

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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CEDAR POINT NURSERY, ET AL.,            )  
  ) Petitioners,  
  ) v.                                    ) No. 20-107  
VICTORIA HASSID, ET AL.,                )  
  ) Respondents.                    )  
- - - - -

Pages: 1 through 73  
Place: Washington, D.C.  
Date: March 22, 2021

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4                                    Petitioners,            )

5                                    v.                                    ) No. 20-107

6   VICTORIA HASSID, ET AL.,            )

7                                    Respondents.            )

8   - - - - -

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10                                   Washington, D.C.

11                                   Monday, March 22, 2021

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13                                   The above-entitled matter came on for  
14 oral argument before the Supreme Court of the  
15 United States at 10:00 a.m.

16

17 APPEARANCES:

18

19 JOSHUA P. THOMPSON, ESQUIRE, Sacramento, California;  
20                                   on behalf of the Petitioners.

21 MICHAEL J. MONGAN, Solicitor General,  
22                                   San Francisco, California;

23                                   on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument this morning in Case 20-107, Cedar  
5 Point Nursery versus Hassid.

6 Mr. Thompson.

7 ORAL ARGUMENT OF JOSHUA P. THOMPSON

8 ON BEHALF OF THE PETITIONERS

9 MR. THOMPSON: Thank you, Mr. Chief  
10 Justice, and may it please the Court:

11 An access easement that takes the  
12 right to enter, occupy, and use another's  
13 private property effects a per se physical  
14 taking under the Fifth Amendment. Any time  
15 limitations placed on access go towards the just  
16 compensation due, not whether a taking has  
17 occurred.

18 The access regulation at issue in this  
19 case authorizes an easement on the property of  
20 Petitioners for the benefit of union organizers.  
21 Under the terms of the Access Regulation,  
22 organizers may occupy the business's property  
23 for three hours each day, 120 days each year.

24 This Court should hold that the taking  
25 of this easement violates the Fifth Amendment

1 because it effects a physical taking without  
2 compensation, and the Court should so hold for  
3 two reasons.

4 First, the appropriation of a real  
5 property interest triggers a categorical duty to  
6 compensate. The Access Regulation authorizes  
7 the taking of a real property interest in the  
8 form of a continual right to occupy and use  
9 Petitioners' property.

10 And, second, at a more fundamental  
11 level, the Access Regulation denies Petitioners  
12 the right to exclude union organizers from their  
13 property. Such an infringement on the most  
14 fundamental property right merits per se  
15 treatment.

16 The Ninth Circuit, however, took a  
17 different tack. It demoted the right to exclude  
18 to just another stick in the bundle and would  
19 give per se treatment only to those rare  
20 easements that authorize 24/7 occupation.

21 Not even the Board supports that  
22 extreme rule. But the Board offers no basis,  
23 much less a principled one, on which to  
24 distinguish access easements that merit per se  
25 treatment from those that don't.

1                   If the government wants to take an  
2                   access easement over private property, it has to  
3                   pay for it. Failure to pay just compensation  
4                   violates the Takings Clause.

5                   I welcome the Court's questions.

6                   CHIEF JUSTICE ROBERTS: Counsel, on  
7                   page 6 of the Chamber of Commerce's brief, it  
8                   says that "requiring a sacrifice of the right to  
9                   exclude third parties during the conduct of  
10                  reasonable government inspections that benefit  
11                  property owners will likely satisfy the doctrine  
12                  of unconstitutional conditions."

13                  I -- I wonder if you agree with that.

14                  MR. THOMPSON: Mr. Chief Justice, we  
15                  would -- we would say that reasonable government  
16                  inspections are a background principle of  
17                  property law that do not affect your property  
18                  right or your right to exclude. I do think the  
19                  government can exact a constitutional condition  
20                  on -- on some -- some relinquishment of the  
21                  right to exclude, but routine government  
22                  inspections and administrative searches are  
23                  justified as a government power that they've had  
24                  at common law.

25                  CHIEF JUSTICE ROBERTS: So it has

1 nothing to do with whether it benefits the  
2 property owners?

3 MR. THOMPSON: Not under our  
4 formulation, Mr. Chief Justice. Under -- as --  
5 as -- as I read this Court's cases, since the  
6 government had the authority at common law to  
7 undertake reasonable searches, the property  
8 owner does not have the right to exclude the  
9 government when it undertakes that power.

10 Certainly, the Fourth Amendment  
11 presents a constitutional limit on the extent to  
12 which the government can search, but it does not  
13 affect one's property right when the government  
14 undertakes that power.

15 CHIEF JUSTICE ROBERTS: Well, why  
16 doesn't benefiting peaceful labor -- or  
17 promoting peaceful labor relations fall under  
18 the same category as safety inspections? In  
19 other words, it benefits the public interest to  
20 have limited access along those lines.

21 MR. THOMPSON: Mr. Chief Justice,  
22 because there was no right at common law to  
23 allow third-party union organizers onto one's  
24 property. That is a right that when the  
25 government takes it has to pay compensation.

1 CHIEF JUSTICE ROBERTS: Were there --  
2 were there a lot of --

3 MR. THOMPSON: And all --

4 CHIEF JUSTICE ROBERTS: -- were there  
5 a lot of union organizers at common law?

6 MR. THOMPSON: Certainly not, Your  
7 Honor. And I also don't think this could be  
8 justified as a constitutional condition, because  
9 the right to enter into agriculture, the right  
10 to sell strawberry plants, for example, is not a  
11 -- is not a government benefit that the -- that  
12 the Board can hold for ransom in exchange for  
13 our -- our fundamental property rights.

14 CHIEF JUSTICE ROBERTS: Counsel,  
15 how -- how much compensation do you think is --  
16 is due because of the existence of this law?

17 MR. THOMPSON: I don't know that  
18 question, Your Honor. That's certainly not  
19 before the Court. I think that the impingement  
20 on the property rights here is significant. And  
21 if the Board would like to pay for that, it can  
22 certainly -- there are certainly measures that  
23 the courts below can undertake to determine the  
24 right compensation.

25 CHIEF JUSTICE ROBERTS: Thank you,



1 counsel.

2 Justice Thomas.

3 JUSTICE THOMAS: Thank you, Mr. Chief  
4 Justice.

5 Counsel, was there a -- the question  
6 presented here, your question presented, is  
7 whether the uncompensated appropriation of an  
8 ease -- involves the uncompensated appropriation  
9 of an easement.

10 Was there a finding that this is an  
11 easement?

12 MR. THOMPSON: No. No, Justice  
13 Thomas, there was no finding that this was an  
14 easement. I think that we use the term easement  
15 in the same way that this Court used the term  
16 servitude in Portsmouth Harbor and this Court  
17 used the term easement in both Kaiser and  
18 Causby. What that -- what that means is it's  
19 over and above a mere trespass. The government  
20 is -- is intending to take a discrete property  
21 interest, and it's that taking of an easement's  
22 interest that merits per se treatment.

23 JUSTICE THOMAS: Does this have to be  
24 an interest or easement that is recognized under  
25 state law, or can it be something that rather

1 than under state law is recognized under common  
2 law?

3 MR. THOMPSON: Mr. -- Justice Thomas,  
4 I don't think that whether this is a -- a  
5 recognizable easement under state law, for  
6 example, whether it's transferable and alienable  
7 matters. What matters is that the right to  
8 exclude has been denied in a way that is more  
9 than a series of mere trespasses, as this Court  
10 indicated in Portsmouth Harbor.

11 If the government's intent to take --  
12 to fire a single shot was to appropriate that  
13 property interest, then compensation is due.

14 JUSTICE THOMAS: And -- but that takes  
15 you back to what the Chief Justice asked, how  
16 much compensation would be due for this,  
17 something that is quite -- is -- somehow  
18 occupies space between a mere trespass and a  
19 temporary easement?

20 MR. THOMPSON: Justice Thomas, we  
21 don't believe that the compensation here would  
22 be minimal. However, the Court in Loretto would  
23 hold that even a minimal invasion of the right  
24 to exclude and even a minimal denial of that  
25 right would merit compensation.

1           Of course, the New York Court of  
2 Appeals in Loretto found a one dollar  
3 compensation sufficient, but this Court  
4 nevertheless held that it was a physical taking  
5 that merited per se treatment.

6           JUSTICE THOMAS: And, finally, you --  
7 you said to the Chief Justice that reasonable  
8 searches were okay. What -- how would you  
9 define a reasonable search in -- in -- in your  
10 case? What would that look like?

11           MR. THOMPSON: Justice Thomas, in our  
12 case, the government is not searching. It is --  
13 it is authorizing third parties to come on to  
14 proselytize.

15           JUSTICE THOMAS: Well, I mean, what  
16 would be a visit that's -- I misspoke. What  
17 would be a visit that would be sufficiently  
18 reasonable that it would not violate your --  
19 would not violate the Fifth Amendment takings  
20 clause?

21           MR. THOMPSON: Justice Thomas, any  
22 time the government undertakes its power to  
23 search, it would not be a taking. It could be  
24 an unconstitutional search under this Court's  
25 Fourth Amendment jurisprudence. But, if it is

1 an unconstitutional search, then, by definition,  
2 it cannot be a taking because the government  
3 doesn't have authority to undertake that action.

