No. 20-107

IN THE

Supreme Court of the United States

CEDAR POINT NURSERY and FOWLER PACKING COMPANY, INC.,
Petitioners,

—v.—

VICTORIA HASID, in her official capacity as Chair of the Agricultural Labor Relations Board, *et al.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* INTERNATIONAL LAWYERS ASSISTING WORKERS NETWORK (ILAW), INTERNATIONAL COMMISSION FOR LABOR RIGHTS (ICLR), GLOBAL LABOR JUSTICE–INTERNATIONAL LABOR RIGHTS FORUM (GLJ-ILRF) AND CORNELL LABOR LAW CLINIC IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

Conventions, Statutes and Regulations

Other Authorities

STATEMENT OF INTEREST

Amici are not-for-profit organizations with a strong interest in promoting the relevance of international labor rights and standards in national labor law systems. The International Lawyers Assisting Workers (ILAW) Network brings together legal practitioners and scholars around the world in an exchange of ideas and information in order to best represent the rights and interests of workers and their organizations. [1]

The International Commission for Labor Rights (ICLR) coordinates the pro bono work of a global network of lawyers and labor experts committed to advancing workers' rights through legal research, advocacy, cross-border collaboration, and use of international and domestic legal mechanisms. ICLR's legal network also responds to urgent appeals for independent reporting on labor rights violations.

Global Labor Justice-International Law Rights Forum (GLJ-ILRF) is a new merged organization that advances cross-sectoral work on global value chains and labor migration corridors, policies and laws that protect decent work and just migration, and freedom of association, new forms of bargaining, and worker organizations.

The Labor Law Clinic at Cornell Law School introduces students to the international labor law field and represents clients with international labor law issues. The clinic has done extensive work involving the International Labor Organization, the

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

Organization of Economic Cooperation and Development, the United Nations oversight mechanisms related to freedom of association, and with a broad range of private agreements that integrate international labor standards. The Clinic has also provided training seminars and workshops for judges in many countries and regions on the topic of international labor standards.

Amici are joined in a common goal to promote customary international law on freedom of association, the right to organize, and the right to collective bargaining, which include workers' right to communicate with union representatives in the workplace and the corresponding right of union representatives to have access to the workplace for such communication.

INTRODUCTION AND SUMMARY OF ARGUMENT

The California Agricultural Labor Relations Board's regulation allowing farm workers to meet with union representatives at the workplace is consistent with customary international labor law standards on freedom of association. Integral to freedom of association is the right of workers to meet with trade union representatives at the worksite to discuss union matters, including to apprise workers of the benefits of union representation – always with due regard for property rights of the employer, and without interfering with work.

International labor law recognizes the special context of the agricultural workplace but applies the same standards regarding freedom of association and trade union access. Comparative law also supports the

principle of trade union access to workplaces, including agricultural worksites; most countries provide for such access.

Access to agricultural worksites is also a commonly accepted practice in corporate social responsibility programs, "soft law" which can be defined as a quasi-legal obligation that does not have binding force, but nevertheless is seen by actors in the international sphere as a relevant guide in determining the range of acceptable conduct.

Trade union access to the workplace is vitally important for helping farm workers attain a safe and healthy workplace, not least in the midst of the Coronavirus pandemic. The ALRA regulation limiting it as to time, place and duration is a reasonable accomplishment of this customary international law principle.

ARGUMENT

I. Freedom of association is a customary international law norm that should be applied in this case to uphold the California regulation. Integral to freedom of association is the right of workers to meet with trade union representatives at the worksite to discuss union matters, including to apprise workers of the benefits of union representation – always with due regard for property rights of the employer, and without interfering with work.

A. Freedom of association and customary international law.

International instruments and state practice confirm the customary law status of freedom of

association (FOA). Freedom of association is recognized as a fundamental right in every international and regional human rights instrument, from the Universal Declaration of Human Rights and related international covenants[2] to regional human rights charters and governing documents of international organizations.

