No. 20-107

In The

Supreme Court of the United States

CEDAR POINT NURSERY, et al.,

Petitioners,

v.

VICTORIA HASSID, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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AMICUS CURIAE'S INTEREST IN THIS CASE

California Farm Bureau Federation ("CFBF") is a nongovernmental voluntary membership organization incorporated under and governed by the California Nonprofit Mutual Benefit Corporation Law. Cal. Corp. Code, § 7110 et seq.[1]

CFBF's purposes include working for the solution of the problems of the farm and representing and protecting the economic interests of California's farmers.

CFBF's members consist of 53 county Farm Bureau organizations, each of which is incorporated under the law cited above. They represent farmers in 56 of California's 58 counties and have in total among them more than 33,600 members, including more than 24,000 agricultural members.

CFBF participated in the development of California's Alatorre-Zenovich-Dunlap-Berman Agricultural Labor Relations Act of 1975 ("ALRA"; Cal. Lab. Code, § 1140 et seq.) and supported its passage.

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[1] Counsel of record for Petitioners and for Respondents received timely notice of CFBF's intent to file this brief. CFBF may file this brief because counsel for Petitioners submitted to this Court's Clerk a letter granting blanket consent to the filing of *amicus curiae* briefs in this matter and counsel for Respondents consented to the filing of this brief. Rules of the Supreme Court of the United States, Rule 37.2(a). No counsel for any party authored any part of this brief. No party and no counsel for any party made any monetary contribution intended to fund the preparation or submission of this brief. Rules of the Supreme Court of the United States, Rule 37.6.

Over the years, CFBF has on several occasions submitted to the California Agricultural Labor Relations Board ("ALRB") and the California Office of Administrative Law comments on regulations under the ALRA.

CFBF has sponsored legislation to amend the ALRA and has filed with California's appellate courts *amicus curiae* briefs in several cases involving disputes arising under the ALRA.

In December 2019, CFBF held its 101st Annual Meeting. During that meeting, its House of Delegates, which proportionately represents the agricultural (i.e., voting) membership of its member county Farm Bureaus, set its policies for 2020. As it has annually for decades, the CFBF House of Delegates reaffirmed this policy statement on the ALRB's Access Regulation (Cal. Code Regs., tit. 8, § 20900(e)):

> Union organizers are not exempt from California's trespass laws. We strongly object to Agricultural Labor Relations Board access rules that allow union organizers . . . to enter private property without the owner's consent. We especially object to a rule that allows union personnel to take access during a strike for the purpose of communicating with non-striking workers. We believe these rules violate the state and federal constitutional safeguards against unauthorized access of persons to private lands.

The constitutionality of the Access Regulation is the issue in this case. Given its longstanding policy that vehemently opposes the Access Regulation, and as thousands of the agricultural members of CFBF's member county Farm Bureaus are agricultural employers who are subject to the Access Regulation, CFBF is of course intensely interested in the outcome of this case.

SUMMARY OF ARGUMENT

There is no justification for the Access Regulation, and it is unconstitutional.

It lets non-employee union organizers enter the premises of an agricultural employer for up to 120 days per year to communicate with the employer's agricultural employees without any showing that the union has no alternative channels of effective communication with those employees.

Indeed, a union can effectively communicate with agricultural employees in California in several ways without having to do so at their workplace.

Accordingly, the Access Regulation is an affront to precedent of this Court.

ARGUMENT

THE ACCESS REGULATION IS UNCONSTITUTIONAL.

California's Alatorre-Zenovich-Dunlap-Berman Agricultural Labor Relations Act of 1975 ("ALRA"; Cal. Lab. Code, § 1140 et seq.) is administered by the California Agricultural Labor Relations Board ("ALRB").

Soon after the ALRA was enacted, the ALRB adopted the Access Regulation (Cal. Code Regs., tit. 8, § 20900(e)). The Access Regulation enables a labor organization to take access onto an agricultural employer's property for up to four 30-day periods each year, simply by filing with a regional office of the ALRB a notice of intention to take access, together with a proof of service on the agricultural employer. *Ibid*. No proof supporting the notice is required.

