No. 20-107

In the Supreme Court of the United States

CEDAR POINT NURSERY AND
FOWLER PACKING COMPANY, INC., PETITIONERS

v.

VICTORIA HASSID, IN HER OFFICIAL
CAPACITY AS CHAIR OF THE CALIFORNIA
AGRICULTURE LABOR RELATIONS BOARD, ET AL.

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

BRIEF AMICI CURIAE OF VIRGINIA, COLORADO, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, HAWAII, ILLINOIS, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, AND WASHINGTON IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

Petitioners urge this Court to adopt a sweeping rule that could raise questions about the constitutionality of a wide range of state and federal regulations designed to protect public health and safety. Amici States have a significant interest in defending the validity of laws that protect their residents, as well as ensuring the proper interpretation and application of the Fifth Amendment's prohibition on uncompensated takings.

SUMMARY OF ARGUMENT

As respondents correctly explain, this case can be readily resolved under this Court's existing takings jurisprudence. There is thus neither need nor warrant to consider the wholesale rethinking proposed by petitioners and their amici.

In contrast, the "simple" rule that petitioners urge this Court to adopt is radical in its breadth. According to petitioners, any time that "an infringement on the right to exclude takes the form of an easement, the uncompensated appropriation of the easement violates the Fifth Amendment." Pet. Br. 33. In petitioners' view, it makes no difference why or to whom a power of access is granted or whether the right of access is intermittent or limited in duration: rather, *any* infringement on the owner's right to exclude is, by itself, sufficient to establish a *per se* taking. Adopting such a rule would effect a sea change in takings jurisprudence and could raise constitutional questions about a staggering array of state and federal statutory

and regulatory regimes—most notably, those that depend on government inspections of private property to serve their ends.

Apparently recognizing that petitioners' proposed rule could upend commonplace (and common sense) regulatory regimes, petitioners' amici attempt to recast it. Surely not all physical intrusions would be *per se* takings, amici promise—rather, those that are designed to and do protect public health and safety would survive. But amici's assurances are unmoored from this Court's takings jurisprudence and worlds away from the "simple" rule petitioners urge the Court to adopt. And when one presses beneath the surface of amici's arguments, it becomes clear that any effort to limit the breadth of petitioners' position would require developing an entirely new legal framework for takings claims. Because the court of appeals correctly applied this Court's existing (and longstanding) framework, nothing about this case warrants such a wholesale rethinking of takings jurisprudence.

ARGUMENT

Reversal could raise questions about numerous state and federal regimes designed to protect health and safety

More than 50 years ago, this Court recognized that "[o]fficial entry upon commercial property" is a common technique used by administrative agencies "at all levels of government" to "enforce a variety of regulatory laws" instituted to maintain public health and safety. *See* v. *City of Seattle*, 387 U.S. 541, 543–44

(1967). The federal government and the States have relied on this principle in enacting a wide variety of statutory and regulatory regimes that depend on inspections of private property to serve public health and safety. Adopting the "simple" rule that petitioners espouse could raise questions about *all* of those statutes, and the efforts of various amici to limit the collateral damage of ruling for petitioners only confirm the flaws with petitioners' theory of this case.

A. Federal and state laws frequently authorize access to private property to ensure health and safety

1. Congress has repeatedly granted federal officials or their designees the authority to conduct inspections on private property. In the Mine Act, for example, Congress gave the Secretaries of Labor and Health and Human Services expansive power "to protect the health and safety of the Nation's coal or other miners." 30 U.S.C. § 801(g). In particular, the Secretaries may direct their representatives to make "frequent," unannounced "inspections and investigations" to obtain information on "the causes of accidents[ ] and . . . diseases," "disseminat[e] information relating to health and safety conditions," and "determin[e] whether an imminent danger exists." 30 U.S.C. § 813(a). Similarly, under the Federal Railroad Safety Act, "officer[s], employee[s], or agent[s]" of the Secretary of Transportation may "enter" onto railroad property to inspect "equipment, facilities, rolling stock, operations, and relevant records." 49 U.S.C. § 20107(b).

