No. 20-107

IN THE

Supreme Court of the United States

CEDAR POINT NURSERY, ET AL.,

Petitioners,

v.

VICTORIA HASSID, ET AL.,

Respondents.

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

BRIEF OF NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNTATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND GOVERNMENT FINANCE OFFICERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes and Ordinances

Miscellaneous

STATEMENT OF INTEREST[1]

States, cities, and localities enact and administer innumerable laws authorizing public officials or their delegees to enter onto private property temporarily or intermittently to protect public health, safety, and welfare. *Amici* are not-for-profit organizations with a strong interest in preserving the settled and sound constitutional standards for determining whether the physical intrusions authorized by these state and local laws constitute takings compensable under the federal Constitution.

The National Association of Counties (NACo) is the only national association that represents county governments in the United States. Founded in 1935, NACo serves as an advocate for county governments and works to ensure that counties have the resources, skills, and support they need to serve and lead their communities.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with forty-nine state municipal leagues, NLC is the voice of more than 19,000 American cities, towns, and villages, representing collectively more than 200 million people. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions.

The U.S. Conference of Mayors (USCM) is the official nonpartisan organization of the more than 1,400 United States cities with a population of more than 30,000 people.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to this brief's preparation and submission. The parties have consented in writing to the filing of this brief.

Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 12,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to advance professional local government through leadership, management, innovation, and ethics.

The International Municipal Lawyers Association (IMLA) is a nonprofit, nonpartisan, professional organization consisting of more than 2,500 members. Membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before state and federal appellate courts.

The Government Finance Officers Association (GFOA) is the professional association of state, provincial, and local finance officers in the United States and Canada. The GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its more than 20,000 members are dedicated to the sound management of government financial resources.

INTRODUCTION AND SUMMARY OF ARGUMENT

State and local officials, and their delegees, routinely must enter onto private property as an incident to the exercise of their multitudinous duties. From restaurant inspections to guardian ad litem home visitations, limited-purpose physical intrusions by governments are an ubiquitous feature of American life.

Such intrusions of course must comply with the Fourth Amendment's prohibition on unreasonable searches and seizures. And, in rare cases, governmental entries onto private land can become frequent, lengthy, and/or severe enough that they 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). In those instances, this Court has long recognized, the owner must be compensated. But those cases are and should remain the exception rather than the rule.

Petitioners propose a revolution in takings jurisprudence whereby governments must pay whenever they enter onto private land. They reimagine every such entry as a custom-built "easement" that the public "appropriates." They posit that a landowner's right to exclude others not only comprises a distinct property interest in toto, but also that it is divisible into micro-interests abridged by anyone who intrudes for any period of time. In this way, each governmental entry onto private land, no matter how fleeting or unobtrusive, is transmogrified into a direct appropriation of a property interest—a classic taking. The sole exception to petitioners' everything-is-an-easement theory is an ill-defined, blanket exemption for governmental "trespasses," which do not even trigger the protection of the Takings Clause.

Precedent forecloses this rigid approach to physical intrusions. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and elsewhere, "this Court has consistently distinguished between … cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion," and imposed a per se compensation mandate "*only* in the former situation," *id.* at 428 (emphasis added). When government permanently occupies physical space, it utterly destroys three vital sticks in the private owner's bundle of rights in that space: possession, use, and devise. That characteristic of permanent occupations, coupled with landowners' well-rooted expectation of compensation for them, supports a categorical approach. Outside the "very narrow" class of permanent occupations, *id.* at 441, however, courts adjudicate physical takings claims not with all-or-nothing rules, but rather with fact-intensive evaluations of the intrusion's frequency, duration, and severity; the character of the property; the owner's reasonable, investment-backed expectations; and the degree to which the invasion was the intended or foreseeable result of authorized government action, *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 38-39 (2012).

