No. 20-107

In the Supreme Court of the United States

CEDAR POINT NURSERY AND FOWLER PACKING CO.,
Petitioners,

v.

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

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

BRIEF IN OPPOSITION

XAVIER BECERRA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
THOMAS S. PATTERSON
Senior Assistant Attorney General

JOSHUA PATASHNIK*
Deputy Solicitor General
MARK R. BECKINGTON
Supervising Deputy Attorney General
R. MATTHEW WISE
Deputy Attorney General

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
455 Golden Gate Avenue,
Suite 11000
San Francisco, CA 94102-7004
(415) 510-3896
Josh.Patashnik@doj.ca.gov
**Counsel of Record*

October 2, 2020

QUESTION PRESENTED

In 1975, the California Agricultural Labor Relations Board promulgated a regulation affording union organizers a limited right to access the property of agricultural employers. Cal. Code Regs., tit. 8, § 20900(e). The Board modeled the regulation on a right of access that this Court has recognized under the National Labor Relations Act. *See id.* § 20900(b); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). The state regulation restricts the right of access in several ways. Among other things, organizers may access only non-work spaces, during non-work periods, for no more than three hours per day, and for no more than four thirty-day periods each year. Cal. Code Regs., tit. 8, § 20900(e)(1)(A), (3). The only permissible purpose of the access is for organizers to meet and talk with employees and solicit their support, *id.* § 20900(e), and the access right terminates five days after the completion of a ballot count in a union representation election, *id.* § 20900(e)(1)(C). The organizers must provide advance notice to the employer, *id.* § 20900(e)(1)(B), and only two organizers, plus one additional organizer for every 15 employees beyond 30, may access the property, *id.* § 20900(e)(4)(A). Disruption of the employer's business operations is prohibited. *Id.* § 20900(e)(4)(C). The question presented is:

Whether the access regulation effects a *per se* physical taking of petitioners' property under the Fifth Amendment.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

STATEMENT

1. In 1975, the California Legislature enacted the Agricultural Labor Relations Act (the Act), Cal. Labor Code § 1140 *et seq*. The Act is "modeled . . . in large part after the comprehensive federal labor relations statutes, the National Labor Relations Act and the Taft-Hartley Act (NLRA)." *J.R. Norton Co. v. Agric. Labor Relations Bd.*, 26 Cal. 3d 1, 8 (1979). The NLRA does not apply to "agricultural laborer[s]," 29 U.S.C. § 152(3), and the state statute applies only to agricultural employees excluded from coverage under the NLRA, Cal. Labor Code § 1140.4(b). The federal and state statutes share the same general policy objectives, *compare* 29 U.S.C. § 151, *with* Cal. Labor Code § 1140.2, and contain functionally identical provisions affording employees "the right to self-organization," "to bargain collectively," and to "engage in other concerted activities for . . . mutual aid or protection," 29 U.S.C. § 157; Cal. Labor Code § 1152.

The Act established the California Agricultural Labor Relations Board (the Board), which "possesses authority and responsibilities comparable to those exercised by the National Labor Relations Board (NLRB)." *J.R. Norton*, 26 Cal. 3d at 8; *see* Cal. Labor Code § 1141. The state Board may promulgate "such rules and regulations as may be necessary to carry out" the Act and its policies. Cal. Labor Code § 1144. The Act also provides that the Board "shall follow applicable precedents of the National Labor Relations Act." *Id.* § 1148.

Shortly after the Board's creation, it promulgated the regulation at issue here. *See* Cal. Code Regs., tit. 8, § 20900. The Board noted that, in interpreting the NLRA in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), this Court had recognized that "organizational

rights are not viable in a vacuum" and "depen[d] in some measure on the ability of employees to learn the advantages and disadvantages of organization from others." Cal. Code Regs., tit. 8, § 20900(b). Thus,

> [w]hen alternative channels of effective communication are not available to a union, organizational rights must include a limited right to approach employees on the property of the employer. Under such circumstances, both statutory and constitutional principles require that a reasonable and just accommodation be made between the right of unions to access and the legitimate property and business interests of the employer.

Id.; *accord Babcock*, 351 U.S. at 113 ("[I]f the location of a plant and the living quarters 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.").