4 JUSTICE THOMAS: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Breyer.

7 JUSTICE BREYER: Well, a lot of what I  
8 read in this seemed to suggest that you think  
9 that the search here or the -- the right -- the  
10 state's action here was excessive, is that  
11 right?

12 MR. THOMPSON: We do think that this  
13 violated our fundamental property right, Justice  
14 Breyer.

15 JUSTICE BREYER: But I -- will you  
16 answer my question? Do you think it's excessive  
17 as a regulation? Is it?

18 MR. THOMPSON: Justice Breyer, I think  
19 the uncompensated taking of a property interest  
20 is always excessive. And I do think the duty --

21 JUSTICE BREYER: Well, then, if you  
22 think it's always excessive, there -- there are  
23 dozens and dozens and dozens of statutes which  
24 provide -- for example, one brief tells us the  
25 Mine Safety and Health Act of 1977 allows the

1 Secretary of Labor to inspect a coal mine at  
2 least four times a year.

3 And I guess that they could have, say,  
4 some kind -- they might delegate that authority  
5 to -- to private inspectors. I don't know. But  
6 are all those long list of statutes, are they  
7 all unconstitutional?

8 MR. THOMPSON: No, Justice Breyer,  
9 because those are not affecting your property  
10 right. You do not possess the property right at  
11 common law --

12 JUSTICE BREYER: You can't keep them  
13 out.

14 MR. THOMPSON: That's true, Your  
15 Honor.

16 JUSTICE BREYER: Oh, per the common  
17 law. I see, it's common law. Okay. Well, you  
18 know what they have that's really surprising? I  
19 don't mean to sound facetious or sarcastic, but  
20 I was trying to think of an example, and people  
21 now have in 15 years their own private  
22 spaceships or their own electric cars or their  
23 own driverless cars, and there's a law that says  
24 people can go in, the inspectors, the gas  
25 station. If you keep your car without using it

1     inside your property for 10 years, they want to  
2     go inspect it. They have to do that because it  
3     might blow up.

4             They had no spaceships at common law.  
5     I'm just trying to think of an example where  
6     it's the same idea, it's just they didn't have  
7     it at common law.

8             MR. THOMPSON: Justice Breyer, what --  
9     what matters is whether the government had the  
10    power to search at common law, not -- not what  
11    they are -- what they are searching. So, if the  
12    government is using its authority to search,  
13    which is a power that the govern -- government  
14    possessed at common law, the property owner does  
15    not possess the right to exclude them without  
16    the govern --

17            JUSTICE BREYER: The government can  
18    search what it -- whatever is reasonable, it can  
19    search it, but what it cannot do is?

20            MR. THOMPSON: Is take a discrete  
21    property interest.

22            JUSTICE BREYER: Well, I -- I  
23    understand the word take, but that sounds like a  
24    conclusion. What they cannot do is? I mean,  
25    they send someone out there, as here, to talk to

1 workers to find out what the conditions are, for  
2 example. Can they do that?

3 MR. THOMPSON: No.

4 JUSTICE BREYER: They're searching for  
5 conditions. They're searching to see whether  
6 they'd like to belong to a union. They can't do  
7 that. What's the difference?

8 MR. THOMPSON: The difference is the  
9 power that the government is doing. If it is a  
10 power that the government possessed at common  
11 law, then you do not have the right to exclude  
12 the government from undertaking that power.

13 If it is not a power that the  
14 government possessed at common law, then, of  
15 course, you do possess the right to exclude, and  
16 when the government takes that right from you,  
17 something that it could not do at common law, it  
18 has to compensate you for taking that right.

19 JUSTICE BREYER: But they're searching  
20 to see if the electric car, which they didn't  
21 have in common law, is safe enough to take out  
22 on the highway.

23 MR. THOMPSON: Yes, Just --

24 JUSTICE BREYER: Can they do it?

25 MR. THOMPSON: Of course, Justice

1 Breyer, because they still have the power to  
2 search. It's the searching power, not the thing  
3 that they're searching that matters.

4 CHIEF JUSTICE ROBERTS: Justice Alito.

5 JUSTICE ALITO: Judge Ikuta looked to  
6 California property law in determining that in  
7 her judgment there was a taking here of a  
8 property interest. Is that the proper approach?  
9 Do we look to how state law in 2021 defines  
10 property interests?

11 MR. THOMPSON: Justice Alito, every  
12 takings question is going to begin by what is  
13 the property right that the property owner  
14 possesses. But, after that analysis is  
15 undertaken, this Court is certainly charged with  
16 determining the extent of the violation of the  
17 Fifth Amendment.

18 And, here, the fact that this can be  
19 fairly characterized as an easement under  
20 California law, as Judge Ikuta noted in her en  
21 banc dissent, only strengthens our claim that  
22 this is a taking of a discrete property  
23 interest. But notwithstanding whether it can be  
24 fairly characterized as an easement under  
25 California law --



1 JUSTICE ALITO: Well --

2 MR. THOMPSON: -- the impact on the  
3 right --

4 JUSTICE ALITO: Well, can -- can you  
5 answer that question a little bit more simply?  
6 Is this a question of whether it's a property  
7 interest under California law today, or is it a  
8 question whether it would be regarded as a  
9 property interest at the time of the adoption of  
10 the Fifth Amendment, or is it something else?

11 Is it a generic concept of an  
12 easement, maybe we would look to the Restatement  
13 of Property? This is an important point.  
14 What -- what is the answer? Is there a simpler  
15 answer to that question?

16 MR. THOMPSON: Yes, Justice -- Justice  
17 Alito. We are using the term easement in the  
18 sense that the Court used it in Causby and  
19 Portsmouth Harbor. It's not looking to whether  
20 it squares on all fours with state law. What  
21 matters is whether the impingement on the right  
22 to exclude is over and above a series of mere  
23 trespasses.

24 JUSTICE ALITO: Well, what is the --  
25 the definition of -- of an easement then if it's

1 not -- it's not California law, it's not common  
2 law, you acknowledge this is not a classic --  
3 not a classic easement. What -- what is your  
4 definition of an easement?

5 MR. THOMPSON: The -- the -- we are  
6 using easement in the same sense that this Court  
7 used easement in Causby, Portsmouth Harbor,  
8 Kaiser, Aetna. We are using the term to say  
9 that this is the taking of the right to exclude  
10 over and above a series of mere trespasses.

11 JUSTICE ALITO: Well, the Restatement  
12 defines an easement as "an easement creates a  
13 non-possessory right to enter and use land in  
14 the possession of another" and it goes on.

15 Is that your definition? Any right to  
16 enter -- enter land is an easement?

17 MR. THOMPSON: Justice -- Justice  
18 Alito, that may be the Restatement's definition.  
19 That is not how we are using the term easement  
20 here. Again, we are using the term easement as  
21 a shorthand to designate a taking of a property  
22 right that is over and above a series of mere  
23 trespasses. It's certainly true that the Access  
24 Regulation grants the union the right to come on  
25 and use our property for a discrete purpose, and

1 that, as Judge Ikuta noted, has the hallmarks of  
2 an easement in gross under California law  
3 that --

4 JUSTICE ALITO: All right. One -- one  
5 last question if I can squeeze it in. How do  
6 you distinguish or do you not distinguish the --  
7 the right of union representatives to enter  
8 under the National Labor Relations Act?

9 MR. THOMPSON: Justice Alito, I don't  
10 think this Court needs to address the access  
11 authorized under the NLRA simply by virtue of  
12 how this Court has narrowed that access right to  
13 only those situations where workers are  
14 inaccessible, and those cases, of course, didn't  
15 raise takings questions, they were  
16 interpretations of the NLRA.

17 JUSTICE ALITO: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Sotomayor.

20 JUSTICE SOTOMAYOR: Counsel, that's  
21 the problem I'm having. Answer Justice Alito's  
22 question. Under your theory -- and you're  
23 creating sort of a federal common law definition  
24 of what an easement is because you're not  
25 referring to California law, you're not

1 referring to common law, I -- I guess you want  
2 us to make it up somehow.

3 But would Babcock -- would the NLRB  
4 rule and the limitations that we created in  
5 Babcock make you entitled to compensation?

6 MR. THOMPSON: No, I do not think they  
7 would, Justice Sotomayor. I think, in  
8 Lechmere -- as narrow as the access right is  
9 under the NLRA, it does not authorize the taking  
10 of anything more than what would be a -- a mere  
11 one-time authorized trespass or --

12 JUSTICE SOTOMAYOR: Well, it's not one  
13 time. It could be much more under the NLRB. It  
14 just can't -- wouldn't be as much as this.

15 But let me ask you this, counsel:  
16 Aren't you then just conceding that this is not  
17 a per se rule? And we have very few per se  
18 rules in this area. In Arkansas Game, my late  
19 colleague, Justice Ginsburg, explained that  
20 there are nearly infinite ways of -- in which  
21 government actions can affect property  
22 interests. The Court has recognized few and  
23 variable rules in this area.

24 So, given that, why don't we just take  
25 the Arkansas Game theory -- or, not theory,

1 variables and apply them to this case? Why  
2 don't you win under that? You're claiming --  
3 and that's what the dissent said in the -- in  
4 the panel decision.

