No. 20-107

IN THE
Supreme Court of the United States

CEDAR POINT NURSERY, ET AL.,
Petitioners,

v.

VICTORIA HASSID, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF LOCAL GOVERNMENTS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are local governments from across the United States.[2] We write to ensure that this Court appreciates the full extent of the disruption to local government operations that would ensue under Petitioners' unfounded and perilous interpretation of the Takings Clause.

Local governments are the first line of protection for their residents' health, safety, and welfare. *See, e.g.*, *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949) ("The police power of a state extends beyond health, morals and safety … to protect the well-being and tranquility of a community."). We ensure that food is prepared in restaurants in a safe and clean manner, that homes and businesses are safely constructed and equipped with maintained fire protection, that foster children are cared for in appropriate and supportive settings, and that farms and their workers use potentially dangerous pesticides safely and effectively. To accomplish these objectives and others, local governments regularly send inspectors, mandate signage, and engage in other activities that require access to private property. That access is not absolute. But it is robust and regular—as it must be to ensure actual compliance with our laws and regulations. *See, e.g.*, *Camara v. Mun. Ct. of City & Cnty. of San*

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[1] All parties have consented to the filing of this brief. In addition, no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* or *amici*'s counsel made a monetary contribution to the preparation or submission of this brief.

[2] A complete list of all *amici* can be found in Appendix A.

Francisco, 387 U.S. 523, 535-36 (1967) ("There is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections …."). The benefits of inspections extend beyond simple compliance with local regulatory provisions; in some circumstances, inspections have uncovered deeply troubling (and often hidden) harms and misconduct, including human and labor trafficking.

We respect the private property rights of our residents and take care to ensure that local governmental regulatory inspection and enforcement efforts fall within the bounds of the Constitution. But we have an equally solemn duty to protect the health, safety, and welfare of our communities—especially that of the most vulnerable. Petitioners' effort to manufacture new private property rights at the expense of crucial and often lifesaving local regulatory functions is dangerous, ill-considered, and contrary to this Court's precedent.

SUMMARY OF ARGUMENT

Entry onto private property is a common occurrence in the operations of a modern government. Every day, local governments conduct thousands of health and safety inspections at businesses of varying sizes across a wide range of industries and in private residences. These inspections protect workers, consumers, residents, and our environment from an assortment of potential hazards and harms. Some of these entries rely on surprise. Others occur at a set time or on a regular schedule with significant warning. Some entries are authorized by local permits,

whereas others are authorized by a warrant or exigent circumstances. Some entries are limited to narrow spaces within private property, while others are expansive in scope. These inspections, with their many permutations, are a core component of *amici*'s efforts to ensure compliance with local laws and to preserve the safety and welfare of our communities. Whether through food inspection at processing plants, jobsite safety reviews, environmental compliance checks, or at-home visits to protect the welfare of children, regulators and their designated private partners must come onto private property to ensure the public good.

Petitioners' novel theory of takings liability jeopardizes local governments' ability to pursue those critical objectives. Petitioners take specific aim at California's Access Regulation, which grants union organizers scheduled and temporary access to employer worksites for up to 120 days per year (and is utilized far less in practice). *See* Cal. Code Regs. tit. 8, § 20900(e). But their proposed rule sweeps far more broadly. The Access Regulation is no anomaly: it shares many of the core components of routine governmental inspection regimes and a variety of similar policies. It grants a time-limited right of access for a specific purpose; it is designed to advance the health and welfare of residents; and (like many other regulatory regimes) it permits private entities to enter onto land to advance a government interest. Under Petitioners' rule, *any* governmental interference with a property owner's "right to exclude"—from the Access Regulation at issue in this case to run-of-the-mill government inspections that local governments depend on to protect vulnerable communities—could constitute a *per se* taking. *See* Pet. Br. 16-17. That unprecedented approach conflicts with this Court's well-established takings jurisprudence and

potentially exposes local governments to broad constitutional liability for routine entries and inspections that are already scrutinized (and pass constitutional muster) under the Fourth Amendment. That cannot be, and is not, the law.

ARGUMENT

I. Petitioners' *Per Se* Takings Rule Would Undermine Core Governmental Functions.

Petitioners' expansive reading of the Takings Clause threatens a vast array of local laws that protect the health, safety, and welfare of *amici*'s residents. These laws vary in nature and scope and cover many different industries, establishments, and individuals.[3] All share a common thread: they impose reasonable restrictions on a private property owner's right to exclude, in order to protect local residents, including children, workers, business owners, and other residents.

A. Local governmental regulatory functions depend on reasonable entry onto private property.

California's Access Regulation is not an outlier. Across the country, countless regulations permit local government agents to enter onto private property. These regulations serve as critical tools in executing local governments' essential functions and fulfilling their core mission of protecting their communities.