The Board determined that this principle generally applied in the context of agricultural employment. It found that "unions seeking to organize agricultural employees" ordinarily "do not have available alternative channels of effective communication," because the alternative channels "which have been found adequate in industrial settings do not exist or are insufficient in the context of agricultural labor." Cal. Code Regs., tit. 8, § 20900(c). That reality, along with other developments, had created "unstable and potentially volatile condition[s] in the agricultural fields of California." *Id.* § 20900(d). To alleviate those conditions and to "provide clarity and predictability to all parties," *id.*, the Board adopted the regulation at issue here.

The regulation provides that the rights of employees to organize and engage in collective action "include the right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support." Cal. Code Regs., tit. 8, § 20900(e). That right of access, however, is limited and conditioned in a number of ways:

- Organizers may enter the property only for one hour before the start of work, one hour after the completion of work, and one hour during employees' lunch break. *Id.* § 20900(e)(3)(A)-(B).
- Organizers' access is limited to the parts of the property where "employees congregate before and after working" (for the one hour before and after work) and where "employees eat their lunch" (for the one hour during lunch break). *Id.*
- Organizers may enter the property only "for the purpose of meeting and talking with employees and soliciting their support." *Id.* § 20900(e).
- Organizers' access is limited to "no more than four (4) thirty-day periods in any calendar year." *Id.* § 20900(e)(1)(A). Each thirty-day period commences when a labor organization files with a regional Board office a written notice of intention to take access to the property, a copy of which must also be provided to the employer. *Id.* § 20900(e)(1)(B).
- If a petition for a union election is filed, the right of access "shall continue until after the

election," but terminates five days after "completion of the ballot count" for the election. *Id.* § 20900(e)(1)(B)-(C).

- Access is limited to "two organizers for each work crew on the property, provided that if there are more than 30 workers in a crew, there may be one additional organizer for every 15 additional workers." *Id.* § 20900(e)(4)(A).
- Organizers must "identify themselves by name and labor organization to the employer or his agent," and must wear a badge with that same information. *Id.* § 20900(e)(4)(B).
- Organizers may not engage in "conduct disruptive of the employer's property or agricultural operations, including injury to crops or machinery or interference with the process of boarding buses." *Id.* § 20900(e)(4)(C).

The regulation also provides that any organizer who violates any of these provisions "may be barred from exercising the right of access under this part . . . for an appropriate period of time to be determined by the Board." *Id.* § 20900(e)(5)(A).

After the Board promulgated the regulation, certain agricultural employers filed suit in state court, asserting that the regulation on its face violated their due process rights and constituted an uncompensated taking of their property. *Agric. Labor Relations Bd. v. Superior Court (Pandol & Sons)*, 16 Cal. 3d 392 (1976). The California Supreme Court rejected these claims. *Id.* at 411. Invoking this Court's decision in *Babcock*, the state court held that if the circumstances of employment "'place the employees beyond the reach of reasonable union efforts to communicate with them, *[t]he employer must allow the union to approach his*

employees on his property.'" *Id.* at 409 (quoting *Babcock*, 351 U.S. at 113; italics added by state court). The court concluded that, at least in the context of the facial challenge the plaintiffs had brought, *see id.* at 401, the regulation did not violate due process or constitute an uncompensated taking, *see id* at 402-411. Although there might be "individual instances in which access might in fact have been unnecessary in order to effectively communicate with the workers, . . . general economic regulations affecting property rights are not constitutionally invalid merely because they may be inappropriate in the case of a few individual property owners." *Id.* at 410.

The employers then sought further review through this Court's mandatory appellate jurisdiction that applied at the time. This Court dismissed the appeal "for want of a substantial federal question." *Pandol & Sons v. Agric. Labor Relations Bd.*, 429 U.S. 802 (1976).

2. The petitioners in this case are two agricultural employers in California that are subject to the Act and to the access regulation. Cedar Point Nursery grows strawberries in Dorris, California, near the Oregon border. Pet. App. G4. It alleges that organizers with the United Farm Workers entered its property on October 29, 2015, to stage a protest. *Id.* at G9-10. Cedar Point filed a charge with the Board against the union, alleging that the union violated the access regulation by failing to provide the required notice. *Id.* at G10.