The Access Regulation has always been highly controversial, with farmers vehemently opposing what they see as a usurpation of their private property rights and a nullification of trespass laws that otherwise apply to their farms.

Moreover, as noted by the United States Court of Appeals for the Seventh Circuit in a case under the National Labor Relations Act, a "right of access to company property of nonemployees who wanted to organize a union of the company's employees . . . obviously would have a distracting, perhaps disruptive, effect on the company's operations. . . ." *Caterpillar Inc. v.*

N.L.R.B., 803 F.3d 360, 365-66 (7th Cir. 2015), citing *Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527 (1992).

The CFBF policy quoted *ante* on page 2 aptly recognizes those serious concerns. Brushing them aside, however, the California Supreme Court approved the access regulation by a four-to-three vote in *A.L.R.B. v. Superior Court (Pandol & Sons)*, 16 Cal.3d 392 (1976). Differences between agricultural and nonagricultural work settings and labor forces justified the regulation, the majority declared.

By allowing nonemployee organizers automatic access to areas of private property not open to the public, the access regulation is outrageous, despite the California Supreme Court's endorsement of it by the slimmest of votes. Automatic blanket access based on stereotypical assumptions about agricultural workplaces and workforces was not justified in the mid-1970s—more than four decades ago—when the regulation was adopted, and it is even less justified today.

Subsection (c) of the Access Regulation (Cal. Code Regs., tit. 8, § 20900(c)) states the finding:

> Generally, unions seeking to organize agricultural employees do not have available alternative channels of effective communication. Alternative channels of effective communication which have been found adequate in industrial settings do not exist or are insufficient in the context of agricultural labor.

The key phrase *alternative channels of effective communication* is from *N.L.R.B. v. Babcock & Wilcox*

Co., 351 U.S. 105 (1956). In *Babcock*, this Court ruled that nonemployee organizers may take access on an employer's private property under only very limited circumstances. *Ibid.*, at 112.

Looking at the issue, this Court in *Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527 (1992) explained at page 533 its holding in *Babcock* this way:

> As a rule, then, an employer cannot be compelled to allow distribution of union literature by nonemployee organizers on his property. As with many other rules, however, we recognized an exception. Where "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them," *ibid.* [citing *Babcock*], employers' property rights may be "required to yield to the extent needed to permit communication of information on the right to organize," *id.*, at 112. . . .

Lechmere continues at page 537:

> *Babcock's* teaching is straightforward: § 7 simply does not protect nonemployee union organizers except in the rare case where "the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels," 351 U.S. at 112. . . . Our reference to "reasonable" attempts was nothing more than a commonsense recognition that unions need not engage in extraordinary feats to communicate with inaccessible employees—

> not an endorsement of the view (which we expressly rejected) that the Act protects "reasonable" trespasses. Where reasonable alternative means of access exist, § 7's guarantees do not authorize trespasses by nonemployee organizers, even (as we noted in *Babcock, ibid.*) "under . . . reasonable regulations" established by the Board.

This Court at page 538 of *Lechmere* noted that "balancing the employees' and employers' rights" is a second stage that is to occur only after it has been determined that nonemployee organizers do not have "reasonable access to employees outside an employer's property."

This Court at page 539 of *Lechmere* continued by reaffirming that the exception to its rule in *Babcock* applies only where the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them; examples include logging camps, mining camps, and mountain resort hotels.

Tellingly, this Court declared at page 540:

> *Babcock's* exception was crafted precisely to protect the § 7 rights of those employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society. The union's burden of establishing such isolation is, as we have explained, "a heavy one. . . ."

