth Amendment "taking" were applied to the NLRA access rules just described, those rules, which have been enforced with this Court's approval for decades, would be unconstitutional, as they would effectuate "per se" takings without providing the employer with compensation. Though Petitioners do not acknowledge this reality, perhaps out of a recognition that to do so would reveal how radical their takings theory truly is, a review of the elements of their theory makes it abundantly clear that the theory is incompatible with NLRA access rules developed by the NLRB and approved by this Court.

The Petitioners' takings theory begins with the premise that the access right created by the California ALRB regulation is a type of "easement in gross." Pet'rs' Br. 20. In support of that premise, Petitioners cite to Judge Ikuta's dissent below—indeed, only to that dissent. *Id.* 20-21. The dissent's full definition of an "easement in gross" is: "[t]he right to enter onto the land of another to take some action," App. E-23—a definition that the dissent says the ALRB regulation satisfies by giving union organizers "the right to enter onto employers' private property to 'meet and talk with employees and solicit their support,'" *id.* (cleaned up). Building on that premise, the Petitioners' takings theory concludes by asserting that any regulation that confers an easement in gross over a landowner's property constitutes a "per se taking" of that property. Pet'rs' Br. 23.

The NLRA access rules meet Petitioners' definition of an "easement in gross" in the same way that the ALRB's access regulation does. Each of the NLRA rules confers on persons who otherwise would be trespassers (off-duty employees and nonemployee organizers) "the right to enter onto the land of another to take some action." Indeed, the "some" action that the ALRB regulation authorizes union organizers to take—"meeting and talking with employees and soliciting their support"—is the *same* action that the NLRA access rules authorize off-shift employees and nonemployee union organizers to take. If Petitioners' theory were correct, then the numerous decisions of this Court and the lower federal courts sustaining NLRB decisions granting access to off-duty employees and nonemployee organizers over a span of decades all would be wrong.

It is no answer for Petitioners to say that the access right guaranteed by the ALRB regulation is available to nonemployee organizers in a broader range of circumstances than is the NLRA access right. For even assuming that proposition to be true,[2] Petitioners fail to explain why the NLRA access right available to nonemployee organizers does not create an "easement in gross" in the circumstances in which the NLRA right attaches, such as when the worksite is a remote lumber camp. Nor do Petitioners even acknowledge the existence of the NLRA access right recognized by this Court in its *Republic Aviation* holding—a right available for organizing purposes to off-duty employees who, but for the existence of that right, would also be trespassers. *See supra* at 8-9.

4. It is not just the outcomes of NLRA access cases that are inconsistent with Petitioners' theory. This Court's entire methodological approach toward resolving those cases is inconsistent with the theory that a government grant to a third party of "the right to enter onto the land of another to take some action" constitutes a "per se" taking of that land.

To begin with, in none of this Court's cases in the NLRA access area—including in cases *reversing*

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[2] In point of fact, Petitioners overstate the difference. They suggest, for example, that seasonal or transient farm employees who reside during a harvesting season in offsite employer-paid hotels are necessarily accessible under the NLRA standard. *See* Pet'rs' Br. 11. But they fail to recognize (i) that the hotels themselves are private property from which the hotel owner can exclude union organizers without regard to whether any or all of the employees staying there would welcome union visits, and (ii) that a hotel owner whose source of payment is the employer, not the farmworkers, has incentives that are not apt to align with a decision to provide access to union organizers.

NLRB decisions granting access—has the Court suggested that the NLRB even came close to effectuating an unconstitutional "taking" of employer property, much less a "per se" taking.

Nor has the Court invoked the doctrine of constitutional avoidance in this area, even though in reviewing NLRB decisions in many other areas, the Court has "repeatedly" invoked that doctrine to avoid clashes with constitutional provisions. *NLRB v. Cath. Bishop of Chicago*, 440 U.S. 490, 499-500 (1979) (interpreting the NLRA to avoid potential infringements on religious-institution autonomy protected by the First Amendment's religion clauses; and noting that the Court had previously construed the NLRA to avoid potential infringements of nonunion employees' freedom of association, *see Machinists v. Street*, 367 U.S. 740 (1961), as well as potential violations of separation of powers involving the authority of the Executive over relations with foreign nations, *see McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963)). *See also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (construing NLRA to avoid potential infringement on labor organization free speech rights).