The International Labor Organization (ILO) is a specialized agency of the United Nations with 186 member states, recognized as the authoritative international body on labor rights and labor standards. Freedom of association is enshrined as the first of the four "core labor standards" in the ILO's 1998 *Declaration on Fundamental Principles and Rights at Work*. See ILO *Declaration on Fundamental Principles and Rights at Work*, International Labor Conference, 86th Session, Geneva, June, 1998 https://www.ilo.org/declaration/lang--en/index.htm. That instrument points to ILO Conventions 87 and 98 on freedom of association, the right to organize and the right to collective bargaining as the foundation of freedom of association principles. See ILO, *Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87); *Right to Organise and Collective Bargaining Convention*, 1949 (No. 98). Most member states, of which there are 187, have ratified

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[2] These Covenants are the International Covenant on Civil and Political Rights, (ICCPR), and the International Covenant on Economic Social and Cultural Rights. The United States has ratified the ICCPR, and signed the ICESCR. The ICCPR provides at Article 22, Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. The California Legislation at issue in this case allowing union access to workers, are the kind of laws which implement the protections of this ratified treaty.

conventions 87 and 98 (155 ratifications of C. 87; 167 ratifications of C. 98). *See* ILO, "Ratifications of ILO Conventions" https://www.ilo.org/dyn/normlex/en/f?p=1000:11001:::NO:::

Most countries' constitutions and laws recognize workers' rights to form and join trade unions and to bargain collectively. *See* ILO *NATLEX Database of national labour, social security and related human rights legislation* https://www.ilo.org/dyn/natlex/natlex4.home?p_lang=en.

Different countries apply different conditions and limitations on the exercise of these rights, but these variations do not belie their customary law status. Many countries' high courts have confirmed the applicability of ILO standards in their national constitutional and labor law systems. See, for example, the decision of the Canadian Supreme Court stating:

> Canada's international obligations can assist courts charged with interpreting the *Charter*'s guarantees ... The sources most important to the understanding of s. 2(*d*) of the *Charter* are the *International Covenant on Economic, Social and Cultural Rights*, the *International Covenant on Civil and Political Rights*, and the International Labour Organization's *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*…This means that these documents reflect not only international consensus, but also principles that Canada has committed itself to uphold. See *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, June 8, 2007.

The European Court of Human Rights similarly applied ILO standards as customary international law in a case involving the right to collective bargaining in light of Article 11 of the European Convention on Human Rights ("Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests"). *See* European Convention on Human Rights https://www.echr.coe.int/documents/convention_eng.pdf. The Court said:

> The Court observes that in international law, the right to bargain collectively is protected by ILO Convention No. 98 concerning the Right to Organise and to Bargain Collectively… [H]aving regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 of the Convention... *See* European Court of Human Rights, *Demir and Baykara v. Turkey*, Application no. 34503/97 (2008).[3]

[3] This decision was issued by the European Court of Human Rights, the most important European judicial authority concerning workers' fundamental freedoms and the role of international law in defining the scope of those freedoms. This decision, in which all eighteen judges of the Court's Grand Chamber concurred, is binding upon all states that are parties to the *European Convention on Human Rights and Fundamental Freedoms*. This Convention governs 800 million people.

[continued next page]

The Inter-American Court of Human Rights said "[I]n trade union matters, freedom of association is of the utmost importance for the defense of the legitimate interests of the workers, and falls under the *corpus juris* of human rights" and relied on decisions by the ILO Committee on Freedom of Association and Committee of Experts to find that Panama's mass dismissal of union members "violated the right to freedom of association enshrined in Article 16 of the American Convention." See Inter-American Court of Human Rights, *Baena Ricardo et al*. (270 workers vs. Panama), February 2, 2001) https://www.corteidh.or.cr/corteidh/docs/casos/articulos/seriec_72_ing.pdf.