Food health and safety regulations are paradigmatic: local governments, including *amici*,

[3] Local ordinances and regulations authorizing such inspections are noted throughout Part I. In addition, Appendix B describes other representative examples from *amici* local governments and other jurisdictions.

require inspections at multiple points along the food supply chain to protect public health and the safety of food production. The City of Cincinnati, for instance, authorizes inspectors to enter slaughterhouses and fisheries before meat and fish are sent to market, ensuring the safety of meat and fish sold to grocers and restaurants. City of Cincinnati, Ohio, Ord. Code § 603-1. Likewise, the City and County of Denver grants its manager of public health and environment a right of entry into the premises of any food service licensee, including food processing, wholesale, and warehouse establishments, as well as retail food establishments, to protect consumers from food-borne risks to their health. Denver, Colo., Mun. Code § 23-3. And the Agricultural Commissioner for the County of Santa Clara is authorized to enter private property to quarantine out-of-state produce to protect the food supply from invasive pests and plant diseases. Cal. Food & Agric. Code § 5023.[4]

Local building, industrial, and environmental safety codes also routinely authorize entry onto private property to protect public safety. For example, the County of Santa Clara authorizes inspections of onsite wastewater treatment systems on private property. County of Santa Clara, Cal., Ord. Code §§ B11-60–B11-102. The City of St. Paul authorizes its fire department to enter private property to inspect smoke detectors in dwellings. City of St. Paul, Minn., Code of Ord. § 58.05. The City of

[4] Many local governments similarly require regular inspections for food carts and trucks that are often deployed to multiple locations throughout the jurisdiction. *See, e.g.*, City of Boston, Mass., Ord. Code § 17-10.8; City of Columbus, Ohio, Ord. Code § 573.05.

Boston requires its health commissioner to inspect any facility using "large-scale" recombinant DNA molecules at least once a year. City of Boston, Mass. Ord. Code § 17-9.2(b). Cook County, Illinois grants its Building Commissioner "the authority to enter, at any reasonable hour, any building, structure, or premises within the unincorporated areas of Cook County to enforce the provisions of the [Building] Code." Cook County, Ill., Code of Ord. § 102-105(4)(3)(b)(4)(a).[5] Under this authority, the County conducts building, electrical, plumbing, elevator, ventilation, fire prevention, and boiler and refrigeration inspections, all of which serve to safeguard the buildings in which residents live and work. *See id.* §§ 102-105(4)(3)(b)(3)(b.1)–(j).[6]

These building inspection programs help local governments identify dangerous or hazardous conditions and ensure that they are rectified. For

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[5] The City and County of Denver creates a similar general right of entry for all of its inspections: "Inspectors and investigators shall be permitted to have access to licensed premises at all times, in the course of their duties, concerning the enforcement of the Charter, ordinances of the city and rules and regulations promulgated pursuant and thereto." Denver, Colo., Mun. Code § 32-17(a).

[6] Onsite access to buildings is routine. *See, e.g.*, City of Milwaukee, Wis., Code of Ord. § 222-4 ("[T]he commissioner or his duly authorized representative may enter all buildings and premises and all parts thereof, except occupied dwellings, in order to make an inspection, reinspection, observation, examination, or test of the electrical equipment or wiring contained therein …."); City of Madison, Wis., Code of Ord. § 19.08(2)(b) ("The Electrical Inspectors shall make inspections of all electrical wiring and equipment [and] shall have the right to enter any building during reasonable hours in the discharge of their duties ….").

example, elevator inspections minimize the risk of death and serious injury from accidents. In 2018, a routine inspection performed by the Cook County Department of Building and Zoning revealed that the lone elevator in a six-story condominium was unsafe for use. The elevator was immediately taken out of service, but subsequent inspections revealed that the property manager had failed to repair the dangerous condition and bring the elevator back online, leaving the (mostly elderly) residents with no working elevator. Ultimately, the Cook County State's Attorney had to obtain a temporary restraining order directing that the elevator be repaired. *See County of Cook v. Landings Condominium Ass'n Bldg. E*, Case No. 19 MI 400266 (Cook Cnty. Cir. Ct. Feb. 6, 2019). Beyond addressing whether buildings are generally safe for occupancy, these inspection programs can help to identify other specific threats to health and safety. For example, in recent years, the County of Santa Clara shut down nine illegal massage businesses because of building code violations. The County then partnered with community-based organizations to address the needs of the workers at these illegal businesses, many of whom may have been victims of human trafficking. In the City of Oakland, building and fire inspections have uncovered often horrific and dangerous living conditions, prompting the city attorney to take enforcement action to protect tenants and others in the community. *See, e.g.*, Compl. ¶¶ 24-40, *People of the State of California & City of Oakland v. Crear*, Case No. RG 18918472 (Super. Ct. Alameda Cnty. Aug. 27, 2018).

More broadly, local governments regularly permit entry onto private property to protect vulnerable populations from exploitation, abuse, and other harm,

whether in the home or in the workplace. The City of Houston, for instance, authorizes peace officers to enter massage parlors to conduct inspections pursuant to Texas state law. *See* City of Houston, Tex., Code of Ord. § 28-370.[7] The City of Milwaukee authorizes its health department to inspect a property "whenever a child who lives in or visits the property is identified with a blood lead level" requiring "environmental intervention." City of Milwaukee, Wis., Code of Ord. § 66-20(4). Moreover, the County of Santa Clara requires that foster parents serving the approximately 1,750 children and youth under County supervision agree to regular social worker entry as a condition of licensure and placement of children in foster care. Because, as this Court has recognized, "surprise is crucial" to the success of certain regulatory regimes, *New York v. Burger*, 482 U.S. 691, 710 (1987), the County permits (and in some instances requires) unannounced visits to foster care homes.