Instead of viewing the question of NLRA access rights through a Fifth Amendment lens, the Court long has held that the question is one of ordinary statutory construction, with the NLRB having the chief responsibility for balancing the interest in safeguarding employees' § 7 rights (both direct and derivative) against the interest in protecting employer property rights.

Thus, in *Hudgens v. NLRB*, 424 U.S. 507 (1976), after rejecting the proposition that the *First* Amendment required owners of shopping malls to provide *greater* access to their property than that required by the NLRA, the Court set out in the clearest possible terms that the question of access was one of statutory construction, not of constitutional law:

> [T]he rights and liabilities of the parties in this case are dependent *exclusively* upon the National Labor Relations Act. Under the Act the task of the Board, subject to review by the courts, is to resolve conflicts between § 7 rights and private property rights, and to seek a proper accommodation between the two….
>
> The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance.

Id. at 522-23 (emphasis added; internal quotation marks and citations omitted). The Court then remanded the case to the NLRB for consideration "under the statutory criteria of the National Labor Relations Act *alone*." *Id.* at 523 (emphasis added).

It was only five months after *Hudgens* was decided that the California Supreme Court's decision in *Agricultural Labor Relations Board v. Superior Court*, 546 P.2d 687 (Cal. 1976), came to this Court pursuant to what was then the Court's mandatory appellate jurisdiction. In that case, the California Supreme Court

rejected a takings challenge to the very same ALRB regulation that is at issue here after acknowledging that the regulation would likely allow nonemployee organizers access in some circumstances where the NLRA's rules would not. *Id.* at 699. This Court, consistent with its view expressed in *Hudgens* that line-drawing decisions concerning matters of union access to employer property present quintessential questions of statutory construction and not substantial questions of constitutional law, dismissed the appeal for want of a substantial federal question. *See Pandol & Sons v. Agric. Labor Rels. Bd. of Cal.*, 429 U.S. 802 (1976).

B. Petitioners' Theory Is Inconsistent With This Court's Takings Jurisprudence

It is not only NLRA precedents that are in conflict with Petitioners' theory. This Court's Takings Clause precedents likewise are in conflict with that theory. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), is the most relevant precedent in this regard.

The central question in *PruneYard* was whether state constitutional provisions that permitted individuals to enter and remain on the grounds of a privately-owned shopping center, over the owner's objection, for the purpose of engaging in peaceful speech and petitioning activity during business hours violated the federal constitution's Takings Clause. The Court unanimously answered that question in the negative. *Id.* at 84.

The Court recognized that "one of the essential sticks in the bundle of property rights is the right to exclude others," but it held that the provisions' impact on that stick did *not* effectuate a per se taking of the

shopping center's property and instead triggered, and survived, regulatory-takings scrutiny under the multi-factor test described *supra* at 7. *Id.* at 82-84.

PruneYard is flatly inconsistent with Petitioners' theory that when the government grants itself or a private party "the right to enter onto the land of another to take some action," the government effectuates a "per se" taking through the appropriation of an "easement in gross." For what the state constitutional provisions granted third-party speakers in *PruneYard* was *precisely* "the right to enter onto the land of another to take some action," namely, action in the form of speech and petitioning directed to and communicated in the presence of those already invited onto the property by its owner (there, circulation of a petition protesting a U.N. resolution).

The fact that the shopping center owner in *PruneYard* allowed on the property those members of the public who were there for *other* purposes, including shopping, dining, strolling, or working for one of the mall's stores, does not detract from the reality that the state constitutional provisions challenged in that case required the owner to allow, over his objection, *additional* persons to enter onto the property for *additional* purposes, including soliciting others on the property to sign petitions. On Petitioners' definition, that is an "easement in gross" and is no different, in property-law terms, from the access here.

Furthermore, in *Nollan v. California Coastal Commission*, 483 U.S. 825, 832 n.1 (1987), this Court explained that the provisions challenged in *PruneYard* did not trigger per se analysis because*, inter alia*, (i) they did not grant "permanent access" to the

petition circulators and other beneficiaries of the access grant but only access during business hours when other third parties were already on the property; and (ii) they did not grant a "classic right-of-way easement" but only access to the shopping center's general grounds rather than some dedicated strip of land or delineated pathway that the access holder could record on a map and claim a specific right to possess. The same is true of the ALRB regulations challenged here. Nothing in them requires the employer/landowner to dedicate any particular portion of its land to union organizing; the employer can choose from time to time where its employees may congregate and eat lunch and thereby determine for itself where the organizer access is to occur.