Petitioners' approach would proliferate, not eliminate, "arbitrary line-drawing." Pet. Br. 16. More troublingly, it would subject a host of important and unexceptional exercises of the police power to an impracticable compensation mandate. Basic processes of local self-government—having nothing to do with land-use regulation—would be plunged into protracted, costly federal litigation over which physical entries count as trespasses and which as takings and, for the latter, what compensation is "just" for

a state or local official's incidental, time-limited interference with a landowner's right to exclude. Even if the Court concludes that somewhat more exacting Takings Clause scrutiny is warranted for impermanent physical invasions than has been applied to date by the lower courts, there is no warrant for the bludgeon of per se takings liability for every such invasion.

Amici do not support either party in this dispute because the proper disposition of the petition is to dismiss it as improvidently granted. Petitioners would not be entitled to the injunctive relief they seek even if they suffered uncompensated takings of property, because they have an adequate remedy at law: an inverse-condemnation claim against the State. *See Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2179 (2019); *Baldwin v. State*, 491 P.2d 1121, 1130 (Cal. 1972). Moreover, although they sought and obtained this Court's review of a question of takings law, petitioners' merits argument rests in no small part on their accusation that respondents' regulation, by granting union organizers access to agricultural employees on private land without a finding of necessity, does not substantially advance a legitimate state interest. *E.g.*, Pet. Br. 7-10, 31; *see also* Amicus Br. of Cato Institute & NFIB Small Business Legal Center 20 (proposing that per se liability for a physical intrusion turn on whether the government proffers an "anti-harm justification—made in good faith and on reasonable grounds"). That accusation sounds in due process or Fourth Amendment reasonableness but "has no proper place in … takings jurisprudence." *Lingle*, 544 U.S. at 540. The Court should not feel pressured to stretch the Takings Clause and Section 1983 beyond their limits to provide a remedy—an outright prohibition on state action—that was not even on the table in *Loretto* or its progeny.

ARGUMENT

THE FOURTEENTH AMENDMENT DOES NOT MANDATE COMPENSATION WHENEVER PUBLIC OFFICIALS OR THEIR DELEGEES ENTER ONTO PRIVATE PROPERTY

A. There Are Fundamental Distinctions Between Permanent Occupations And Lesser Physical Intrusions

Loretto addressed a "New York law provid[ing] that a landlord must permit a cable television company to install its cable facilities upon [the landlord's] property." 458 U.S. at 421. The cable facilities "completely occup[ied] space immediately above and upon the roof and along the building's exterior wall," *id.* at 438, leaving that private space unusable for other purposes. In finding that this government-mandated "occupation of the landlord's property by a third party" must be compensated, *id.* at 440, this Court distilled and "affirm[ed] the traditional rule": "Not every physical invasion is a taking," but every "permanent physical occupation of property is a taking," *id.* at 435 n.12, 441.

The Court understood that its categorical rule for permanent occupations was a "very narrow" exception to the usual "multifactor inquiry" into takings liability for physical intrusions. *Loretto*, 458 U.S. at 440-41. The exception was supportable because a permanent occupation "is perhaps the most serious form of invasion of an owner's property interests." *Id.* at 435. "First, the owner has no right to *possess* the occupied space himself, and also has no power to exclude the occupier from possession and use …. Second, the permanent physical occupation of property forever denies the owner any power to control the *use* of the property …. [Third,] the permanent occupation of that

space by a stranger will ordinarily empty the right [to *dispose*] of any value, since the purchaser will also be unable to make any use of the property." *Id.* at 435-36 (emphases added). Thus, the government "effectively destroys *each* of the[] rights" of possession, use, and devise—together, the nucleus of property rights in a physical thing. *Id.* at 435; *see also Horne v. Dep't of Agric.*, 576 U.S. 350, 361-62 (2015). Shrinking the occupied space, *Loretto* held, alters the magnitude, but not the character, of the intrusion.

