

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CEDAR POINT NURSERY, ET AL.,)

4 Petitioners,)

5 v.) No. 20-107

6 VICTORIA HASSID, ET AL.,)

7 Respondents.)

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9

10 Washington, D.C.

11 Monday, March 22, 2021

12

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

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20 on behalf of the Petitioners.

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23 on behalf of the Respondents.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	JOSHUA P. THOMPSON, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF:	
6	MICHAEL J. MONGAN, ESQ.	
7	On behalf of the Respondents	38
8	REBUTTAL ARGUMENT OF:	
9	JOSHUA P. THOMPSON, ESQ.	
10	On behalf of the Petitioners	72
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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 businesses' 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 I also --

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 Aetna 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
7 alienable, matters. What matters is that the
8 right to exclude has been denied in a way that
9 is more than a series of mere trespasses, as
10 this Court 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 -- it somehow occupies
18 space between a mere trespass and a temporary
19 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, anytime
22 the government undertakes its power to search,
23 it would not be a taking. It could be an
24 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 effecting 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 --

16 JUSTICE BREYER: So the government --

17 MR. THOMPSON: -- without the govern
18 --

19 JUSTICE BREYER: -- can search what it
20 -- whatever is reasonable, it can search it, but
21 what it cannot do is?

22 MR. THOMPSON: Is take a discrete
23 property interest from --

24 JUSTICE BREYER: Well, I -- I
25 understand the word take, but that sounds like a

1 conclusion. What they cannot do is? I mean,
2 they send someone out there, as here, to talk to
3 workers to find out what the conditions are, for
4 example. Can they do that?

5 MR. THOMPSON: No.

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

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

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

21 JUSTICE BREYER: All right. They're
22 searching to see if the electric car, which they
23 didn't have in common law, is safe enough to
24 take out on the highway.

25 MR. THOMPSON: Yes, Just --

1 JUSTICE BREYER: Can they do it?

2 MR. THOMPSON: Of course, Justice
3 Breyer, because they still have the power to
4 search. It's the searching power, not the thing
5 that they're searching, that matters.

6 CHIEF JUSTICE ROBERTS: Justice Alito.

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

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

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

1 fairly characterized as an easement under
2 California law --

3 JUSTICE ALITO: Well --

4 MR. THOMPSON: -- the impact on the
5 right --

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

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

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

1 JUSTICE ALITO: Well, what is the --
2 the definition of -- of an easement then if it's
3 not -- it's not California law, it's not common
4 law, you acknowledge this is not a classic --
5 not a classic easement. What -- what is your
6 definition of an easement?

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

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

17 Is that your definition? Any right to
18 enter -- enter land is an easement?

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

1 Regulation grants the union the right to come on
2 and use our property for a discrete purpose, and
3 that, as Judge Ikuta noted, has the hallmarks of
4 an easement in gross under California law
5 that --

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

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

19 JUSTICE ALITO: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Sotomayor.

22 JUSTICE SOTOMAYOR: Counsel, that's
23 the problem I'm having. Answer Justice Alito's
24 question. Under your theory -- and you're
25 creating sort of a federal common law definition

1 of what an easement is because you're not
2 referring to California law, you're not
3 referring to common law, I -- I guess you want
4 us to make it up somehow.

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

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

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

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

1 So, given that, why don't we just take
2 the Arkansas Game theory -- or, not theory,
3 variables and apply them to this case? Why
4 don't you win under that? You're claiming --
5 and that's what the dissent said in the -- in
6 the panel decision.

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

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

21 JUSTICE SOTOMAYOR: Counsel, that's
22 just simply not true, because we've had access
23 right cases like Kaiser Aetna and PruneYards,
24 even Arkansas Game, which were invasions of the
25 right to exclude. All those cases were

1 identical to this one stick in the bundle of
2 rights. And, there, we just didn't apply a per
3 se rule. We found in -- in -- we suggested that
4 some takings, like in Arkansas Game, were
5 unconstitutional but not under a per se
6 analysis.

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

11 JUSTICE SOTOMAYOR: So what do you do
12 with PruneYards?

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

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

24 MR. THOMPSON: No, I don't think that
25 would make a difference here, Your Honor. I

1 think what matters is the extent of the physical
2 invasion authorized by law.

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

9 MR. THOMPSON: I don't --

10 JUSTICE SOTOMAYOR: Some mines require
11 when -- extensive visits.

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

18 That would save all of the
19 administrative and inspection regimes that --
20 that worried the Board --

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Kagan.

24 JUSTICE KAGAN: Mr. Thompson, if I
25 could go back first to your answers to Justice

1 Thomas. Let -- let -- let's say that I don't
2 think that this would count as an easement under
3 California law for a variety of reasons that
4 Justice Thomas gave and Justice Alito gave.
5 Let's just assume that to be true.