5           You're claiming that this is different  
6 than -- than the Babcock situation or similar to  
7 the Babcock situation because people don't live  
8 on the premises, they're easily accessible, they  
9 speak English more than Spanish, and I'm not  
10 even sure the language difference makes -- the  
11 language difference makes a difference in our  
12 analysis, but don't you win under Babcock?

13           MR. THOMPSON: Justice Sotomayor, we  
14 -- we might, but the distinction that this Court  
15 has always made between per se rules and ad hoc  
16 adjudications of Takings Clause is whether the  
17 denial of the right to exclude in the form of  
18 taking of the --

19           JUSTICE SOTOMAYOR: Counsel, that's  
20 just simply not true, because we've had access  
21 right cases like Kaiser Aetna and PruneYards,  
22 even Arkansas Game, which were invasions of the  
23 right to exclude. All of those cases were  
24 identical to this one stick in the bundle of  
25 rights. And, there, we just didn't apply a per

1 se rule. We found in -- in -- we suggested that  
2 some takings like in Arkansas Game were  
3 unconstitutional but not under a per se  
4 analysis.

5 MR. THOMPSON: Justice Sotomayor, I  
6 don't believe that that -- that formulation of  
7 Kaiser Aetna survives subsequent decisions by  
8 this Court. This Court has always recognized --

9 JUSTICE SOTOMAYOR: So what do you do  
10 with PruneYards?

11 MR. THOMPSON: Justice -- Justice  
12 Sotomayor, as this Court has recognized,  
13 PruneYard is a limited rule that is only  
14 available to publicly accessible places.

15 JUSTICE SOTOMAYOR: And one question:  
16 Is your rule of applicable -- can we exempt your  
17 absolutist rule and say it applies to only  
18 situations in which government -- in which  
19 access is provided to someone who's not a  
20 government official or a government agent or  
21 contractor?

22 MR. THOMPSON: No, I don't think that  
23 would make a difference here, Your Honor. I  
24 think what matters is the extent of the physical  
25 invasion authorized by law.

1 JUSTICE SOTOMAYOR: But then -- then  
2 you are -- then you are putting at risk all of  
3 the government regimes that permit -- for  
4 nuclear power plants, there are inspections  
5 almost on a daily basis, if not a weekly or  
6 monthly basis.

7 MR. THOMPSON: I don't --

8 JUSTICE SOTOMAYOR: Some mines require  
9 when -- extensive visits.

10 MR. THOMPSON: I don't believe that's  
11 correct, Your Honor. I think, as my discussion  
12 with Justice Breyer indicated, those are  
13 limitations on your property right at common  
14 law. You do not have the right to deny the  
15 government to come onto your property to search.

16 That would save all of the  
17 administrative and inspection regimes that --  
18 that worried the Board --

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Justice Kagan.

22 JUSTICE KAGAN: Mr. Thompson, if I  
23 could go back first to your answers to Justice  
24 Thomas. Let -- let -- let's say that I don't  
25 think that this would count as an easement under

1 California law for a variety of reasons that  
2 Justice Thomas gave and Justice Alito gave.  
3 Let's just assume that to be true.

4 You do keep on talking about a  
5 discrete interest in property. So I guess my  
6 question is, what discrete interest are you  
7 talking about if not an easement as defined by  
8 California law?

9 MR. THOMPSON: Justice Kagan, we're  
10 talking about the denial of the right to exclude  
11 third parties from our property for 120 days a  
12 year --

13 JUSTICE KAGAN: Yeah, I mean, I know  
14 what the thing says, but I don't think, like,  
15 the denial of a right to exclude counts as a  
16 discrete interest in property.

17 I mean, the right to exclude is one of  
18 the sticks in the bundle that a property owner  
19 has, but usually, when people talk about  
20 discrete interests in property, it's like a  
21 legal form. It's an easement. It's a fee  
22 simple. It's something like that.

23 But you're not pointing to anything  
24 like that. Am I right?

25 MR. THOMPSON: That's correct, Justice



1 Kagan. What we're pointing to is the same  
2 language that this Court used in Causby to  
3 describe an easement.

4 JUSTICE KAGAN: Okay.

5 MR. THOMPSON: There was no --

6 JUSTICE KAGAN: Sorry. If -- if --  
7 you talk a lot about background principles of  
8 property law, and -- and that's the way you save  
9 every inspection regime and every search regime,  
10 that somehow that there's a -- that there is a  
11 background principle of property law that is  
12 incorporated into this analysis so that these  
13 property owners don't really have a property  
14 right to exclude inspectors and so forth.

15 But then you put that -- you -- you --  
16 you time that as of, I think -- this goes to  
17 what Justice Alito was talking about -- as of  
18 the time of the ratification of the  
19 Constitution.

20 And I guess I wonder why that should  
21 be, because this -- this question of what is  
22 your property interest seems as though it  
23 shouldn't stop at the time of the Constitution.  
24 The Takings Clause operates as against whatever  
25 it is that property generally means. But why

1 should that freeze at that time?

2 MR. THOMPSON: Justice Kagan, I think  
3 Your Honor's highlighting some ambiguousness in  
4 this Court's discussion of what merits a  
5 background principle of law.

6 I don't think that that -- that  
7 concern is really implicated here because, as  
8 the Court noted in Palazzolo and in Lucas, the  
9 -- the -- the state can't by ipse dixit create a  
10 new background principle some 40 years ago.

11 So, while there may be some  
12 ambiguities at the margins of what constitutes a  
13 background principle of property law, here,  
14 there's no doubt that the -- that the ability to  
15 exclude unwanted third-party interlopers was not  
16 a right that existed as a background principle  
17 of California law.

18 JUSTICE KAGAN: Okay. And can I get  
19 one short -- more short one in, which is are you  
20 denying this -- the notion that I think comes  
21 from Loretto that there's -- there really is a  
22 difference between permanent deprivations and  
23 temporary deprivations?

24 MR. THOMPSON: Justice Kagan, I don't  
25 -- I -- I -- I think that insofar as you're

1 talking about a structure on one's property,  
2 that structure needs to be permanent to have per  
3 se treatment. Insofar as the Court is talking  
4 about access to one's property by individuals,  
5 Nollan dispelled the notion that people have to  
6 be stationed there 24/7.

7 JUSTICE KAGAN: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Gorsuch.

10 JUSTICE GORSUCH: Counsel, I think I'd  
11 like you to have a little more opportunity to  
12 respond to the -- the charge that this would be  
13 revolutionary and the end of all regulatory  
14 regimes and that the government would never be  
15 able to walk on anyone's property again to -- to  
16 do a search or -- or to conduct tests or ensure  
17 the safety of -- of licensed operations there,  
18 whether it's a power plant or otherwise. Would  
19 you address that concern, please?

20 MR. THOMPSON: Yes, I'd be happy to,  
21 Justice Gorsuch.

22 As -- as the Court is aware, every  
23 takings claim begins with what is the property  
24 right that the private property owner possesses,  
25 and that looks to background principles of

1 property law to determine what the scope of the  
2 property right is.

3 With respect to the government's  
4 authority to search, that was certainly present  
5 at common law, and the Fourth Amendment put  
6 limits on the government's power -- power to  
7 search, but it certainly recognizes that that is  
8 a power that the government possessed at all  
9 times and certainly at the time of the  
10 California founding.

11 So, when the government exercises that  
12 power to search, as it does with administrative  
13 search inspections and other -- other -- other  
14 searches, it is not taking away a property right  
15 from you because that's nothing that you  
16 possessed.

17 As this Court said in *Hurtado*, the  
18 government doesn't have to pay for a duty that  
19 it is already owed.

20 JUSTICE GORSUCH: Well, what if  
21 California had passed an identical regulation to  
22 the one here, except that instead of allowing  
23 union organizers access, it allowed union  
24 opponents access in order to speak with  
25 employees about the down sides of joining a

1 union? So, again, not a government worker  
2 coming to do a search to ensure compliance with  
3 the regulatory regime but a third party being  
4 permitted and given a right to access the  
5 property.

6 Or -- or -- or suppose that California  
7 had allowed any member of the public to come  
8 onto the property to speak with employees for  
9 three hours a day, 120 days a year about health  
10 and safety issues, educational opportunities,  
11 medical treatment available to them or -- or --  
12 or -- or just to promote an ideological cause.

13 Would -- would there be a different  
14 result?

15 MR. THOMPSON: No, there would not,  
16 Justice Gorsuch. The -- the -- the -- the  
17 property question, the takings question does not  
18 turn on the speech that is being advocated. If  
19 it were right to work advocates or if it were  
20 members of the public that were given access and  
21 given a discrete property interest to my  
22 clients, that would also merit per se treatment  
23 under this Court's Takings Clause doctrine.

24 JUSTICE GORSUCH: Thank you very much,  
25 counsel.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Kavanaugh.

3 JUSTICE KAVANAUGH: Thank you, Mr.  
4 Chief Justice.

5 And good morning, Mr. Thompson. I'm a  
6 bit mystified by some of the arguments here  
7 because it seems like you're asking us to  
8 reinvent the wheel, but it's not a new issue at  
9 least as I see it.

