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 Agricultural Labor Relations Board, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF *AMICUS CURIAE* OF PROPERTY LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors whose research and teaching focus on property law. They have no personal stake in the outcome of this case. Their sole interest is in assisting the Court in understanding fundamental principles of property law and the law of takings relevant to the resolution of this case. Joining in this brief as *amici* are the following 14 professors:

Gregory S. Alexander, A. Robert Noll Professor of Law Emeritus, Cornell Law School

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[1] This brief is filed with the written consent of the parties. No counsel for a party authored this brief in whole or in part, and no person other than the *amici* and their counsel made a financial contribution to fund the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

The *amici* property law professors address five points in the hope of helping the Court resolve this case. First, petitioners' framing of the case as an appropriation of an easement mischaracterizes the government action at issue and inappropriately relies on state property law to address a federal constitutional takings question. Second, petitioners and their *amici* implicitly invite the Court to revive the "substantially

advances" takings analysis the Court properly repudiated in *Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005), and the Court should reject this invitation. Third, the proposal that the Court adopt a *per se* test for intermittent physical occupations would create a serious imbalance in the architecture of takings law and reflects an anachronistic understanding of certain Court physical takings precedents. Fourth, the so-called "right to exclude," used in either its theoretical or colloquial sense, provides no useful support for petitioners' proposed *per se* rule. Finally, the various proposed exceptions to the proposed *per se* rule advanced by petitioners and some *amici* are problematic in their own right, and their multiplicity raises serious questions about the wisdom and feasibility of a *per se* approach to intermittent occupations, including public health and safety inspections and other limited government occupations that have never previously been regarded as raising serious takings problems.

ARGUMENT

I. Petitioners' Theory that a "*Per Se*" Test Applies in this Case Because it Allegedly Involves an "Appropriation" of an "Easement" Is Based on a Misunderstanding of Federal Takings Doctrine and is Contrary to Court Precedent.

Petitioners' objective is clear: to persuade the Court to change the "very narrow" rule established in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458

U.S. 419, 441 (1982), for permanent and continuous occupations of private property by expanding the rule to encompass "intermittent" occupations. Instead of presenting their case in straightforward fashion, however, petitioners present a novel argument. They contend that: an "appropriation" of a "discrete property interest" is a "*per se*" taking; an easement is a discrete property interest under general property law; the California Agricultural Labor Relations Board's access rule appropriates an easement for union organizers seeking to communicate with workers; and therefore the access rule results in a *per se* taking of petitioners' property.

Petitioners' framing of their case amounts to distracting chaff. While the Court's vocabulary relating to physical takings has sometimes been imprecise, it is plain this taking claim is based on an occupation, not an appropriation. The Court has used the term appropriation to refer to *de jure* or *de facto* transfers of ownership of property from an owner to the government or a third party designated by the government. Examples of appropriations include the seizure of a farmer's raisin crop, *Horne v. Dep't of Agric.*, 576 U.S. 351 (2015), or the takeover of a private factory, *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951). By contrast, occupations involve government entry, or entry by third parties acting with government authorization, onto private property with people or things. Examples of occupations include flooding of land, *Pumpelly v. Green Bay & Mississippi Co.*, 80 U.S. 166 (1871), or granting the public a right to traverse private property, *Nollan*

v. California Coastal Commission, 483 U.S. 825 (1987). Under the Court's precedents, this case involves an occupation, not an appropriation; the board's rule allows union organizers to enter private property for a specific purpose at limited times; it does not purport to transfer ownership of an interest in petitioners' property to anyone.

Furthermore, petitioners cannot plausibly argue for a "*per se*" rule by contending that the government-authorized occupation at issue in this case is comparable to an "easement" under California property law. State property law generally answers the threshold question in any taking case of whether a claimant has "property" sufficient to support a claim. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law"); *but cf*. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 891, 893 (2000) (observing that federal constitutional law supplies "general criteria" governing what interests qualify as "property" within the meaning of the Takings Clause). Assuming a claimant has property, the next question is whether the property has been "taken." That question is governed by federal constitutional law, not state property law. This distinction follows not only from the constitutional text but from the distinct character and scope of state property law and federal takings doctrine. Property law, generally

speaking, addresses the legal relations between persons with respect to land and other things. *See* Jesse Dukeminier et al., *Property* 55 (9th ed. 2018). By contrast, takings doctrine mediates the relationship between individual property owners and the community as a whole represented by government. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960) (stating that the Takings Clause is designed "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). Asking the Court to resolve the "taking" question simply by contending that the government action impinges on private property in a fashion akin to a state-law easement inappropriately conflates state property law with constitutional takings law.