Fowler Packing Company grows grapes and citrus fruit at its facility in Fresno. Pet. App. G4. It was the subject of an unfair labor practice charge that the United Farm Workers filed with the Board in 2015, alleging that the company had blocked organizers from accessing its property in violation of the access

regulation. *Id.* at G11. The union withdrew the charge in January 2016. *Id.*

Petitioners sued the Board in February 2016 in federal district court. Pet. App. G. They alleged that, as applied to them, the regulation constituted a taking without just compensation in violation of the Fifth Amendment and an unreasonable seizure in violation of the Fourth Amendment. *Id.* at G13-16. Petitioners sought declaratory and injunctive relief preventing the Board from enforcing the regulation against them. *Id.* at G16.

The district court denied petitioners' motion for a preliminary injunction and granted the Board's motion to dismiss. Pet. App. B, C, D. It concluded that petitioners' takings claim failed because the regulation did not result in a "'permanent physical occupation' in a manner that has been recognized by the Supreme Court." Pet. App. D10; *see id.* at B8.[1] The court explained that the access required by the regulation was "limited to certain times and locations." *Id.* at D10 & n.3. It also rejected petitioners' theory that the regulation could be analogized to the government actions in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Pet. App. D10-14. Unlike the easements at issue in those cases, the right of access in this case "is not necessarily permanent, depend[s] on what kind of business is conducted at the location,

[1] Although *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), had not yet been decided, the district court found it appropriate to reach the merits of petitioners' takings claim under the so-called "futility" exception to the state-litigation requirement of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Pet. App. D8.

is limited, and is for a very specific reason." *Id.* at D14. Separately, the court noted that petitioners had not attempted to establish a regulatory taking under the multi-factor test laid out in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and had not alleged that the regulation had "had any negative economic impact on them at all." Pet. App. B9-10.[2]

3. The court of appeals affirmed. Pet. App. A. It observed that petitioners "base[d] their [takings] argument entirely on the theory that the access regulation constitutes a permanent physical invasion of their property and therefore is a per se taking" under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Pet. App. A15. The court noted that the category of government actions constituting permanent physical occupations is "'relatively narrow,'" *id.* at A14 (quoting *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005)), and concluded that the challenged regulation did not qualify. Although the regulation places some limits on employers' right to exclude union organizers from their property, the court deemed that insufficient to constitute a taking under the "permanent physical occupation" test. *Id.* at A15-A18. It reasoned that this Court's precedents, including *Kaiser Aetna* and *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), indicate that not all limitations on the right to exclude constitute a permanent physical occupation under *Loretto*. Pet. App. A16-17, A18-20 & n.8. And unlike the easement at issue in *Nollan*, the regulation here "significantly limits

---

[2] The district court also rejected petitioners' Fourth Amendment claim, concluding that they had failed to allege that the regulation had "cause[d] a meaningful interference with their possessory interests" in their property. Pet. App. B13; *see id.* at B10 (citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)).

organizers' access to [petitioners'] property" and "does not allow random members of the public to unpredictably traverse their property 24 hours a day, 365 days a year." *Id.* at A17-18. The court explained that although the limitations on petitioners' right to exclude would be a relevant factor in a *Penn Central* regulatory takings analysis, petitioners had declined to raise any such claim. *Id.* at A19-20 & n.8.

The court also responded to the dissent's contention (*see infra* pp. 8-9) that the challenged regulation effects a taking because it ostensibly sweeps more broadly than the access right provided for in the NLRA, as interpreted by this Court in *Babcock* and subsequent cases. Pet. App. A21-22. "[W]hile *Babcock* may be helpful in analyzing challenges to the access regulation under" the state Agricultural Labor Relations Act—a claim that petitioners had not advanced—"it is not relevant to the [petitioners'] contention that the access regulation is a physical per se taking in violation of the Fifth Amendment." *Id.*; *see id.* at A21 n.9; Cal. Labor Code § 1148 (requiring the Board to "follow applicable precedents of the [NLRA]").[3]

Judge Leavy dissented. Pet. App. A26-31. He noted that petitioners' complaint had "alleged that no employees reside on the employers['] property, and that alternative methods of effective communication are available to the nonemployee union organizers." *Id.* at A26. In light of that allegation, he would have reversed the district court's dismissal of petitioners'

[3] The court of appeals also affirmed the dismissal of petitioners' Fourth Amendment claim, reasoning that they had not alleged facts indicating that the regulation had meaningfully interfered with their property rights, so no seizure had occurred. Pet. App. A22-25. Petitioners do not seek this Court's review of that claim.

takings claim on the ground that petitioners and their employees did not fall within the contours of the NLRA access right recognized by this Court in cases including *Babcock* and *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). Pet. App. A30-31.