In this case, the Court overturned the decision by a Turkish Court which had allowed a public employer to repudiate a collective agreement with a public sector union. The Turkish court had relied, in part, on Turkey's non-ratification of sections 5 and 6 of the European Social Charter, on the right to organize and to bargain collectively. In overturning the ruling of the Turkish Court, the European Court of Human Rights considered interpretations of the rights of freedom of association and collective bargaining issued by the ILO. Particularly significant in the European Court's decision are the following findings:

1. In determining the meaning of freedom of association, the Court must take into account "relevant rules and principles of international law" (para. 67), "relevant international treaties" (para. 69), "the interpretation of such elements by competent organs" (para. 85) and "the consensus emerging from specialized international instruments and from the practice of contracting states" (para. 85);
2. "It is not necessary that a state had ratified the entire collection of applicable instruments; it is sufficient if relevant international instruments denote evolution in the norms and principles applied in international law" (para. 86);
3. Any restrictions that affect the essential elements of trade union freedom, without which that freedom would become devoid of substance, are unacceptable (para. 144).

Under the federal system in the United States, incorporating international guarantees into law is generally the preserve of Congress and/or state legislatures. However, U.S. courts have often used international law as an interpretive lens to guide and develop constitutional law principles. As stated in *The Paquete Habana*: "International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *See The Paquete Habana*, 175 U.S. 677 (1900). See also, for example, *Graham v. Florida*, 560 U.S. 648 (2010) and *Roper v. Simmons*, 543 U.S. 551 (2005). Specifically with regard to freedom of association and ILO standards, a federal district court said:

> After analyzing "international conventions, international customs, treatises, and judicial decisions rendered in this and other countries" to ascertain whether the rights to associate and organize are part of customary international law, this court finds, at this preliminary stage in the proceedings, that the rights to associate and organize are generally recognized as principles of international law sufficient to defeat defendants' motion to dismiss. *See Estate of Rodriguez v. Drummond Co.*, 256 F.Supp.2d 1250 (N.D. Ala 2003).

B. The primary status of conventions 87 and 98 and the role of ILO oversight bodies

The International Labor Organization (ILO) and its specialized oversight organs, the Committee on Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and

Recommendations (CEACR), are authoritative sources for determining international labor standards, particularly with respect to freedom of association, the right to organize and the right to collective bargaining.

The two conventions on freedom of association, C. 87 on freedom of association and protection of the right to organize and C. 98 on the right to organize and collective bargaining, are considered to have constitutional status in the ILO. This means that member countries are obligated to comply with these conventions whether or not the countries have ratified them.

The Committee on Freedom of Association (CFA) is the specialized oversight body that receives complaints against governments for violations of conventions 87 and 98. The United States has not ratified these conventions, but is obligated by them and subject to the CFA's jurisdiction under the ILO constitution.

In dozens of cases, the CFA has confirmed that trade union access to the workplace is necessary for the application of conventions 87 and 98. A seminal case arose in the United States involving Food Lion, a Belgium-based multinational supermarket company, at stores in Virginia where union representatives sought to communicate with employees in non-work areas, including parking lots adjacent to stores. Store managers called police to have the union representatives arrested.

In its Conclusions and Recommendations in the Food Lion case, the CFA said that the United States should "guarantee access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers, in order to apprise them of the potential advantages of

unionization." *See* International Labour Office Governing Body, 284th Report of the Committee on Freedom of Association, 254th Session, Geneva, November 1992, Case No. 1523 (United States). https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2901959.

The CFA has consistently invoked this formulation – union access with due respect for property rights and business interests – in all subsequent cases involving this issue. Amici offer a sample of cases here demonstrating that such access is integral to the exercise of rights to freedom of association.

Chile

In a case involving a copper mining company management denying access to union representatives because of potential safety hazards inherent in a mining worksite:

> Although it takes note of the particular characteristics of the mining industry, which could complicate the granting of access to workers from outside an enterprise, the Committee recalls that on numerous occasions it has underlined that "governments should guarantee the access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers in order to apprise them of the potential advantages of unionization." In these circumstances, the Committee requests the Government to take all necessary measures to promote an agreement . . . so that [union] representatives can gain access to workplaces to pursue their

> union activities, without compromising the functioning of the enterprise.