The point is confirmed by considering the Court's takings jurisprudence more generally. The Court has articulated several distinct tests for evaluating different types of taking claims, including, for example, the *Penn Central* multi-factor regulatory takings analysis, the *Lucas* "*per se*" rule for regulatory denials of all economic use, the *Loretto* "*per se*" rule for permanent and continuous occupations, and the *Nollan/Dolan/Koontz* standards for "exactions." *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 537–40 (2005) (summarizing the Court's takings tests). In prescribing these various tests, and in deciding which test applies in what circumstances, the Court has unquestionably applied federal constitutional law. *See also Murr v. Wisconsin*, 137 S. Ct. 1933, 1950 (2017) (Roberts, C.J., dissenting) (observing that

in a regulatory takings context state law defines "private property," but recognizing that "whether a regulation effects a taking is a separate question" governed by federal law).

Finally, the Court has already effectively rejected petitioners' argument that state property definitions should drive physical taking analysis. In *Loretto*, and more recently in *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23, 38 (2012), the Court affirmed that taking claims based on *temporary* occupations comparable to *temporary* easements are not governed by a *per se* rule but instead are "subject to a more complex balancing process to determine whether they are a taking." *Loretto*, 458 U.S. at 435 n.12. The Court so ruled even though a temporary easement is every bit as much a "discrete property interest" as a permanent easement. Petitioners cite various examples of easements conferring intermittent access to private property, *see* Pet. Br. at 23, and contend these examples show that intermittent occupations represent discrete property interests under state law and therefore are "*per se*" takings. But it is just as easy to compile examples of easements that confer temporary access. *See*, *e.g.*, *McCurdy v. State*, 885 N.E.2d 185, 186 (N.Y. 2008) ("temporary easement" designed to facilitate highway construction project); *City of Mission Hills v. Sexton*, 160 P.3d 812, 818 (Kan. 2007) ("temporary easement" created for sewer rehabilitation project). In other words, despite the fact that temporary easements represent discrete property interests, the Court has determined that temporary occupations are

not governed by a *per se* rule. Thus, petitioners' "easement" theory is flatly contradicted by Court precedent.

Government actions that are comparable to the creation of easements can, *of course*, sometimes result in a compensable taking. *See*, *e.g.*, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (applying a *per se* test); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (applying a multi-factor test). The point is simply that because government action affects private property in a fashion akin to a state-law easement is insufficient, by itself, to establish that a taking has *necessarily* occurred. *See*, *e.g.*, *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74 (1980) (state law compelling shopping center owner to grant access to unwelcome political activists not a taking); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (federal civil rights law requiring motel owner to grant access to unwelcome Blacks not a taking).[2]

[2] Because this case does not involve an appropriation, it is unnecessary for the Court to address the standards governing taking claims based on appropriations. While the Court has recognized that appropriations commonly represent compensable takings, *see Horne v. Department of Agriculture*, 576 U.S. 351 (2015), there are myriad examples of literal appropriations that plainly are not takings, much less "*per se*" takings. *See*, *e.g.*, *United States v. Sperry Corp.*, 493 U.S. 52, 62 (1989) (user fee); *Bennis v. Michigan*, 516 U.S. 442 (1996) (forfeiture of family automobile). *See generally* John Echeverria, *What is a Physical Taking?* 54 U.C. DAVIS L. REV. 731, 749–55 (2020) (cataloguing examples of property seizures that are not regarded as takings).

II. The Court Should Decline Petitioners' Invitation to Revive the Discredited "Substantially Advances" Takings Theory.

Petitioners' fundamental objection to the board's rule is that it allegedly is unnecessary and therefore arbitrary and unreasonable. This argument is an invitation to the Court to revive the kind of inquiry into the validity of government action under the Takings Clause that the Court repudiated in *Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005). The Court should decline petitioners' invitation to revive the substantially advances test.

Petitioners apparently concede that society has a legitimate interest in ensuring that union organizers can communicate with workers. However, petitioners object that it is not necessary to grant organizers access to their property without their consent to accomplish this goal. In a "bygone era," petitioners contend, when travel and communication were more difficult, and many farmworkers resided at their places of employment, the ability to gain access to employment sites could be critical. Pets. Br. at 6–7. But the concerns that originally "prompted" the rule "no longer exist today," petitioners assert, given that "agricultural workers do not generally live on the property of their employer, can speak either English or Spanish, and have access to union advertisements through smartphones, radio, and other means of communication," including radio stations operated by the United Farm Workers "that broadcast the union's message to

its target audience in heavily agricultural areas of California." *Id*. at 8–10.