These types of inspections go well beyond the narrow exceptions to the Takings Clause outlined by Petitioners' *amici*, such as abating an existing nuisance, addressing an imminent danger, or engaging in criminal law enforcement. *See, e.g.*, Oklahoma Br. 18-24; U.S. Br. 30. Those exceptions—which may rest on (for example) complex distinctions between what counts as an "imminent" danger—would invite, rather than avoid, "arbitrary line-

[7] *See also* City of Columbus, Ohio, Ord. Code § 540.10 ("No registration to operate a massage or bath establishment shall be issued, renewed or continued unless an inspection discloses that the establishment complies" with certain requirements); City of Oakland, Cal., Mun. Code § 5.36.170 ("City or county employees charged with the enforcement of this chapter may enter the premises of any massage establishment during regular business hours as may be necessary in performance of their duties.").

drawing." Pet. Br. 16. Equally unavailing is the Chamber of Commerce's related assertion that "core governmental functions" are "generally lawful" under the unconstitutional conditions doctrine, "which permits the government to condition grants of licenses on grantees' willingness to allow reasonable inspections." U.S. Chamber of Commerce Br. 18; *see also* U.S. Br. 31-33. To be sure, local governments often require consent to enter property as a condition of a license or permit, but they also routinely implement regulations authorizing entry onto private property apart from any licensing requirement. *See, e.g.*, City of Cincinnati, Ohio, Ord. Code § 604-11 (authorizing access to buildings and premises for the purpose of rat control inspections); City of Los Angeles, Cal., Mun. Code § 161.601 (authorizing entry onto residential rental properties between 8:00 a.m. and 6:00 p.m.); City of Minneapolis, Minn., Ord. Code § 216.60 (authorizing inspection of any water well supply). In any event, Petitioners should not be permitted to dictate the manner in which local governments choose to regulate, and *amici* should not be forced to adopt licensing schemes to implement reasonable regulations to protect the health, safety, and welfare of their residents.

B. Local governments authorize private individuals to enter private property to achieve regulatory goals.

Local governments also frequently partner with private entities to provide essential services or to enforce critical laws. In many of these public-private partnerships, private entities are authorized to enter onto private property for important public policy reasons.

For example, many foster-care programs administered by local and state governments rely heavily on partnerships with private organizations to protect children and keep families intact. CASA/GAL is one such private organization that works in 49 states to recruit and train volunteer court-appointed special advocates for children "so every child who has experienced abuse or neglect can be safe, have a permanent home, and the opportunity to thrive."[8] The duties of these court-appointed special advocates include both announced and unannounced home visits.[9]

In addition, local governments partner with private entities to protect residents from substandard housing. The County of Santa Clara, for instance, retains private contractors to perform housing quality standards inspections for its supportive housing programs.

Similarly, local governments in many states contract out probation services to private entities. *See, e.g.*, Colo. Rev. Stat. § 18-1.3-202(2); Fla. Stat. Ann. § 948.15; Ga. Comp. R. & Regs. 503-1.02; Mo. Rev. Stat § 559.600; Utah Admin. Code R156-50-601. Because statutes in those states empower courts to mandate home visits by probation officers, access to private property is necessary to provide probation services.

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[8] *Our Mission*, National CASA/GAL Ass'n, https://nationalcasagal.org/our-work/mission-vision-and-values/ (last visited February 12, 2021).

[9] *CASA: Court Appointed Special Advocates for Children*, https://www.duboiscountyin.org/document_center/casa/600051.pdf (last visited February 12, 2021).

See Colo. Rev. Stat. § 18-1.3-204(2)(a)(X); Fla. Stat. Ann. § 948.03(1)(b); Ga. Code Ann. § 42-8-35(a)(4).

Many local governments also partner with private entities, whether non-profit or for-profit, to provide emergency medical services. *See generally* Nat'l Highway Traffic Safety Admin., *EMS System Demographics* tbl. 4 (June 2014) (indicating that a substantial number of EMS providers are private), *available at* https://www.ems.gov/pdf/National_EMS_Assessment_Demographics_2011.pdf; *see also, e.g.*, Hennepin County, Minn., Ord. No. 9, § 3(3) (defining "Ambulance provider" to include "any individual, firm, partnership, corporation, trustee, association, or unit of government, licensed … to provide ambulance services"). Indeed, private EMS-providers frequently serve as paramedic providers and provide EMS transport in many of the country's largest cities. For example, the County of Santa Clara, which includes the tenth largest city in the United States (the City of San José) contracts with Rural/Metro Ambulance for nearly all of the county's 9-1-1 ambulance services. These private EMS-providers, like public providers, often need to access private property to respond to medical emergencies.

