No. 20-107

IN THE

Supreme Court of the United States

CEDAR POINT NURSERY AND
FOWLER PACKING COMPANY, INC.,
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 OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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February 12, 2021

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC has an interest in ensuring that the Takings Clause of the Fifth Amendment is interpreted, in accordance with its text and history, to permit regulations that allow limited access to private land without rendering the property valueless. CAC accordingly has an interest in this case.

SUMMARY OF ARGUMENT

Under California law, labor organizers are permitted to visit agricultural employers' property during non-work time on a limited number of days to "talk[] with employees and solicit[] their support." Cal. Code Regs., tit. 8, § 20900(e). Petitioners, who are agricultural employers, argue that California's access regulation violates the Takings Clause of the Fifth Amendment, which provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. The court below, however, rejected that argument, holding that the challenged regulation does not effect a *per se* taking of property

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

within the meaning of the Clause. Allowing the challenged regulation to stand is consistent with the Takings Clause's text and history, and this Court should affirm.

As originally understood, the Takings Clause applied only to the direct physical appropriation of private property. This reading of the Takings Clause is consistent with that of similar provisions in colonial and state constitutions, and it is well established that the Framers, including James Madison, who drafted the Clause, understood that it too would be so limited. Indeed, for decades after the Clause's adoption, this Court interpreted it as applying only to direct physical appropriations. As Justice Scalia recognized, "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992).

Beginning toward the end of the nineteenth century, however, this Court held that the Takings Clause may also apply in cases involving the functional equivalent of a direct physical appropriation of property. Yet even in these cases, the Court was careful to cabin the Clause's application to regulations that could reasonably be considered tantamount to the sorts of direct expropriations that were within the scope of the Clause's original meaning. Thus, for most of the nation's history, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas*, 505 U.S. at 1014 (quoting *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870), and *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879)).

This Court has recognized two categories of regulations that fit within those parameters and are thus

considered takings *per se*: (1) "regulations that compel the property owner to suffer a physical 'invasion' of his property," "at least with regard to permanent invasions," *id.* at 1015, and (2) regulations that "den[y] *all* economically beneficial or productive use of land," *id.* (emphasis added); *see id.* at 1017 (suggesting that the justification for the latter rule might be "that *total deprivation* of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation" (emphasis added)). These categories "share a common touchstone," as "[e]ach aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

Regulations that do not fall within these two categories of takings *per se* are generally evaluated under a multifactor test established in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *See Lingle*, 544 U.S. at 538-39. Under that test, a court considers, among other things, "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," as well as the "character of the governmental action." *Penn Central*, 438 U.S. at 124.

Under the original understanding of the Takings Clause, the California regulation challenged here would not have been considered a taking, and it is plainly not a taking *per se* under this Court's precedents. It does not effect an actual physical expropriation of property, nor does it effect the functional equivalent thereof by allowing a permanent physical occupation of private property or by rendering such property valueless. Indeed, the challenged regulation

strictly limits who is allowed to visit agricultural employers' property, when they can visit, where they can go, why they can visit, and what they can do while visiting. *See* Cal. Code Regs., tit. 8, § 20900. This Court should therefore affirm the judgment of the court below.

ARGUMENT

I. THE TEXT AND HISTORY OF THE TAKINGS CLAUSE DEMONSTRATE THAT THE CLAUSE APPLIES ONLY TO THE DIRECT APPROPRIATION OF PROPERTY OR THE FUNCTIONAL EQUIVALENT THEREOF.

As this Court has recognized, for most of the nation's history, it has been understood "that the Takings Clause reache[s] only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas*, 505 U.S. at 1014 (quoting *Legal Tender Cases*, 79 U.S. (12 Wall.) at 551, and *Transportation Co.*, 99 U.S. at 642); *accord Murr v. Wisconsin*, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting). The California regulation at issue here therefore fully comports with the Takings Clause, as it was originally—and properly—understood. Any extension of the Takings Clause to proscribe California's access regulation would not be "grounded in the original public meaning of the Takings Clause of the Fifth Amendment," *Murr*, 137 S. Ct. at 1957 (Thomas, J., dissenting), and must be rejected.