The centrality of this argument to petitioners' claim is demonstrated by their contention that this case does not implicate the very similar labor access requirements enforced by the National Labor Relations Board pursuant to the National Labor Relations Act. The labor access requirements under the NLRA are "easily distinguishable," petitioners contend, because they are limited to situations "where employees are truly inaccessible to the outside world," making a government mandate to provide access a "necessity." Pet. Br. 31 n.17. A case that turns on whether a regulation is truly needed or not focuses on whether a regulation is unreasonable and arbitrary. *See also* Cato Br. at 23-24 (advocating application of a least restrictive means test derived from strict scrutiny analysis). This argument has no place in a taking case.

In 1980, in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), the Court stated that a regulation effects a taking if it "does not substantially advance legitimate state interests." Over the ensuing 25 years, the Court repeatedly recited this formula, although it never held that a regulation was a taking under this standard. Based on the Court's language, some lower courts applied this formula as an independent basis for upholding taking claims. *See*, *e.g.*, *Hotel & Motel Association. of Oakland. v. City of Oakland*, 344 F.3d 959, 965 (9th Cir. 2003) (addressing whether city housing regulation substantially advanced a legitimate government interest).

However, in *Lingle*, the Court – in a unanimous decision – reversed course and ruled that "the 'substantially advances' formula is not a valid takings test, and indeed . . . has no proper place in our takings jurisprudence." 544 U.S. at 548. Tracing the evolution of the substantially advances test, the Court observed that the test derived from due process precedents. *Id*. at 540. The Court also said that in substance the substantially advances formula involves a due process inquiry rather than a takings inquiry; the formula asks, "in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose," and "[a]n inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause." *Id*. at 542 (emphasis in original). By contrast, the Court said, such an inquiry is "not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment." *Id*. The Court explained that takings cases properly focus on "the severity of the burden that government imposes upon private property rights," but the substantially advances formula "reveals nothing" about the severity of the burden imposed by a regulation. *Id*. at 529. Beyond that, the Court observed, an inquiry into a regulation's validity "is logically prior to and distinct from the question whether a regulation effects a taking, because the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose." *Id*. at 543. Thus, "if a government action is found to be impermissible – for instance because

it fails to meet the 'public use' requirement or is so arbitrary as to violate due process – that is the end of the inquiry. No amount of compensation can authorize such action." *Id*.

The *Lingle* Court explained that the "substantially advances" formula "is not only *doctrinally* untenable as a takings test," but also "can be read to demand heightened means-ends review of virtually any regulation of private property." *Id*. at 544 (emphasis in original). This standard, the Court said, "would require courts to scrutinize the efficacy of a vast array of state and federal regulations," a task "for which courts are not well suited," and which would require them "to substitute their predictive judgments for those of elected legislatures and expert agencies." *Id*. The Court termed this approach "remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation." *Id*. at 545 (citing *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963)) ("The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely has long since been discarded."). The *Lingle* Court concluded, "[t]he reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here." *Id*.

Petitioners (and several *amici*) ask the Court to engage in precisely the kind of review of the need for and effectiveness of government policy that the *Lingle*

Court said has no proper place in takings jurisprudence. Moreover, by proposing that the Court review the board's rule without giving deference to the judgments of the elected branches of California government, petitioners ask the Court to engage in the kind of intrusive review of social and economic measures that the Court has avoided since the era of *Lochner*, whether under the banner of takings or due process. After mistakenly pursuing the substantially advances takings theory once, and ultimately being forced to "eat crow," as Justice Antonin Scalia put it in his characteristically frank way,[3] the Court should reject petitioners' invitation to embrace the substantially advances theory again.

III. The Court Should Reject the Proposal to Expand the Rule of *Loretto* Beyond Permanent and Continuous Occupations.

Respondents explain at length why the Court's precedents support applying the rule of *Loretto* to permanent and continuous occupations and why they do not support extending the rule to intermittent occupations. We will not re-plow this ground but instead highlight two points.

First, the Court has ruled that claims based on temporary occupations are governed by a multi-factor

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[3] Transcript of Oral Argument, *Lingle v. Chevon USA Inc.*, No. 04-163 February 22, 2005 at 21, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2004/04-163.pdf ("I mean, so we have to eat crow no matter what we do. Right?") (Scalia, J.).

analysis and it would be anomalous for the Court to adopt a different approach for taking claims based on intermittent occupations. As discussed, the *Loretto* Court distinguished "temporary limitations" on an owner's ability to exclude, which it said "are subject to a more complex balancing process to determine whether they are a taking" than permanent occupations. 458 U.S 419, 435 n.12 (1982). Subsequently, in *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23 (2012), the Court reaffirmed the distinction drawn in *Loretto* between permanent and temporary occupations. Significantly, the Pacific Legal Foundation, counsel for petitioners, and others urged the Court in *Arkansas Game and Fish* to apply a *per se* test to temporary occupations. *See* Brief *Amicus Curiae* of Pacific Legal Foundation, et al. in *Arkansas Game and Fish Commission*, at 30, 2012 WL 2641849. The Court rejected this proposal and applied its traditional multi-factor framework instead. The *Arkansas* Court explained that the factors guiding a taking claim based on a temporary occupation include the duration of the invasion, the degree to which the invasion is intended or is the foreseeable result of authorized government action, the character of the land at issue, the owner's "reasonable investment-backed expectations," and "the severity" of the interference with the property. 568 U.S. at 38-39, citing, inter alia, *Penn Central*.