C. Local governments routinely limit the right to exclude to further important regulatory objectives.

Petitioners' nebulous rule not only endangers the governmental inspection regimes outlined above; it also invites litigants to challenge *any* restriction on a private property owner's right to exclude as a *per se* taking. Pet. Br. 17 ("The right to exclude is too important to be left at the mercy of government officials who will inevitably seek as much public access

as possible without paying for it."). Many important local regulatory efforts, including those outside the context of governmental inspections, impose limits on the right to exclude.

Myriad local housing and public accommodations regulations, for example, prohibit property owners from denying housing or services to any individual based upon unlawful discrimination. *See, e.g.*, Cook County, Ill., Code of Ord. § 42-37 (public accommodations ordinance); *id.* § 42-38 (fair housing ordinance); City of Seattle, Wash., Mun. Code § 14.06.030 (public accommodations ordinance); *id.* § 14.08.040 (fair housing ordinance). In fact, several *amici* go beyond federal and state protections to prohibit such discrimination on the basis of source of income, criminal history, marital status, political ideology, and other categories.[10] These regulations are plainly constitutional under the Takings Clause. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258-59 (1964) ("[A]ppellant has no 'right' to select its guests as it sees fit, free from governmental regulation."). But Petitioners' ill-defined *per se* rule

[10] *See, e.g.*, Cook County, Ill., Code of Ord. § 42-31 (defining "unlawful discrimination" to include discrimination on the basis of, among other things, "ancestry, sexual orientation, marital status, parental status, military discharge status, source of income, gender identity or housing status"); *id.* § 42-38(b) (prohibiting housing discrimination based upon covered criminal history); City of Seattle, Wash., Mun. Code § 14.06.020(L) (defining "discrimination" to include discrimination on the basis of, among other things, "marital status, parental status, sexual orientation, gender identity, political ideology, honorably discharged veteran or military status [or] participation in a Section 8 program"); *id.* § 14.08.020 (similarly defining discrimination with respect to unfair housing discrimination).

risks emboldening private property owners to advance the (specious) argument that local governments must pay them whenever civil rights laws require them to serve an individual whom they would prefer not to serve, in exchange for the right to do business locally. And even if courts reject these baseless and disruptive lawsuits, local governments would still be forced to shoulder substantial litigation costs.[11]

Petitioners' proposed rule would also invite enterprising litigants to challenge regulations requiring the installation of devices intended to protect public safety. Consistent with widely accepted safety standards, local governments regularly require property owners to install and maintain certain fire safety instruments, ranging from fire alarm systems and extinguishers to sprinklers and standpipes. *See, e.g.*, Cook County, Ill., Code of Ord. § 102-104(4)10; County of Santa Clara, Cal., Ord. Code § C3-6; City of Seattle, Wash., Building Code §§ 703.4, 907.2. These regulations are carefully tailored to protect residents from natural disasters—including earthquakes,

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[11] For similar reasons, Petitioners' rule could even inspire constitutional challenges to state statutes and regulations that require hospitals to provide critical health care services, or health care discounts, to low-income patients. *See, e.g.*, Cal. Health & Safety Code § 127405 (requiring hospitals to have a discount payment program and charity care policy for low-income patients); 210 Ill. Comp. Stat. Ann. § 89/10 (requiring Illinois hospitals to give certain uninsured patients a discount on their medical bills); 10-144-150 Me. Code. R. §§ 1.01(A), 1.02(C) ("No hospital shall deny services to any Maine resident solely because of the inability of the individual to pay for those services."); *see also Franklin Mem'l Hosp. v. Harvey*, 575 F.3d 121, 126 (1st Cir. 2009) (holding that Maine statute did not constitute a *per se* taking).

wildfires, and freezing temperatures. *See* City of Seattle, Wash., Building Code §§ 1604.8.2, 2106.1 (specifying design features in earthquake zones); County of Santa Clara, Cal., Ord. Code § C3-8 (requiring special fire-retardant roof coverings in areas affected by wildfires); Cook County, Ill., Code of Ord. § 102-151 (requiring heating systems in localities prone to frequent winter freezing).

In addition, local governments routinely require businesses to post signage to promote public health and safety. For instance, Cook County requires tobacco product retailers to post signs warning that it is a violation of law to sell tobacco products to any person under the age of eighteen. *See* Cook County, Ill., Code of Ord. § 54-305(f); *see also* County of Santa Clara, Cal., Ord. Code § B11-578(d) (similar requirements for anyone under the age of twenty-one). Similar regulations abound for products including alcohol, *see, e.g.*, Cook County, Ill., Code of Ord. § 6-28, fireworks, *see, e.g.*, Wash. State Code § 70.77.580, and firearms, *see, e.g.*, 430 Ill. Comp. Stat. Ann. § 66/65(d), and local governments frequently require businesses to post signs regarding worker protections like the minimum wage or earned sick leave, *see, e.g.*, Cook County, Ill., Code of Ord. §§ 42-3, 42-19; City of Seattle, Wash., Mun. Code § 14.19.045. Although these workaday regulations fall well within constitutional bounds, Petitioners' revolutionary *per se* rule could open the floodgates to an onslaught of time-consuming and costly, albeit baseless, takings challenges.

