No. 20-107

In the Supreme Court of the United States

CEDAR POINT NURSERY, *et al.*,

Petitioners,

v.

VICTORIA HASSID, *et al.*,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

Founded in 1991, the Institute for Justice (IJ) is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. As part of that mission, IJ has litigated cases challenging the use of eminent domain to seize an individual's private property and give it to other private parties. Among the cases that IJ has litigated are *Kelo* v. *City of New London*, 545 U.S. 469 (2005), in which this Court held that the U.S. Constitution allows government to take private property and give it to others for purposes of "economic development," and *Norwood* v. *Horney*, 853 N.E.2d 1115 (Ohio 2006), in which the Ohio Supreme Court expressly rejected *Kelo* and held that the Ohio Constitution provides greater protection for private property than does the U.S. Constitution. IJ continues to litigate important statutory and constitutional questions in eminent domain cases around the country, both as amicus and as counsel for property owners. The Institute for Justice has a substantial interest in ensuring that this Court reaffirms the crucial doctrinal difference between government action that causes a physical invasion of private property and government action that merely restricts an owner's use of property. The latter is sometimes a taking; the former is presumptively a taking.[1]

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[1] In accordance with Rule 37.6, no counsel for a party authored this *amicus* brief in whole or in part and no person other than the Institute for Justice, its members, or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Both parties consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Farmers in California are required by state law to allow labor organizers onto their property up to three times per day, up to 120 days per year. A Ninth Circuit panel below recognized that this law had created an uncompensated easement of indefinite duration. Yet, because the easement did not allow for 24-hour access, 365 days per year, the court held that the easement did not effect a per se taking.

Petitioners persuasively demonstrate that an easement, even one that is limited to certain times of the day or week, is a "permanent physical occupation" within the meaning of this Court's precedents and that, accordingly, the California law at issue is a per se taking. The Institute for Justice submits this brief, however, to highlight another way that the court below erred. The panel held that if petitioner were unable to establish a per se taking, then the only available theory was a regulatory taking, which petitioner intentionally did not advance. Yet this Court has consistently recognized that *temporary* physical invasions are a distinct category of taking, different from both permanent physical occupations and regulatory takings. And unlike regulatory takings, which are extremely difficult to prove, temporary physical occupations are *usually* takings. Only the briefest physical invasions can escape the Fifth Amendment's just compensation requirement. This Court should reaffirm that physical invasions, even if they do not qualify for per se treatment, are presumptively takings.

ARGUMENT

I. Temporary physical invasions are subject to a far more stringent level of review than regulatory actions that merely restrict an owner's use of property.

The Fifth Amendment's Takings Clause recognizes two broad categories of government action that can cause a taking: physical invasions of property and regulations depriving property owners of the uses of their property. Physical invasions exist on a continuum from the permanent to the fleeting. Regulations, by contrast, are analyzed primarily in terms of their economic impact.

The Ninth Circuit erred in this case by treating all non-permanent physical invasions as simply a subset of regulatory takings, to be analyzed in terms of economic impact. According to the Ninth Circuit there are only three types of takings: (1) "permanent physical invasion[s]", (2) "regulations that completely deprive an owner of all economically beneficial use of her property," and (3) "the remainder of regulatory actions." *Cedar Point Nursery* v. *Shiroma*, 923 F.3d 524, 530–31 (9th Cir. 2019) (internal quotation marks omitted). This error had consequences. By lumping temporary physical invasions in with regulations that merely restrict an owner's use of property, the Ninth Circuit set the bar far too high. While regulatory takings claims are difficult to prove, physical invasions—even when temporary—are presumptive takings.

This Court has repeatedly recognized the "longstanding distinction" between physical invasions and regulations of property. *Horne* v. *Dep't of Agric.*, 576 U.S. 350, 361 (2015); see also *Ark. Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 33 (2012);

Tahoe-Sierra Preserv. Council, Inc. v. *Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002); *First Eng. Evangelical Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 318 (1987).[2] Indeed, the difference is so important that this Court has held that it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a regulatory taking." *Tahoe-Sierra Preserv. Council, Inc.* 535 U.S. at 323. When bringing a Takings Clause claim under a temporary physical invasion theory, the property owner need not meet the more burdensome standard for a regulatory taking

A. Regulatory taking doctrine presents a higher bar for property owners than physical invasions.

Prevailing on a regulatory taking claim is difficult for property owners. Although a variety of factors are potentially relevant, the determining factor is usually the diminution of value caused by the regulation at issue. See *Keystone Bituminous Coal Ass'n* v.