Both as matter of doctrine and for practical reasons, it would be awkward for the Court to prescribe different rules for intermittent occupations than for temporary occupations. In *Loretto*, the Court said the

rationale for not applying a *per se* approach to temporary occupations is "evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property." 458 U.S at 435 n.12. Similarly, intermittent occupations do not absolutely dispossess the owner of her rights to use, and exclude others from, her property. Furthermore, applying different standards would create an odd imbalance in the architecture of takings doctrine. For example, in *Arkansas Game & Fish*, the Court characterized an eight-year pattern of seasonal flooding caused by a government dam resulting in the damage or destruction of more than 18 million board feet of timber as a temporary occupation subject to a multi-factor taking analysis. It would be anomalous to apply a stricter *per se* standard to more limited intermittent intrusions, such as in this case or in cases involving periodic inspections of restaurants or foster homes. On the other hand, there is a common sense symmetry to the current architecture of physical takings doctrine: a "*per se*" rule for permanent *and* continuous occupations, and a non-*per se* rule for occupations that are not permanent and continuous, that is, that are *either* temporary *or* intermittent. Finally, articulating different standards for taking claims based on temporary and intermittent occupations would invite endless debates over the distinctions between temporary and intermittent occupations. *Cf. Hendler v. United States*, 952 F.2d 1364, 1376 (Fed. Cir. 1991) (arguing that "'permanent' does not mean forever, or anything like it").

Second, petitioners cite a handful of older Court cases they say "suggest" a "*per se*" rule should apply to intermittent occupations. *See* Pet. Brief at 24-26, discussing *United States v. Causby*, 328 U.S. 256 (1946); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922); and *United States v. Cress*, 243 U.S. 316 (1917). However, these cases do not support petitioners' position and indeed they are misleadingly anachronistic precedents for present purposes. To explain why, it is necessary to review the historical evolution of the Court's physical takings jurisprudence.

In *Loretto*, the Court announced a "*per se*" rule of takings liability based on permanent and continuous physical occupations, the most notable feature of which is that liability will lie even if the economic impact of the occupation is "minimal." 458 U.S. at 435. This ruling represented a dramatic departure from prior precedent, a change the United States acknowledges in back-handed fashion by describing *Loretto* as having "crystallized" the Court's prior expressions of concern about "government-caused physical invasions" into a new "*per se*" rule. U.S. Br. at 16. Prior to *Loretto*, the Court certainly considered whether a government action challenged as a taking involved a physical intrusion, but it also considered other factors, including the economic burden imposed by a physical intrusion. *See*, *e.g.*, *Pumpelly*, 80 U.S. at 181 ("Where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, *so as to effectually destroy*

or impair its usefulness, it is a taking, within the meaning of the Constitution.") (emphasis added).

The older cases cited by petitioners are entirely consistent with this pre-*Loretto* analysis. In each case, the Court considered the magnitude of the economic burden imposed by the physical intrusion in determining whether it resulted in a taking. *See Portsmouth Harbor*, 260 U.S. at 329 (concluding that claimant presented a viable physical taking claim by alleging that "a serious loss has been inflicted upon the claimant"); *Cress*, 243 U.S. at 328 (upholding a finding that flooding resulted in a taking when the property was reduced in value by one half, and observing that "it is the character of the invasion, not the amount of damage resulting from it, *so long as the damage is substantial*, that determines the question whether it is a taking") (emphasis added); *Causby*, 328 U.S. at 265–66 (citing *Cress*, and stating a taking occurred because plaintiffs suffered "damages" that "were not merely consequential"). Because these cases considered multiple factors in addressing the takings claims and did not apply a *per se* rule, they cannot legitimately be invoked as authority for a broad application of *Loretto's per se* rule. To the contrary, because the Court applied a multi-factor analysis in these cases, they support respondents' position that taking claims based on intermittent occupations should be analyzed based on multiple factors.