D. Petitioners' proposed rule would impose overwhelming burdens on local governments.

Petitioners' theory of takings liability would permit private property owners to contest and demand compensation for each of the essential exercises of local government police powers outlined above. The extraordinary burdens imposed on local governments would be crippling.

For starters, Petitioners' position seemingly requires local governments to compensate all property owners falling within the scope of the regulations discussed above. *See* Pet. Br. 14 (arguing that the Access Regulation authorizes a taking "from every agricultural business in the state"). Beyond those prohibitive costs, local governments might need to develop new mechanisms to evaluate the multiplicity of new takings claims that will follow from Petitioners' novel rule. For example, governments may need to employ, or partner with, appraisers to make individualized assessments of the fair market value of each alleged taking. And they will need to bear the added costs of defending against an avalanche of federal takings lawsuits, including paying attorney's fees in some instances.

This Court has previously refused to impose *per se* takings liability when doing so "would undoubtedly require changes in numerous practices that have long been considered permissible exercises of police power." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 335 (2002). There is no reason to depart from that principle. Petitioners' new *per se* rule would endanger local governance, by precipitating challenges to long-settled regulation of

health, safety, and welfare and by imposing untenable costs on routine exercises of local government police powers.

II. Petitioners' Sweeping Expansion of the *Per Se* Takings Doctrine Would Disturb Well-Established Legal Principles.

In addition to threatening the viability of innumerable local government regulations, Petitioners' far-reaching rule would mark a radical departure from this Court's settled precedent under the Takings Clause and the Fourth Amendment.

A. Petitioners' proposed rule is flatly inconsistent with this Court's longstanding takings jurisprudence.

Under this Court's precedent, claims that a government regulation effects a taking are generally evaluated under a flexible standard. The *per se* takings doctrine applies only to "narrow categories" of government action. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Id.* at 537; *see also Horne v. Dep't of Agric.*, 576 U.S. 350, 357 (2015) (holding that a "classic taking [is one] in which the government directly appropriates private property for its own use") (alteration in original) (internal quotation marks omitted).

Beyond this "paradigmatic taking," this Court has applied a *per se* rule in two exceedingly rare circumstances. First, the Court has recognized that "a permanent physical occupation of property authorized by government is a taking." *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012) (citing *Loretto*

v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982)). So, for instance, a government regulation requiring private property owners to grant the public "a permanent and continuous right of access to and fro" would constitute a *per se* taking. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 832 (1987); *see also Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994) (holding that a "permanent recreational easement" on private property that "eviscerate[s]" the owner's "right to exclude" constitutes a *per se* taking). But mere temporary invasions on private property would not. *See Loretto*, 458 U.S. at 428. Second, the Court has held that "a regulation that permanently requires a property owner to sacrifice *all* economically beneficial uses of his or her land" is a *per se* taking. *Ark. Game & Fish Comm'n*, 568 U.S. at 32 (emphasis added) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)).

"Outside these two relatively narrow categories," claims under the Takings Clause "are governed by the standards set forth in" *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *Lingle*, 544 U.S. at 538. Under the *Penn Central* test, courts must evaluate (among other things) the "character of the action and [] the nature and extent of the interference with rights." *Penn Central*, 438 U.S. at 130; *see also Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017) (observing that the Court's takings jurisprudence "has been characterized by 'ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances'") (quoting *Tahoe-Sierra*, 535 U.S. at 322). That multi-factor test is well-suited to balancing the public and private interests at stake in the wide range of settings in which local governmental

regulation arises. *See Murr*, 137 S. Ct. at 1951 (Roberts, C.J., dissenting) (observing that the Court's regulatory takings approach "strikes a balance between property owners' rights and the government's authority to advance the common good" and ensures "that [property owners] will be compensated for particularly onerous regulatory actions, while governments maintain the freedom to adjust the benefits and burdens of property ownership without incurring crippling costs from each alteration"). Indeed, courts across the country have long applied the *Penn Central* test in evaluating claims under the Takings Clause. *See, e.g.*, *Hilton Washington Corp. v. District of Columbia*, 777 F.2d 47, 49 (D.C. Cir. 1985) (applying *Penn Central* test in upholding hotel taxi-stand regulations against takings challenge); *Naegele Outdoor Advert., Inc. v. City of Durham*, 803 F. Supp. 1068, 1074 (M.D.N.C. 1992) (holding regulation of billboards not a taking under *Penn Central*), *aff'd*, 19 F.3d 11 (4th Cir. 1994); *see also Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1282-83 (Fed. Cir. 2009) (applying *Penn Central* in upholding federal salmonella regulations against takings challenge); *Franklin Mem'l Hosp.*, 575 F.3d at 126-30 (concluding that state requirement that hospitals provide free care to low income patients was not *per se* taking and upholding under *Penn Central*).

Instead of respecting those bedrock principles, Petitioners invite this Court to toss them aside and adopt a sweeping rule that would treat *any* interference with a private property owner's right to exclude as a *per se* taking. This Court should reject that misguided invitation to overhaul its established precedent, for several reasons.