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

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

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

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

25 But you're not pointing to anything

1 like that. Am I right?

2 MR. THOMPSON: That's correct, Justice
3 Kagan. What we're pointing to is the same
4 language that this Court used in Causby to
5 describe an easement.

6 JUSTICE KAGAN: Okay.

7 MR. THOMPSON: There was no --

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

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

22 And I guess I wonder why that should
23 be, because this -- this question of what is
24 your property interest seems as though it
25 shouldn't stop at the time of the Constitution.

1 The Takings Clause operates as against whatever
2 it is that property generally means. But why
3 should that freeze at that time?

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

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

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

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

1 MR. THOMPSON: Justice Kagan, I don't
2 -- I -- I -- I think that insofar as you're
3 talking about a structure on one's property,
4 that structure needs to be permanent to have per
5 se treatment. Insofar as the Court is talking
6 about access to one's property by individuals,
7 Nollan dispelled the notion that people have to
8 be stationed there 24/7.

9 JUSTICE KAGAN: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch.

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

22 MR. THOMPSON: Yes, I'd be happy to,
23 Justice Gorsuch.

24 As -- as the Court is aware, every
25 takings claim begins with what is the property

1 right that the private property owner possesses,
2 and that looks to background principles of
3 property law to determine what the scope of the
4 property right is.

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

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

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

22 JUSTICE GORSUCH: Well, what if
23 California had passed an identical regulation to
24 the one here, except that instead of allowing
25 union organizers access, it allowed union

1 opponents access in order to speak with
2 employees about the downsides of joining a
3 union? So, again, not a government worker
4 coming to do a search to ensure compliance with
5 the regulatory regime but a third party being
6 permitted and given a right to access the
7 property.

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

15 Would -- would there be a different
16 result?

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

1 JUSTICE GORSUCH: Thank you very much,
2 counsel.

3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh.

5 JUSTICE KAVANAUGH: Thank you, Mr.
6 Chief Justice.

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

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

21 Now I think you -- you probably
22 prevail under that rule, but I'm -- I'm curious
23 why your argument is not as simple as Justice
24 Clark's -- California Supreme Court Justice
25 Clark's argument in his dissent in the '76 case

1 that you cite where he just says, under Babcock,
2 there's a rule, the Board's regulation here goes
3 beyond the Babcock rule by permitting blanket
4 access under private -- onto private property
5 during worker -- working hours and access when
6 alternative means of communications do, in fact,
7 exist. The regulation is, therefore,
8 unconstitutional.

9 Why is it not as simple as that?

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

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

23 So, in other words, it seems to me,
24 especially if you go back into the briefs in
25 Babcock, which are all about the Fifth

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

11 Your response to that?

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

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

20 JUSTICE KAVANAUGH: Exactly.

21 MR. THOMPSON: And to be perfect --

22 JUSTICE KAVANAUGH: But -- but now
23 that it's here, isn't that the simple, easy
24 response to the -- this case, which is we've
25 already considered 65 years ago the balance of

1 property rights against labor organizing. We
2 set forth a very clear rule, and it was
3 reiterated in Lechmere by Justice Thomas's
4 majority opinion, and, you know, there's no
5 reason to depart from that rule that we've seen.
6 It provides expansive protection for property
7 rights but not without the exception as
8 articulated in Babcock, end of case.

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

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

24 MR. THOMPSON: I -- I agree that we
25 would prevail under Babcock, but I don't think

1 that question is fairly presented by this case.

2 What the --

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett.

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

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

16 So let me ask you this: What if
17 California had a regulation that permitted union
18 organizers to go onto the property of your
19 clients one hour a day, one day a year. Is that
20 a taking subject to the per se rule?

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

1 taking that property right, that the taking
2 would be complete.

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

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

22 MR. THOMPSON: That's exactly correct,
23 Justice Barrett.

24 JUSTICE BARRETT: Okay. Then I don't
25 understand how, under that theory, Section 7 of

1 the NLRA isn't accomplishing a taking.

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

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

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

1 for FDA licensing regimes, and inspections can
2 be justified as legitimate exercises of
3 conditions on the government permitting a
4 company to enter the pharmaceutical market.

5 Why doesn't that rationale apply to
6 your entry into the agricultural market?

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

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

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

22 JUSTICE BARRETT: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel. A minute to wrap up.

25 MR. THOMPSON: Thank you, Mr. Chief

1 Justice.

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

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

19 The decision of the Ninth Circuit
20 should be reversed.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 General Mongan.