Furthermore, these cases do not support petitioners for the additional reason that they involved permanent and continuous occupations, in the sense that the

government intruded on plaintiffs' property at will and so frequently that it could be inferred the government asserted a permanent and continuous right to intrude. *See Portsmouth Harbor*, 260 U.S. at 329 (ruling that plaintiffs stated a viable claim by alleging the government "installed its battery, not simply as a means of defence in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use"); *Cress*, 243 U.S. at 328 ("There is no difference of kind, but only of degree, between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows; and, on principle, the right to compensation must arise in the one case as in the other."); *Causby*, 328 U.S. at 266 ("Flights 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."). These cases stand for the unremarkable proposition that evidence of frequent, repeated invasions of private property by the government at times of its choosing can just as effectively establish that the government has claimed a continuous legal right to enter private property as a formal legal declaration to that effect.

IV. Invocation of the Abstract Right to Exclude Does Not Resolve this Case.

The "right to exclude" represents an influential and useful concept in the field of property law. Academic commentators from William Blackstone to Thomas W. Merrill have highlighted the significance of the right to exclude. *See* 2 William Blackstone, *Commentaries on the Laws of England* *1; Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. (1998) ("*Exclude I*"); *but see* Gregory Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009) (discussing some of the limitations of the right to exclude concept). However, contrary to the position of petitioners and some *amici*, the right to exclude concept is not helpful in analyzing, much less resolving, the question whether government-caused intermittent occupations of real property *necessarily* result in compensable takings.

In a colloquial sense, a "right to exclude" is obviously related to the common law trespass action as well as to this Court's recognition that uninvited occupations of private land by government can give rise to takings liability. However, the right to exclude, at least as understood by academic commentators, has a different, broader meaning. As explained by Professor Merrill, the leading modern proponent of the exclusion concept, the "right to exclude is a fundamental attribute of property," and the "exclusion thesis" seeks to "identif[y] a common thread among *all* the interests we call property." Thomas W. Merrill, *Property and the Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS.

CONF. J. 1, 2 (2014) (*Exclude II*) (emphasis added). Thus, according to this view, the right to exclude is as central for defining rights in the *use* of land as in the right to expel trespassers. *See Exclude I* at 746 ("What distinguishes usufructury rights from unowned resources is not the right to *use* the resource, but rather the right to exclude others from engaging in particular *uses* of the resource.") (emphases added). Indeed, some of petitioners' *amici* explicitly acknowledge that the right to exclude concept applies to property interests generally. *See* Cato Institute Br., et al., at 7 (referring to "the right to exclude others from possession *or use*") (emphasis added); Brief *Amicus Curiae* of Pelican Institute for Public Policy, at 2-4.

In addition, and equally important, academic commentators do not conceive of the right to exclude as absolute. *See Exclude I* at 753; *Exclude II* at 8. As explained by Professor Merrill, the right to exclude is a "*residual* right." *Id.* (emphasis in original). In other words:

> "Property entails having a general right to exclude *after* certain exceptions grounded in common law and statutes have been subtracted. There must be enough residual exclusion to be able to say that the owner exercises significant discretion about who can come and go and who can touch or use the thing. But as long as we leave enough residual discretion in the owner, we still regard the owner as having property."

Id. (emphasis in original).

These specifications of the right to exclude, applied to this case, demonstrate that invocation of the abstract right to exclude is far from the show stopper petitioners and some of their *amici* suggest. Because the right to exclude idea applies to all kinds of interests in property, this theory provides no theoretical support for treating physical occupations (intermittent or otherwise) differently than government regulation of uses of property. Equally important, because the right to exclude is not absolute, invocation of the exclusion concept lends no support to the idea that government-caused physical occupations, and in particular intermittent ones, are *necessarily* takings. Even though petitioners' property interests have been made "subject to an exception grounded in statute," they obviously retain a right to exclude with respect to their property. After all, following enforcement of the board's access rule, there is no question who "owns" the farms in question, who determines theirs uses, and who decides whether and when third parties, including union organizers, can enter onto the land, *except* insofar as the owners' property interests are restricted under the rule.

We recognize that the Court has long said that the right to exclude, used in the colloquial sense, is "fundamental" and that government-caused invasion is a "more severe" intrusion than other types of government regulation of property. *Loretto*, at 420, 438. But, with respect, the Court has never provided a good explanation for why government trespasses should trigger stricter scrutiny under the Takings Clause than, for example, restrictions on property use, *see Lucas v.*