See International Labour Office Governing Body, 354th Report of the Committee on Freedom of Association, 305th Session, Geneva, June 2009, Case No. 2618 (Chile), para. 360 at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_108490.pdf

Colombia

In a case involving management's denial of union representatives' access to oil field workers based on industrial safety concerns:

> The Committee therefore requests the Government to take the necessary measures to ensure that, under conditions which take into account objective security concerns and do not impede their efficient functioning, all of the enterprises in the oil sector allow external trade union officials to enter staff areas, whether to meet with their members or to inform non-unionized workers of the potential benefits of membership. *See* International Labour Office Governing Body, 374th Report of the Committee on Freedom of Association, 323rd Session, Geneva, 12-17 March 2015, Case No. 2946 (Colombia), para. 242 at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_357167.pdf.

Mauritius

In a case in which hotel management unilaterally halted a 10-year practice of permitting union representatives' access to the workplace to meet with workers during their lunch periods:

> The Committee generally recalls that the right of occupational organizations to hold meetings to discuss occupational questions is an essential element of freedom of association. Observing that the company has authorized the use of its premises for the holding of trade union meetings for more than ten years, the Committee emphasizes that the change of a longstanding policy without imperative reasons involving the withdrawal of previously granted facilities would not be conducive to harmonious labour relations. The Committee requests the Government to intercede with the parties with a view to finding a mutually acceptable solution and to keep it informed of any developments in this regard. *See* International Labour Office Governing Body, 370th Report of the Committee on Freedom of Association, 319th Session, Geneva, 16-31 October 2013, Case No. 2969 (Mauritius), para. 527 at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_228181.pdf.

Russian Federation

In a case involving management's denial of access to union representatives not directly employed by the company:

> Governments should guarantee the access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers in order to apprise them of the potential advantages of unionization and carry out their

> representation function…[The Committee] requests the Government to take the necessary measures in order to ensure that the trade union's occupational health and safety inspectors are granted access to the enterprise in order to exercise their rights to oversee the observance of labor, health and safety legislation, conferred on them by the Law on Trade Unions. See International Labour Office Governing Body, 355th Report of the Committee on Freedom of Association, 306th Session, Geneva, November 2009, Case No. 2642 (Russian Federation), para. 1161; 1179(b) at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_117701.pdf.

Sri Lanka

In a case involving denial of access to union representatives by management of an industrial factory zone pursuant to a Labor Relations Manual requiring unions to represent at least 40 percent of the workers:

> The Committee considers that these requirements do not allow access to an EPZ/FTZ enterprise of trade unions which do not have representative status in the particular enterprise, in order to inform the workers of the advantages of trade unionism. The Committee recalls that governments should guarantee access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers, in order to apprise them of the potential advantages of

> unionization…The Committee therefore requests the Government to ensure that trade union representatives are granted access to the workplace even when their organization does not have representative status in a particular EPZ/FTZ enterprise, and that permission for such access may not be unreasonably withheld, with due respect to the need to maintain the smooth functioning of the enterprise concerned. *See* International Labour Office Governing Body, 333rd Report of the Committee on Freedom of Association, 289th Session, Geneva, March 2004, Case No. 2255 (Sri Lanka), para. 131 at https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2907703.

II. International labor law recognizes the special context of the agricultural workplace but applies the same standards regarding freedom of association and trade union access.

A. ILO conventions on protecting agricultural workers

One of the earliest conventions adopted by the ILO went directly to the question of protecting agricultural workers' freedom of association. Convention 11 says, in Article 1:

> Each Member of the International Labour Organisation which ratifies this Convention undertakes to secure to all those engaged in agriculture the same rights of association and combination as to industrial workers, and to repeal any statutory or other provisions restricting such rights in the case of those

> engaged in agriculture. See ILO, *Right of Association (Agriculture) Convention*, 1921 (No. 11) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C011

ILO Convention 141, adopted in 1975, gave more content to the freedom of association rights of farmworkers:

> All categories of rural workers, whether they are wage earners or self-employed, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations, of their own choosing without previous authorization…The principles of freedom of association shall be fully respected; rural workers' organisations shall be independent and voluntary in character and shall remain free from all interference, coercion or repression… See ILO *Rural Workers' Organisations Convention*, 1975 (No. 141) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0:::55:P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:CON,en,C141,/Document.