A. The Takings Clause Was Originally Understood to Apply Only to the Direct Physical Appropriation of Property.

The Takings Clause of the Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. By its terms, the Clause's scope is quite narrow: it

applies only when the government takes private property, and it does not prevent such takings but rather requires the government to provide just compensation when those takings occur. *See First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles*, 482 U.S. 304, 314 (1987). While the Constitution does not define the term, a "taking" most naturally means an expropriation of property, such as when the government exercises its eminent domain power to physically acquire private property to build a road, military base, or park. *See* Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. Envt'l Aff. L. Rev. 509, 515 (1998).

This plain-language interpretation of the Clause is consistent with the Framers' understanding that the Takings Clause would prohibit only actual appropriations of private property. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 782 (1995) ("[T]he Takings Clause and its state counterparts originally protected property against physical seizures, but not against regulations affecting value."). Indeed, "the limited scope of the [T]akings [C]lause[] reflected the fact that, for a variety of reasons, members of the framing generation believed that physical possession of property was particularly vulnerable to process failure," necessitating a compensation requirement specifically for the direct appropriation of private property. *Id.*

Historical circumstances preceeding the adoption of the Takings Clause support this understanding of the Clause's original meaning. Prior to the ratification of the Fifth Amendment, "there was no [federal] rule requiring compensation when the government physically took property or regulated it. The decision

whether or not to provide compensation was left entirely to the political process." *Id.* at 783; *see id.* ("[T]he framers did not favor absolute protection of property rights."). Thus, during the Revolutionary War, the military regularly seized private goods without providing compensation. *See* 1 William Blackstone, *Commentaries with Notes of Reference to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 305-06 (St. George Tucker ed., 1803) (statement by Tucker); *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 363 (Pa. 1788) (upholding uncompensated seizure of provisions from private citizens during the war).

Indeed, only two foundational documents from the colonial era included even limited recognition of a right to compensation for the taking of private property, and both covered only physical appropriations of property. Treanor, *supra*, at 785. First, the Massachusetts Body of Liberties, adopted in 1641, imposed a compensation requirement that applied only to the seizure of personal property: "No mans Cattel or goods of what kinde soever shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford." Mass. Body of Liberties § 8 (1641), reprinted in *Sources of Our Liberties: Documentary Origins of Individual Liberties in the United States Constitution and Bill of Rights* 149 (Richard L. Perry & John C. Cooper eds., 1959) (hereinafter *Sources of Our Liberties*); *see* Treanor, *supra*, at 785 n.12 ("This provision of the Body of Liberties appears to have been modelled on Article 28 of Magna Carta, which barred crown officials from 'tak[ing] anyone's grain or other chattels, without immediately paying for them in money.'" (quoting Magna Carta art.

28 (1215), reprinted in *Sources of Our Liberties* 16)); Amicus Br. of Center for Constitutional Jurisprudence 4 (noting that "Madison may have used the language of the Massachusetts Constitution in crafting" the Takings Clause).

Likewise, the 1669 Fundamental Constitutions of Carolina, which were drafted by John Locke and never fully implemented, would have mandated compensation for the direct seizure of real property. Treanor, *supra*, at 785-86. These documents sought to authorize public construction of buildings and highways, so long as "[t]he damage the owner of such lands (on or through which any such public things shall be made) shall receive thereby shall be valued, and satisfaction made by such ways as the grand council shall appoint." *Id.* at 786 (quoting Fundamental Constitutions of Carolina art. 44 (1669), reprinted in 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 115 (1971)).