South Carolina Coastal Council, 505 U.S. 1003, 1017 (1992), quoting 1 E. Coke, Institutes, ch. 1, § 1 (1st Am. ed. 1812) ("[F]or what is the land but the profits thereof[?]"), or restrictions on the right to devise property. *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (observing that "the right to pass on property – to one's family in particular – has been part of the Anglo-American legal system since feudal times"). The Court has from time to time asserted that occupations (at least permanent ones) are distinctive because they destroy the "rights to possess, use and dispose of" property. *Loretto*, 458 U.S. at 435–36. But this characterization of the effect of an occupation (such as by the cable equipment in *Loretto*) is only accurate if one focuses on the specific portion of the property subject to the occupation. It is, of course, well established that the whole-parcel rule of regulatory takings doctrine does not apply in a physical taking case governed by the *per se* rule of *Loretto*. But the question whether a *per se* rule *should* apply to occupations in the first place cannot logically be determined by *assuming* that *per se* analysis already applies. The reasoning is perfectly circular. Furthermore, in the context of an intermittent occupation such as in this case, this reasoning has even less force because it cannot plausibly be said that *any* stick in the bundle of property rights has actually been "destroyed."

V. The Proposed Exceptions to the Proposed *Per Se* Rule Argue Against the Proposed *Per Se* Rule.

Finally, petitioners and their *amici* face a serious challenge in advocating for a *per se* rule for intermittent occupations because such a rule would condemn as compensable takings many government programs involving entries onto private property that serve vital public purposes and have never been considered compensable takings. In an attempt to solve this problem, petitioners (and some *amici*) offer up a variety of proposed exceptions to the proposed *per se* rule. The numerosity of the proposed exceptions is a powerful clue that the proposed *per se* rule itself is deeply problematic.

At the outset, it is well established that "background principles" of property or tort law can defeat a taking claim, including a physical taking claim. *See Horne v. Department of Agriculture*, 576 U.S. 350, 367 (2015) (discussing *Leonard & Leonard v. Earle*, 279 U.S. 392 (1929)); *Lucas v South Carolina Coast Council*, 505 U.S. 1003, 1029 (2005) (discussing *Scranton v. Wheeler*, 179 U.S. 141 (1900)). The Takings Clause addresses takings of "private property;" if applicable background principles preclude a plaintiff from claiming a property interest to begin with, the taking claim fails at the threshold. While unquestionably important, background principles provide a narrow defense against taking claims. They are largely limited to common law rules, they must be deeply rooted in the state's "legal tradition," and they apply only when

the activity was "*always* unlawful." *Lucas*, 505 U.S. at 1030 (emphasis in original). Neither petitioners nor any of their *amici* suggest that background principles are sufficient, by themselves, to adequately cabin the potential destructiveness of the proposed *per se* rule.

It is also established that, in limited circumstances, an "exaction" of a right to occupy private property will not necessarily result in a compensable government taking if it is imposed in exchange for the discretionary grant of a privilege by the government. More specifically, if the government could have denied a permit without incurring takings liability, a grant of a permit coupled with an exaction of an access requirement will not result in a compensable taking if it meets the relatively exacting "essential nexus" and "rough proportionality" tests established in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *See also Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595 (2013) (ruling that the *Nollan/Dolan* tests apply to a government permit denial in response to an owner's refusal to accept an exaction that violates the essential nexus/rough proportionality test). While the *Nollan/Dolan/Koontz* analysis represents another important limitation on a strict *per se* physical occupation theory, this analysis is limited in scope because it only applies in the specific context of a property exchange for a special benefit.

Thus, petitioners and their *amici* strive to identify potential *additional* exceptions they suggest may

make the proposed *per se* rule for intermittent occupations more palatable. First, *amicus* Chamber of Commerce suggests that the harshness of the proposed *per se* rule might be mitigated by deploying an expanded version of the *Nollan/Dolan* analysis. The Chamber forthrightly recognizes that a *per se* test for intermittent physical occupations would threaten a vast number of traditional inspection programs. To address this problem it argues for applying *Nollan/Dolan* to any access requirement imposed on any firm or individual engaged in "market participation," regardless of whether the access requirement is in exchange for a discretionary benefit. *See* Chamber Br. at 22. Significantly, the United States does not embrace this novel theory, *see* U.S. Br. at 31, and for good reason.

Most importantly, this proposal is foreclosed by Court precedent. The Court has been clear that the *Nollan/Dolan* analysis does not apply to government occupations that are not imposed in exchange for a discretionary grant of a special benefit. In *Nollan*, the Court stated, "the right to build on one's own property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as a 'governmental benefit.' " 483 U.S. at 833 n.2 "[T]hus," the Court explained, allowing an owner to build on her land "cannot be regarded as establishing the voluntary 'exchange' " supporting application of an exactions analysis. *Id.* Following the same logic, in *Horne*, 576 U.S. at 366, the Court rejected the argument that "selling produce in interstate commerce" represents the kind of "special governmental benefit

that the Government may" grant in exchange for seizing raisins without compensation. *See also Loretto*, 458 U.S. at 439 n.17 ("a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation"). Under these precedents, petitioners' farming activity "cannot remotely" be described as a government benefit, and we presume petitioners would not argue otherwise. Thus, the predicate for applying *Nollan/Dolan* simply does not exist in this case.