24

25

1 ORAL ARGUMENT OF MICHAEL J. MONGAN

2 ON BEHALF OF THE RESPONDENTS

3 MR. MONGAN: Mr. Chief Justice, and

4 may it please the Court:

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

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

19 There's just two narrow categories of
20 per se regulatory takings: the Lucas category,
21 for regulations that eliminate all economically
22 beneficial uses, and the Loretto category, for
23 regulations authorizing a permanent and
24 continuous physical invasion, which this Court
25 said effectively destroys the owner's rights in

1 their property.

2 Other regulations may also effect
3 takings, but they're subject to the standard ad
4 hoc inquiry, examining the nature of the
5 regulation and the particular burdens it
6 imposes.

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

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

1 instrument of a per se rule.

2 Mr. Chief Justice, I welcome the
3 Court's questions.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 You began by saying this authorizes a
7 limited number of organizers to enter the
8 property. What -- what is that number?

9 MR. MONGAN: It's typically two
10 organizers for each work crew. If there are
11 greater than 30 workers, there can be one
12 additional organizer for each 15 additional
13 workers.

14 CHIEF JUSTICE ROBERTS: But what do
15 you do if there's more than one union that wants
16 access? I mean, it's not -- it's not at all
17 unusual for unions to be competing for
18 representation. So does each union gets its own
19 120 days?

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

1 possible.

2 CHIEF JUSTICE ROBERTS: And -- and I
3 gather there's no limit on that? Whether it's
4 theoretical or not, this could be -- end up
5 being an authorization to enter every day of the
6 year, which you would acknowledge is a taking?

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

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

18 CHIEF JUSTICE ROBERTS: You
19 acknowledge, as I understand it, that if the
20 access was every day during daylight hours, that
21 that would be a taking?

22 MR. MONGAN: No, Your Honor, I don't
23 think that's quite our position. We think that
24 typically this has to be a step through the ad
25 hoc inquiry. What Loretto and Nollan said is

1 that if -- you know, it has to be permanent --

2 CHIEF JUSTICE ROBERTS: Well, if it
3 were, is there a situation where you think the
4 ad hoc inquiry would say that every day,
5 daylight hours, does not violate the Takings
6 Clause?

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

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

21 CHIEF JUSTICE ROBERTS: Under your --

22 MR. MONGAN: -- that considers --

23 CHIEF JUSTICE ROBERTS: -- under your
24 analysis, is the property interest defined by
25 state law or common law?

1 MR. MONGAN: Well, there's a
2 fee-simple property interest here, but, in
3 determining whether it is a taking, you're going
4 to look to the severity of the burden. And we
5 don't think that there is any basis for treating
6 this as an easement under state or com --
7 federal common law, but it --

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas.

11 JUSTICE THOMAS: Thank you, Mr. Chief
12 Justice.

13 Mr. Mongan, the -- I'm quite
14 interested in how related the inspection or the
15 opportunity to be on private property has to do
16 with the -- how related does it have to be to
17 the business operation.

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

1 business, the state police could train there?

2 MR. MONGAN: Your Honor, I think that
3 that would --

4 JUSTICE THOMAS: Would that be a
5 taking?

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

14 And Penn Central itself says that a
15 critical focus of the inquiry is whether there
16 is a -- a physical intrusion authorized by the
17 regulation and the need --

18 JUSTICE THOMAS: Well, let's just --

19 MR. MONGAN: -- for interference.

20 JUSTICE THOMAS: I understand your
21 point, but I'm really interested in why -- how
22 this is different from the training, so -- I'm
23 sorry, from the union's presence while workers
24 are there.

25 If the condition is that the -- only

1 two or three police officers can train during
2 non-business hours and only in unoccupied
3 portions of the property, how is that -- if that
4 is closer to the line than the union coming onto
5 property while workers are there and possibly
6 even interfering with workers, how is the
7 intrusion of the police officers different from
8 that of the union organizers?

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

20 JUSTICE THOMAS: Well, let's say the
21 state police are just there to use it for
22 calisthenics and working out, and they're not
23 firing guns, they're not meeting with the
24 employees, and for -- and they are to remain as
25 inconspicuous as possible. So why is that

1 closer to the line than the union organizers?

2 MR. MONGAN: Well, I think it does
3 have to do with the fact that this is a
4 situation related to a business activity that's
5 being conducted on the land, and your
6 hypothetical would be sort of without regard to
7 the -- the activities on the land, but it would
8 be assessed in an ad hoc inquiry because neither
9 of those are continuous intrusions, Your Honor.

10 JUSTICE THOMAS: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Breyer.

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

22 We have previously defined or sort of
23 said that that kind of interest has to be a
24 taking that is continuous and indefinite, like
25 taking even an inch of somebody's apartment

1 house to put up a CATV system or taking an
2 easement for the beach.