To begin, Petitioners' proposed rule finds no support in this Court's precedent and would dramatically expand the "narrow categories" of *per se* takings. Under Petitioners' view, a government regulation that authorizes a minimal, time-limited entry on private property sits on the same constitutional footing as a land exaction requiring individuals to *permanently* open the beachfront around their home to the public. But that one-size-fits-all approach to *per se* takings is flatly inconsistent with this Court's precedent, which draws a clear distinction between "permanent physical occupations" and "temporary invasions of property." *Ark. Game & Fish Comm'n*, 568 U.S. at 36.

Petitioners' novel rule would also impose significant costs on local governments, thereby undermining their efforts to protect the health, safety, and welfare of residents. As explained above, *see supra* Part I, Petitioners' broad *per se* rule could subject those core governmental regulatory functions (and many others) to potential takings liability, and would force local governments to defend against a new wave of protracted federal litigation seeking compensation for any regulation that has any effect on a private property owner's right to exclude.

Finally, and relatedly, Petitioners' proposed rule will encourage enterprising litigants to recharacterize run-of-the-mill exercises of the police power as "easements." That is precisely what happened in this case. Petitioners portray the Access Regulation as an "easement from every agricultural business in the state for the benefit of union organizers." Pet. Br. 14. That is not correct. Instead, the Access Regulation was implemented for the benefit of *workers*. *See* Cal. Code

Regs. tit. 8, § 20900 ("Labor Code Section 1140.2 declares it to be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing."). And "establishing … worker rights remains well within the traditional police power of the states." *Curtis v. Irwin Indus., Inc.*, 913 F.3d 1146, 1152 (9th Cir. 2019) (Ikuta, J.) (internal quotation marks omitted). This Court should not reward Petitioners' sleight of hand by endorsing an unprecedented *per se* takings rule. That maneuver will not only upend decades of settled case law, but will also incentivize other private property owners to label every minor regulatory burden an "easement" to trigger takings liability. Under Petitioners' rule, for instance, a private property owner in Cook County could argue that the Building Code imposes a compensable "easement" simply because it authorizes the Building Commissioner to enter into a building at "any reasonable hour" for enforcement purposes. Cook County, Ill., Code of Ord. § 102-105(4)(3)(b)(4)(a). Likewise, a business owner in the County of Santa Clara could argue that the Agricultural Commissioner's authority to enter private property to inspect out-of-state produce constitutes an easement, *see* Cal. Food & Agric. Code § 5023, as could a foster parent with respect to a child-welfare advocate's authority to make a home visit. This Court should not adopt a theory that would upend this Court's well-established takings jurisprudence and could subject local governments to crushing liability.

B. Petitioners' proposed rule would inject uncertainty and confusion into judicial review of local government action under the Fourth Amendment.

The fact that Petitioners' *per se* rule collides with this Court's longstanding takings precedent is reason enough to reject it. But there is more. Expanding the *per se* takings doctrine would also have collateral effects on this Court's Fourth Amendment jurisprudence.

As explained above, local governments enforce a wide range of civil regulations through entry onto private property. *See supra* Part I.A. The constitutionality of these entries is ordinarily evaluated under the Fourth Amendment. *See See v. City of Seattle*, 387 U.S. 541, 545 (1967) (holding that Fourth Amendment administrative subpoena requirements apply to "investigative entry upon commercial establishments"). The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. The touchstone of the Fourth Amendment analysis is reasonableness. *See Camara*, 387 U.S. at 531. Like the *Penn Central* test, this relatively flexible "reasonableness" standard accommodates the wide range of circumstances in which civil regulatory inspections arise—and the varying scope of property and privacy interests implicated by those searches.

A *per se* rule that any government entry upon a property constitutes a taking would be entirely inconsistent with the flexible approach contemplated by this Court's Fourth Amendment jurisprudence. Under Petitioners' proposed approach, even governmental inspection programs that require

warrants based on probable cause, and thus bear the quintessential hallmarks of reasonableness under the Fourth Amendment, would threaten to expose governments to liability under the Fifth Amendment.

Petitioners' State *amici* contend that "reversal in this case would not impair government's ability to conduct searches, inspections, and the like" because "[a]n entry cannot be both a law enforcement search and a taking" under the Constitution. Oklahoma Br. 17; *see also* U.S. Chamber of Commerce Br. 24 ("When the framers of the Bill of Rights separately enacted the Fourth and Fifth Amendments, they recognized that legitimate law enforcement searches were governed by the reasonableness requirements of the former, and not the compensation requirement of the latter."). But that assertion—which Petitioners have not expressly endorsed—does little to resolve the uncertainty and confusion that Petitioners' proposed *per se* takings rule would inject into the constitutional analysis of these types of inspection regimes.

As an initial matter, this Court has repeatedly held that "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 70 (1992). And at least one circuit court has permitted a plaintiff to proceed with a claim invoking both the Fourth and Fifth Amendments. *See Presley v. City of Charlottesville*, 464 F.3d 480, 487 (4th Cir. 2006). While the Access Regulation in this case violates neither right, the Court should not ignore the possible fallout implications that Petitioners' takings theory has on the Fourth Amendment.