Furthermore, the rationale for applying *Nollan/Dolan/Koontz* collapses if the government is not conferring a special benefit that it can withhold without incurring takings liability. This analysis is based on the logic that if the government could have denied a permit outright without takings liability, it should be able to take the lesser step of granting the permit subject to an exaction without takings liability, so long as the exaction serves the same purposes that would have been served by outright permit denial. *Nollan*, 483 U.S. at 835–37. However, if the government is exercising no discretionary approval authority, as in this case, a government-imposed access requirement is subject to direct challenge as a taking. In other words, the Chamber's effort to avoid the effect of a *per se* rule by applying the *Nollan/Dolan/Koontz* test fails because the logical precondition for applying this analysis is not met.

Second, the United States offers up a second possible exception to the proposed *per se* rule by making the extraordinary suggestion that physical occupations

should not be compensable takings so long as they involve "core exercises of the police power." U.S. Br. at 29. Prior to the Court's landmark decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Court generally held that exercises of the police power were never takings. *See* William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 797 (1995). At least since *Mahon*, however, the Court has recognized that exercises of the police power can result in takings. *See* 260 U.S. at 413 ("[S]ome values are enjoyed under an implied limitation and must yield to the police power[, b]ut obviously the implied limitation must have its limits. . . ."). Indeed, modern takings doctrine is largely designed to determine when exercises of the police power (and comparable exercises of federal power) "go too far" and should be deemed compensable takings. *See also Loretto*, 458 U.S. at 425 (stating that the issue of whether a regulation "is within the State's police power" is a "separate question" from "whether an otherwise valid regulation so frustrates property rights that compensation must be paid").

So far as we know, the Court has never suggested that a determination that an exercise of the police power is in some sense "core" can or should define the limits of takings liability. The United States has apparently invented this novel test out of whole cloth; a Westlaw search reveals *no* federal court case containing the phrase "core exercises of the police power." And for good reason. The police power is one of the broadest and vaguest terms in the law. Professor Laurence Tribe

observed that "[t]he police power was always a flexible notion – so flexible, indeed, that some have quipped that the concept has little to commend it beyond alliteration." 1 Laurence H. Tribe, *American Constitutional Law* § 6–4 (3d ed. 2000). *See also Eubank v. City of Richmond*, 226 U.S. 137, 142-43 (1912), quoting *District of Columbia v. Brooke*, 214 U.S. 138, 149 (1909) (observing that the police power "is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government"). Adding the modifier core to this amorphous term adds no real content – except to suggest that takings cases arising from exercises of the police power could be sorted into two different groups. The word "core" has no substantive meaning and it is impossible to imagine on what principled basis courts could distinguish between "core" and "non-core" exercises of the police power. Adoption of a "core exercises of the police power" standard for determining whether a physical intrusion is a compensable taking would set the lower federal and state courts adrift to decide cases based on virtually unlimited discretion, in contrast with the structured framework for analysis prescribed by *Penn Central* and *Arkansas Game and Fish*.

We recognize some lower courts have invoked the police power to justify rejection of physical takings claims. *See*, *e.g.*, *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1153–54 (Fed. Cir. 2008) (seizure of pharmaceuticals in connection with a criminal investigation not a taking because government was exercising the "police power"); *United States v. $7,990.00 in*

U.S. Currency, 170 F.3d 843, 845 (8th Cir. 1999) ("[T]he forfeiture of contraband is an exercise of the government's police power, not its eminent domain power."). These *outcomes* are surely unexceptional. But, with respect, these decisions offer no explanation for why or to what extent the police power rationale can properly justify rejection of a taking claim. For an especially telling analysis, *see Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1332–33 (Fed. Cir. 2006), in which the Federal Circuit acknowledged that "it is insufficient to avoid the burdens imposed by the Takings Clause simply to invoke the 'police powers' of the state," but nonetheless concluded that a "prohibition on importing goods bearing counterfeit marks that misrepresent their quality and safety is the *kind* of exercise of the police power that has repeatedly been treated as legitimate even in the absence of compensation to the owners of the imported property." *Id.* at 1333 (emphasis added). The Federal Circuit's "kind" of police power formula is no more informative than the United States' "core" standard. The track record of lower courts invoking the police power as a defense to physical taking claims offers no reason to believe this approach would yield predictable, principled results.