It should come as no surprise, then, that when this Court held in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), that the permanent installation of cable boxes on the roofs of apartment owners were "per se" takings, it distinguished *both* its *PruneYard* decision *and* its NLRA access decisions on the same ground: namely, that access rights accorded to those who wish to enter another's property to communicate with third parties already invited on the property during the times of day those third parties are present are *not* akin to permanent physical occupations or permanent invasions that qualify as per se takings. *Id.* at 434 & n.11.

For this reason, the United States could not be more wrong in stating that the ALRB's access regulation is indistinguishable from the complete physical occupation of the owner's property that was effectuated in *Loretto*. U.S. Br. 21. Despite the clear difference between this case and *Loretto*, the United

States insists that the ALRB regulation, like the installation of the cable box, "does not simply take a single strand from the bundle of property rights: it chops through the bundle, taking a slice of every strand" and thereby puts the property owner in the position where he "loses the power to exclude third parties from possession and use of *that* space." U.S. Br. 21 (emphasis added; brackets and internal quotation marks omitted). As in *PruneYard*, and unlike in *Loretto*, there is no "*that* space" that the ALRB regulation ever causes to be permanently occupied, since an agricultural employer can choose from time to time where it allows its employees to congregate, and organizers are allowed in any one given area only for a maximum of one hour at a time.

C. Petitioners' Proposed Rule Would Invalidate Many Longstanding Regulations That Allow for Access to Commercial Property, and the Efforts of Petitioners' Amici to Control the Damage Only Highlight the Rule's Deficiencies

1. In its amicus brief in support of Petitioners, the United States candidly recognizes that the ALRB regulation is far from unique "given the wide range of federal statutes and regulations that also require access to private property in certain circumstances." U.S. Br. 1. Another of Petitioners' prominent amici, the Chamber of Commerce, likewise acknowledges the existence of "the many longstanding health and safety inspection regimes enforced by the federal government and the States." Chamber Br. 5. Laws and regulations authorizing limited entries onto land are indeed so common and of such long standing that,

even at the time of the publication of the first Restatement of Torts in 1934, the authors devoted Section 211, captioned "Entry Pursuant to Legislative Authority or Duty," to that topic, and observed in the commentary that "[w]hether the actor is a public official or a private person is immaterial to the existence of the privilege." Restatement (First) of Torts § 211 & cmt. d (1934).[3]

While the United States and the Chamber of Commerce try to reassure the Court in various ways that a reversal of the decision below need not imperil every statute and regulation composing this "wide range" of "longstanding" statutes and regulations, it is telling that neither amicus denies that Petitioners' proposed "simple" rule would in fact *reach* those statutes and regulations and deem them "per se" takings. Nor could amici deny that point. Petitioners' "simple" rule, as we have stressed, is that it constitutes a "per se" taking for the government to adopt a regulation that manifests an intent to grant a private party or the government's own agents "the right to enter onto the land of another to take some action." *See supra* at 6-7. Every onsite inspection statute and other access regulation does precisely that.

This Court has stressed that "per se" takings are "relatively rare." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 324 (2002). And the very fact that Petitioners' amici acknowledge that there is a wide range of longstanding statutes and regulations that confer "the right to enter onto the

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[3] The Restatement does not comment on the constitutionality of such access regulations; we cite it to establish the ubiquity of such regulations even before the New Deal era.

land of another to take some action" is reason enough to turn away from Petitioners' proposal to analyze such regulations under the Court's "per se" takings jurisprudence rather than under the Court's regulatory takings jurisprudence.

But the United States and the Chamber of Commerce nevertheless press for "per se" treatment while also urging that the kinds of statutes, regulations, and inspection regimes that they would like to see preserved can survive a ruling in Petitioners' favor, so long as the Court adopts their proposed exceptions to Petitioners' proposed rule—exceptions that presumably would operate as affirmative defenses to a prima facie case of a "per se" taking.

Thus, the United States contends that a government could defend against a per se taking claim brought under Petitioners' proposed rule by showing that the property to which the access regulation applied was "held subject to certain core exercises of the police power." U.S. Br. 29. And the Chamber, along with the United States, contends that a government could also defend by showing that a challenged regulation is a reasonable condition on the right of the regulated business to engage in a given type of commercial activity. Chamber Br. 19-21; U.S. Br. 31. The Chamber develops this point by suggesting that the courts could apply the "unconstitutional conditions" doctrine to determine when a government regulation requiring a company to grant property-access rights is permissible as "a germane condition on market participation" or is, instead, impermissible because nongermane. Chamber Br. 19, 22.