More broadly, Petitioners' *per se* takings rule will invite litigants to engage in fine line-drawing

regarding the nature of particular inspections in the context of other governmental regulatory regimes. Petitioners' State *amici*, for example, appear to argue that the line between a search that is properly analyzed under the Fourth Amendment and a taking that is properly analyzed under the Fifth Amendment is whether the government's physical entry onto the property is for the purpose of obtaining information. *See* Oklahoma Br. 16 (citing *United States v. Jones*, 565 U.S. 400, 404-07 (2012)). Even assuming that distinction were appropriate, government inspections often serve *both* to gather information about potential violations and to address or ameliorate those violations. For example, a social services caseworker on a home visit may seek to identify criminal or program violations and may also seek to inform or educate parents. *See, e.g.*, *Wyman v. James*, 400 U.S. 309, 317 (1971) ("[T]he caseworker's posture in the home visit is perhaps, in a sense, both rehabilitative and investigative."). Likewise, a food safety inspector may identify regulatory violations and also generate information regarding compliance for subject businesses. And an animal control officer may identify violations of local ordinances, while also abating dangers posed by certain animals. Under Petitioners' rule, nothing would stop litigants in other cases from arguing that a government regulation constitutes *both* a taking under the Takings Clause and a search under the Fourth Amendment.

* * *

Petitioners' proposed rule poses severe risks to core governmental functions that protect the health, safety, and welfare of local communities; threatens productive public-private partnerships that further those core functions; and would introduce chaos into this Court's finely tuned precedents governing the Takings Clause and the Fourth Amendment. This Court should not follow Petitioners down that deeply mistaken path.

CONCLUSION

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

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A

(List of Amici Local Governments)

City of Seattle, Washington
Cook County, Illinois
County of Santa Clara, California
City of Albuquerque, New Mexico
City of Austin, Texas
City of Chicago, Illinois
City of Cincinnati, Ohio
City of Dallas, Texas
City and County of Denver, Colorado
City of Los Angeles, California
Milwaukee County, Wisconsin
City of Minneapolis, Minnesota
City of Oakland, California
City of Philadelphia, Pennsylvania
City of Portland, Oregon
City of St. Paul, Minnesota
County of San Benito, California
City of Santa Monica, California

APPENDIX B

The following city and county ordinances and regulations are representative examples of the types of inspectional regimes in place across the county.

Animal and Pet Control

Jurisdiction	Citation	Short description
City and County of Denver, CO	Rev. Muni. Code Sec. 8-103	The Department of Public Health & Environment shall inspect animal shelters, kennels, pet grooming shops, pet hospitals, and pet shops to ensure compliance with licensure requirements.
City of Madison, WI	Gen. Ord. Sec. 7.29	The Director of Public Health has the right to inspect or to order the inspection of any premises where fowl are kept.
City of Oakland, CA	Gen. Ord. Sec. 6.08.160	The Officer-In-Charge of the Animal Control Section or their representative has the right to inspect the property where any potentially dangerous

Jurisdiction	Citation	Short description
		dog is kept after giving 24 hours written notice.
County of Santa Clara, CA	Ord. Code Sec. B31-75.	The Manager of Animal Control or their representative has the right to inspect any animal facility at any reasonable time.

Building and Construction

Jurisdiction	Citation	Short description
City of Columbus, OH	Gen. Ord. Sec. 1145.60	The Director of Public Utilities has the right to enter any premise where wastewater/ stormwater is generated or treated, chemicals are stored, or where records or monitoring equipment is kept, to ensure compliance with code.
City and County of Denver, CO	Rev. Muni. Code Sec. 10-141	The Manager of Community Planning & Development shall inspect neglected or derelict properties at

Jurisdiction	Citation	Short description
		least quarterly to ensure compliance with code.
City of Milwaukee, WI	Code of Ord. Sec. 8-205	The Commissioner of Building Inspection must inspect all water and sewage plumbing work prior to connecting to sewage or water supply.
City of Oakland, CA	Gen. Ord. Sec. 8.54.310	Foreclosed properties must be inspected to ensure compliance with code.

Entertainment Venues

Jurisdiction	Citation	Short description
Cook County, IL	Code of Ord. Sec. 102-105(4)(3)(b)(3)(b.2)	The Building Commissioner must inspect all buildings and structures used for entertainment in an amusement park before they are open to the public.

Jurisdiction	**Citation**	**Short description**
City of Dallas, TX	Code of Ord. Sec. 9A-12.	Code compliance, police, and fire department representatives may inspect billiard halls during business hours.
City of Portland, OR	City Code Sec. 8.20.070	The Health Officer must inspect public bathhouses, public and semi-public swimming pools, and make sanitary tests of all public and semi-public swimming pools from time to time.
City of St. Paul, MN	Code of Ord. Sec. 415.08	City health, building, and license inspectors, and police officers may inspect licensed theaters anytime any person is present on the premises.