4. Petitioners filed a petition for rehearing en banc, which the court of appeals denied. Pet. App. E4.

Judge Ikuta, joined by seven other judges, dissented from that denial. Pet. App. E10-32. In her view, the agricultural industry has "changed dramatically in the past 40 years," such that most employees do not live on the employer's property and "modern technology gives union organizers multiple means of contacting employees." *Id.* at E12 n.1. In light of these developments, she considered it "questionable" whether the original justifications for the access regulation remain valid. *Id.* She concluded that this Court's precedents regarding access rights under the NLRA did not foreclose petitioners' takings claim because petitioners had alleged that "their employees are accessible to union organizers through reasonable means of communication." *Id.* at E13 n.2. She would have held that the regulation effects an uncompensated taking of an easement in gross, because it affords union organizers the ability to "enter the land of another for the purpose of taking some action." *Id.* at E18; *see id.* at E23-24.

Judge Paez, joined by Judge Fletcher, concurred in the denial of rehearing en banc in order to "respond to arguments raised in Judge Ikuta's dissent." Pet. App. E4-10. He explained that this Court's case law does not "stand[] for the proposition that a regulatory easement which allows intermittent intrusions onto private property will result in a taking" absent a showing of any detrimental effect on the property owner. *Id.* at

E6. He also noted that, unlike the easement at issue in *Nollan*, the regulation challenged here "does not authorize 'continuous' access to [petitioners'] property," because "[o]nly in specific circumstances" may union organizers "take advantage of the limited access" the regulation affords them. *Id.* at E8.

ARGUMENT

The court of appeals faithfully applied this Court's precedents in holding that the challenged regulation does not effect a *per se* physical taking. Contrary to petitioners' view, this Court has never held—or even suggested—that a government regulation of the kind at issue here results in a *per se* taking of property. Indeed, the Court has recognized a similar limited right of access under the NLRA. Nor do petitioners identify any other persuasive reason for further review. They contend that the decision below is at odds with a nearly 30-year-old Federal Circuit case, but a more recent decision from that Circuit (which petitioners do not cite) makes clear that there is no conflict. And petitioners do not establish that the challenged regulation, which is rarely invoked and allows only limited access subject to numerous safeguards and restrictions, has caused them or other agricultural employers any actual economic harm or disruption.

1. Petitioners contend that the court of appeals misapplied this Court's takings precedents. *See* Pet. 17-27; *see also* Pet. App. E18-21 (opinion dissenting from denial of rehearing en banc). That is incorrect. The court of appeals recognized the distinction this Court has drawn between physical and regulatory takings, including in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Pet. App. A14-15. Applying that framework, the court properly determined that the Board's regulation does not result in a

per se taking of an easement under the *Loretto* "permanent physical occupation" rule. *Id.* at A15.

a. Petitioners argue that the court of appeals misapplied *Loretto*. Pet. 20-21. It did not. *Loretto*'s holding was "very narrow." 458 U.S. at 441. The Court "affirm[ed] the traditional rule that a permanent physical occupation of property is a taking," *id.*, in the context of a government regulation requiring property owners to allow the permanent placement of cable television equipment on their property, *id.* at 423. The case did not address intermittent access to property by people.

In contrast to the taking in *Loretto*, the access right defined in the Board's regulation is temporary and limited: union organizers may access the property for a total of only three hours per day, before and after work hours and during lunch; they may do so for only four thirty-day periods each year; the access right terminates five days after the completion of any union election; access is limited to the areas of the property where employees congregate during non-working periods; the only permissible purpose of the access is to communicate with employees regarding union organizing; no more than two organizers (plus one for each 15 employees beyond 30) are permitted; and notice to the employer and the Board is required. *Supra* pp. 3-4; Cal. Code Regs., tit. 8, § 20900(e).