10 We decided unanimously in 1956 how to  
11 balance property rights against union organizing  
12 rights in the Babcock case. And then, of  
13 course, in Lechmere, we reiterated that in  
14 Justice Thomas's opinion for the Court there.  
15 The Babcock briefs, if you go back into those,  
16 those are all about property rights against  
17 union organizing rights, and then Babcock  
18 considers that and -- and sets forth a rule.

19 Now I think you -- you probably  
20 prevail under that rule, but I'm -- I'm curious  
21 why your argument is not as simple as Justice  
22 Clark's -- California Supreme Court Justice  
23 Clark's argument in his dissent in the '76 case  
24 that you cite where he just says, under Babcock,  
25 there's a rule, the Board's regulation here goes

1 beyond the Babcock rule by permitting blanket  
2 access under private -- onto private property  
3 during worker -- working hours and access when  
4 alternative means of communications do, in fact,  
5 exist, the regulation is, therefore,  
6 unconstitutional.

7 Why is it not as simple as that?

8 MR. THOMPSON: Because, Justice  
9 Kavanaugh, as -- as you're undoubtedly aware,  
10 the NLRA cases are interpreting the statute and  
11 they're not -- they're not being adjudicated  
12 under a takings theory. And --

13 JUSTICE KAVANAUGH: Well, let me stop  
14 you right there. I -- I think they're doing  
15 constitutional avoidance and constitutional  
16 avoidance not to necessarily avoid a potentially  
17 unconstitutional, but an unconstitutional --  
18 unconstitutionality if the regulation were  
19 allowed to go beyond what the Court allowed in  
20 Babcock.

21 So, in other words, it seems to me,  
22 especially if you go back into the briefs in  
23 Babcock, which are all about the Fifth  
24 Amendment -- not all about, but they talk a lot  
25 about the Fifth Amendment -- that then you read

1 Babcock, it is interpreting the statute as  
2 informed by the Constitution and saying, given  
3 the constitutional status of the property  
4 rights, we're only going to allow this very  
5 limited intrusion, again, as Justice Clark says  
6 for the California Supreme Court, when  
7 alternative means of communication do, in fact,  
8 exist, then you can't go onto the property.

9 Your response to that?

10 MR. THOMPSON: I -- I agree with you,  
11 Justice Kavanaugh, that what the Court is doing  
12 in Lechmere and Babcock is undertaking a -- a --  
13 a constitutional avoidance inquiry.

14 I think that we were unable or  
15 precluded from -- from interpreting the Access  
16 Regulation or the ALRA in a similar manner  
17 because of the Pandol & Sons decision from 1976.

18 JUSTICE KAVANAUGH: Exactly.

19 MR. THOMPSON: And to be perfect --

20 JUSTICE KAVANAUGH: But -- but now  
21 that it's here, isn't that the simple, easy  
22 response to the -- this case, which is we've  
23 already considered 65 years ago the balance of  
24 property rights against labor organizing. We  
25 set forth a very clear rule, and it was



1 reiterated in Lechmere by Justice Thomas's  
2 majority opinion, and, you know, there's no  
3 reason to depart from that rule that we've seen.  
4 It provides expansive protection for property  
5 rights but not without the exception as  
6 articulated in Babcock, end of case.

7 MR. THOMPSON: Justice Kavanaugh,  
8 because the Access Regulation that is in effect  
9 in California right now effects a physical  
10 taking, and it is that claim that is before this  
11 Court. It's a claim that we alleged. If  
12 California on remand wants to promulgate a new  
13 rule that doesn't take access or 120 days a year  
14 with inaccessibility not being a consideration,  
15 then perhaps it can craft a rule that would  
16 survive a takings inquiry, but it has not done  
17 so. And the one before this Court clearly  
18 violates the Takings Clause.

19 JUSTICE KAVANAUGH: Just to be clear,  
20 I'm saying you would prevail under Babcock. You  
21 don't want to prevail under Babcock, though?

22 MR. THOMPSON: I -- I agree that we  
23 would prevail under Babcock, but I don't think  
24 that question is fairly presented by this case.  
25 What the --

1 CHIEF JUSTICE ROBERTS: Justice  
2 Barrett.

3 JUSTICE BARRETT: Mr. Thompson, so I  
4 think that both sides, you and the Respondents,  
5 have line-drawing problems, so let me address  
6 your line-drawing problems.

7 I think a lot of the questions, you  
8 know, starting with Justice Thomas's questions  
9 about easements and, you know, Justice Kavanaugh  
10 talking about Babcock and Lechmere, go to the  
11 question of when does something arise -- when  
12 does something become a physical taking such  
13 that the Per Se Rule is triggered.

14 So let me ask you this: What if  
15 California had a regulation that permitted union  
16 organizers to go onto the property of your  
17 clients one hour a day, one day a year. Is that  
18 a taking subject to the Per Se Rule?

19 MR. THOMPSON: Yes, it is, Justice  
20 Barrett, and the Court already held so in -- in  
21 Portsmouth Harbor or at least indicated strongly  
22 when it said that if the -- if the guns were to  
23 fire a single shot with the admitted intent of  
24 taking that property right, that the taking  
25 would be complete.

1           If the -- if the government enacts a  
2 regulation that takes the property right for one  
3 hour a year with the admitted intent of -- of  
4 occupying and appropriating that property, the  
5 compensation may be minimal, but it's still a  
6 taking.

7           JUSTICE BARRETT: Okay. So let me  
8 make sure that I understand the relevance then  
9 of the, you know, focus on the amount of time  
10 and the degree of intrusion. It's really not  
11 about whether property has been taken. It's  
12 about whether that's reflective of the  
13 government's intent to occupy or take, which is  
14 why that language in Portsmouth Harbor talks  
15 about if the intent behind a single shot was to  
16 assert control over the property, then the  
17 taking would be complete and that there's no  
18 question about the intent here because it was  
19 accomplished by regulation. Is that correct?

20           MR. THOMPSON: That's exactly correct,  
21 Justice Barrett.

22           JUSTICE BARRETT: Okay. Then I don't  
23 understand how, under that theory, Section 7 of  
24 the NLRA isn't accomplishing a taking.

25           MR. THOMPSON: Justice Barrett, I

1 think -- I think it's -- it's possible that the  
2 NLRA access could be justified as a  
3 constitutional condition and that it is limited  
4 to the very remote scenario where workers are  
5 otherwise inaccessible and the government can  
6 condition that -- that ability to employ workers  
7 completely removed from society from a very,  
8 very limited access right and then only when the  
9 Board weighs the property interest that would be  
10 at stake in a particular circumstance.

11 JUSTICE BARRETT: Okay. Well, let me  
12 ask you, I mean, I think the problems here are  
13 line-drawing and then the other problems are,  
14 as, you know, others of my colleagues have been  
15 suggesting, the -- the licensing regimes.

16 And the Service Employees  
17 International Union has an amicus brief in which  
18 they say, well, listen, some of these  
19 justifications or some of these inspection  
20 regime -- regimes might be justified, and the  
21 Chamber of Commerce makes this point, as  
22 constitutional conditions on participation in  
23 the agriculture employment market, just as, say,  
24 for FDA licensing regimes, and inspections can  
25 be justified as legitimate exercises of

1 conditions on a government permitting a company  
2 to enter the pharmaceutical market.

3 Why doesn't that rationale apply to  
4 your entry into the agricultural market?

5 MR. THOMPSON: Because, Justice  
6 Barrett, as -- as this Court said in *Horne*, the  
7 right to enter agriculture is not something that  
8 the government can hold hostage. It's not  
9 something that can be conditioned.

10 JUSTICE BARRETT: Why is the  
11 pharmaceutical industry different? Is this an  
12 industry-by-industry calculus?

13 MR. THOMPSON: Well, to -- to use the  
14 Chief Justice words in *Horne*, we're not talking  
15 about toxic chemicals. We're talking about an  
16 unhealthy snack. There's a -- there's quite an  
17 unambiguous line between those substances that  
18 can cause public harm and entering into  
19 agriculture.

20 JUSTICE BARRETT: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel. A minute to wrap up.

23 MR. THOMPSON: Thank you, Mr. Chief  
24 Justice.

25 As many of the Court's questions today

1 indicate, this case does ultimately come down to  
2 line-drawing. The Ninth Circuit would draw that  
3 line at 24/7, 365-day occupations. The Board  
4 rejects that line in explaining that a daylight  
5 easement would a per se physical taking but  
6 offers no alternative. Petitioners' proposal  
7 squares with the Federal Circuit and is at least  
8 hinted at, if not explicitly endorsed, by this  
9 Court's decision in Portsmouth Harbor.

10 The Court ought to explicitly endorse  
11 that line today. It gives due respect to the  
12 fundamental right to exclude that is at the  
13 heart of the Fifth Amendment that the access  
14 easement taken by the Board is so valuable to  
15 it, it can simply pay the businesses the value  
16 of that easement.

17 The decision of the Ninth Circuit  
18 should be reversed.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 General Mongan.