3 The virtue of their approach is that
4 it's pretty clear, I think, because, otherwise,
5 you get into the mess of saying, well, what
6 about a year? Here, it's 4 percent of all the
7 year's hours and 10 percent or 12 percent of all
8 the daylight hours and -- and -- but it is not
9 government coming in, it's a private person
10 coming in. That's what they say.

11 So what are the rules that distinguish
12 an easement from not? I thought an easement,
13 for example, ran with the land so that if it's
14 no longer agricultural land but, rather, is a --
15 a steel mill, you can't transfer the easement.
16 It doesn't exist anymore. Nobody can go on the
17 property.

18 There may be other characteristics.
19 What are they, in your opinion, that
20 distinguishes this case from a classical
21 easement?

22 MR. MONGAN: Well, Your Honor, I think
23 that this is not a classical easement. As you
24 noted, it is not appurtenant to any particular
25 parcel of land. It is a regulatory scheme that

1 applies to a particular type of business
2 conducted on the land, and the access is not to
3 a particular pathway or parcel, it's to the
4 employees, where they are. And the regulation
5 makes clear, if they're congregated on the bus,
6 off the property, before or after work, the
7 access is to the bus, not to the farm.

8 It's also not something that could be
9 assigned or -- or conveyed. It wouldn't be
10 recorded. So it doesn't have the hallmarks of
11 an easement.

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

23 And if you get past that, then courts
24 are going to have to be applying a multitude of
25 very complex exceptions in the mine run case

1 rather than looking at the considerations that
2 have always been the focus of a Fifth Amendment
3 inquiry, the severity of the burden and the
4 character of the particular government action.

5 JUSTICE BREYER: Thank you, thank you.

6 CHIEF JUSTICE ROBERTS: Justice Alito.

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

14 You would concede that that's -- that
15 that is a per se taking, right?

16 MR. MONGAN: Your Honor, I'd want to
17 know a little bit more to know how to analyze
18 it, but, yes, I think that, under any standard,
19 a sort of formal appurtenant easement over the
20 property would be a taking.

21 And what this Court has said in Nollan
22 is, if it's continuous, it's per se. Under this
23 Court's precedent, if it was, you know, a very
24 limited period of time, I guess you'd analyze it
25 under Penn Central --

1 JUSTICE ALITO: Well --

2 MR. MONGAN: -- but I think that that
3 would be the only --

4 JUSTICE ALITO: -- well, that seems
5 like a pretty simple -- that seems like a pretty
6 simple question. What more would you need to
7 know? The town says, we're -- we're going to
8 take an easement over your property so that
9 people can walk across your property to get from
10 point A to point B.

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

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

25 MR. MONGAN: I think those are going

1 to be slam-dunk takings claims under Penn
2 Central, Your Honor, because they're
3 substantially interfering with your
4 investment-backed expectations and you're
5 singling out one landowner for this type of
6 particular infringement.

7 JUSTICE ALITO: Why do you need to get
8 to Penn Central?

9 MR. MONGAN: Well --

10 JUSTICE ALITO: Under -- did we start
11 out with Penn Central? If it was an easement
12 for everybody, 365 days of the year, is that a
13 Penn Central question? Do you think everything
14 is a Penn Central question?

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

1 What would be deeply problematic is if
2 the Court adopted a rule of per se treatment for
3 any sort of authorized intrusion, including a
4 limited intrusion as a part of a regulatory
5 taking.

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

11 And if you're not taking that
12 position, then I really don't understand exactly
13 where you're drawing the line. That's what I'm
14 trying to get at.

15 MR. MONGAN: Yes, Your Honor. I think
16 that those would be takings under any standard,
17 but we should not adopt a broad per se rule that
18 applies to the different type of regulatory
19 regime that we have here in many types of access
20 regulations that look nothing like an easement.

21 JUSTICE ALITO: All right, thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor.

24 JUSTICE SOTOMAYOR: Counsel, I -- I --
25 I -- I'm following up on Justice Alito's

1 question in part. I think you're saying that a
2 per se rule should apply only to permanent and
3 continuous physical invasions of a property
4 right that's defined by state law, correct?

5 So, if there was a permanent easement,
6 you suggest it might be then a taking? A formal
7 easement under California law?

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

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

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

23 I mean, if somebody buys the land and
24 changes the business, then this Access
25 Regulation has no applicability. That suggests

1 to me that it has to be a different test. It
2 can't be Penn Central.