Loretto does not address whether a limited right of access of this kind constitutes a permanent physical occupation. The opinion's reasoning suggests it does not: The Court explained that an "easement of passage, not being a permanent occupation of land, [is] not considered a taking *per se*." 458 U.S. at 433 (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 180

(1979)). While it may amount to a "government intrusion of an unusually serious character," it is nonetheless subject to a multi-factor regulatory takings analysis under *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). *Loretto*, 458 U.S. at 433; *see also Kaiser Aetna*, 444 U.S. at 174-175, 178. Here, however, petitioners opted not to assert any *Penn Central* claim, Pet. App. A20, and they have never alleged that the Board's regulation "has had any negative economic impact on them at all," *id.* at B10 (emphasis omitted).[4]

b. Petitioners next argue that the court of appeals ran afoul of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), which they contend "involved an access easement like the one here." Pet. 22; *see id.* at 21-23, 25; *see also* Pet. App. E21 (opinion dissenting from denial of rehearing en banc). That argument misreads *Nollan*.

Nollan held that a "'permanent physical occupation' has occurred, for purposes of [*Loretto*], where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed." 483 U.S. at 832. But the Court did not attempt to define what it means for a

---

[4] Petitioners complain that "[t]he technical availability of a *Penn Central* claim . . . is little consolation" for them, because "[t]he vast majority of easements" do not diminish the value of property substantially enough to qualify as a regulatory taking. Pet. 18-19 n.5. But the *Penn Central* inquiry considers a number of factors, not just diminution in value. "[T]he character of the governmental action" at issue is a principal consideration, and "[a] 'taking' may more readily be found" under *Penn Central* "when the interference with property can be characterized as a physical invasion by government." 438 U.S. at 124.

regulation to mandate "permanent and continuous" access—likely because the case before it *did* involve an easement mandating round-the-clock access by the general public. *See id.* at 829, 831-832.[5]

Petitioners contend that the court of appeals "limited *Nollan* to easements permitting access all day, every day." Pet. 22; *see id.* at 19, 22-23. That is not so. The court held that the regulation at issue here "does not meet *Nollan*'s definition of a permanent physical occupation," in light of the "significant[] limits" it places on union organizers' access. Pet. App. A17; *see id.* at A7-9. The court did not purport to establish a bright-line rule that any regulation mandating access for less than "24 hours a day, 365 days a year" falls outside of *Nollan*'s definition of a permanent physical occupation.

To the extent *Nollan* sheds any light on whether and how the concept of "permanent and continuous" access might apply in cases involving intermittent access rights, it suggests a relatively narrow understanding of that concept. The Court explained that the restriction on the right to exclude that was upheld in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), did *not* entail "permanent access." *Nollan*, 483 U.S. at 832 n.1. That restriction required a shopping

---

[5] Petitioners argue that "the easement taken" in *Nollan* in fact "did not permit continuous public access" because passage would be "impossible" at times "due to 'high-tide line shifts.'" Pet. 22 (quoting *Nollan*, 483 U.S. at 854 (Brennan, J., dissenting)). But that argument relies on the dissent's understanding of "continuous" access, not the Court's. In any event, whatever the exact nature of the public access right considered in *Nollan*, the facts of that case are markedly different from those here.

center to indefinitely allow political speech by members of the general public during normal business hours, *see PruneYard*, 447 U.S. at 77-78, a significantly more "permanent" intrusion than the intermittent access contemplated by the Board's regulation here. Petitioners fail to mention *Nollan*'s characterization of *PruneYard* as not involving "permanent access"; indeed, they truncate their quotation of *Nollan* to omit it. *Compare* Pet. 27, *with* 483 U.S. at 832 n.1.[6]

Petitioners appear to read *Nollan* for the proposition that any "denial of the right to exclude" automatically "triggers application of the physical takings doctrine," at least when the property is not already publicly accessible. Pet. 25; *see id.* at 25-27. But *Nollan* says nothing of the sort. And a sweeping rule of that kind would be at odds with this Court's admonition that the permanent physical occupations addressed by *Loretto* are a "relatively narrow categor[y]," *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005), and that "[i]n view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules" in takings doctrine, *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012).