Environment

Jurisdiction	Citation	Short description
City of Albuquerque, NM	Code of Ord. Sec. 9-5-1-5	The Air Quality Control Board Environmental Health Department may enter any private or public property, except private residences, that the Department has reasonable cause to believe is or will become a source of air contaminants contributing to air pollution.
City and County of Denver, CO	Rev. Muni. Code Sec. 4-8	The Department of Public Health is authorized to inspect all air contamination sources whenever necessary to determine the quantity and character of air pollutants.
City of Portland, OR	City Code Sec. 10.50	The Director of Developmental Services may inspect wherever it is necessary to control the creation of sediment

Jurisdiction	Citation	Short description
		and prevent erosion due to construction.
County of San Benito, CA	Code of Ord. Sec. 21.01.136	The Health Department shall have access to the recycling areas outside of any dwelling unit at any time without prior notice as a condition for granting the issuance of a building permit.

Fire and Emergency

Jurisdiction	Citation	Short description
City of Cincinnati, OH	Mun. Code Sec. 1201-17	The Fire Chief must inspect premises as often as necessary to identify and correct any conditions liable to cause fire and violations of the fire code.
City of Columbus, OH	Gen. Ord. Sec. 2501.05	The Fire Chief may enter any premises to inspect it for compliance with the fire code or to enforce the

Jurisdiction	Citation	Short description
		code at any reasonable time.
Harris County, TX	Fire Code Sec. 104.3	The Fire Code Official may enter any premises to inspect it for compliance with the fire code or to enforce the code at any reasonable time.
City of St. Paul, MN	Code of Ord. Sec. 58.05	The Department of Safety and Inspections is authorized to enter any dwelling at any reasonable time to inspect smoke detectors.

Food Safety

Jurisdiction	Citation	Short description
City of Albuquerque, NM	Code of Ord. Sec. 9-6-1-6(B)	The Mayor's designated enforcement authority, shall be permitted to enter any food establishment for the purpose of making inspections to determine compliance

Jurisdiction	Citation	Short description
		with the food sanitation code.
City of Cincinnati, OH	Mun. Code Sec. 603-1	The Health Commissioner may enter and inspect any premises where live animals and animal products for consumption are held, prepared, slaughtered, or disposed of.
City of Madison, WI	Gen. Ord. Sec. 7.08(5)	The Director of Public Health must inspect every restaurant at least once every 12 months, and make subsequent inspections if a violation is found to ensure compliance.
City of Milwaukee, WI	Code of Ord. Sec. 68-9-2.3	The Health Department must inspect all licensed food dealers at least once every 12 months, and make subsequent inspections if a violation is found to ensure compliance.

Jurisdiction	Citation	Short description
City of Oakland, CA	Gen. Ord. Sec. 8.16.050	Milk inspectors have the authority to enter and have full access to any premises or place where dairy products are stored, processed, or transported in.

Housing and Hotels

Jurisdiction	Citation	Short description
City of Boston, MA	Mun. Code Sec. 9-1.2	The Commissioner of Housing Inspection shall inspect places of human habitation to enforce the housing code.
City of Dallas, TX	Code of Ord. Sec. 8A-20(b)	The Director of the department designated by the city manager may inspect any boarding home facility for violations with this code or with any other city ordinances.

Industrial Safety

Jurisdiction	Citation	Short description
Cook County, IL	Code of Ord. Sec. 30-211	The Department of Environment and Sustainability may conduct inspections of all commercial and industrial sites.
City of Columbus, OH	Gen. Ord. Sec. 3392.13	The Public Health Director can order inspection of any junk yard, salvage yard, or impound to determine compliance with the code.
City of Dallas, TX	Code of Ord. Sec. 49-55.3(a)	Water industrial users are to be inspected at least once each year.
County of San Benito, CA	Code of Ord. Sec. 15.05.013	The Water District shall have the right to enter upon any premises at all reasonable times to make inspections and tests of groundwater aquifers.

Liquor and Controlled Substances

Jurisdiction	Citation	Short description
Cook County, IL	Code of Ord. Sec. 6-5(a)(2)	The Liquor Control Commissioner has the power to enter licensed premises where liquor is sold to or consumed by the public.
City of Oakland, CA	Planning Code Sec. 17.156.240	Officials responsible for enforcing the Planning Code may enter and inspect any premises that sell alcohol.

Pest Control

Jurisdiction	Citation	Short description
City of Cincinnati, OH	Mun. Code Sec. 604-11	Inspectors of the Board of Health have authority to enter and inspect any premises to enforce rat control.
City of Portland, OR	City Code Sec. 8.44	The Bureau of Insect Control has the power and authority to enter any premises in the City to determine the presence of earwigs,

Jurisdiction	Citation	Short description
		elm leaf beetles, mosquitoes, and all other injurious insects.

Social Services

Jurisdiction	Citation	Short description
City of Dallas, TX	Code of Ord. Sec. 33-5	City officials are authorized to inspect any assisted living facility to confirm its status and to ensure compliance with the Texas Health and Safety Code.