Third, the Chamber of Commerce points to a possible third exception based on the Fourth Amendment, suggesting that if an inspection is valid under the Fourth Amendment, the risk of invalidation under the Takings Clause might be avoided. Chamber Br., at 23-31. However, resolution of the question whether a government action violates one provision of the Bill

of Rights does not answer the question whether the action might violate some other provision of the Bill of Rights. *Soldal v. Cook County*, 506 U.S. 56, 70 (1992). Furthermore, if there is a question about whether some government action violates the Fourth Amendment, a determination that the government has complied with the Fourth Amendment simply supplies a necessary precondition for a viable claim of a taking for public use under the Takings Clause. *See Lingle*, 544 U.S. at 543. On the other hand, if an inspection violates the Fourth Amendment, no claim for compensation for a taking for public use will lie. *Id.*

Fourth, the Cato Institute and others make a brazen appeal to the Court to chart a revolutionary new course with takings doctrine, not only in physical taking cases but in general. *See* Cato Br. at 17 ("If there were ever a chance for the Court to change course, this case is it."). In their brief they argue that the Court should embrace the radical theory of Professor Richard Epstein that *every* government impingement on private property interests should be regarded as a compensable taking, *unless* the government action can be justified on the ground that it supplies perfect in-kind compensation (obviating the need for financial compensation), or serves some ill-defined harm-prevention purpose largely if not exclusively rooted in background principles of property or nuisance law. *See* Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985). The Court has never embraced this academic theory and should not do so now. Ironically, after expending pages expounding this theory of

takings, the Cato Institute avoids actually applying it in this case by suggesting that the board's rule flunks an alternative least restrictive means test borrowed from the Court's strict scrutiny analysis under the First Amendment. *See United States v. Alvarez*, 567 U.S. 709, 729 (2012). *See* Cato Br. at 23-24.

Finally, petitioners appear to suggest two other possible exceptions to the proposed *per se* rule, one for occupations that do not rise to the level of an "easement," *see* Pets. Br. at 15, 31 n.19, and another for occupations that involve the tort of trespass. *See id*. at 26, 35. Neither of these potential exceptions can serve to mitigate the serious harm that would be inflicted by petitioners' expansive *per se* rule.

First, the proposed distinction between occupations that are easements and occupations that fall short of being easements conflicts with the reality that there is no theoretical or practical limitation on a lawyer's ability to craft brief or narrow easements. *See* Brief *Amicus Curiae* of Oklahoma et al., at 8 ("An easement does not cease to be an ownership interest in property if it falls below some threshold of the number of property rights affected."). In other words, if the Court were to adopt petitioners' misguided theory that an "appropriation" of an "easement" is necessarily a taking, every occupation, no matter how minute, would be a compensable taking. As the saying go, it would be "turtles all the way down."

Second, the notion that some occupations may be trespasses rather than takings offers no help either. To

be sure the Court has on occasion suggested that government action that does not rise to the level of a taking may nonetheless be a trespass. *See Portsmouth Harbor*, 260 U.S. at 330. But these rulings simply reflect the reality that under existing law not every occupation is a taking, and if the Takings Clause does not apply trespass doctrine still may. Moreover, there is a very substantial overlap between taking clams and trespass claims. *See Hansen v. United States*, 65 Fed. Cl. 76, 96 (2005) ("The development of takings law was, in effect, an extension of the principle[ ] of trespass to the actions of the government."). Tellingly, in *Loretto*, Mrs. Loretto alleged that the New York cable law resulted in *both* a trespass and a taking. There is no discernible dividing line between takings and trespasses that can serve as a limit on the proposed *per se* rule.[4]

In sum, the proposed exceptions to the ostensible *per se* rule applicable to intermittent occupations are not grounded in precedent, fail to offer a principled, predictable way of delimiting the proposed *per se* rule, or suffer from both defects. Amorphous ostensibly categorical exceptions to an ostensibly *per se* rule of liability based on such notions as "core" police power

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[4] Petitioners also suggest that "necessity" could serve as defense to a *per se* claim based on an intermittent occupation. *See* Pet. Br. at 31 n.19. This suggestion reflects the mistaken idea discussed above that common law property rules can be relied upon to define the meaning of a constitutional taking, and would also invite the kind of free-roaming inquiry into the validity of a government action to determine whether a compensable taking occurred that the Court repudiated in *Lingle*.

functions or harmfulness would increase the uncertainty and unpredictability of takings law. While a multi-factor takings analysis is not completely determinative, it has the advantage of forthrightly identifying the normative considerations that guide taking analysis and generates *relatively more* predictable results. A *per se* rule riddled with various amorphous *per se* exceptions is a not a *per se* rule at all, and it would be pointless, misleading and counter-productive to suggest that it is.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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