c. Petitioners also contend that the decision below misapplies the Court's decisions in *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922), and *United States v. Causby*, 328 U.S. 256 (1946). Pet. 23-24; *see also* Pet. App. E18-20 (opinion

---

[6] Petitioners note that *Nollan* and other cases have distinguished *PruneYard* on the ground that the shopping center in that case was already open to the public. Pet. 27. That is true, but *Nollan* explained that "*in addition*" to that distinction, "permanent access was not required" in *PruneYard*. *Nollan*, 483 U.S. at 832 n.1 (emphasis added).

dissenting from denial of rehearing en banc). That is not correct either.

Those two cases involved allegations that the government had effected a taking by repeatedly invading plaintiffs' airspace—either with military aircraft, *Causby*, 328 U.S. at 258, or projectiles fired from coastal defense guns, *Portsmouth Harbor*, 260 U.S. at 328. Although both cases predated this Court's modern takings framework, in neither case did the Court hold that the fact of the invasion, on its own, resulted in a taking. Instead, the Court explained that a taking would result only if the invasions substantially impaired the plaintiffs' use of their property.[7] The cases thus do not establish that every government invasion of private property, without regard to its severity or economic impact, results in a taking. Nor do they support petitioners' contention that the regulation challenged here does so—in an entirely different factual setting and without any asserted economic impact on petitioners at all, *see* Pet. App. B9-10.

2. Petitioners argue that the decision below creates a conflict with *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991). Pet. 13-17; *see also* Pet. App. E21-23 (opinion dissenting from denial of rehearing en banc). But the facts of *Hendler* bear no resemblance to those here, and the Federal Circuit did not hold (as petitioners suggest) that any regulation limiting a

---

[7] *See Portsmouth Harbor*, 260 U.S. at 329 (if "the Government . . . fire[s] projectiles directly across" property, "with the result of depriving the owner of its profitable use," compensation would be required); *Causby*, 328 U.S. at 266-267 ("[f]lights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land" and cause a "diminution in value of the property").

property owner's right to exclude some class of persons results in a *per se* taking.

In *Hendler*, the EPA installed a series of 22 wells on the plaintiffs' land to monitor toxic chemicals in groundwater near a hazardous waste disposal site. 952 F.2d at 1369-1370; *see id.* at 1376 n.11. The wells were "100 feet deep, lined with plastic and stainless steel, and surrounded by gravel and cement." *Id.* at 1376. Each well was "capped with a cement casing lined with reinforcing steel bars, and enclosed by a railing of steel pipe set in cement." *Id.* at 1376. The wells remained in place for many years; there was no indication that the agency would ever remove them. *Id.* And "[g]overnment vehicles and equipment entered upon plaintiffs' land from time to time, without permission, for purposes of installing and servicing the various wells." *Id.* at 1377.

The Federal Circuit held that these facts established a "permanent physical occupation" under *Loretto*. 952 F.2d at 1377. The court reasoned that the wells were "at least as 'permanent' in this sense as the CATV equipment in *Loretto*, which comprised only a few cables attached by screws and nails and a box attached by bolts." *Id.* at 1376. But the court disclaimed any attempt to "decide here what physical occupancy, of what kind, for what duration, constitutes a *Loretto* taking." *Id.* at 1377. It was "enough to say that, on the facts" of the case, such a taking had occurred. *Id.* That conclusion was bolstered, the court reasoned, by the activities of agency officials, who periodically and without notice or permission entered the plaintiffs' land to service the wells. *Id.* at 1377-1378. The court analogized the case to *Nollan* and *Kaiser Aetna*, because the "Government behaved as if it had acquired" a "'permanent and continuous right to

pass to and fro, so that the real property may continuously be traversed.'" *Id.* (quoting *Nollan*, 483 U.S. at 832). "[O]n the[se] facts," the court held, a "permanent physical occupation" had occurred. *Id.* at 1378.