Federal inspection regimes are also common in the consumer protection arena. For example, the Federal Food, Drug, and Cosmetic Act authorizes the Secretary of Health and Human Services "to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, tobacco products, or cosmetics are manufactured" and to inspect "all pertinent equipment, finished and unfinished materials, containers, and labeling therein." 21 U.S.C. § 374(a)(1). The Controlled Substances Act is similar: it authorizes the Attorney General's assigns to "enter controlled premises" and "conduct administrative inspections" of records, "pertinent equipment, finished and unfinished drugs, listed chemicals, and other substances or materials." 21 U.S.C. § 880(b).

2. States have similarly acted to ensure the safety and security of their residents by authorizing inspections of land, facilities, and activities. For example, the Commonwealth of Virginia has sought to minimize the spread of asbestos during construction by granting the Commissioner of Labor and Industry the power to enter "any business establishment, construction site, or other area, workplace, or environment" "without delay" to conduct inspections. Va. Code Ann. § 40.1-51.26(7). The Commonwealth of Massachusetts likewise authorizes its Department of Labor Standards to enter certain businesses "at any time," to investigate compliance with certain state health and safety laws, including laws relating to the handling and disposal of asbestos. Mass. Gen. Laws ch. 149, §§ 6A, 10.

Other States have taken similar steps. Tennessee has addressed nuclear safety by granting representatives of the Commissioner of Health "the right to enter, at any reasonable hour" any premises hosting a radiation source. Tenn. Code Ann. § 68-202-706; see also Mass. Gen. Laws ch. 111, § 5N (similar). In Oregon, affiliates of the Department of Agriculture "may enter at any time into any car, warehouse, depot, or upon any ship within the boundaries of th[e] state" to investigate whether any items are "infested with any injurious insects or other plant pests." Or. Rev. Stat. § 570.135. And in Maine, officers and employees of the Department of Health and Human Services have a right, "without an administrative inspection warrant," to enter "any" licensed food-service establishment "to determine the state of compliance with" applicable law. Me. Rev. Stat. Ann. Tit. 22, § 2497.

Like the federal government, States have also authorized inspections to protect workers. In Illinois, "an inspector may enter without delay and at reasonable times *any* establishment, construction site, or other area, workplace, or environment where work is performed . . . in order to enforce [] occupational safety and health standards." 820 Ill. Comp. Stat. 219/65(b)(1) (emphasis added). In Michigan, representatives from the Department of Labor may enter "a place of employment to physically inspect or investigate conditions of employment." Mich. Comp. Laws Ann. § 408.1029(1). Investigators may inspect "all pertinent conditions, equipment, and materials in the place of employment" and may privately question "the employer, owner,

operator, agent, or an employee with respect to safety or health." *Id.*; see also Mass. Gen. Laws ch. 149, § 17 (permitting workplace inspection of wage and hour records); Va. Code Ann. § 40.1-6(8) (stating that the Commission of Labor and Industry may "inspect and investigate" any "business establishment, construction site, or other area" and "and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein").

States also authorize unannounced inspections on private property for the purpose of protecting vulnerable populations. In Nebraska, officials from the Foster Care Review Office retain the right to "visit and observe foster care facilities," including private homes, "to ascertain whether the individual physical, psychological, and sociological needs of each foster child are being met." Neb. Rev. Stat. § 43-1303(5); Neb. Rev. Stat. § 43-1301(3). Similarly, Ohio empowers its Director of Health to inspect a licensed nursing home "at any time" to ensure continued compliance with legal standards. Ohio Rev. Code Ann. § 3721.02(B)(1).

B. Petitioners' proposed rule would raise serious questions about such laws

Under petitioners' description of their own "simple" rule, Pet. Br. 16, 33, each of the statutes described above would likely violate the Takings Clause. Although none contemplates permanent and continuous access, each creates an ongoing legal right of entry to private property, thereby limiting the owner's right to exclude in certain respects.

To be sure, petitioners insist that their proposed rule would apply only when the challenged restriction "takes the form of an easement." Pet. Br. 33, 35. But petitioners offer scant guidance for determining whether that standard is satisfied. Indeed, petitioners suggest that the access right they challenge here qualifies *because* it "deprives the property owners of the right to exclude trespassers from their property." Pet. Br. 16.[1]

Critically, petitioners make no effort to explain how the various regulatory regimes described above would survive under the rule it urges this Court to adopt. Rather, the only limitation petitioners offer is a head-scratching assertion that their proposed rule *might not* invalidate the right of access guaranteed by Section 7 of the National Labor Relations Act because that right is so "extremely limited" that it "cannot reasonably be characterized as an easement." Pet. Br. 31 n.19 (citing *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 537 (1992)). But even that limited assurance—which "sound[s] more of *ipse dixit* than reasoned explanation," *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 543 (1985)—only underscores the

[1] Petitioners do not rely on the fact that the regulation they challenge permits access by private parties rather than government officials. This Court has previously rejected reliance on such a distinction in the context of permanent physical occupations. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 n.9 (1982) ("A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant.").

fundamentally unclear and potentially radical nature of the rule petitioners seek.