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

4 JUSTICE SOTOMAYOR: So why can't it be
5 Arkansas Game?

6 MR. MONGAN: Your Honor, I -- I think
7 that an ad hoc approach -- and we think that the
8 inquiry in --

9 JUSTICE SOTOMAYOR: Counsel, let me
10 stop you there. Ad hoc won't satisfy many
11 people.

12 MR. MONGAN: Well --

13 JUSTICE SOTOMAYOR: We need -- we need
14 something that gives clear guidance.

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

16 JUSTICE SOTOMAYOR: So give me a clear
17 -- a clear method of addressing this case so
18 something like Justice Thomas's hypothetical
19 doesn't become permissible for the government to
20 do.

21 MR. MONGAN: I think that --

22 JUSTICE SOTOMAYOR: It seems to me
23 that letting the government come and use your
24 land for non-business purposes or
25 non-business-related purposes seems to be

1 exactly what the Takings Clause was intended to
2 avoid.

3 MR. MONGAN: Your Honor --

4 JUSTICE SOTOMAYOR: So articulate the
5 rule to me.

6 MR. MONGAN: -- I think the Court has
7 given clear guidance. In Penn Central itself,
8 it said that certain numbers --

9 JUSTICE SOTOMAYOR: Well, I don't -- I
10 think the clear guidance is in Babcock and --
11 and -- and its progeny. So I don't think it's
12 Penn Central. I think it's those cases.

13 MR. MONGAN: Well, if I could just say
14 briefly, Your Honor, the Court has made very
15 clear that if there is a substantial physical
16 intrusion, that factor can predominate. And in
17 Kaiser Aetna, it applied Penn Central to a
18 reg -- an action that involved a substantial
19 physical intrusion and found a taking on that
20 basis primarily without looking closely at
21 diminution in value.

22 And I think, if there's concern about
23 how lower courts apply that ad hoc framework to
24 Access Regulations, the answer would be to grant
25 review in a case that actually presents a Penn

1 Central challenge to an Access Regulation, not
2 to adopt a -- a very broad per se rule that
3 would swallow up a lot of other types of Access
4 Regulations.

5 CHIEF JUSTICE ROBERTS: Justice Kagan.

6 JUSTICE KAGAN: General Mongan, I -- I
7 have to admit I'm a little bit struggling to
8 understand your argument, so can -- can -- can I
9 just ask you to clarify this?

10 As I understood what you said to
11 Justice Alito, you said maybe a 365/24 taking of
12 an easement, something that did, in fact,
13 qualify as an easement, maybe that would be a
14 per se taking. You sort of said maybe to that.

15 But -- but, if this weren't -- if it
16 was not a formal easement, you know, if there
17 was not a discrete property interest, that the
18 365/24 possession of property would not qualify
19 as a per se taking but instead would be resolved
20 under Penn Central. Is that correct?

21 MR. MONGAN: No, Your Honor, and --
22 and let me clarify. We think Loretto and Nollan
23 make clear that if you have a permanent and
24 continuous access right, whether it's a
25 requirement under an easement or just a

1 regulatory access right, that would be per se.

2 But --

3 JUSTICE KAGAN: Okay. Then -- then --
4 then you do get into the line-drawing problem.
5 I mean, I guess I thought that you were getting
6 rid of your line-drawing problem by just getting
7 rid of Loretto, but -- but if -- if there -- if
8 -- if you do acknowledge that, that a 365/24
9 ability to -- to intrude on property is a per se
10 taking under Loretto and -- and -- and Nollan,
11 then, you know, just ratcheting back from that,
12 when does it stop being a per se taking?

13 MR. MONGAN: Well, what Loretto and
14 Nollan said is that you require, you know,
15 permanent and continuous access because then it
16 effectively destroys the owner's rights with
17 respect to that part of the property.

18 And so what we would acknowledge is
19 that if you have something that's, you know,
20 short of --

21 JUSTICE KAGAN: No, I mean, you know,
22 if it's 365 days -- this is really a concrete
23 question, General. If it's 365 days, how about
24 360 days?

25 MR. MONGAN: I -- I think a court

1 could conclude that that effectively destroys
2 the rights in the same way as the -- the
3 year-round access --

4 JUSTICE KAGAN: So where do you stop?

5 MR. MONGAN: -- in Nollan --

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

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

10 JUSTICE KAGAN: -- 200 days.

11 MR. MONGAN: I think it's the line
12 that the Court suggested in Loretto, you know,
13 is there a continued ability to use, possess,
14 and dispose of this property. And, Your Honor,
15 what I would suggest is that I think any
16 line-drawing problems with that position, which
17 I think follows from your precedent, are going
18 to not recur frequently because we don't have
19 Access Regulations that are anywhere close to
20 continuous and they're not going to create a lot
21 of practical problems because it's either going
22 to be per se or a slam-dunk case under Penn
23 Central.