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[2] Part of the confusion appears to stem from the fact that *Penn Central Transportation Company* v. *City of New York*, 438 U.S. 104, 124 (1978) (listing factors to consider in determining whether a regulation effects a taking), is sometimes treated as synonymous with regulatory takings. Yet *Penn Central* actually distinguished between physical invasions and regulations. In addressing the first *Penn Central* factor, the "character of the government action," this Court explained that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government." *Penn Cent. Transp. Co.*, 438 U.S. at 124. Subsequent physical invasion cases have typically not treated *Penn Central* as setting out a controlling formula, except inasmuch as it indicates that courts should look to all of the facts and circumstances in takings cases. See *Ark. Game & Fish Comm'n* v. *U.S.*, 568 U.S. 23, 38–40 (2012).

DeBenedictis, 480 U.S. 470, 497 (1987) ("[O]ur test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property[.]"). In fact, this Court has even described the diminution of value inquiry as the "goal" of regulatory takings analysis. *Murr* v. *Wisconsin*, 137 S. Ct. 1933, 1944 (2017); see also *Penn. Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922) ("[I]f regulation goes too far it will be recognized as a taking."). By contrast, "when there has been a physical appropriation, 'we do not ask * * * whether it deprives owner of all economically valuable use' of the item taken." *Horne* v. *Dep't of Agric.*, 576 U.S. 350, 362 (2015).

When viewed in this light, this Court's holding in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992), is inescapable. If a regulation becomes a taking when it goes "too far," then a regulation that destroys all of a property's economic value must obviously be a taking. A regulation can go no further.

This Court has not precisely delineated where the line must be drawn in regulatory takings cases, but it is clear that to effect a regulatory taking, a regulation must be truly "onerous." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). Lower courts (though not this Court) have held that even diminutions of 95% of the property's value may not constitute a regulatory taking. See, *e.g.*, *William C. Hass & Co.* v. *City & County. of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979) (value reduced from $2 million to $100,000). While lower courts are not in agreement regarding how great a diminution in value must be shown to establish a regulatory taking, courts do generally recognize that "challenges to regulatory takings are

difficult for property owners to mount." *Piedmont Triad Reg'l Water Auth.* v. *Unger*, 572 S.E.2d 832, 835 (N.C. App. 2002). This Court has justified the high bar in regulatory takings cases by stating that regulations often "[do] not interfere with interests that [are] sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." *Penn Cent. Transp. Co.* v. *City of New York*, 438 U.S. 104, 125 (1978).

B. Temporary physical invasions are presumptive takings.

Unlike mere regulation of property, government action that leads to a direct physical invasion of property is "[t]he paradigmatic taking requiring just compensation." *Lingle* v. *Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005). Indeed, the property interests hindered by physical invasions are of such "an unusually serious character for purposes of the Takings Clause," *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), that even slight intrusions, having a minimal economic impact on the property owner, like placing cables on a rooftop, effect a compensable taking under the Fifth Amendment. See *id.* at 441. Yet notwithstanding this Court's repeated insistence that physical invasions are different and far more serious than mere regulations, the Ninth Circuit dismissed the physical character of the government action at issue in this case on the grounds that it was not "permanent." That was a mistake.

To be sure, this Court has not extended the *per se* rule of *Loretto* to include temporary physical invasions of property. See *Ark. Game & Fish Commission* v. *United States.* 568 U.S. 23, 36 (2012); but see, *Tahoe-Sierra Preserv. Council, Inc.* v. *Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 356 (2002) (Thomas, J.,

dissenting) (suggesting that at least some temporary physical invasions are per se takings). But it does not follow that the physical character of the invasion therefore becomes irrelevant in the takings analysis. Quite the contrary.

Perhaps the clearest distinction between a physical invasion and a regulation is that in the invasion context, a diminution of value analysis is irrelevant to the question of whether there is a taking. See *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-80 (1979) ("And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation."); *Horne* v. *Dep't of Agric.*, 576 U.S. 350 (2015) ("[W]hen there has been a physical appropriation, 'we do not ask * * * whether it deprives owner of all economically valuable use' of the item taken."); *First Eng. Evangelical Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 329-30 (1987) (Stevens, J., dissenting) ("This diminution of value inquiry is unique to regulatory takings."). While the value diminution analysis is generally the determinant in regulatory takings, this Court has said "a more complex balancing process" is appropriate in cases of temporary physical invasions. *Arkansas Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 36 (2012).