The Committee on Freedom of Association has recognized the special characteristics of the agricultural workplace but insists on the continued application of principles regarding trade union access:

> The Committee has recognized that plantations are private property on which the workers not only work but also live. It is therefore only by having access to plantations that trade union officials can carry out normal trade union activities among the workers. For this reason, it is of special importance that the

> entry of trade union officials into plantations for the purpose of carrying out lawful trade union activities should be readily permitted, provided that there is no interference with the carrying on of the work during working hours and subject to any appropriate precautions being taken for the protection of the property. *See* ILO *Compilation of Decisions of the Committee on Freedom of Association* (6th Edition 2018), para. 1609 https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_632659.pdf.

In a Costa Rica case involving United Fruit company management forbidding trade union representatives to use public roads in large plantation areas to reach workers at their homes, the CFA said:

> [E]mployers of plantation workers should provide for the freedom of entry of the unions of such workers for the conduct of their normal activities…[T]he Committee, while recognising fully that the estates are private property, considers that, as the workers not only work but also live on the estates, so that it is only by entering the estates that trade union officials can normally carry on any trade union activities among the workers, it is of special importance that the entry into the estates of trade union officials for the purpose of lawful trade union activities should be readily permitted, provided that there is no interference with the carrying on of the work during working hours and subject to any appropriate precautions for the protection of the estate. *See* International Labour Office Governing Body, Report No. 66, (1963) Case No. 239 (Costa Rica), paras. 154, 168

https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:2898464.

B. The ILO Committee of Experts on trade union access

The Committee of Experts on the Application of Conventions and Recommendations (CEACR) is a group of 20 eminent jurists appointed by the Governing Body for renewable three-year terms. In annual general reports to the ILO conference, the Committee makes observations on countries' application of selected ratified Conventions. Where it identifies shortfalls, the Committee puts questions to the government concerned, requiring follow-up responses and information.

In a 2015 report titled *Giving Voice to Rural Workers* the Committee of Experts said:

> Rural workers' organizations should have the right to organize their activities in full freedom and to formulate their programmes with a view to defending the occupational interests of their members while respecting the law of the land. This includes, in particular, the right of trade union officers to have access to places of work and to communicate with management, the right to collective bargaining, and the right to organize protest actions.
>
> [P]roblems which may arise concerning the access of organizations of rural workers to their members should be dealt with in a manner respecting the rights of all concerned and in accordance with the terms of Convention No. 87…In this respect, the Committee emphasized the importance for

> governments to take measures by legislative means to safeguard the right of access of trade union leaders and representatives to farms and plantations to meet with workers … [A]ccess by trade union officials for the purpose of carrying out lawful trade union activities should be readily permitted, provided that there is no interference with work being performed during working hours and subject to any appropriate precautions being taken for the protection of the property. See ILO Committee of Experts on the Application of Conventions and Recommendations, *General Survey concerning the right of association and rural workers' organizations instruments*, International Labour Conference, 104th Session (2015), paras. 149, 152, 153 https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2015-104-1B).pdf.

III. Comparative law also supports the principle of trade union access to workplaces, including agricultural worksites; most countries provide for such access.

A. Comparative legislation, regulation and jurisprudence

Most countries have enacted or applied legislation, regulation and judiciary rulings to permit trade union access to workers in agricultural workplaces consistent with the rulings of the ILO Committee on Freedom of Association noted above. Having established the international law obligations, we show here how national and subnational jurisdictions have been able to put in place domestic legal and policy frameworks that fulfill those obligations, while remaining sensitive to distinct social and economic contexts.