24 The bigger line-drawing problems are
25 associated with my friend's rule, where it's not

1 even clear how the threshold test that would
2 apply in every challenge to an Access Regulation
3 would be applied. And if you think --

4 JUSTICE KAGAN: I mean, he has his
5 problems, but I'm really trying to figure -- you
6 know, figure out the answer to your problems. I
7 -- I guess I just don't see -- even if you don't
8 want to give me -- I can understand your not
9 wanting to give me, oh, it's this number, but
10 what's the principle that would enable you to
11 set a line someplace short of 365 days?

12 MR. MONGAN: I -- I think that the
13 principle here is that per se treatment is
14 reserved for extreme cases that really are the
15 functional equivalent of the government coming
16 on and directly appropriating your property.

17 And you might say that about an access
18 easement that applies 360 days out of the year,
19 but you wouldn't say it about a tailored
20 regulatory access regime where it's only a few
21 hours a day for short periods during the year.

22 JUSTICE KAGAN: Thank you, General.

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch.

25 JUSTICE GORSUCH: Counsel, I -- I'd

1 like to pick up on that. In -- in your brief,
2 you did, I believe, concede that an easement
3 identical to the one in Nollan but limited to
4 daylight hours may qualify as a taking without
5 regard to other factors. So I -- I -- I think
6 that at least was your -- your point there.

7 And if that -- if that's the case,
8 then -- then let's just take a few things that
9 move away from it a little bit. What if the
10 state limited access to the easement to
11 residents of a particular neighborhood? Would
12 that take it out of a per se taking?

13 MR. MONGAN: No, Your Honor. If I'm
14 understanding the hypothetical, and you're
15 talking about continuous access but only to
16 residents of a per -- a certain neighborhood, I
17 think that that would still be per se under
18 Loretto and -- and Nollan.

19 JUSTICE GORSUCH: Okay. And then --

20 MR. MONGAN: And the reason --

21 JUSTICE GORSUCH: -- and then what if
22 the state prohibited any of those residents from
23 transferring their interests? It was a personal
24 right. Would -- would that cease to be a per se
25 taking?

1 MR. MONGAN: Your Honor, I -- I -- I
2 think that if we're contemplating some sort of
3 continuous ability for third parties to come
4 onto the property whenever they want, that would
5 be a per se taking because --

6 JUSTICE GORSUCH: Okay.

7 MR. MONGAN: -- it would effectively
8 destroy the owner's rights with respect to that
9 strip of property. Of course, we're very far
10 from that test.

11 JUSTICE GORSUCH: Okay. And what if
12 -- what if the state had issued a regulation
13 announcing that access right rather than
14 formally recording it? Would that make a
15 difference?

16 MR. MONGAN: If it's continuous, I
17 think, if it's done by regulation, that would be
18 a per se taking. I think the question is if it
19 is an intermittent regulation that only applies
20 for minimum periods --

21 JUSTICE GORSUCH: All right.

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

23 JUSTICE GORSUCH: Okay.

24 MR. MONGAN: -- and there's
25 substantial protections to minimize the burden,

1 that's not per se.

2 JUSTICE GORSUCH: So it's still per se
3 -- still per se. And then, finally, what if --
4 what if the stated promise to remove the
5 easement in the event that the residential
6 property owner agreed to have it developed into
7 a commercial one?

8 MR. MONGAN: Your Honor, I -- I guess
9 -- I'm not sure exactly how that would be
10 analyzed. I -- I think that it would still be
11 continuous in nature and potentially permanent.
12 I think that's going to be a taking without --
13 you know, reserving the -- the -- the possible
14 Nollan/Dolan exceptions, it's likely to be a
15 taking under either Penn Central or per se.

16 I guess it might not be permanent
17 depending on how you structure the hypothetical.

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

23 MR. MONGAN: Your Honor, the reason
24 that we've acknowledged that possibility with
25 respect to daylight hours is that the focus is

1 really on whether there's some continued ability
2 to use and possess and dispose of the property
3 or whether those rights are effectively
4 destroyed. And if the government says the only
5 time you can exclude somebody from the beach is
6 in the middle of the night, we think a court
7 could reasonably conclude that still effectively
8 destroys your rights and apply a per se rule and
9 it --

10 JUSTICE GORSUCH: Thank you, counsel.

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh.

13 JUSTICE KAVANAUGH: Thank you, Chief
14 Justice.

15 And good morning, General Mongan. The
16 questions here have obviously been a lot about
17 line-drawing, and I wanted to ask you, again,
18 the flip side of what I was asking your friend
19 on the other side.

20 It seems to me our precedent in the
21 labor organizing context has drawn the lines and
22 has established a very narrow and very simple
23 resolution for this case, and I want you to tell
24 me why it's wrong or why you disagree with it.