Government-sanctioned physical invasions of private property almost always constitute a taking. For instance, in *Kimball Laundry Co.* v. *United States*, this Court considered how much compensation was due to the owner of a commercial laundry that had been seized for government use during World War II. 338 U.S. 1 (1949). The physical invasion was obviously temporary, but there was no question that a taking had occurred. The only dispute was whether the government would be required to pay not only for the use

of the property, but also for the resulting damage to the property owner's business. The *Kimball* court held that the business losses were compensable. *Id* at 16.; see also *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945). Indeed, "a 'temporary physical invasion' * * * may be characterized as a 'presumptive taking,'" even if not a *per se* taking. *Hilton Washington Corp.* v. *D.C.*, 593 F. Supp. 1288, 1291 (D.D.C. 1984), aff'd, 777 F.2d 47 (D.C. Cir. 1985).[3]

Tahoe-Sierra Preservation Council, Inc. v. *Tahoe Regional Planning Agency* also illustrates the fundamental differences between physical invasions and regulatory takings. In that case, this Court held that whether moratoria on development in the Lake Tahoe Basin effected a taking should be determined under the *Penn Central* test for regulatory takings. *Id.* at 321. This Court distinguishes between physical invasions—where "the government * * * has a categorical duty to compensate the former owner"—and regulatory takings—where courts engage in ad hoc, factual inquiries. *Id.* at 322. There, this Court explicitly rejected the idea that the issue turned on whether the moratoria were temporary in nature. *Id.* at 337. Instead, it held that *Penn Central* applied because the moratoria were regulatory takings rather than physical invasions. This Court recognized the greater deprivation inherent in physical invasions and explicitly

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[3] Analogizing to antitrust jurisprudence, as this Court has done before, see *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982) ("In the antitrust area, similarly, this Court has not declined to apply a *per se* rule simply because a court must, at the boundary of the rule, apply the rule of reason and engage in a more complex balancing analysis."), one might say that temporary physical invasions are subject to the "quick look" review applied to actions that are usually unlawful. *Cal. Dental Ass'n* v. *FTC*, 526 U.S. 756, 763 (1999).

noted that temporariness could not cure such a constitutional violation. *Id.* at 322 ("[C]ompensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary."). Because of the particularly egregious deprivation inherent in a physical invasion, only brief, one-time physical invasions may be held not to effect a taking.

Typically, courts will always find there has been a taking in physical invasion cases unless the invasion was a brief, one-time incursion. For instance, in *YMCA* v. *United States*, 395 U.S. 85 (1969), this Court held that a "temporary, unplanned occupation" of property during "the course of battle" did not constitute a taking. *Id.* at 93.[4] Similarly, the California Supreme Court has held that there is no taking when government agents enter private property for the purpose of one-time groundwater testing. See *Prop. Reserve, Inc.* v. *Super. Ct.*, 375 P.3d 887, 923 (Cal. 2016). (However, the installation of groundwater monitoring equipment on private property, for an indefinite

[4] Notably, the Court emphasized that the occupation in that case actually protected the property owners' interest because it prevented rioters from damaging the owners' buildings as much as other buildings. *Id.* at 90. It noted that it would turn the purposes of the Takings Clause on its head for the Government to have to compensate the property owners when they were "the particular intended beneficiary of the governmental activity" rather than a party incurring the costs of benefits to the public. *Id.* at 92. It also noted that, under the particular facts of the case, where the riot prevented any beneficial use of the property, "the buildings could not have been used by [the owners] in any way." *Id.* at 93. The Court's focus on these factors may suggest that in a different factual circumstance even an otherwise-similar occupation may constitute a temporary physical invasion requiring just compensation.

period of time, does effect a taking. See *Hendler* v. *United States*, 952 F.2d 1364, 1371 (Fed. Cir. 1991).) The Third Circuit has likewise found that there was no taking when police officers physically occupied a property for just two hours while conducting a lawful search. *Jones* v. *Phila. Police Dep't*, 57 F. App'x 939, 942 (3d Cir. 2003).

Such cases are exceptions that illustrate the general principle that physical invasions are presumptive takings. These invasions' brevity means they do not limit the property owners' ability to possess, use, or keep others off their property in a meaningful way. See *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005) (highlighting the importance of the right to exclude). These types of cases were aptly explained by the Federal Circuit in one of its leading cases on physical invasions. Cases in which physical invasions do not lead to takings are those in which the:

> government's activity was so short lived as to be more like the tort of trespass than a taking of property. The distinction between the government vehicle parked one day on O's land while the driver eats lunch, on the one hand, and the entry on O's land by the government for the purpose of establishing a long term storage lot for vehicles and equipment, on the other, is clear enough.

Hendler v. *United States*, 952 F. 2d 1364, 1371 (Fed. Cir. 1991).

Beyond such brief incursions, courts generally find physical invasions to constitute a taking. Indeed, this Court has established that "while a single act may not be enough [to turn a physical trespass into a taking], a continuance of them in sufficient number and

for sufficient time may prove it." *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U.S. 327, 329–30 (1922). "Every successive trespass adds to the force of the evidence" that the incursions effect a taking. *Ibid*.

In a case involving a requirement that beachfront property owners maintain a pathway on their property for public access to the beach, this Court recognized that where "real property may continuously be traversed, even though no particular individual is permitted to station himself permanently" there is a taking because of the limitation on the right to exclude that such a requirement entails. *Nollan* v. *Cal. Coastal Comm'n*, 483 U.S. 825, 832 (1987).