A per se rule for permanent occupations is easy to administer because "[t]he placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute." *Loretto*, 458 U.S. at 437. Further, a long line of this Court's cases "uniformly ha[d] found a taking to the extent of [a permanent physical] occupation, without regard to whether the action achieve[d] an important public benefit or ha[d] only minimal economic impact on the owner." *Id.* at 434-35. Yet a taking had *not* uniformly been found in "cases involving a more temporary invasion." *Id.* at 428; *see also id.* at 432 n.9 (distinguishing "cases of physical invasion short of permanent appropriation"). Owing to this body of jurisprudence, "the property owner entertains a historically rooted expectation of compensation" for permanent physical occupations. *Id.* at 441.

Loretto was just as emphatic in cabining its per se rule to "the *extreme* form of a permanent physical occupation." 458 U.S. at 426 (emphasis added). "The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude." *Id.* at 435 n.12. Indeed, the Court discussed several lines of precedent in which government-authorized intrusions on private property had not required compensation. *See id.* at 428 (citing *Sanguinetti v. United States*, 264 U.S. 146, 149

(1924) (government action that may have induced more flooding of private land for short periods of time did not effect taking)); *id.* at 434 (citing *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980) (state constitution did not effect taking by authorizing temporary and limited invasion of private shopping center by protesters)); *id.* at 440 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (federal statute barring racial discrimination in public accommodations, and thus authorizing physical entry by guests a property owner preferred to exclude, did not effect taking)). Of particular note here, *Loretto* distinguished "labor cases requiring companies to permit access to union organizers," where a per se rule is not applied because "'[t]he "yielding" of property rights … is both temporary and limited.'" 458 U.S. at 434 n.11 (quoting *Central Hardware Co. v. NLRB*, 407 U.S. 539, 545 (1972)).

Five years later, the Court held in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), that, "as to property reserved by its owner for private use," *id.* at 831, the per se rule announced in *Loretto* requires that compensation be paid for "a permanent grant of continuous [public] access" to the property, *id.* at 836. In *Nollan*, a state commission was held to have imposed an unconstitutional exaction by conditioning a permit for residential development on an unrelated grant of access across a residential lot to reach a public beach. *Id.* at 837.

In applying *Loretto*'s per se rule to that "classic right-of-way easement," *Nollan*, 483 U.S. at 832 n.1, this Court effectively rejected limiting the rule solely to possessory interests in land. *Cf. Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93, 105 (2014) ("An easement is

a '*nonpossessory* right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.'" (quoting RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.2(1) (1998) (Restatement) (emphasis added))). But *Nollan* never suggested, much less held, that all nonpossessory interests (or even all easements) constitute "permanent occupations" triggering the federal Constitution's per se compensation mandate. To the contrary, the Court assured that its holding was "not inconsistent with," 483 U.S. at 832 n.1, Justice Rehnquist's opinion in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), which held that a state law giving protesters access to a private shopping center did not effect a taking, *see id.* at 84 ("In these circumstances, the fact that they may have 'physically invaded' appellants' property cannot be viewed as determinative.").[2] Thus, the "standard Takings Clause analysis" that *PruneYard* applied, *Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Protection*, 560 U.S. 702, 714 (2010) (Scalia, J., plurality opinion), remained "generally applicable to" takings claims arising from "nonpossessory governmental activity," *Loretto*, 458 U.S. at 440.[3]

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[2] This Court has since reframed the state law authorizing the physical invasions in *PruneYard* as a "regulatory restriction on use" of the shopping center by its owner. *Horne*, 576 U.S. at 364. That *any* governmental invasion can be so characterized confirms that "limiting a property owner's right to exclude," *ibid.*, is not a talisman of per se takings liability.

[3] Without the shackles of a per se rule, the Court could properly account for the sensitive free-speech issues presented in *PruneYard*. Indeed, the frequent presence of competing constitutional concerns in disputes over physical intrusions underscores the perils of a categorical approach to takings liability. *Cf. Martin v. City of Struthers*, 319 U.S. 141 (1943) (upholding free-exercise challenge to ordinance barring Jehovah's Witness from leafletting on private property).