2. It would be an understatement to call these exceptions amorphous and indeterminate.

a. As to the United States' proposed "*certain core* exercises of the police power" defense, the italicized words make it impossible to predict which regulations would qualify for the proposed defense and which would not.

More specifically, the United States fails to explain why California's Agricultural Labor Relations Act and the ALRB's implementing regulations are not themselves core exercises of the police power. Working conditions in agricultural fields are strenuous and hazardous, often involving long days in the hot sun, contact with pesticides, and exposure to other dangers. It is a classic exercise of police power for a State, such as California, to determine that an effective way to address those conditions is not just to enact minimum safety standards but also to encourage collective bargaining that empowers workers to play a role in determining the appropriate trade-offs between and among wages, safe working conditions, and other terms of employment. *See generally* Michael H. Gottesman, *Wither Goest Labor Law: Law and Economics in the Workplace*, 100 Yale L.J. 2767, 2795 (1991) (observing that traditional "[g]overnment [occupational health] regulation takes control of the workplace away from both employer and employees, imposing rigid terms that may not correspond to either's desire," whereas, under "collective bargaining … [e]mployees participate with employers in shaping rules that are tailored to their workplace and that reflect the interests of both").

It is likewise an exercise of the police power to authorize private parties to accompany government officials on worksite safety inspections over the objection of the employer. Indeed, Congress has done just

that in the Federal Mine Health and Safety Act of 1977, which allows union and nonunion employee representatives to have such access to mine owners' property during periodic inspections. *See* 30 U.S.C. § 813(f); 30 C.F.R. § 40.1; 43 Fed. Reg. 29508 (July 7, 1978) (preamble to 30 C.F.R. § 40.1).

If only direct, top-down government-imposed regulations of workplace conditions count as qualifying exercises of the "police power" under the United States' definition of that term, but regulations like the ALRB's—aimed at empowering employees by ensuring that they have the information necessary to address those conditions themselves—do not count, the definition is indeterminate and conclusory. It is not at all useful in separating access regulations eligible for the proposed "police power" defense to Petitioners' proposed per se takings rule from those that are ineligible.

b. As to the proposal that application of the "unconstitutional conditions" doctrine can save from invalidation inspection or other access regulations deemed desirable, that proposal is plagued by at least as much indeterminacy as the proposed "certain core exercises of the police power" defense. Courts struggle to "find useful guidance from the general unconstitutional-conditions doctrine because it has been deemed conclusory, incoherent, and infamously inadequate." Einer Elhauge, *Contrived Threats Versus Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail*, 83 U. Chi. L. Rev. 503 (2016) (quotation marks omitted).

The proposal for applying the unconstitutional conditions doctrine here is especially problematic.

That is because amici invoke cases like *Nollan*, *supra*, where the question is whether a property owner who is seeking a governmental permit *to expand or improve the owner's real property itself* can reasonably be compelled as a condition of receiving that permission to accept some concession that will mitigate the impact of that *real-property* improvement. *Nollan*, 483 U.S. at 836.

Where the government is attempting through an onsite inspection regime to accomplish a public purpose that the legislature considers important regardless of what land-use plans the regulated businesses might have in mind, it makes no sense to ask whether imposing the access requirement on the pertinent businesses is an unconstitutional *condition*. It makes sense only to evaluate the constitutionality of the access requirement directly and on its own terms. Otherwise, it would appear that even the public-safety inspection regimes that amici are most focused on preserving from invalidation could not be implemented on an across-the-board basis but could only be phased in sporadically and at a fortuitous pace dictated by when particular businesses happened to be seeking building permits or other forms of favorable governmental action.

If the Chamber of Commerce's proposed "constitutional conditions" defense is *not* so mechanical as to be available only when the government could tie it to some new-construction or other land-use permit application but instead asks more generally whether a particular access regulation is "a germane condition on market participation," Chamber Br. 22, then it is difficult to see why it would be unavailable here. Large agricultural businesses like Petitioners are

highly regulated to prevent, among other things, overproduction, overuse of pesticides, and harmful environmental practices. They also employ large numbers of employees under strenuous and hazardous conditions.