In *Caquelin* v. *United States*, 959 F.3d 1360 (Fed. Cir. 2020), a recent case applying *Arkansas Game and Fish*, the Federal Circuit held that a property owner was entitled to $900.00 as compensation for the government's extending a private easement over the owner's property for 180 days. Such an invasion, the trial court had noted, was not "the mere 'parked truck of the lunchtime visitor.'" *Caquelin* v. *United States*, 140 Fed. Cl. 564, 579 (Fed. Cl. 2018) (citing *Hendler*, 952 F.2d at 1376), aff'd, 959 F.3d 1360 (Fed. Cir. 2020); see also *Primetime Hosp., Inc.* v. *Albuquerque*, 206 P.3d 112, 123 (N.M. 2009) (awarding damages for 142 days of temporary physical invasion).

These cases demonstrate that physical invasions are unlike alleged regulatory takings, where the deck is stacked against the property owner. Just the opposite. A physical invasion, even a temporary one, "may be characterized as a presumptive taking." *Hilton Washington Corp.* v. *District of Columbia*, 593 F. Supp. 1288, 1291 (D.D.C. 1984), aff'd, 777 F.2d 47 (D.C. Cir. 1985); see also Frank I. Michelman,

Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1226 (1967) (noting that physical invasions have "doctrinal potency" in takings analysis).

II. This Court should reaffirm the categorical difference between physical invasions and regulations of property use.

By conflating temporary physical invasions with regulatory takings, the decision below threatens to reverse the normal presumption that physical invasions are takings unless they are of especially short duration. Affirming the Ninth Circuit's decision would inappropriately shift the burden in cases of temporary physical invasions to the detriment of innocent property owners. Temporary physical invasions should not be evaluated using the same standard as regulatory takings because they more closely resemble a permanent physical invasion. See *First Eng. Evangelical Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 318 (1987) ("'[T]emporary' takings which * * * deny a landowner all use of his property are not different in kind from permanent takings[.]"); see also *Tahoe-Sierra Preserv. Council, Inc.* v. *Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 346–47 (Rehnquist, J., dissenting) ("[A] distinction between 'temporary' and 'permanent' prohibition is tenuous."); *Hendler* v. *United States*, 952 F.2d 1364, 1376–77 (arguing that the idea of a temporary taking is "illogical" since "[a]ll takings are 'temporary,' in the sense that the government can always change its mind at a later time"). The danger of substituting the standard for temporary physical invasions with the standard for regulatory takings is not theoretical.

Under the Ninth Circuit's approach, owners whose properties are subject to actual physical invasions will find themselves without recourse unless they can prove serious financial harm. This Court must not allow such a misunderstanding of the doctrine to stand. Other courts have adopted similarly flawed approaches. For example, in *Franklin Mem'l Hosp.* v. *Harvey*, 575 F.3d 121 (1st Cir. 2009), the First Circuit denied compensation to an owner whose property was subject to "periodic and intermittent" physical invasions, *id.* at 126 n.4, in part because the invasion at issue did not pose a "threat to [the owner's] economic viability" even though the court acknowledge that the property owner faced significant economic harm. *Id.* at 127. In light of this Court's reasoning in *Portsmouth* that multiple intrusions constitute a taking, that holding cannot be correct.

Similarly concerning is the holding *Hilton Washington Corp.* v. *District of Columbia*, 777 F.2d 47 (D.C. Cir. 1985), where the D.C. Circuit also denied compensation in a temporary physical invasion case because the property owner did not demonstrate that the invasion caused a "significant economic impact." *Id.* at 50. And in *Cienega Gardens* v. *United States*, 331 F.3d 1319 (Fed. Cir. 2003), the Federal Circuit held that a property owner subject to a physical invasion was required to show "serious financial loss" from the regulation at issue in order to prove a taking. *Id.* at 1338, 1340. Fortunately, the court in that case concluded that the property's 96% loss in value was sufficient to establish a taking, but it left open the question whether 35% would be sufficient. *Id.* at 1343 n.40.

This Court must reverse the decision of the Ninth Circuit because, notwithstanding the clarity of this Court's precedents, the federal courts are confused

about how to analyze temporary physical invasions. Due to this confusion, property owners are being deprived of compensation due to them under the Fifth Amendment. In order to ensure the rights of property owners, it is crucial that this Court explicitly reaffirm that temporary physical invasions are not evaluated as regulatory taking, but under a more stringent and property-protective standard. This Court must reaffirm that temporary physical invasions are presumptive takings. In this case the crucial question is whether the government action constitutes a physical invasion. If it does, then it is presumptively a taking, regardless of whether it can be characterized as a permanent, per se taking.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Ninth Circuit and should reaffirm that temporary physical invasions are presumptive takings under the Takings Clause.

Respectfully submitted.

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