To the extent it is possible to distill a rule from *Hendler*'s fact-dependent holding, it is roughly this: When the government installs equipment on property without any clear removal date, and then periodically enters the property at its discretion to maintain the equipment, a "permanent physical occupation" under *Loretto* has occurred. *Cf. Otay Mesa Property, L.P. v. United States*, 670 F.3d 1358, 1361-1362, 1365-1368 (Fed. Cir. 2012) (finding a *Loretto*-type taking on similar facts).

Indeed, that is how the Federal Circuit understood *Hendler* in a more recent decision, which petitioners do not cite. In *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002), the U.S. Fish and Wildlife Service prohibited the plaintiff "from excluding spotted owls from its property" and "required [it] to allow government agents to enter its property to conduct owl surveys." *Id.* at 1352. The court held that these facts did "not make out a per se takings claim under *Loretto*." *Id.* The government's "brief, [t]ransient, nonexclusive entries . . . to conduct owl surveys" did not "permanently usurp" the plaintiff's "exclusive right to possess, use, and dispose of its property." *Id.* at 1355. The court rejected the plaintiff's argument that *Hendler* compelled a different result, emphasizing that "[t]he government intrusion complained of in this case was of far lesser duration than that in *Hendler*, and it did not involve the placement of a permanent or even a quasi-permanent installation." *Id.* at 1355-1356. The court continued:

> *Hendler*'s *holding was unremarkable and quite narrow*: it merely held that when the government enters private land, sinks 100–foot deep steel reinforced wells surrounded by gravel and concrete, and thereafter proceeds to regularly enter the land to maintain and monitor the wells over a period of years, a per se taking under *Loretto* has occurred.

Id. at 1357 (emphasis added).

Thus, in the Federal Circuit, whether a government mandate regarding property access constitutes a permanent physical occupation under *Loretto* requires consideration of, among other things, the "duration" of the limitation on the landowner's right to exclude; whether it involves the "placement" of any "installation" on the property; whether (and to what degree) the intrusion is of a "limited and transient nature"; and the "purpose" of the government action. *Boise Cascade*, 296 F.3d at 1355-1356, 1357.

The decision below does not conflict with the Federal Circuit's approach. The court of appeals here held that the Board's regulation "does not meet *Nollan*'s definition of a permanent physical occupation" in light of the "significant[] limits" it places on organizers' access to petitioners' property. Pet. App. A17; *see id.* at A7-9; *supra*, pp. 3-4. Those limits would be relevant to a court's evaluation of petitioners' *per se* takings claim in the Federal Circuit as well.

3. Petitioners' remaining arguments do not provide any persuasive reason for the Court to grant review.

a. Petitioners assert that "this Court's guidance is now imperative" because, after *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), "federal courts are now

in a primary position to hear takings cases." Pet. 16-17. While federal courts will no doubt be more likely to reach the merits of takings claims after *Knick*, which overruled *Williamson County's* state-litigation requirement, state courts have been adjudicating such claims all along. Yet petitioners do not identify any state court decision that conflicts with the decision below.

Nor do petitioners support their theory that *Knick* will lead to an overall increase in litigation regarding alleged takings of easements. *See* Pet. 16-17. Even if that theory were correct, moreover, it would counsel in favor of awaiting additional litigation and allowing more courts to weigh in on the matter—rather than this Court granting plenary review at this juncture.[8]

b. Petitioners also contend that the burdens imposed by the challenged regulation support immediate review. Pet. 27-28. They warn that the regulation will lead to "stampedes of third-party organizers . . . return[ing] to [their] property year after year." Pet. 28. But petitioners' own description of the facts on the ground make clear that this prediction is fanciful. Pe-

[8] Petitioners note that *Knick* involved an alleged taking of an easement, and they contend that the Third Circuit's "view of the merits" in that case "accords with *Hendler*, suggesting the immediate possibility that the current circuit split will only deepen." Pet. 16-17. But the facts of *Knick* are not at all analogous to those here. *Knick* involved an ordinance requiring owners of private cemeteries to make them "accessible to the general public during daylight hours." 139 S. Ct. at 2168. Even assuming that amounts to a permanent physical occupation under *Loretto* or a *per se* taking of an easement, such a holding would not conflict with the decision below.

titioners allege a total of one instance of property access by union organizers between the two of them. Pet. App. A10-11.