22 ORAL ARGUMENT OF MICHAEL J. MONGAN  
23 ON BEHALF OF THE RESPONDENTS

24 MR. MONGAN: Mr. Chief Justice, and  
25 may it please the Court:

1           The Board's regulation authorizes only  
2 a limited number of organizers to enter  
3 Petitioners' farms for the sole purpose of  
4 speaking with employees at non-work times during  
5 certain periods of the year for no more than  
6 three hours a day and subject to detailed  
7 restrictions.

8           The only question before the Court is  
9 whether that regulation is a per se taking. And  
10 the answer is no. In this area of the law, the  
11 Court has reserved per se treatment for extreme  
12 regulations that are the functional equivalent  
13 of the government directly appropriating private  
14 property.

15           There's just two narrow categories of  
16 per se regulatory taking, the Lucas category,  
17 for regulations that eliminate all economically  
18 beneficial uses, and the Loretto category, for  
19 regulations authorizing a permanent and  
20 continuous physical invasion, which this Court  
21 said effectively destroys the owner's rights in  
22 their property.

23           Other regulations may also effect  
24 takings, but they're subject to the standard ad  
25 hoc inquiry, examining the nature of the

1 regulation and the particular burdens it  
2 imposes.

3           That's why Lucas emphasized that a  
4 regulation eliminating 95 percent of beneficial  
5 uses would not be a per se taking even though  
6 there'd be a strong ad hoc claim. And it's why  
7 Loretto said that regulations authorizing  
8 intermittent physical intrusions are also  
9 subject to ad hoc treatment even though the  
10 duration and severity of the intrusion is a  
11 critical factor that may predominate in that  
12 analysis.

13           Petitioners can't credibly claim that  
14 the Board's regulation destroys all their rights  
15 to any part of their property or that it's the  
16 functional equivalent of the government taking  
17 over their farm. Farmers are free to challenge  
18 this regulation under the Takings Clause. But  
19 judicial review should proceed by focusing on  
20 the nature of this Access Regulation and the  
21 particular burdens it imposes, not by the blunt  
22 instrument of a per se rule.

23           Mr. Chief Justice, I welcome the  
24 Court's questions.

25           CHIEF JUSTICE ROBERTS: Thank you,



1 counsel.

2           You began by saying this authorizes a  
3 limited number of organizers to enter the  
4 property. What -- what is that number?

5           MR. MONGAN: It's typically two  
6 organizers for each work crew. If there are  
7 greater than 30 workers, there can be one  
8 additional organizer for each 15 additional  
9 workers.

10           CHIEF JUSTICE ROBERTS: But what do  
11 you do if there's more than one union that wants  
12 access? I mean, it's not -- it's not at all  
13 unusual for unions to be competing for  
14 representation. So does each union gets its own  
15 120 days?

16           MR. MONGAN: Yes, Your Honor. I think  
17 that's right as a theoretical matter. As a  
18 practical matter, in our experience, there --  
19 there are not typically situations where there  
20 are multiple unions coming on in a -- in a  
21 particular year, but that is theoretically  
22 possible.

23           CHIEF JUSTICE ROBERTS: And -- and I  
24 gather there's no limit on that? Whether it's  
25 theoretical or not, this could be -- end up

1 being an authorization to enter every day of the  
2 year, which you would acknowledge is a taking?

3 MR. MONGAN: Well, Your Honor, it --  
4 it -- it would be in that hypothetical scenario  
5 potentially, but you're only allowed to come on  
6 when people are working there during non-work  
7 time, so I don't know if it's actually going to  
8 amount to year-round.

9 And in practice, as we've noted in the  
10 briefing, it's exceptionally rare to have even  
11 more than one 30-day access notice, and we've  
12 never had anything close to, you know,  
13 year-round on Your Honor's hypothetical.

14 CHIEF JUSTICE ROBERTS: You  
15 acknowledge, as I understand it, that if the  
16 access was every day during daylight hours, that  
17 that would be a taking?

18 MR. MONGAN: No, Your Honor, I don't  
19 think that's quite our position. We think that  
20 typically this has to be established through the  
21 ad hoc inquiry. What Loretto and Nollan said is  
22 that if -- you know, it has to be permanent --

23 CHIEF JUSTICE ROBERTS: Well, if it  
24 were, is there a situation where you think the  
25 ad hoc inquiry would say that every day,

1 daylight hours, does not violate the Takings  
2 Clause?

3 MR. MONGAN: No, I think that would be  
4 a very strong claim under Penn Central, Your  
5 Honor, because of the degree of physical  
6 intrusion and the, you know, potentially much  
7 greater interference with investment-backed  
8 expectations. And that's why you want to have  
9 an ad hoc inquiry here, so you can take account  
10 of the features of a hypothetical like that that  
11 make it look more like a taking.

12 Their rule, of course, would apply  
13 regardless, even to one hour a year on Justice  
14 Barrett's hypothetical, and -- and -- and that  
15 would ignore the critical features that go into  
16 the Fifth Amendment analysis --

17 CHIEF JUSTICE ROBERTS: Under your --

18 MR. MONGAN: -- that considers --

19 CHIEF JUSTICE ROBERTS: -- under your  
20 analysis, is the property interest defined by  
21 state law or common law?

22 MR. MONGAN: Well, there's a  
23 fee-simple property interest here, but, in  
24 determining whether it is a taking, you're going  
25 to look to the severity of the burden. And we

1 don't think that there is any basis for treating  
2 this as an easement under state or com --  
3 federal common law, but it --

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Justice Thomas.

7 JUSTICE THOMAS: Thank you, Mr. Chief  
8 Justice.

9 Mr. Mongan, the -- I'm quite  
10 interested in how related the inspection or the  
11 opportunity to be on private property has to do  
12 with the -- how related does it have to be to  
13 the business operation.

14 For example, could you have the exact  
15 same requirement, except during non-business  
16 hours for the property to be available for  
17 training of the -- of the National Guard, for  
18 example, or the state police? Since it's --  
19 since it's open property, just simply say for  
20 three hours a day, not more than 120 days a  
21 year, but certainly not to interfere with the  
22 business, the state police could train there?

23 MR. MONGAN: Your Honor, I think that  
24 that would --

25 JUSTICE THOMAS: Would that be a

1 taking?

2 MR. MONGAN: I think that would be a  
3 stronger claim under the ad hoc inquiry. It's a  
4 pretty substantial interference with anybody's  
5 investment-backed expectations. You don't  
6 expect your property to be a training ground for  
7 the state police. And it's going to be a  
8 substantially, you know, severe physical  
9 intrusion.

10 And Penn Central itself says that a  
11 critical focus of the inquiry is whether there  
12 is a -- a physical intrusion authorized by the  
13 regulation and the need for interference.

14 JUSTICE THOMAS: Well, let's just -- I  
15 understand your point, but I'm really interested  
16 in why -- how this is different from the  
17 training, so -- I'm sorry, from the union's  
18 presence while workers are there.

19 If the condition is that the -- only  
20 two or three police officers can train during  
21 non-business hours and only in unoccupied  
22 portions of the property, how is that -- if that  
23 is closer to the line than the union coming onto  
24 property while workers are there and possibly  
25 even interfering with workers, how is the

1 intrusion of the police officers different from  
2 that of the union organizers?

3 MR. MONGAN: Well, I guess I'd want to  
4 know more about what the police officers are  
5 allowed to do on the property, but we do know  
6 under this regulation, Your Honor, that the  
7 union organizers are not allowed to interfere  
8 with the property or agricultural operations.  
9 They can only talk to the workers during  
10 non-work periods, only two organizers in the  
11 typical case. They're not, you know, firing  
12 guns or doing the types of things that you might  
13 expect the state police to be doing.

14 JUSTICE THOMAS: Well, let's say the  
15 state police are just there to use it for  
16 calisthenics and working out, and they're not  
17 firing guns, they're not meeting with the  
18 employees, and for -- and they are to remain as  
19 inconspicuous as possible. So why is that  
20 closer to the line than the union organizers?

21 MR. MONGAN: Well, I think it does  
22 have to do with the fact that this is a  
23 situation related to a business activity that's  
24 being conducted on the land, and your  
25 hypothetical would be sort of without regard to

1 the -- the activities on the land, but it would  
2 be assessed in an ad hoc inquiry because neither  
3 of those are continuous intrusions, Your Honor.

4 JUSTICE THOMAS: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Breyer.

7 JUSTICE BREYER: I -- I think the  
8 Petitioners are saying that whether this  
9 regulation is excessive or not is beside the  
10 point. That's a question of whether there's a  
11 regulatory taking and whether it went too far.  
12 This is the kind of taking that it, no matter  
13 what, requires compensation under the Fifth  
14 Amendment. It is a Fifth Amendment taking  
15 because it's a classical property interest.

16 We have previously defined or sort of  
17 said that that kind of interest has to be a  
18 taking that is continuous and indefinite, like  
19 taking even an inch of somebody's apartment  
20 house to put up a CATV system or taking an  
21 easement for the beach. The virtue of their  
22 approach is that it's pretty clear, I think,  
23 because otherwise, you get into the mess of  
24 saying, well, what about a year? Here, it's  
25 4 percent of all the year's hours and 10 percent

1 or 12 percent of all the daylight hours and --  
2 and -- but it is not government coming in, it's  
3 a private person coming in. That's what they  
4 say.