Although colonial governments commonly regulated land use and business operations, *see id.* at 789 (collecting examples), no colonial charter required compensation for property owners affected by those regulations—not even when the regulations affected a property's value, *id.* at 788-89; *see* John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U.L. Rev. 1099, 1100 (2000) ("American legislatures extensively regulated land use between the time America won its independence and the adoption of the property-protecting measures of the Constitution and the Bill of Rights."). Indeed, as Justice Scalia recognized, "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." *Lucas*, 505 U.S. at 1028 n.15. After the American Revolution, most state constitutions echoed their colonial predecessors in this respect, as "[n]one of the state constitutions

adopted in 1776 had just compensation requirements" for physical takings or for regulations that affected property rights. Treanor, *supra*, at 789.

As state constitutions later began to provide compensation for the taking of property, those protections applied only to physical appropriations of property. *See id.* at 791. The Vermont constitution, for example, provided that "whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money." Vt. Const. of 1777, ch. I, art. II, reprinted in 6 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 3740 (Francis N. Thorpe ed., 1909) (hereinafter *The Federal and State Constitutions*). Similarly, the Massachusetts Constitution of 1780 stated that "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Mass. Const. of 1780, part I, art. X, *reprinted in* 3 *The Federal and State Constitutions*, *supra*, at 1891. Further, the Northwest Ordinance of 1787 stated that "should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same." Northwest Ordinance of 1787, art. 2, reprinted in *Sources of Our Liberties*, *supra*, at 395. Significantly, "[i]n each case, a plain language reading of the text indicates that it protected property only against physical confiscation, and the early judicial decisions construed them in this way." Treanor, *supra*, at 791.

Ultimately, when the Framers adopted the federal Takings Clause, "the right against physical seizure received special protection . . . because of the framers'

concern with failures in the political process." *Id.* at 784. For various reasons, the Framers feared that the ordinary political process would not adequately protect physical possession of property. *Id.* at 827; *see, e.g.*, *id.* at 829-30 (explaining how Vermont's Takings Clause and other state analogues were "designed to provide security against the type of process failure to which majoritarian decisionmaking processes were peculiarly prone"—namely "real property interests").

The statements of James Madison, who drafted the Takings Clause, "uniformly indicate that the clause only mandated compensation when the government physically took property." Treanor, *supra*, at 791; *see Lucas*, 505 U.S. at 1057 n.23 (Blackmun, J., dissenting) ("James Madison, author of the Takings Clause, apparently intended it to apply only to direct, physical takings of property by the Federal Government."); *accord* Bernard Schwartz, *Takings Clause—"Poor Relation" No More?*, 47 Okla. L. Rev. 417, 420 (1994). Madison believed that physical property needed special protection in the form of a compensation requirement "because its owners were peculiarly vulnerable to majoritarian decisionmaking." Treanor, *supra*, at 847. Madison wrote, for instance, of the need for a means to protect physical property ownership separate from the political process because, "[a]s the holders of property have at stake all the other rights common to those without property, they may be the more restrained from infringing, as well as the less tempted to infringe the rights of the latter." James Madison, *Note to His Speech on the Right to Suffrage* (1821), *in* 3 *The Records of the Federal Convention of 1787*, at 450-51 (Max Farrand ed., 1911). He described "[t]he necessity of . . . guarding the rights of property," a matter that he observed "was for obvious reasons unattended to in the commencement of the Revolution." James Madison,

Observations on the "Draught of a Constitution for Virginia" (ca. Oct. 15, 1788), *in* 11 *The Papers of James Madison* 287 (Robert A. Rutland et al. eds., 1977). Thus, Madison was concerned that the political process would be insufficient to preserve physical property rights, and he drafted the Takings Clause to protect against political-process failures. *See* Treanor, *supra*, at 854.

The drafting history of the Takings Clause is also consistent with its limited scope. As originally drafted, the Clause read, "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation." *Lucas*, 505 U.S. at 1028 n.15 (quoting Speech Proposing Bill of Rights (June 8, 1789), *in* 12 J. Madison, *The Papers of James Madison* 201 (C. Hobson et al. eds., 1979)). Although no legislative history exists that explains why a select committee, of which Madison was a member, altered the wording before the Amendment's adoption, "[i]t is . . . most unlikely that the change in language was intended to change the meaning of Madison's draft Takings Clause." Schwartz, *supra*, at 420.