C. Amici's efforts to cabin the scope of petitioners' proposed rule are fundamentally flawed

Apparently recognizing the sweeping nature of the rule petitioners propose, their amici offer various theories for cabining or modifying it. But amici's soothing words offer cold comfort. It is far from clear that amici's various theories would save the kind of health- and safety-focused regulatory schemes described above. Others are not grounded in established precedent and would require ground-up construction of new legal regimes that may or may not preserve the types of regulatory regimes that are critical to protecting public health and safety. Indeed, amici's efforts to cabin petitioners' "simple" rule serve only to underscore the degree to which petitioners' proposed rule is fundamentally ill-advised and unworkable.

1. It is well-established that no taking occurs when the government intrudes on an alleged property right that was "not part of [an owner's] title to begin with." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). For that reason, amici are surely right that States may forbid uses of property that would constitute a nuisance and may enter private land for the purpose of abating one. See U.S. Br. 28–29; Oklahoma Br. 18–20; Cato Br. 20. Amici are also correct that government may authorize entry onto privately owned land to terminate an imminent

harm—for example, "to prevent the spreading of a fire or to forestall other grave threats to the lives and property of others." U.S. Br. 29 (quoting *Lucas*, 505 U.S. at 1029 n.16); see also Oklahoma Br. 22–24.

These doctrines, however, do not appear to be broad enough to encompass public health and safety regimes like those described above. Nuisance doctrine serves to prevent an owner's use of their own property from inflicting harms to *other* property or to people present on other property. See, *e.g.*, Restatement (Second) of Torts § 821D. In contrast, the inspection regimes described above are designed to prevent harms that occur on the owner's own property through activities that are typically consistent with—and directly related to—the owner's otherwise-lawful business. Nor are the sorts of inspection regimes described in Part I limited to abating ongoing harms or eliminating the threat of an imminent harm that is already known. Instead, such regimes are often designed to uncover and address such harms or risks *before* they materialize. See, *e.g.*, 30 U.S.C. § 813(a) (authorizing inspections to "determin[e] whether an imminent danger exists").

2. Petitioners' amici also identify various arguments designed to protect health and safety regimes from takings challenges. None of these arguments, however, offers a failsafe defense.

a. The federal government makes several cursory arguments about why petitioners' rule would not invalidate common health and safety regimes that depend on inspections. None is persuasive.

The federal government first contends that "[s]poradic, temporary invasions"—apparently including inspections—"fall outside the per se rule because they are not indefinite." U.S. Br. 26. But the federal government makes no effort to explain *why* the kind of inspection regimes described above do not authorize "indefinite" intrusions. Unlike the National Labor Relations Act rule that the federal government describes, many other inspection regimes are *not* predicated on the existence of a condition precedent such as a showing that "no other reasonable means of communicating [an] organizational message to the employees exists." U.S. Br. 27 (quoting *Lechmere*, 502 U.S. at 534–35). Rather—like the California access regulation challenged here—such regimes often authorize reasonable and intermittent inspections of land, facilities, and businesses so long as the owner is engaged in the type of activities warranting inspection. See Part I, *supra*.

The federal government also cites this Court's 130-year-old decision in *Montana Co.* v. *St. Louis Mining & Milling Co.*, 152 U.S. 160 (1894) (*Montana*), to support its argument that modern inspection regimes would fall outside petitioners' *per se* rule. See U.S. Br. 26–27. But that decision hurts the federal government's argument more than it helps because the *Montana* Court's explanation of why the challenged inspection regime did not violate the Takings Clause relied on reasoning that petitioners would have the current one reject. Recognizing that this Court had previously held that a taking occurs when "a party is

deprived of the *entire* use of his property," the *Montana* Court explained that, with "an inspection neither the title nor the general use is taken, and all that can be said is that there is *a temporary and limited* interruption of the exclusive use." *Montana*, 152 U.S. at 169 (citing *Pumpelly* v. *Canal Co.*, 13 Wall. 166 (1871)) (emphasis added). Given that language, it is more than passing strange for the federal government to now rely on *Montana* in support of its argument that petitioners' proposed rule—which provides that *any* intrusion on land constitutes a *per se* taking, regardless of how "temporary and limited"—is a "narrow" one. U.S. Br. 26–27.