The Court's next brush with exactions, *Dolan v. City of Tigard*, 512 U.S. 374 (1994), applied the same modest gloss to *Loretto*'s per se rule that *Nollan* had. *Dolan* held that the government could not condition a development permit upon dedication of "a permanent recreational easement" granting the public continuous access to land. *Id.* at 394. Harkening back to *Loretto*, the Court reasoned that this type of easement "eviscerate[s]"—as opposed to merely "regulate[s]"—a landowner's right to exclude others. 512 U.S. at 394. That makes it "different in character from" less instrusive physical invasions like those at issue in *PruneYard*. *Ibid.* And a landowner's historically rooted expectation of payment for a continuous "easement of passage," *Loretto*, 458 U.S. at 433, further supports applying a per se rule to this clearly defined, relatively rare form of physical intrusion. *See Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (requiring federal government to compensate for conversion of private pond into public aquatic park); *United States v. Causby*, 328 U.S. 256, 265 (1946) (same for "continuous invasions" by government aircraft into "superadjacent airspace" above private land).

The guardrails on *Loretto*'s per se rule remained intact, however, and were refurbished in *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23 (2012). A unanimous Court there held that a taking *may* occur "when government-induced flood invasions, although repetitive, are temporary." *Id.* at 26. Flooding cases are no different "from the mine run of takings claims," *id.* at 35, meaning that the government's liability for "temporary physical invasion" is neither foreclosed nor assured, *id.* at 38. Liability depends on several factors: "time" (i.e., the invasion's duration), "[s]everity of the interference," "the character of the land at issue," "the owner's 'reasonable

investment-backed expectations' regarding the land's use," and "the degree to which the invasion is intended or is the foreseeable result of authorized government action." *Id.* at 38-39. In short, *Arkansas Game* doubled down on *Loretto*'s well founded distinction between "permanent physical occupations" and "temporary invasions of property," *id.* at 36—the same distinction that petitioners now insist the Court must erase.

B. Petitioners' Argument That *Any* Interference With The Right To Exclude Effects A Taking Is Unsound

The "common touchstone" among branches of takings jurisprudence is that each 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*, 544 U.S. at 539 (emphasis added); *see also Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, 177-81 (1871). *Cf. Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 612 (2013) (holding that governments can violate the Takings Clause by demanding "'in lieu of' fees" that "are functionally equivalent to other types of land use exactions"). Considering function alongside form gives courts flexibility to tailor takings liability to "the nearly infinite variety of ways in which government actions or regulations can affect property interests." *Arkansas Game*, 568 U.S. at 31. And, as *Nollan* and *Dolan* illustrate, even supposedly bright-line liability rules remain subject to refinement based on functional considerations. *See supra*, pages 8-10.

Petitioners thus cut sharply against the constitutional grain in attempting to refashion every physical entry onto private land as a discrete, "permanent," and automatically compensable "easement." That maneuver does nothing to

aid a court in discerning whether a given intrusion (or series of intrusions) is the functional equivalent, from the landowner's perspective, of a classic taking. *Cf. Stop the Beach*, 560 U.S. at 713 & n.5 (Scalia, J., plurality opinion) (deeming "easement" label irrelevant to takings liability).

Petitioners' everything-is-an-easement mantra simply "create[s] a litigation-specific definition of 'property' designed for a claim under the Takings Clause." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1955 (2017) (Roberts, C.J., dissenting). To be sure, the right to exclude others is "*one* … essential stick[] in the bundle of rights that are commonly characterized as property." *Dolan*, 512 U.S. at 384 (emphasis added). And total destruction of even that one stick, without more, results in a taking. *Loretto*, 458 U.S. at 435-36.[4] But a landowner cannot, in the pursuit of compensation, grind that unitary stick into sawdust and then proffer a lone grain as dispositive evidence of a constitutional violation. *Cf. Murr*, 137 S. Ct. at 1952 (Roberts, C.J., dissenting) ("If owners could define the relevant 'private property' at issue as the specific 'strand' that the challenged regulation affects, they could convert nearly all regulations into *per se* takings."). Yet that is precisely what petitioners propose: to limit "the scope of an easement … to the terms of the [regulation] that created it." Pet. Br. 23.