As one scholar has argued, "[t]he substitution of 'taken' for Madison's original 'relinquish' did not mean that something less than acquisition of property would bring the clause into play," *id.*, because Samuel Johnson's *Dictionary*—a prominent Founding-era dictionary—defined "to take" in 1789 as, among other things, "[t]o seize what is not given"; "[t]o snatch; to seize"; "[t]o get; to have; to appropriate"; [t]o get; to procure"; and "[t]o fasten on; to seize," *id.* at 420-21 (quoting 1-2 Samuel Johnson, *A Dictionary of the English Language* (1755-56)). Moreover, because no one besides Madison advocated for the inclusion of a Takings Clause in the Bill of Rights, and there is no record of anyone advocating to expand the scope of Madison's

original draft, there is no reason to think the final draft was meant to be more robust than the original. *See* Treanor, *supra*, at 834 ("Aside from Madison, there was remarkably little desire for any kind of substantive protection of property rights against the national government." (footnote omitted)).

Accounts from shortly after the adoption of the Clause confirm that it was understood to apply only to physical appropriations. "[A]lthough 'contemporaneous commentary upon the meaning of the compensation clause is in very short supply,'" *Lucas*, 505 U.S. at 1057 n.23 (Blackmun, J., dissenting) (quoting Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 58 (1964)), an 1803 treatise recognized that the Clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war." 1 William Blackstone, *Commentaries, supra*, at 305-06. Another treatise writer observed in 1857 that "[i]t seems to be settled that, to entitle the owner to protection under [the Takings] [C]lause, the property must be actually taken in the physical sense of the word." Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law* 519 (1857).

Moreover, the few Supreme Court decisions prior to 1870 interpreting the Takings Clause held that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held *not* to be a taking within the meaning of the constitutional provision." *Transportation Co.*, 99 U.S. at 642 (emphasis added). In fact, until the last few decades of the nineteenth century, this Court steadfastly refused to extend the Clause beyond actual

appropriations. In 1870, this Court affirmed that the Takings Clause "has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power." *Legal Tender Cases*, 79 U.S. (12 Wall.) at 551; *see Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002) ("The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations . . . .").

B. This Court Has Since Held That the Takings Clause Also Applies to the Functional Equivalent of a Physical Appropriation of Property.

The notion that the Takings Clause may apply to government actions beyond the physical expropriation of property emerged gradually over the next century as this Court considered cases in which government action very closely resembled expropriations of property. The first of these cases, *Pumpelly v. Green Bay & Mississippi Canal Co.*, involved a state-authorized dam that flooded the petitioner's property. 80 U.S. 166 (1871). The Court noted that "[i]t would be a very curious and unsatisfactory result, if . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it . . . can inflict irreparable and permanent injury to any extent," or "in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public

use." *Id.* at 177-78. To avoid such a result, the Court held that, "where real estate is *actually invaded* by superinduced additions of water, earth, sand, or other material, . . . so as to *effectually destroy or impair its usefulness*, it is a taking, within the meaning of the Constitution." *Id.* at 181 (emphases added). The Court made clear, however, that "[b]eyond this we do not go, and this case calls us to go no further." *Id.*

Nearly fifty years later, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Court again narrowly expanded the reach of the Takings Clause. This time the Clause was expanded to encompass regulations that the Court viewed as particularly oppressive. Yet this Court was once again careful to limit its newly recognized regulatory takings doctrine to instances in which the effect of a regulation is tantamount to the direct appropriation of property contemplated in the text of the Fifth Amendment. *See Lingle*, 544 U.S. at 539 (noting that to bring a successful regulatory takings claim, a plaintiff must "identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain").