5 So what are the rules that distinguish  
6 an easement for now? I thought an easement, for  
7 example, ran with the land so that if it's no  
8 longer agricultural land but, rather, is a -- a  
9 steel mill, you can't transfer the easement. It  
10 doesn't exist anymore. Nobody can go on the  
11 property.

12 There may be other characteristics.  
13 What are they, in your opinion, that  
14 distinguishes this case from a classical  
15 easement?

16 MR. MONGAN: Well, Your Honor, I think  
17 that this is not a classical easement. As you  
18 noted, it is not appurtenant to any particular  
19 parcel of land. It is a regulatory scheme that  
20 applies to a particular type of business  
21 conducted on the land, and the access is not to  
22 a particular pathway or parcel, it's to the  
23 employees, where they are.

24 And the regulation makes clear, if  
25 they're congregated on the bus, off the



1 property, before or after work, the access is to  
2 the bus, not to the farm.

3 It's also not something that could be  
4 assigned or -- or conveyed. It wouldn't be  
5 recorded. So it doesn't have the hallmarks of  
6 an easement.

7 And, Your Honor, I don't think that  
8 they have articulated a simple Per Se Rule here.  
9 And they've offered about five or six different  
10 formulations of their upfront test. Originally,  
11 they suggested very strongly in the opening  
12 brief you'd be looking at state law, and now  
13 they've disavowed that and say it's a federal  
14 common law inquiry, but they haven't been able  
15 to offer a clear definition of how a court would  
16 discern whether it is a "access easement" or a  
17 permissible series of trespasses.

18 And if you get past that, then courts  
19 are going to have to be applying a multitude of  
20 very complex exceptions in the mine run case,  
21 rather than looking at the considerations that  
22 have always been the focus of a Fifth Amendment  
23 inquiry, the severity of the burden and the  
24 character of the particular government action.

25 JUSTICE BREYER: Thank you, thank you.

1 CHIEF JUSTICE ROBERTS: Justice Alito.

2 JUSTICE ALITO: As Justice Barrett  
3 said, both you and Mr. Thompson have  
4 line-drawing challenges here, so let's suppose  
5 that -- let's start out with a town taking an  
6 easement so that people in the town can walk  
7 over somebody's beachfront property to get to a  
8 public beach.

9 You would concede that that's -- that  
10 that is a per se taking, right?

11 MR. MONGAN: Your Honor, I'd want to  
12 know a little bit more to know how to analyze  
13 it, but, yes, I think that under any standard, a  
14 sort of formal appurtenant easement over the  
15 property would be a taking.

16 And what this Court has said in Nollan  
17 is, if it's continuous, it's per se. Under this  
18 Court's precedent, if it was, you know, a very  
19 limited period of time, I guess you'd analyze it  
20 under Penn Central --

21 JUSTICE ALITO: Well --

22 MR. MONGAN: -- but I think that that  
23 would be the only case --

24 JUSTICE ALITO: -- well, that seems  
25 like a pretty simple -- that seems like a pretty

1 simple question. What more would you need to  
2 know? The town says we're -- we're going to  
3 take an easement over your property so that  
4 people can walk across your property to get from  
5 point A to point B.

6 MR. MONGAN: I -- I -- I think that's  
7 right, Your Honor. Under your precedent, I  
8 think it has to be continuous for it to be per  
9 se, but it's hard for me to conceive of a  
10 situation where a public access easement  
11 appurtenant to a particular parcel is not going  
12 to be a taking under the ad hoc standard,  
13 reserving the --

14 JUSTICE ALITO: All right. So suppose  
15 it's not -- suppose it doesn't apply 365 days a  
16 year. Suppose it's 364 days a year. Suppose  
17 it's 264 days a year. Suppose it's only on the  
18 Memorial Day, 4th of July, and Labor Day  
19 weekends. Different answer?

20 MR. MONGAN: I think those are going  
21 to be slam-dunk takings claims under Penn  
22 Central, Your Honor, because they're  
23 substantially interfering with your  
24 investment-backed expectations and you're  
25 singling out one landowner for this type of

1 particular infringement.

2 JUSTICE ALITO: Why do you need to get  
3 to Penn Central?

4 MR. MONGAN: Well --

5 JUSTICE ALITO: Under -- did we start  
6 out with Penn Central if it was an easement for  
7 everybody, 365 days of the year? Is that a Penn  
8 Central question? Do you think everything is a  
9 Penn Central question?

10 MR. MONGAN: Well, Your Honor, I -- I  
11 think, under this Court's framework, it's  
12 outside of the Per Se Rule because it's not  
13 destroying all the rights in the property. But  
14 let me say this: I think, if the Court's, you  
15 know, focused on that formal easement scenario  
16 and wants to reserve the possibility of a Per Se  
17 Rule for that type of situation where it's  
18 appurtenant to a property, that doesn't give us  
19 much heartburn because I think that that's going  
20 to be something we'd pay for in any event.

21 What would be deeply problematic is if  
22 the Court adopted a rule of per se treatment for  
23 any sort of authorized intrusion, including a  
24 limited intrusion as part of a regulatory  
25 taking.

1 JUSTICE ALITO: Well, I mean, if  
2 you're not willing to concede that a -- a -- a  
3 permanent easement across somebody's property to  
4 get from point A to point B is a per se taking,  
5 then I don't know where your argument is going.

6 And if you're not taking that  
7 position, then I really don't understand exactly  
8 where you're drawing the line. That's what I'm  
9 trying to get at.

10 MR. MONGAN: Yes, Your Honor. I think  
11 that those would be takings under any standard,  
12 but we should not adopt a broad Per Se Rule that  
13 applies to the different type of regulatory  
14 regime that we have here in many types of access  
15 regulations that look nothing like an easement.

16 JUSTICE ALITO: All right, thank you.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Sotomayor.

19 JUSTICE SOTOMAYOR: Counsel, I -- I --  
20 I -- I'm following up on Justice Alito's  
21 question in part. I think you're saying that a  
22 Per Se Rule should apply only to permanent and  
23 continuous physical invasions of a property  
24 right that's defined by state law, correct?

25 So, if there was a permanent easement,

1 you suggest it might be then a taking? A formal  
2 easement under California law?

3 MR. MONGAN: I think that's right,  
4 Your Honor, if I understand the question.

5 JUSTICE SOTOMAYOR: All right. So let  
6 me -- let me take you a step further. If it's  
7 not, why should we be applying the Penn Central  
8 test? That test really doesn't -- fails to  
9 capture the significant interests in the right  
10 to exclude at stake in physical invasion cases.

11 One of my colleagues was skeptical  
12 that there'd be much money involved in a  
13 situation like this one because I suspect that  
14 there's very little economic damage that's being  
15 done to a property in which there's intermittent  
16 inspections, and there's nothing that runs with  
17 the land or the business.

18 I mean, if somebody buys the land and  
19 changes the business, then this Access  
20 Regulation has no applicability. That suggests  
21 to me that it has to be a different test. It  
22 can't be Penn Central.

23 MR. MONGAN: Well, Your Honor, that --

24 JUSTICE SOTOMAYOR: So why can't it be  
25 Arkansas Game?

1                   MR. MONGAN: Your Honor, I -- I think  
2                   that an ad hoc approach, and we think that the  
3                   inquiry in --

4                   JUSTICE SOTOMAYOR: Counsel, let me  
5                   stop you there. Ad hoc won't satisfy many  
6                   people.

7                   MR. MONGAN: Well --

8                   JUSTICE SOTOMAYOR: We need -- we need  
9                   something that gives clear guidance.

10                  MR. MONGAN: Your Honor, I think --

11                  JUSTICE SOTOMAYOR: So give me a clear  
12                  -- a clear method of addressing this case so  
13                  something like Justice Thomas's hypothetical  
14                  doesn't become permissible for the government to  
15                  do. It seems to me that letting the government  
16                  come and use your land for non-business purposes  
17                  or non-business-related purposes seems to be  
18                  exactly what the Takings Clause was intended to  
19                  avoid.

20                  MR. MONGAN: Your Honor --

21                  JUSTICE SOTOMAYOR: So articulate the  
22                  rule to me.

23                  MR. MONGAN: -- I think the Court has  
24                  given clear guidance. In Penn Central itself,  
25                  it said that certain numbers --

1 JUSTICE SOTOMAYOR: Well, I don't -- I  
2 think the clear guidance is in Babcock and --  
3 and -- and its progeny. So I don't think it's  
4 Penn Central. I think it's those cases.

5 MR. MONGAN: Well, if I could just say  
6 briefly, Your Honor, the Court has made very  
7 clear that if there is a substantial physical  
8 intrusion, that factor can predominate. And in  
9 Kaiser Aetna, it applied Penn Central to a  
10 reg -- an action that involved a substantial  
11 physical intrusion and found a taking on that  
12 basis primarily without looking closely at  
13 diminution in value.

14 And I think, if there's concern about  
15 how lower courts apply that ad hoc framework to  
16 Access Regulations, the answer would be to grant  
17 review in a case that actually presents a Penn  
18 Central challenge to an Access Regulation, not  
19 to adopt a -- a very broad Per Se Rule that  
20 would swallow up a lot of other types of Access  
21 Regulations.