There is no indication that the access regulation poses a significant problem for California farms. The regulation has been in place for more than four decades. Pet. App. A6 & n.2. Although there are more than 16,000 agricultural employers in California, petitioners' statistics indicate that union organizers invoked the regulation to access the property of just 62 employers in 2015, Pet. 28.[9] Petitioners speculate that these brief visits might "disrupt production," *id.*, but petitioners have not actually alleged any negative economic impact on them (or anyone else) resulting from the regulation, *see* Pet. App. B9-10. Nor do petitioners' amici the American Farm Bureau Federation and the California Farm Bureau Federation cite any instances of disruption or harm to farmers. And the regulation itself prohibits "conduct disruptive of the employer's property or agricultural operations." Cal. Code Regs., tit. 8, § 20900(e)(4)(C).

Petitioners assert that the effects of the decision below "will be felt in other contexts as well," Pet. 28, including with respect to disputes over beach access in California and elsewhere, *see id.* at 28-30. But this case is not an appropriate vehicle to consider how takings doctrine should apply to those disputes: The decision below turns on the specific limitations on agricultural property access under the Board's regulation. *See supra* pp. 7-10. Moreover, as petitioners acknowledge, California courts have applied *Nollan* in

---

[9] *See* Martin et al., *Employment and Earnings of California Farmworkers in 2015*, 72 California Agriculture 107, 109 (2017), https://tinyurl.com/y3ljceet (chart at bottom of page indicates a total of 16,408 agricultural employers in California).

coastal access disputes, including in a case involving a daylight-hours easement. Pet. 29-30 n.10 (citing *Surfside Colony, Ltd. v. Cal. Coastal Comm'n*, 226 Cal. App. 3d 1260, 1266, 1269 (1991)). And property owners dissatisfied with the lower courts' resolution of such disputes may seek this Court's review in a proper case. *See, e.g.*, *Surfrider Found. v. Martins Beach 1, LLC*, 14 Cal. App. 5th 238, 267-275 (2017), *cert. denied*, 139 S. Ct. 54 (2018).

4. The dissenting judges in the court of appeals emphasized petitioners' allegation that union organizers have means of communicating with petitioners' employees other than accessing petitioners' property. *See* Pet. App. A29-31 (Leavy, J.); *id.* at E13 & n.2 (Ikuta, J.). In their view, that allegation distinguishes this case from the Court's precedents holding that, under the NLRA, "in certain circumstances nonemployee union organizers may have a limited right of access to an employer's premises for the purpose of engaging in organization solicitation." *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 204 (1978) (citing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).

The NLRA access right applies when "'the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them.'" *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539 (1992) (quoting *Babcock*, 351 U.S. at 113). "Classic examples include logging camps, mining camps, and mountain resort hotels." *Id.* at 539-540 (citations omitted). In promulgating the regulation at issue here, which is modeled on that NLRA access right, the Board explained that "[a]lternative channels of effective communication which have been found adequate in industrial settings

do not exist or are insufficient in the context of agricultural labor." Cal. Code Regs., tit. 8, § 20900(c); *see supra* pp. 1-2.

Petitioners' allegation that union organizers have alternative means of communicating with their employees may be relevant to a claim that the access regulation exceeds the Board's authority under the California Agricultural Labor Relations Act, in light of the Board's obligation to "follow applicable precedents of the National Labor Relations Act," Cal. Labor Code § 1148. *See* Pet. App. A21-22. But petitioners never brought such a claim. *See id.* at A21 n.9. Nor do they contend that their *per se* takings theory turns in any way on whether their employees fall within the contours of the NLRA access right this Court has recognized.[10] Any question about the scope or continued vitality of that access right should be addressed in the context of a case directly involving the NLRA—not in a case presenting a takings challenge to a state regulation.

[10] The availability of alternative means of communication might play a role as part of a multi-factor takings analysis, *see, e.g.*, *Penn Central*, 438 U.S. at 124, but it is not apparent how it could be relevant to petitioners' *per se* takings claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
THOMAS S. PATTERSON
Senior Assistant Attorney General
JOSHUA PATASHNIK
Deputy Solicitor General
MARK R. BECKINGTON
Supervising Deputy Attorney General
R. MATTHEW WISE
Deputy Attorney General

October 2, 2020