Apart from its circularity, petitioners' theory unmoors *Loretto*'s per se rule from its foundations. An incidental

[4] Petitioners are wrong to suggest (Br. 19) that destruction of *any* stick in the bundle of property rights is per se compensable. *See, e.g.*, *Hodel v. Irving*, 481 U.S. 704, 712-18 (1987) (applying multifactor test to adjudicate takings liability under federal statute that worked a "complete abolition of both the descent and devise of a particular class of property"); *Andrus v. Allard*, 444 U.S. 51, 64-68 (1979) (finding no taking based on federal statute prohibiting sale of personal property).

interference with the right to exclude occasioned by an official's temporary entry (or intermittent entries) onto land does not eviscerate, and may not even impair, the triad of ownership rights on which the *Loretto* rule rests: possession, use, and devise.

First, it is axiomatic that any physical intrusion classifiable as an easement—a "nonpossessory right," Restatement § 1.2(1)—does not disturb the landowner's right of possession. Notably, petitioners did not seek this Court's review of their claim that respondents' regulation "constituted an unlawful seizure of their property" under the Fourth Amendment, Pet. Br. 12 n.11, due to some "meaningful interference with [their] possessory interests," *United States v. Jones*, 565 U.S. 400, 408 n.5 (2012) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)).

Second, time-limited entries onto private land by public officials or their delegees ordinarily are tailored to minimize or avoid interfering with the owner's use of the land. In the rare case where such physical invasions "interfere … drastically with the [landowners'] use of their property," *Nollan*, 483 U.S. at 836, a taking will be found. *E.g.*, *Kaiser Aetna*, 444 U.S. at 179 (finding a taking where the federal government had effectively "take[n] over the management of the landowner's property" by granting the public a continuous right of acess). In this respect, *Nollan* and *Dolan* recall the *other* per se rule for federal takings liability: Even absent a physical intrusion, this Court "ha[s] found categorical treatment appropriate … where regulation denies all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). The unique character of physical intrusions may dictate per se liability in a *somewhat* wider class of cases, namely, those in which government

action drastically interferes with (but does not entirely destroy) an owner's ability to use property. But that is a far cry from concluding, as petitioners do, that *every* physical intrusion, no matter how marginal its impact on an owner's right to use property, is compensable.

Put more concretely, petitioners seek to make takings liability automatic not only when the government permits entry for up to "360 hours a year," Pet. App. A-25, as does respondents' regulation, but also if the government authorizes regular and predictable entries up to 360 minutes per year, or even just 360 seconds. This Court might well find that an entry authorized for up to 360 *days* per year is functionally a permanent, continuous easement giving rise to per se takings liability—i.e., that *Loretto*'s "categorical rule does not depend on all day, every day accessibility." Pet. Br. 15. But that would not make categorical treatment the answer for far lesser intrusions. *See Arkansas Game*, 568 U.S. at 38 ("When … temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of a compensable taking.").

Third, only in rare cases will government-authorized entries onto private land affect the right of devise. The traditional test for whether a servitude runs with the land is whether it "touch[es] or concern[s] the thing devised," or is instead "merely collateral to the land." *Spencer's Case*, 77 Eng. Rep. 72, 74 (K.B. 1583). This requirement that servitudes be "intimately bound up with the land" in order to convey, Charles E. Clark, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 206 app. I (2d ed. 1947), carries forward "the common law's traditional distrust of encumbrances on land," A. Dan Tarlock,

Touch and Concern Is Dead, Long Live the Doctrine, 77 NEB. L. REV. 804, 817 (1998).[5]

When public officials or their delegees must enter onto private land, the reason is almost invariably "collateral" to the land and pertains instead to persons located or activities conducted thereon. *See infra*, at 17-19. Labeling such intrusions "easements" does not accord with a practical—or even a formalistic—understanding of that term. *See* Restatement § 1.2(3) ("The burden of an easement … is always appurtenant."). County deed books are peppered with classic rights-of-way of the type presented in *Nollan* and *Dolan*, but no sober government lawyer would record an instrument authorizing temporary (or even intermittent) physical intrusions whose relationship to land is merely incidental, e.g., periodic inspections of businesses or visits to children in foster care.