Mahon involved a challenge to the Kohler Act, a Pennsylvania law that prevented coal companies from mining coal that formed the support for surface-level land. 260 U.S. at 416-17. Pennsylvania law recognized this support property as a distinct property interest, and this Court stated that the Act "purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate." *Id.* at 414. The Court declared that the Pennsylvania law had "very nearly the same effect for constitutional purposes as appropriating or destroying [the estate]," *id.*, and, again relying on this analogy to an expropriation of property, declared that a regulation can be considered

a taking when it "goes too far," *id.* at 415; *see Lucas*, 505 U.S. at 1014 (reiterating the "oft-cited maxim" from *Mahon* that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" (quoting *Mahon*, 260 U.S. at 415)); *accord Tahoe-Sierra Preservation Council*, 535 U.S. at 325 n.21.

This Court concluded in *Mahon* that "[b]ecause the statute made it commercially impracticable to mine the coal, and thus had nearly the same effect as the *complete destruction of rights* claimant had reserved from the owners of the surface land, . . . the statute was invalid as effecting a 'taking' without just compensation." *Penn Central*, 438 U.S. at 127-28 (emphasis added) (describing the holding in *Mahon*); *cf. Armstrong v. United States*, 364 U.S. 40, 48 (1960) (holding that although "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense," the government's "*total destruction*" of the full value of certain liens constituted a "taking" (emphasis added)); *Hudson Cty. Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (explaining that if the government were to limit the height of buildings in a city "so far as to make an ordinary building lot *wholly useless*," such a limit would require compensation (emphasis added)).

This Court summarized the status of its regulatory takings jurisprudence to date in *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 123. It acknowledged that the question of what constitutes a regulatory taking (where a regulation is sufficiently akin to an expropriation to require compensation under the Takings Clause) "has proved to be a problem of considerable difficulty," *id.*, and "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require

that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons," *id.* at 124. The Court explained that it relies primarily on a balancing of three factors: (1) the economic impact of the regulation, (2) the extent the regulation interferes with "distinct investment-backed expectations," and (3) "the character of the governmental action." *Id.* Under *Penn Central*'s balancing test, no one factor alone is determinative, and significant diminutions in property value are generally permissible without compensation. *See id.* at 124-25.

This Court has sought to clarify its regulatory takings doctrine in recent years, and it has continued to recognize that there are limits on applying the Takings Clause beyond direct appropriations of physical property. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court held that a "permanent physical occupation" amounting to an unconstitutional taking occurs "where individuals are given a *permanent and continuous* right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Id.* at 832 (emphasis added). In *Nollan*, California had conditioned a couple's purchase of a beachfront lot and the grant of a coastal development permit on the couple providing a "classic right-of-way easement," *id.* at 832 n.1, across their property so that members of the public could access the beach at all times, *see id.* at 827-29. The Court determined that requiring such a "permanent and continuous" easement without compensation violated the Takings Clause.

The Court based its holding in *Nollan* in part on its previous determination in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), that

"where governmental action results in '[a] *permanent* physical occupation' of the property," *Nollan*, 483 U.S. at 831 (emphasis added) (quoting *Loretto*, 458 U.S. at 432-33 n.9), that action effects an unconstitutional taking *per se*, regardless of "whether the action achieves an important public benefit or has only minimal economic impact on the owner," *id.* at 831-32 (quoting *Loretto*, 458 U.S. at 434-35); *accord Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). The *Loretto* Court had made clear, however, that "deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking," 458 U.S. at 436, and it "underscore[d] the constitutional distinction between a permanent occupation and a temporary physical invasion," *id.* at 434.

In *Lucas v. South Carolina Coastal Council*, the Court explained that it has recognized two categories of regulations that are takings *per se*, regardless of the public interest furthered by the governmental action: (1) "regulations that compel the property owner to suffer a physical 'invasion' of his property," *Lucas*, 505 U.S. at 1015—"at least with regard to permanent invasions," such as those requiring landlords to allow the permanent placement of cable facilities in their apartment buildings, *id.* (citing *Loretto*, 458 U.S. at 419), and (2) regulations that "den[y] *all* economically beneficial or productive use of land," *id.* (emphasis added) (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), and *Nollan*, 483 U.S. at 834); *see id.* at 1017 (suggesting that the justification for the latter rule might be "that *total deprivation* of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation" (emphasis added)). The Court thus emphasized that "when the owner of real property has been called upon to sacrifice *all* economically

beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019. The Court ultimately held that a South Carolina law that prevented the petitioner from erecting any permanent habitable structures on his land, rendering the parcels "valueless," *id.* at 1007 (internal quotation marks and citation omitted), "accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of 'just compensation,'" *id.* (quoting U.S. Const. amend. V).