The Chamber of Commerce never explains why a state like California cannot determine that, just as it is a germane condition on participation in the food and drug market that each business agree to periodic onsite inspections of its processing and manufacturing facilities, Chamber Br. 20, it is also a germane condition on participation in the agricultural employment market that the employer agree to allow periodic onsite visits from organizations that wish to explain to employees how collective bargaining might improve their working conditions.

3. Indeterminate rules are problematic in any context. But given that what is at stake in this area of the law is the constitutionality of regulations adopted by the politically accountable branches of government, the indeterminacy of amici's approach is especially troubling. It poses a serious risk that "per se" takings litigation will devolve into a vehicle through which unelected judges can pick and choose access laws for "per se" invalidation based on unconstrained policy preferences, rather than on application of the time-tested regulatory-takings framework that this Court has employed in cases like *PruneYard*.

We have already noted that amici themselves suggest that only laws authorizing inspections to protect public health, but not laws targeted at protecting employees, merit rescue by way of affirmative defense

from Petitioners' proposed per se rule.[4] But there are other types of laws that Plaintiffs' proposed per se rule would appear to invalidate and that amici's proposed defenses might not rescue.

Consider a law providing that private schools must allow deaf students to bring a sign-language interpreter into classrooms with them if they are willing to pay the cost of the interpreter's time. This would, on Petitioners' definition, confer an easement in gross on the interpreter and amount to a per se taking of a private school's property. Would the proposed "police power" defense rescue the law? Would the proposed "constitutional conditions" defense do so? It is impossible to say.

In contrast, recognition that this type of regulation is governed, not by this Court's "per se" takings cases but by *PruneYard* and the regulatory-takings line of authorities of which *PruneYard* is a part, provides a surer way of addressing such a regulation. In the sign-language interpreter example—as was true in *PruneYard* and as is true here—the access is restricted in area, in time, and in purpose: *in area*, only to those

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[4] Protecting public health and protecting employees are often two sides of the same coin. Upton Sinclair's 1906 classic "The Jungle," a book that exposed the workings of the meat-packing industry and that aroused the public sentiment that generated the first federal food inspection laws, was primarily focused on the poor working conditions in meat-packing plants and treated the impact on food safety as a secondary effect of those poor working conditions. Sinclair's main objective was to help meat-packing workers, not improve the quality of meat. "'I aimed for the public's heart,' Sinclair later wrote, 'and by accident hit it in the stomach.'" *I Aimed for the Public's Heart and … Hit It in the Stomach*, Chicago Tribune (May 21, 2006), https://www.chicagotribune.com/news/ct-xpm-2006-05-21-0605210414-story.html.

portions of the property where the owner, for its commercial advantage, already allows use by the people with whom the access recipient is supposed to communicate; *in time*, only to those hours in the day when those same people are allowed to be on the premises; and *in purpose*, only to allow the access recipient to communicate with the relevant people in furtherance of a legitimate statutory purpose.

4. There are, to be sure, areas of the law where courts have no choice but to develop and apply difficult and somewhat indeterminate tests. But it makes no sense whatsoever to introduce such tests into the area of *per se* takings jurisprudence. That is because this Court has stated time and again, not only that per se takings are rare, but (i) that courts should characterize governmental actions as "per se" takings only when they meet objective criteria unlikely to be in serious dispute, *see Loretto*, 458 U.S. at 437; and (ii) that when courts are presented with a governmental action that defies easy classification, the appropriate test to apply is the multi-factor *regulatory* takings test of *Penn Central*.

By proposing that the Court tack on various amorphous defenses to Petitioners' proposed rule, Petitioners' amici would destroy the primary virtue that Petitioners claim for their "simple" and "bright-line" rule and render it dissonant with this Court's per se takings jurisprudence.

Instead of pushing a new category of "per se" takings onto the stage only to mar the category's debut with an embarrassment of caveats and qualifiers, this Court should adhere to its existing jurisprudence and classify the ALRB regulation as a regulation triggering application only of the regulatory-takings

doctrine. Doing so would be consonant with this Court's NLRA jurisprudence, consonant with this Court's Takings Clause jurisprudence, and consonant with the value in respecting, not treating as presumptively invalid, the long history of laws and regulations in this country that provide for area-, time-, and purpose-restricted access to commercial property.

CONCLUSION

The Ninth Circuit's judgment should be affirmed.

Respectfully submitted,

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