Petitioners contend (Br. 16) that applying a per se rule to all physical invasions will eliminate "arbitrary line-drawing" in determinations of the government's takings liability. But their proposal merely shifts the locus of line-drawing from *Arkansas Game*'s nuanced, multifactor test to the fuzzy dividing line between takings and trespasses, whose placement would become dispositive in every case. The interwoven development of takings and trespass law, *see City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 715-17 (1999), blurs the distinction between takings and trespasses and has forced lower courts to craft balancing tests to differentiate them, *e.g.*, *Ridge*

[5] The most recent Restatement of Property advocates moving beyond the touch-or-concern test "as a termination doctrine" used to invalidate servitudes. Restatement § 3.2 cmt. b. But the drafters of that treatise cast no doubt on the ancient origin or the ongoing importance of the touch-or-concern test in the numerous jurisdictions that use it.

Line, Inc. v. United States, 346 F.3d 1346, 1355-56 (Fed. Cir. 2003)—exactly the sort of tests petitioners claim their theory expunges from physical takings jurisprudence.[6]

Petitioners' approach also lacks "tradition to commend it." *Loretto*, 458 U.S. at 435. In this Court's cases, "[a] taking has always been found *only*" in the event of permanent occupation, *not* in the event of lesser physical intrusions. *Id.* at 428; *see* John Echeverria, *What is a Physical Taking?*, 54 U.C. DAVIS L. REV. 731, 749-55 (2020) (cataloguing decisions eschewing per se approach to physical takings liability). Nothing in those cases hints that categorical treatment would have applied to all physical invasions, if only landowners' attorneys had the ingenuity to repackage a temporary invasion as a "permanent" appropriation of a purpose-built property interest.

In sum, petitioners' proposed approach to impermanent physical intrusions is doctrinally and historically unsound. The Court should retain its longstanding approach, most recently distilled in *Arkansas Game*, of considering a multitude of factors when deciding whether temporary or intermittent invasions are functionally equivalent to an appropriation or ouster of a property owner from its land.

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[6] Petitioners' own formulation of the taking-trespass distinction is impenetrable. They do not explain, for example, how respondents' access regulation can have "appropriated an easement across the property of all agricultural businesses in California, irrespective of the accessibility of their employees," Pet. Br. 7, if a parallel provision of the National Labor Relations Act, which applies only when employees are otherwise inaccessible, "cannot reasonably be characterized as an easement" rather than a series of trespasses, *id.* at 31 n.19. Like respondents' takings liability more generally, the classification of the union organizers' intrusions as a taking or trespass cannot depend on whether the regulation allowing those intrusions is directed at "conditions that … no longer exist today." Pet. Br. 10; *see supra*, page 5.

C. Routine Exercises Of State Police Power Call For Public Officials Or Their Delegees To Enter Onto Private Property

Today, as at the time the Fourteenth Amendment was ratified, the general police power reserved to the States "covers 'protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State.'" *Slaughter–House Cases*, 16 Wall. 36, 62 (1872) (quotation omitted). Affording those protections often requires public officials to temporarily enter onto private land under circumstances never thought to give rise to takings liability, and certainly not *automatically*. On the contrary, this Court has rebuffed entreaties to create per se takings liability rules that "would undoubtedly require changes in numerous practices that have long been considered permissible exercises of police power." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 335 (2002); *accord First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 321 (1987). Accepting petitioners' entreaty would usher in a panoply of federal constitutional claims against everyday activities of state and local governments.