Thus, this Court has primarily applied the Takings Clause to prevent uncompensated expropriations of physical property, and while it has held that some regulations amount to takings *per se*, it has been careful to limit that classification to regulations that are tantamount to direct expropriations because they either effect a permanent physical invasion of property (as in *Nollan* and *Loretto*) or render it valueless (as in *Mahon* and *Lucas*). Where a challenged regulation does not fit into either of these categories of takings *per se*, this Court generally applies the multifactor test articulated in *Penn Central*. *See Lingle*, 544 U.S. at 538-39.

II. UNDER THIS COURT'S PRECEDENTS, THE CALIFORNIA REGULATION CHALLENGED HERE DOES NOT EFFECT A TAKING *PER SE*.

Because the Fifth Amendment, as originally understood, applied only to physical takings of property, this Court should continue to carefully limit constitutional liability for regulatory takings. Under the original meaning of the Takings Clause and this Court's precedents, regulations may be considered takings *per se* only when they permit a permanent and continuous invasion of property or deprive property of all economic value. The California regulation challenged here does

neither. It simply allows certain people to visit private property during non-work hours on a set number of days each year and in a manner that specifically does not disrupt work operations. *See* Cal. Code Regs., tit. 8, § 20900(e)(1)(B)-(C), (e)(3)(A)-(B), (e)(4)(A)-(C). It therefore does not effect an actual physical expropriation of property to the government, nor does it produce the "functional[] equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539. The regulation thus does not effect a taking *per se*.

First, the California regulation does not allow a permanent physical invasion of property, such as those requiring landlords to allow the permanent placement of cable facilities in their apartment buildings. *See Lucas*, 505 U.S. at 1015. It also does not provide a "*permanent and continuous* right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises," as this Court has recognized might signify a taking. *Nollan*, 483 U.S. at 832 (emphasis added). Far from it. The regulation at issue specifically limits who is allowed to visit the property (generally two labor organizers per work crew, Cal. Code Regs., tit. 8, § 20900(e)(4)(A)); when they can visit (one hour before work, one hour during lunch, and one hour after work for up to 120 days each year, *id.* § 20900(e)(1)(A)-(B), (e)(3)(A)-(B)); where they can go (only where "employees congregate before and after working" and where "employees eat their lunch," *id.* § 20900(e)(3)(A)-(B)); why they can visit (only to "solicit[] . . . support" of employees, *id.* § 20900(e)); and what they can do while visiting (strictly no "conduct disruptive of the employer's property or agricultural operations," *id.* § 20900(e)(4)(C)).

Moreover, unlike the "permanent and continuous" occupations that this Court has held amounted to takings in the past, the California regulation allows an agricultural employer to retain the "right to possess the occupied space himself." *Loretto*, 458 U.S. at 435. Nothing in the regulation requires him to clear out of the property—or to stop using any part of it—to allow the labor organizers to enter. There is no "practical ouster of [the owner's] possession." *Lucas*, 505 U.S. at 1014 (brackets in original) (quoting *Transportation Co.*, 99 U.S. at 642). And the regulation certainly does not "require . . . that the [property] owner permit another to exercise *complete* dominion" over his property, as did the action this Court ruled unconstitutional in *Loretto*. 458 U.S. at 436 (emphasis added). Instead, the regulation is strictly cabined to preserve the owner's property rights while allowing labor organizers to visit temporarily.