25 Babcock was obviously a statutory case

1 but informed by the Constitution explicitly, as
2 I read it, and the question was how much access
3 will we allow to property under the statute, the
4 NLRA, given the constitutional backdrop of
5 property rights?

6 And the decision seems to reflect the
7 Court's understanding of the Constitution and
8 how much protection there is for property
9 rights, at page 112 of the decision, and
10 basically says no access unless you can show
11 that there are no alternative means of
12 communication that exist, to simplify what it
13 says there.

14 Doesn't Babcock reflect a
15 constitutional line-drawing that controls this
16 case?

17 MR. MONGAN: Well, Your Honor, I -- I
18 agree that although it was a statutory case, the
19 Court was recognizing the need to balance
20 between property rights and the rights of
21 employees to get this information.

22 I think the Board expressly recognized
23 that same need in its regulation, and it took a
24 somewhat different approach in the context of a
25 different statute with a different timeline for

1 elections in a unique sector of California's
2 economy.

3 JUSTICE KAVANAUGH: But isn't that the
4 problem right there? It took a different
5 approach that intruded on -- on the property
6 rights more than the Supreme Court, this Court,
7 had allowed in Babcock? And isn't that -- you
8 know, Justice Clark in the California Supreme
9 Court decision pointed that out as the exact
10 problem with the California regulation. It just
11 went too far because it went beyond the NLRA?

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

15 JUSTICE KAVANAUGH: Put aside -- put
16 aside the -- the nomenclature. The rule is you
17 can't get access to the property when there are
18 alternative means of communication. That's the
19 Babcock rule about how to accommodate the
20 Takings Clause and the labor organizing rights.

21 MR. MONGAN: And, Your Honor, I think
22 that that can be a consideration that absolutely
23 could factor into an inquiry that looks at the
24 relevant circumstances of this regulation as it
25 applies to -- to landowners, but it wouldn't

1 seem to provide a basis for adopting a broad per
2 se rule that would apply across the board and
3 certainly not one that applies to Access
4 Regulations that have nothing to do with this
5 type of communication.

6 JUSTICE KAVANAUGH: You -- you mean
7 outside the labor context?

8 MR. MONGAN: Right, Your Honor. I
9 mean, they're pushing for a broad per se rule
10 that --

11 JUSTICE KAVANAUGH: Exactly. And
12 that's why I was pushing on them, that I don't
13 understand why they're not relying on Babcock in
14 the labor organizing context. They seem to want
15 a much broader rule. But the -- the flip side
16 of that is Babcock's a problem for you because,
17 if we just follow that and said that reflected
18 the balance of the constitutional rights, the
19 constitutional right here, you would lose under
20 Babcock, I think. I'll --

21 MR. MONGAN: So --

22 JUSTICE KAVANAUGH: -- I'll end there,
23 and -- and you can move on to Justice Barrett.
24 Thank you.

25 MR. MONGAN: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett.

3 JUSTICE BARRETT: General Mongan, so,
4 obviously, this would not be an approach that
5 would apply strictly to commercial property, as
6 the hypotheticals based on Nollan suggest. So
7 let me give you a hypothetical based on my
8 personal residence.

9 Let's imagine that it's situated on
10 the corner of two busy streets and a city
11 decides that it would be beneficial to allow
12 people to protest on my lawn because it's so
13 highly visible to the traffic that's passing by.

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

19 MR. MONGAN: Yes, that would be a
20 powerful Penn Central case --

21 JUSTICE BARRETT: Okay, but why would
22 it be a powerful Penn Central? I mean, in the
23 reply brief, your friends on the other side
24 point out that the Ninth Circuit and the Federal
25 Circuit couldn't identify any Penn Central cases

1 in which a court has found a taking where the
2 diminution in value is less than 50 percent.

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

6 MR. MONGAN: I don't think that that
7 would be the right way to approach that type of
8 background inquiry that's now --

9 JUSTICE BARRETT: But where are you
10 getting that? Where are you -- where are you
11 getting that?

12 MR. MONGAN: From Penn Central itself,
13 Your Honor, which says that if there is a
14 regulation authorizing a physical intrusion,
15 courts should be more likely to find a taking.
16 Kaiser Aetna applied that and found a taking
17 based on the severity and duration of the
18 physical intrusion.

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

24 JUSTICE BARRETT: But, General, my --
25 Penn Central is deliberately designed to be very

1 permissive towards regulations given the
2 pervasiveness of regulations on property use in
3 modern life. And so it's -- it's stacked in
4 favor of regulations. But yet, you know, you're
5 saying that in this particular context -- and
6 I'm not sure I read Kaiser Aetna the same way
7 that you do -- but you're saying that physical
8 occupations are different.