Applying these principles to the facts at hand, the *Lechmere* Court threw out the conclusion of the

National Labor Relations Board that the union had no reasonable means short of trespass to make Lechmere's employees aware of its organizational efforts, noting:

> Because the employees do not reside on *Lechmere's* property, they are presumptively not "beyond the reach," *Babcock*, 351 U.S., at 113, . . . of the union's message. Although the employees live in a large metropolitan area . . . that fact does not in itself render them "inaccessible" in the sense contemplated by *Babcock*. [Citation omitted.] Their accessibility is suggested by the union's success in contacting a substantial percentage of them directly, via mailings, phone calls, and home visits. Such direct contact, of course, is not a necessary element of "reasonably effective" communication; signs or advertising also may suffice. In this case, the union tried advertising in local newspapers; the Board said that this was not reasonably effective because it was expensive and might not reach the employees. [Citation omitted.] Whatever the merits of that conclusion, other alternative means of communication were readily available. Thus, signs (displayed, for example, from the public grassy strip adjoining Lechmere's parking lot) would have informed the employees about the union's organizational efforts. (Indeed, union organizers picketed the shopping center's main entrance for months as employees came and went every day.) *Access* to employees, not *success* in winning them over, is the critical issue—although success, or lack

> thereof, may be relevant in determining whether reasonable access exists.

Id., at 540-41.

Lechmere is quoted at such length because it shows this Court believes that facts warranting the application of the exception to *Babcock's* no-access rule are, indeed, very rare. Employees who do not live on the employer's property are presumptively not beyond the reach of the union's message. The cited examples of channels of communication—mailings, phone calls, home visits, advertising, and signs—are available in all but the most exceptional cases.

Consistent with those principles, a blanket access rule cannot stand in California agriculture today. Fewer and fewer agricultural employees migrate:

> More than 80 percent of hired crop farmworkers are not migrant workers but are considered settled, meaning they work at a single location within 75 miles of their home. This number is up from 41 percent in 1996-98, reflecting a profound change in the nature of the crop farm workforce.
>
> Among the small share of remaining migrant workers, the largest group is "shuttlers," who work at a single farm location more than 75 miles from home and may cross an international border to get their worksite. Shuttlers made up about 10 percent of hired crop farmworkers in 2014-16, down from about 24 percent in 1996-98.

> More common in the past, the "follow the crop" migrant farmworker, who moves from State to State working on different crops as the seasons advance, is now a relative rarity. These workers made up just 5 percent of those surveyed by the NAWS in 2014-16, down from a high of 14 percent in 1992-94.

United States Dep't of Agriculture, Economic Research Service, *More Farmworkers are Settled, Fewer are Migrants*, https://www.ers.usda.gov/topics/farm-economy/farm-labor/#employment (last updated April 22, 2020; last accessed August 24, 2020).

Likewise, the number living on their employer's property has declined over the years. "As the present chapter indicates, employer-provided on-farm housing has reached a nadir. Today, all but a relative handful of workers obtain housing off-farm." Marcouiller, David et al., eds., *Rural Housing, Exurbanization, and Amenity-Driven Development: Contrasting the "Haves" and the "Have Nots" (Perspectives on Rural Policy and Planning)* 194 (2011) (in the chapter by Villarejo, Don, *The Challenge of Housing California's Hired Farm Laborers*, p. 2, https://www.prrac.org/projects/fair_housing_commission/los_angeles/TheChallenge-HousingCAhiredFarmLaborers-DVillarejo.pdf; last accessed August 24, 2020).

According to a 2003-04 survey of crop farm workers in California:

> Nearly all workers (96%) reported living off-farm in a property not owned or administered by their present employer. Of the

> remainder of workers, three percent said they resided on the farm of the grower they were working for and one percent said they lived off the farm but in a property owned or administered by their employer.

Aguirre International, *The California Farm Labor Force: Overview and Trends from the National Agricultural Workers Survey* 30, https://www.alrb.ca.gov/wp-content/uploads/sites/196/2018/05/CalifFarmLaborForceNAWS.pdf (last accessed August 26, 2020).