Second, the California regulation does nothing to diminish any economic interest or value in the property. While this Court has recognized that the "*total destruction*" of the full value of a property may constitute a taking under the Fifth Amendment, *Armstrong*, 364 U.S. at 48 (emphasis added), and that a regulation that renders private property "*wholly useless*" may require compensation under the Clause, *Hudson Cty. Water*, 209 U.S. at 355 (emphasis added); *cf. Lucas*, 505 U.S. at 1015 (explaining that the Takings Clause covers regulations that "den[y] *all* economically beneficial or productive use of land" (emphasis added)); *id.* at 1017 (suggesting that "*total deprivation* of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation" (emphasis added)), the California regulation does not diminish the value of the property at all. It in no way interferes with agricultural employers' ability to conduct business on

their property, and the property therefore loses no value as a result of the regulation. In fact, the regulation expressly prohibits any visiting organizers from engaging in "conduct disruptive of the employer's property or agricultural operations." Cal. Code Regs., tit. 8, § 20900(e)(4)(C). This Court has recognized that a "deprivation of the right to use and obtain a profit from property . . . is clearly relevant" to the question whether a particular regulation effects a taking, *Loretto*, 458 U.S. at 436, and here, there is no deprivation of the right to use and obtain a profit. And even if there were such a deprivation—which there plainly is not—that alone would be insufficient to render the regulation unconstitutional. *See id.*

Petitioners rely on this Court's decisions in *United States v. Causby*, 328 U.S. 256 (1946), and *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922), for the proposition that an easement is a taking *per se*, regardless of whether it allows only temporary access or whether it affects the value of the property. *See* Pet'r Br. 15, 24; *cf.* Amicus Br. of New England Legal Foundation 9 (arguing that "[i]mpaired economic use of the hotel played no role" in the Court's determination in *Portsmouth Harbor* whether the challenged easement constituted a taking). But that is not what this Court has held, and there is no reason to adopt such a rule in this case.

In *Causby*, this Court held that the government had effected a taking in the constitutional sense by directing "frequent and regular flights of army and navy aircraft over respondents' land at low altitudes," 328 U.S. at 258, such that it "limit[ed] the utility of the land and cause[d] a diminution in its value," *id.* at 262. The Court therefore held that the government completed a taking requiring compensation because "there was a diminution in value of the property and . . . the

frequent, low-level flights were the direct and immediate cause." *Id.* at 267; *see also id.* at 265 (noting that the "continuous invasions" of the airspace "affect[ed] the use of the surface of the land itself").

Similarly, in *Portsmouth Harbor*, the United States had erected a fort near the petitioner's land and regularly fired guns over the land. *See* 260 U.S. at 328. This Court observed that "[t]here is no doubt that a serious loss has been inflicted upon the claimant, as the public has been frightened off the premises by the imminence of the guns." *Id.* at 329. Accordingly, the Court concluded that "the specific facts set forth would warrant a finding that a servitude has been imposed" that might require compensation. *Id.* at 330.

Neither of these cases announced a *per se* rule that all easements, including limited and temporary ones that allow work operations to continue unhindered, amount to takings—and indeed, no such rule exists. *See, e.g.*, *Loretto*, 458 U.S. at 433 (explaining that in *Kaiser Aetna*, 444 U.S. 164, "the easement of passage, not being a permanent occupation of land, was not considered a taking *per se*"). Because the regulation here specifically forbids "conduct disruptive of the employer's property or agricultural operations," Cal. Code. Regs., tit. 8, § 20900(e)(4)(C), it is nothing like the actions this Court has concluded might amount to takings *per se*. It neither produces a permanent and continuous occupation of the property, nor diminishes the value of the property. *Lucas*, 505 U.S. at 1015.

* * *

In short, the text and history of the Takings Clause demonstrate that it was designed to apply only to actual physical appropriations of private property. Although this Court has recognized that the Clause also covers regulations that are tantamount to a physical

appropriation because they effect a permanent and continuous occupation or render private property valueless, *Lucas*, 505 U.S. at 1015, that is not the situation here. The challenged regulation therefore does not effect a taking *per se*, as it allows only the intermittent entry of certain individuals into designated areas and specifically does not disrupt business operations or devalue any property.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 12, 2021 * Counsel of Record