22 CHIEF JUSTICE ROBERTS: Justice Kagan.

23 JUSTICE KAGAN: General Mongan, I -- I  
24 have to admit I'm a little bit struggling to  
25 understand your argument, so can -- can -- can I



1 just ask you to clarify this?

2 As I understood what you said to  
3 Justice Alito, you said maybe a 365/24 taking of  
4 an easement, something that did, in fact,  
5 qualify as an easement, maybe that would be a  
6 per se taking. You sort of said maybe to that.

7 But -- but, if this weren't -- if it  
8 was not a formal easement, you know, if there  
9 was not a discrete property interest, that the  
10 365/24 possession of property would not qualify  
11 as a per se taking but instead would be resolved  
12 under Penn Central. Is that correct?

13 MR. MONGAN: No, Your Honor, and --  
14 and let me clarify. We think Loretto and Nollan  
15 make clear that if you have a permanent and  
16 continuous access right, whether it's a  
17 requirement under an easement or just a  
18 regulatory access right, that would be per se.

19 JUSTICE KAGAN: Okay. Then -- then  
20 you do get into the line-drawing problem. I  
21 mean, I guess I thought that you were getting  
22 rid of your line-drawing problem by just getting  
23 rid of Loretto, but -- but if -- if there -- if  
24 -- if you do acknowledge that, that a 365/24  
25 ability to -- to intrude on property is a per se

1 taking under Loretto and -- and -- and Nollan,  
2 then, you know, just ratcheting back from that,  
3 when does it stop being a per se taking?

4 MR. MONGAN: Well, what Loretto and  
5 Nollan said is that you require, you know,  
6 permanent and continuous access because then it  
7 effectively destroys the owner's rights with  
8 respect to that part of the property.

9 And so what we would acknowledge is  
10 that if -- if you have something that, you know  
11 --

12 JUSTICE KAGAN: No, I mean, you know,  
13 if it's 365 days -- this is really a concrete  
14 question, General. If it's 365 days, how about  
15 360 days?

16 MR. MONGAN: I -- I think a court  
17 could conclude that that effectively destroys  
18 the rights in the same way as the -- the  
19 year-round access --

20 JUSTICE KAGAN: So where do you stop?

21 MR. MONGAN: -- in Nollan --

22 JUSTICE KAGAN: Where -- where does it  
23 stop? If it's -- if it's 365/24, where is your  
24 line? Now it's --

25 MR. MONGAN: I think it's --

1 JUSTICE KAGAN: -- 200 days.

2 MR. MONGAN: I think it's the line the  
3 Court suggested in Loretto, you know, is there a  
4 continued ability to use, possess, and dispose  
5 of this property. And, Your Honor, what I would  
6 suggest is that I think any line-drawing  
7 problems with that position, which I think  
8 follows from your precedent, are going to not  
9 recur frequently because we don't have access  
10 regulations that are anywhere close to  
11 continuous and they're not going to create a lot  
12 of practical problems because it's either going  
13 to be per se or a slam-dunk case under Penn  
14 Central.

15 The bigger line-drawing problems are  
16 associated with my friend's rule, where it's not  
17 even clear how the threshold test that would  
18 apply in every challenge to an access regulation  
19 would be applied. And --

20 JUSTICE KAGAN: I mean, he has his  
21 problems, but I'm really trying to figure -- you  
22 know, figure out the answer to your problems. I  
23 -- I guess I just don't see -- even if you don't  
24 want to give me -- I can understand you're not  
25 wanting to give me, oh, it's this number, but

1 what's the principle that would enable you to  
2 set a line someplace short of 365 days?

3 MR. MONGAN: I -- I think that the  
4 principle here is that per se treatment is  
5 reserved for extreme cases that really are the  
6 functional equivalent of the government coming  
7 on and directly appropriating your property.

8 And you might say that about an access  
9 easement that applies 360 days out of the year,  
10 but you wouldn't say it about a tailored  
11 regulatory access regime where it's only a few  
12 hours a day for short periods during the year.

13 JUSTICE KAGAN: Thank you, General.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Gorsuch.

16 JUSTICE GORSUCH: Counsel, I -- I'd  
17 like to pick up on that. In -- in your brief  
18 you did, I believe, concede that an easement  
19 identical to the one in Nollan but limited to  
20 daylight hours may qualify as a taking without  
21 regard to other factors. So I -- I think that  
22 at least was your -- your point there.

23 And if that -- if that's the case,  
24 then -- then let's just take a few things that  
25 move away from it a little bit. What if the

1 state limited access to the easement to  
2 residents of a particular neighborhood? Would  
3 that take it out of a per se taking?

4 MR. MONGAN: No, Your Honor. If I'm  
5 understanding the hypothetical, and you're  
6 talking about continuous access but only to  
7 residents of a per -- certain neighborhood, I  
8 think that that would still be per se under  
9 Loretto and -- and Nollan.

10 JUSTICE GORSUCH: Okay.

11 MR. MONGAN: And the reason --

12 JUSTICE GORSUCH: And then what if the  
13 state prohibited any of those residents from  
14 transferring their interests? It was a personal  
15 right. Would -- would that cease to be a per se  
16 taking?

17 MR. MONGAN: Your Honor, I -- I think  
18 that if we're contemplating some sort of  
19 continuous ability for third parties to come  
20 onto the property whenever they want, that would  
21 be a per se taking because --

22 JUSTICE GORSUCH: Okay.

23 MR. MONGAN: -- it would effectively  
24 destroy the owner's rights with respect to that  
25 strip of property. Of course --

1 JUSTICE GORSUCH: Okay. And what if  
2 -- what if the state had issued a regulation  
3 announcing that access right, rather than  
4 formally recording it? Would that make a  
5 difference?

6 MR. MONGAN: If it's continuous, I  
7 think if it's done by regulation, that would be  
8 a per se taking. I think the question is if it  
9 is an intermittent regulation that only applies  
10 for minimum periods --

11 JUSTICE GORSUCH: All right.

12 MR. MONGAN: -- of the year --

13 JUSTICE GORSUCH: Okay.

14 MR. MONGAN: -- and there's  
15 substantial protections to minimize the  
16 burdens --

17 JUSTICE GORSUCH: So -- it's still per  
18 se. Still per se. And then, finally, what if  
19 -- what of the stated promise to remove the  
20 easement in the event that the residential  
21 property owner agreed to have it developed into  
22 a commercial one?

23 MR. MONGAN: Your Honor, I -- I guess  
24 -- I'm not sure exactly how that would be  
25 analyzed. I -- I think that it would still be

1 continuous in nature and potentially permanent.  
2 I think that's going to be a taking without --  
3 you know, reserving the -- the possible  
4 Nollan/Dolan exceptions, it's likely to be a  
5 taking under either Penn Central or per se.

6 I guess it might not be permanent,  
7 depending on how you structure the hypothetical.

8 JUSTICE GORSUCH: So all of these are  
9 per se takings on your view, and as I understand  
10 it, the key difference is how many days are at  
11 issue? But daylight-only hours is enough, so  
12 half of the year is enough, I -- I assume, then?

13 MR. MONGAN: Your Honor, the reason  
14 that we've acknowledged that possibility with  
15 respect to daylight hours is that the focus is  
16 really on whether there's some continued ability  
17 to use and possess and dispose of the property  
18 or whether those rights are effectively  
19 destroyed.

20 And if the government says the only  
21 time you can exclude somebody from the beach is  
22 in the middle of the night, we think a court  
23 could reasonably conclude that still effectively  
24 destroys your rights and apply a per se rule --

25 JUSTICE GORSUCH: Thank you, counsel.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Kavanaugh.

3 JUSTICE KAVANAUGH: Thank you, Chief  
4 Justice. And good morning, General Mongan.

5 The questions here have obviously been  
6 a lot about line drawing. And I wanted to ask  
7 you, again, the flip side of what I was asking  
8 your friend on the other side.

9 It seems to me our precedent in the  
10 labor organizing context has drawn the lines and  
11 has established a very narrow and very simple  
12 resolution for this case, and I want to -- you  
13 to tell me why it's wrong or why you disagree  
14 with it.

15 Babcock was obviously a statutory case  
16 but informed by the Constitution explicitly, as  
17 I read it. And the question was how much access  
18 will we allow to property under the statute, the  
19 NLRA, given the constitutional backdrop of  
20 property rights?

21 And the decision seems to reflect the  
22 Court's understanding of the Constitution and  
23 how much protection there is for property  
24 rights, at page 112 of the decision, and  
25 basically says no access unless you can show



1 that there are no alternative means of  
2 communication that exist, to simplify what it  
3 says there.

4 Doesn't Babcock reflect a  
5 constitutional line drawing that controls this  
6 case?

7 MR. MONGAN: Well, Your Honor, I -- I  
8 agree that although it was a statutory case, the  
9 Court was recognizing the need to balance  
10 between property rights and the rights of  
11 employees to get this information.

12 I think the Board expressly recognized  
13 that same need in its regulation, and it took a  
14 somewhat different approach in the context of a  
15 different statute with a different timeline for  
16 elections in a unique sector of California's  
17 economy.