Finally, the federal government attempts to shoehorn inspection regimes into the principle that "all property is held subject to certain core exercises of the police power." U.S. Br. 29. But the federal government offers no way to distinguish between "core" and "noncore" exercises of the police power. And although amici States certainly believe that the various inspection regimes described above *do* represent "core" exercises of state police power, the federal government's invitation for courts to scrutinize state enactments in such a manner is incongruous with the *per se* rule that petitioners seek.[2]

b. The arguments advanced by other amici are no more persuasive.

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[2] Should the Court agree that the sorts of statutes described in Part I of this brief are protected from challenge under the Takings Clause because they represent "core exercises of the police power," U.S. Br. 29, it should clearly state so in its opinion.

i. Several amici make a category mistake by suggesting that *because* certain physical searches of closely regulated areas do not violate the Fourth Amendment, a right to enter such areas for purposes of inspection likewise *cannot* effectuate a "taking" for purposes of the Fifth Amendment. See Oklahoma Br. 17 (asserting that "[a]n entry cannot be both a law enforcement search and a taking; it must be analyzed under the correct provision"). Other amici are more equivocal, stating "this Court's precedents suggest that reasonable inspection regimes will *sometimes* be lawful under both the Fourth Amendment and the unconstitutional conditions doctrine." Chamber of Commerce Br. 29 (emphasis added).

None of these assertions is firmly grounded in established precedent. It is commonplace for plaintiffs challenging a statute or regulation to plead multiple constitutional claims—indeed, petitioners did so here, arguing that the challenged access regulation violated *both* the Fourth Amendment and the Takings Clause. See Pet. App. G13–G16. It is equally commonplace for one constitutional claim to succeed and another to fail, such as where a challenger succeeds in showing that a statute or regulation violates the First Amendment while failing to show that the same law violates the Equal Protection Clause. For that reason, the fact that a given inspection regime does not authorize a constitutionally unreasonable search or seizure does not clearly resolve that same regime's viability under the Takings Clause.

ii. The Chamber of Commerce also suggests that the unconstitutional conditions doctrine will save health and safety regimes from takings challenges. Citing numerous federal statutes permitting inspections of land and facilities, it insists that "there is no basis to the notion that ruling for petitioners would hobble the government's ability to ensure public safety by requiring access to private property as a reasonable condition of licensing," because "any sacrifice of the right to exclude third parties from one's property entailed in allowing such inspections would satisfy the doctrine of unconstitutional conditions." Chamber of Commerce Br. 22. In support of that argument, the Chamber relies on this Court's decision in *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 831–832 (1987).

That argument substantially overreads *Nollan*'s ability to protect existing health and safety statutes. As the Court has observed, *Nollan* involved "a *special application* of the doctrine of unconstitutional conditions, which provides that the government may not require a person to give up . . . the right to receive just compensation when property is taken" in exchange for a land-use permit. *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005) (emphasis added) (internal quotation marks and citation omitted). But not all takings claims based on a health and safety inspection statute will involve a permit (land-use or otherwise)—indeed, it is likely that most will not. On this point, the federal government—which supports petitioners—specifically contends that application of the *Nollan* doctrine is inappropriate in this case because "[t]he predicate . . . is absent." U.S. Br. 33.

For those reasons, the Chamber's insistence that health and safety inspection regimes will necessarily survive adoption of petitioners' rule is overly facile. Because *Nollan* was limited to conditions imposed on a land-use permit, the test this Court articulated would not map neatly onto the kinds of health and safety regimes described above. Accordingly (and contrary to amici's assertion), adoption of petitioners' proposed rule would require a new legal landscape to address why physical intrusions committed in the context of health and safety inspections—which may or may not be required as a condition of licensing—do not constitute a *per se* taking.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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