Even for the few who do live on their employer's property, "the statutory right to communication by the union with workers living in a labor camp has been repeatedly acknowledged" by the California Supreme Court. *Sam Andrews' Sons v. A.L.R.B.*, 47 Cal.3d 157, 174-75 (1988). Thus, it cannot be said that such employees in California are isolated from contact by union organizers as employees living in logging camps, mining camps, or mountain resort hotels might be in other states.

Indeed, the ALRB has said its regulation at Section 20910(d), which allows unions to obtain pre-petition employee lists, is "to enable the unions to reach the workers at home in order to attempt to organize them in a setting away from the potentially intimidating presence of their employer and supervisors." (Statement of Necessity for Section 20910 on page 10 of the ALRB's 1981 notice that it had reviewed its existing regulations in Sections 20900 to 20915.) That statement of necessity contradicts and undermines the ALRB's conclusion that opportunities for such contact

are so rare that a blanket right of access must be afforded to unions.

An affiliate of the most prominent union representing agricultural employees in California—the United Farm Workers of America ("UFW")—runs La Network Campesina (website: campesina.com). The affiliate is Chavez Radio Group, a California corporation that until October 2019 was named Farmworker Educational Radio Network, Inc.

The network operates at least three radio stations in California—KUFW (106.3 FM—Visalia), KMYX (92.5 FM—Bakersfield), and KSEA (107.9 FM—Salinas)—that broadcast the union's message to its target audience in heavily agricultural areas of California.

According to the website of the Cesar Chavez Foundation (URL: https://chavez foundation.org/communications-fund/), Chavez Radio Group's "flagship program, Radio Campesina, was founded by Cesar Chavez in 1983 as a way to both entertain and instill a sense of community for Latinos and working families. Radio remains a powerful medium for sharing information across communities and inspiring engaging conversations."

Another channel of effective communication available to unions for reaching farmworkers is mobile phones. According to an abstract of it, a research article first published in June 2016 found that

> a surge in mobile phone adoption and use took place during a time where production of

> labor-intensive crops like strawberries increased throughout California, farm worker settlement patterns matured, and mobile phone plans changed becoming more affordable and easier to understand. The widespread adoption of mobile phones brought more predictability to the informal agricultural job market for farm workers. . . .

Jimenez, Carlos, *From telephones in rural Oaxaca to mobile phones among Mixtec farm workers in Oxnard, California*, https://journals.sagepub.com/doi/abs/10.1177/1461444816655098 (last accessed August 24, 2020).

Confirming the proliferation of mobile phones among farm workers—and noting their use by UFW to communicate with them via social media—is this observation by Marichel Mejia, a national field coordinator for the UFW Foundation: "Farmworkers are just like everybody else—we all have smartphones. . . . Many of them are active on Facebook and WhatsApp, so we use Facebook as a means to be able to communicate with workers." Los Angeles Times' Essential California Newsletter, *Using Social Media to Make Sure Farmworkers Know Their Rights*, June 14, 2019, https://www.latimes.com/newsletters/la-me-In-essential-california-20190614-storyhtml (last accessed August 24, 2020).

In all but a very few instances, a labor organization seeking to contact and organize farm workers in California can communicate with them by doing the things cited by the *Lechmere* court. But even if agricultural employees in certain segments of California

agriculture generally could be said to be so isolated as to be beyond the reach of a union's message by alternative channels of effective communication, a blanket access rule even for that segment of the industry is not warranted.

Despite the recognition by this Court in *Lechmere* as discussed *ante* that logging camps, mining camps, and mountain resort hotels exemplify businesses that might have the requisite degree of isolation, it is inconceivable this Court would approve a blanket National Labor Relations Board rule requiring access in such an entire industry or segment thereof.

As noted *ante*, *Lechmere* first requires a case-by-case analysis of the threshold question: whether alternative channels of effective communication exist. Then, even if they do not, the Constitutional private property rights of the employer must be balanced against the employees' organizational rights. By preventing either inquiry from occurring, a blanket access rule such as the Access Regulation violates *Lechmere*.

CONCLUSION

This Court should grant the Petition.

Dated: August 27, 2020

Respectfully submitted,

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