18 JUSTICE KAVANAUGH: But isn't that a  
19 problem right there? It took a different  
20 approach that intruded on -- on the property  
21 rights more than the Supreme Court, this Court,  
22 had allowed in Babcock? And isn't that, you  
23 know, Justice Clark in the California Supreme  
24 Court decision pointed that out as the exact  
25 problem with the California regulation; it just

1 went too far because it went beyond the NLRA?

2 MR. MONGAN: Your Honor, I guess I  
3 don't see how that would be a basis for a per se  
4 rule, but --

5 JUSTICE KAVANAUGH: Put aside -- put  
6 aside the -- the nomenclature. The rule is you  
7 can't get access to the property when there are  
8 alternative means of communication. That's the  
9 Babcock rule about how to accommodate the  
10 Takings Clause and the labor organizing rights.

11 MR. MONGAN: And, Your Honor, I think  
12 that that can be a consideration that absolutely  
13 could factor into an inquiry that looks at the  
14 relevant circumstance of this regulation as it  
15 applies to -- to landowners, but it wouldn't  
16 seem to provide a basis for adopting a broad per  
17 se rule that would apply across the board and  
18 certainly not one that applies to access  
19 regulations that have nothing to do with this  
20 type of communication.

21 JUSTICE KAVANAUGH: You mean outside  
22 the labor context?

23 MR. MONGAN: Right, Your Honor. I  
24 mean, they're pushing for a broad per se rule  
25 that --

1 JUSTICE KAVANAUGH: Exactly. And  
2 that's why I was pushing on them, that I don't  
3 understand why they're not relying on Babcock in  
4 the labor organizing context. They seem to want  
5 a much broader rule. But the -- the flip side  
6 of that is Babcock's a problem for you because  
7 if we just followed that and said that reflected  
8 the balance of the constitutional rights, the  
9 constitutional right here, you would lose under  
10 Babcock, I think. I'll --

11 MR. MONGAN: So --

12 JUSTICE KAVANAUGH: I'll end there,  
13 and -- and you can move on to Justice Barrett.  
14 Thank you.

15 MR. MONGAN: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Barrett.

18 JUSTICE BARRETT: General Mongan, so,  
19 obviously, this would not be an approach that  
20 would apply strictly to commercial property, as  
21 the hypotheticals based on Nollan suggest. So  
22 let me give you a hypothetical based on my  
23 personal residence.

24 Let's imagine that it's situated on  
25 the corner of two busy streets and a city

1 decides that it would be beneficial to allow  
2 people to protest on my lawn because it's so  
3 highly visible to the traffic that's passing by.

4 But exactly like this one, you know,  
5 it says you can do it 120 days a year and three  
6 hours at a time just during rush hour. I take  
7 it, under your theory, that's not a per se  
8 taking, that would be subject to Penn Central.

9 MR. MONGAN: Yes, that would be a  
10 powerful Penn Central case --

11 JUSTICE BARRETT: Okay, but why would  
12 it be a powerful Penn Central? I mean, in the  
13 reply brief, your friends on the other side  
14 point out that the Ninth Circuit and the Federal  
15 Circuit couldn't identify any Penn Central cases  
16 in which a court has found a taking where the  
17 diminution in value is less than 50 percent.

18 And, surely, my property value hasn't  
19 decreased more than 50 percent as a result of  
20 the regulation I just described.

21 MR. MONGAN: I don't think that that  
22 would be the right way to approach that type of  
23 background inquiry --

24 JUSTICE BARRETT: But where are you  
25 getting that?

1           MR. MONGAN: From Penn Central itself,  
2 Your Honor, which says if there is an regulation  
3 authorizing a physical intrusion, courts should  
4 be more likely to find a taking, Kaiser Aetna  
5 applied that and found a taking based on the  
6 severity and duration of the physical intrusion.

7           And if there's a concern that courts  
8 are not properly applying Penn Central to this  
9 type of situation, then the solution would be to  
10 take that type of case, as I mentioned, and  
11 clarify how it should apply. It --

12           JUSTICE BARRETT: But, General, my --  
13 Penn Central is deliberately designed to be very  
14 permissive towards regulations, given the  
15 pervasiveness of regulations on property use in  
16 modern life.

17           And so it's stacked in favor of  
18 regulations, but yet, you know, you're saying  
19 that in this particular context -- and I'm not  
20 sure I read Kaiser Aetna the same way that you  
21 do -- but you're saying that physical  
22 occupations are different.

23           So if physical occupations are  
24 different, why isn't the easier way to handle  
25 them the rule that we announced in Loretto,

1 which is to say they are subject to a Per Se  
2 Rule?

3 MR. MONGAN: Because, Your Honor,  
4 there are going to be some easy Penn Central  
5 cases, perhaps like the hypothetical that you  
6 just offered, but then in the middle of the  
7 spectrum there are some very difficult cases  
8 involving much more modest physical intrusions  
9 as to which you really need to know something  
10 about the severity of the burdens and the  
11 character and nature of the government action  
12 and the --

13 JUSTICE BARRETT: Let me just --

14 MR. MONGAN: -- procedure at stake.

15 JUSTICE BARRETT: -- interrupt you  
16 there, so we don't lose all of my time. What is  
17 the big deal here? If the severity is -- goes  
18 to compensation, as the Petitioners claim, why  
19 would it be that big of a deal for California to  
20 say to the unions: Listen, to compensate for  
21 the taking if you want access, you pay 50 bucks?

22 MR. MONGAN: Your Honor --

23 JUSTICE BARRETT: And let's just say  
24 that that -- let's say that the Court says that  
25 that's a -- that's a fair amount for the

1 compensation. What's wrong with that?

2 MR. MONGAN: It would be a big deal  
3 because then you would be skipping past the  
4 consideration that's the severity of the burden,  
5 the nature of the action that informed the Fifth  
6 Amendment analysis.

7 And that wouldn't be as  
8 straightforward as my friend suggests, because  
9 you'd have to apply a multitude of complex  
10 exceptions before you get to determining whether  
11 compensation would be required.

12 JUSTICE BARRETT: Thank you -- thank  
13 you, counsel.

14 CHIEF JUSTICE ROBERTS: A minute to  
15 wrap up, General Mongan.

16 MR. MONGAN: Thank you. The rule  
17 we're defending today carries out the purpose of  
18 the Fifth Amendment by considering the burdens  
19 imposed by an intermittent access regulation and  
20 the character of that regulation before finding  
21 the taking.

22 The rule proposed by Petitioners would  
23 require you to overrule your precedent and find  
24 per se takings without regard to those important  
25 factors. Now, they say it would simplify the

1 doctrine, but actually it would make things far  
2 more complicated and uncertain; first by  
3 adopting a mirky threshold test, that tries to  
4 distinguish between a series of authorized  
5 trespasses and a compensable but totally  
6 undefined access easement, and then by requiring  
7 courts to apply a multitude of complex  
8 exceptions to all the access regulations that  
9 fall within the scope of that rule.

10 And the sheer volume of words  
11 Petitioners and their amici devote to proposing  
12 all those exceptions to mitigate the harmful  
13 impact to their rule is strong evidence that the  
14 rule is not a sensible one. Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Rebuttal, Mr. Thompson.

18 REBUTTAL ARGUMENT OF JOSHUA P. THOMPSON  
19 ON BEHALF OF THE PETITIONERS

20 MR. THOMPSON: Thank you, Mr. Chief  
21 Justice. Three quick points.

22 There has been a number of discussions  
23 about the easement characterization in this  
24 case. We characterize the easement here, as the  
25 Court did in Portsmouth Harbor, called it a



1 servitude, in Causby an easement, and Kaiser  
2 Aetna an easement. Neither of those -- none of  
3 those cases involved a transferable or alienable  
4 property-like interest.

5           Nevertheless, in all three of those  
6 cases the Court treated the takings inquiry as  
7 requiring per se treatment. And the Federal  
8 Circuit has done the same thing in Hendler and  
9 Otay Mesa.

10           It's also worth noting up that until  
11 this Court, the Board has never disputed the  
12 characterization of an easement. It simply said  
13 that an easement that authorized intermittent  
14 access would not be a per se taking, but what  
15 merits per se treatment is the taking of a  
16 discrete property interest.

17           I want to quickly echo Justice  
18 Barrett's concerns about Penn Central and my  
19 friend's optimism that Penn Central provides  
20 adequate relief here are simply unfounded. As  
21 she noted, no -- no court, at least in the Ninth  
22 Circuit and Federal Circuit, have been able to  
23 find a Penn Central case where value was  
24 diminished less than 50 percent.

25           And, lastly, on the question of the

1 day, the line drawing, we are asking the Court  
2 to draw the line that it has always drawn; the  
3 line between use restrictions and physical  
4 invasions and occupations. That's the Court's  
5 -- that's the line that this Court has always  
6 drawn. And where the occupation or where the  
7 invasion is minimal, minimal compensation may be  
8 due as in Loretto. But that's an easy line to  
9 draw.

10 The Petitioners, on the other hand, as  
11 this Court's questioning made clear, are unable  
12 to draw a principled line. And for these  
13 reasons, the decision of the Ninth Circuit  
14 should be reversed. Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel. The case is submitted.

17 (Whereupon, at 11:09 a.m., the case  
18 was submitted.)

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