For example, countless statutes and regulations direct public officials to conduct periodic, often unannounced, inspections of residential and commercial properties to protect health and safety. *See v. City of Seattle*, 387 U.S. 541, 543-44 (1967) (noting prevalence of inspection laws).[7] Most

[7] *E.g.*, Iowa Code § 123.30(1)(b) (liquor stores); Ohio Rev. Code §§ 3721.02(B)(1) (nursing homes), 4737.04(C) (scrap-metal dealers); Utah Code § 13-32a-101 (second-hand dealers); Wash. Rev. Code § 59.18.125 (rental housing); Alamosa, Colo. Code § 12-35 (mobile-home parks); Newark, Cal. Code § 5.24.150 (massage parlors); Food & Drug Administration, Food Code 2017, § 8-402.11 (model code for restaurant inspections adopted by many jurisdictions).

of these inspections are "searches" subject to the strictures of the Fourth Amendment. *See, e.g.*, *id.* at 545-46 (requiring warrant for commercial inspection); *Camara v. Municipal Court*, 387 U.S. 523, 538-39 (1967) (same for residential inspection).[8] Yet *amici* have not been able to find any case deeming a "regular and predictable," Pet. Br. 1, physical inspection compensable under the Takings Clause of the Fifth Amendment. That is unsurprising because a *taking for public use* is an "infinitely more intrusive step" than a workaday *search*. *Kelo v. City of New London*, 545 U.S. 469, 518 (2005) (Thomas, J., dissenting).

These public-inspection regimes would collapse if the government had to pay landowners for every inspection. The advance or concurrent compensation required by the Takings Clause, *see Knick*, 139 S. Ct. at 2177, would not only be impracticable to procure, it would be self-defeating in cases where "surprise is crucial if the regulatory scheme … is to function at all," *New York v. Burger*, 482 U.S. 691, 710 (1987). State or local inspectors accordingly would be asked to violate the federal Constitution by entering onto private land to do their jobs, after which landowners could sue to recover compensation. It is cold comfort that governments would prevail in many of those suits on the ground that "the owner's pecuniary loss … is zero." *Brown v. Legal Foundation*, 538 U.S. 216, 240 (2003). The time and expense of reaching that conclusion with respect

[8] Inspection laws are expressly recognized by the federal Constitution, which empowers States to collect duties from merchants to cover the costs of inspecting goods. U.S. Const. art. I, § 10, cl. 2; *see also Boyd v. United States*, 116 U.S. 616, 623 (1886) (discussing act of the First Congress that authorized entry onto private property to inspect goods). Petitioners' categorical rule for physical invasions would turn that constitutional provision on its head by compelling *States* to compensate merchants for interferences with their right to exclude.

to a specific property, let alone a mass of properties, would drain government resources immeasurably.

Other examples of temporary or intermittent physical invasions abound. Home visits by public officials or their delegees are made for a variety of reasons, most often the protection of minors. *See, e.g.*, *Wyman v. James*, 400 U.S. 309, 318-20 (1971).[9] The physical invasion is only incidental to the visit's purpose: to meet with and protect *persons*. Here again, it appears that no court has ever determined that such visitations run afoul of the Takings Clause.

Existing takings doctrine fully accommodates these routine exercises of police power, without absolving state or local governments of their duty to pay compensation in truly unusual cases where physical intrusions become "occupations," *Loretto*, 458 U.S. at 430, or are otherwise so severe as to be indistinguishable from appropriations of property. This Court should not make takings liability for physical intrusions the rule rather than the exception.

CONCLUSION

The petition should be dismissed as improvidently granted. Alternatively, this Court should reaffirm that liability under the federal Takings Clause for physical intrusions by public officials or their delegees is to be decided using the factors set forth in *Arkansas Game*, unless the intrusion constitutes a permanent occupation.

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[9] *See, e.g.*, Cal. Health & Safety Code § 1596.852 (home day cares); Neb. Rev. Stat. § 43-1303(5) (foster homes); N.J. Stat. § 30:4C-12 (child-welfare visits); *Idaho Dep't of Health & Welfare v. Doe*, 244 P.3d 180, 183 (Idaho 2010) (reciting typical court order requiring parents to permit home visits by guardian ad litem and public officials).

Respectfully submitted,

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