9 So, if physical occupations are
10 different, why isn't the easier way to handle
11 them the rule that we announced in Loretto,
12 which is to say they're subject to a per se
13 rule?

14 MR. MONGAN: Because, Your Honor,
15 there are going to be some easy Penn Central
16 cases, perhaps like the hypothetical that you
17 just offered, but then, in the middle of the
18 spectrum, there are some very difficult cases
19 involving much more modest physical intrusions
20 as to which you really need to know something
21 about the severity of the burdens and the
22 character and nature of the government action
23 and the --

24 JUSTICE BARRETT: Let -- let me just
25 --

1 MR. MONGAN: -- procedure at stake.

2 JUSTICE BARRETT: -- interrupt you
3 there so I don't lose all of my time. What is
4 the big deal here? If the severity goes to
5 compensation, as the Petitioners claim, why
6 would it be that big of a deal for California to
7 say to the unions: Listen, to compensate for
8 the taking, if you want access, you pay 50
9 bucks?

10 MR. MONGAN: Your Honor --

11 JUSTICE BARRETT: And let's just say
12 that that's -- let's say that the Court says
13 that that's a fair -- that's a fair amount for
14 the compensation. What's wrong with that?

15 MR. MONGAN: It would be a big deal
16 because then you'd be skipping past the
17 considerations as to the severity of the burden,
18 the nature of the action that inform the Fifth
19 Amendment analysis. And that wouldn't be as
20 straightforward, as my friend suggests, because
21 you'd have to apply a multitude of complex
22 exceptions before you get to determining whether
23 compensation would be required.

24 JUSTICE BARRETT: Thank you -- thank
25 you, counsel.

1 CHIEF JUSTICE ROBERTS: A minute to
2 wrap up, General Mongan.

3 MR. MONGAN: Thank you.

4 The rule we're defending today carries
5 out the purpose of the Fifth Amendment by
6 considering the burdens imposed by an
7 intermittent access regulation and the character
8 of that regulation before finding the taking.

9 The rule proposed by Petitioners would
10 require you to overrule your precedent and find
11 per se takings without regard to those important
12 factors. Now they say it would simplify the
13 doctrine, but, actually, it would make things
14 far more complicated and uncertain, first, by
15 adopting a murky threshold test that tries to
16 distinguish between a series of authorized
17 trespasses and a compensable but totally
18 undefined access easement and then by requiring
19 courts to apply a multitude of complex
20 exceptions to all the Access Regulations that
21 fall within the scope of that rule.

22 And the sheer volume of words
23 Petitioners and their amici devote to proposing
24 all those exceptions to mitigate the harmful
25 impacts of their rule is strong evidence that

1 the rule is not a sensible one. Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Rebuttal, Mr. Thompson.

5 REBUTTAL ARGUMENT OF JOSHUA P. THOMPSON
6 ON BEHALF OF THE PETITIONERS

7 MR. THOMPSON: Thank you, Mr. Chief
8 Justice. Three quick points.

9 There have been a number of
10 discussions about the easement characterization
11 in this case. We characterize the easement here
12 as the Court did in Portsmouth Harbor, called it
13 a servitude, in Causby an easement, and Kaiser
14 Aetna an easement. Neither of those -- none of
15 those cases involved a transferable or alienable
16 property-like interest.

17 Nevertheless, in all three of those
18 cases, the Court treated the takings inquiry as
19 requiring per se treatment. And the Federal
20 Circuit has done the same thing in Hendler and
21 Otay Mesa.

22 It's also worth noting that up until
23 this Court, the Board has never disputed the
24 characterization of an easement. It simply said
25 that an easement that authorized intermittent

1 access would not be a per se taking, but what
2 merits per se treatment is the taking of a
3 discrete property interest.

4 I want to quickly echo Justice
5 Barrett's concerns about Penn Central and my
6 friend's optimism that Penn Central provides
7 adequate relief here are simply unfounded. As
8 she noted, no -- no court, at least the Ninth
9 Circuit and Federal Circuit, have been able to
10 find a Penn Central case where value was
11 diminished less than 50 percent.

12 And, lastly, on the question of the
13 day, the line-drawing, we are asking the Court
14 to draw the line that it has always drawn: the
15 line between use restrictions and physical
16 invasions and occupations. That's the Court's
17 -- that's the line that this Court has always
18 drawn. And where the occupation or where the
19 invasion is minimal, minimal compensation may be
20 due, as in Loretto. But that's an easy line to
21 draw.

22 The Petitioners, on the other hand, as
23 this Court's questioning made clear, are unable
24 to draw a principled line. And for these
25 reasons, the decision of the Ninth Circuit

1 should be reversed. Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel. The case is submitted.

4 (Whereupon, at 11:09 a.m., the case
5 was submitted.)

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