These frameworks, in general, provide for deep cooperation between governments and trade unions, and in some cases employers. They typically balance different public interests – enforcing farmworkers' rights, empowering them to speak out about violations of law, ensuring uninterrupted production of agricultural commodities critical from the perspective of food supply, protecting property rights and business operations.

The State of California's approach to regulating access to farms is generally consistent with international law and the practice of most states, and so deserving of deference as an appropriate balancing of international obligations, workers' rights, public interest and public policy goals.

The international standards related to freedom of association on farms, as the ILO supervisory bodies have described, and as laid out above, are highly attentive to the particular vulnerability of agricultural workers, and the need for special measures to enable them to organize and exercise a voice at work. They often reside on employer property – or in housing effectively controlled by the employer – they are more likely to be internal or cross-border migrants and are more likely to be living in poverty.

Many of those vulnerabilities are relevant, as we assess the state's interest in promoting organization among these workers. The ILO's Committee of Experts has documented the inadequacy of labor inspection regimes in agriculture, in countries as diverse as Cameroon, South Africa, Tunisia, Brazil, New Zealand, the Dominican Republic and the Netherlands. See ILO Committee of Experts on the Application of Conventions and Recommendations, *Giving Voice to Rural Workers: General Survey*

concerning the right of association and rural workers' organizations instruments, International Labour Conference, 104th Session (2015), paras. 149, 152, 153 https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2015-104-1B).pdf.

Given this, and the critical role that farms and farmworkers play in food supply chains, the public interest in systems of co-enforcement of workers' rights guarantees in law – with unions playing a strong role in monitoring conditions and encouraging workers to come forward to report violations – is especially strong.

The obligation to ensure freedom of association for farmworkers is described in detail above. Below, we set forth the range of ways in which jurisdictions around the world have met their obligation and advanced public interest in strong worker voice on farms, without imperiling other interests or undermining competing rights.

In the first place, states have generally refused to weigh access against generic property rights defined in overly broad ways. Indeed, safety, security, and the continuous operation of the business are the more common countervailing interests explicitly set forth in these frameworks.

For example, Australian legislation limits trade union access to protect "the right of occupiers of premises and employers to go about their business without undue inconvenience." *See* Australia *Fair Work Act* 2009, Chapter 3, Parts 3-4 "Right of Entry" https://www.fwc.gov.au/registered-organisations/entry-permits#field-content-2-heading.

The province of Ontario states that access "must not interfere with work processes, health and safety and

other considerations." *See* Ontario *Agricultural Employees Protection Act*, 2002, S.O. 2002, c. 16 - Bill 187 https://www.ontario.ca/laws/statute/s02016

France's Labor Code requires that access for works council members and trade union representatives "not cause substantial inconvenience to the accomplishment of work" ["ne pas apporter de gêne importante à l'accomplissement du travail des salariés."]. See France *Code du Travail*, Article L. 2325-11 https://www.legifrance.gouv.fr/codes/id/LEGIARTI000006902064/2008-05-01

This is not because these jurisdictions fail to take property rights seriously – protections against government or private incursions are in many cases at least as ample as those in the United States. But in the absence of threatened damage to property, most jurisdictions understand that property rights are not especially relevant to an assessment of access to the workplace. Just as legal frameworks therefore balance access against the impact on business operations (and not property rights) as a primary consideration, the entity from which access is sought is not the property owner but the employer, and the locations to be accessed are defined as those "under the employer's control," to use the framing from Finland's Employments Contracts Act:

> The employer must allow employees and their organisations to use suitable facilities under the employer's control free of charge during breaks and outside working hours in order to deal with employment issues and matters forming part of the function of trade unions. Exercise of this right of assembly must not have a harmful impact on the employer's operations" *See* Finland Employment

Contracts Act (55/2001), Chapter 13, Sec. 2 https://www.finlex.fi/en/laki/kaannokset/2001/en20010055.pdf

Allowing access only during breaks and outside working hours, and to break rooms/lunch rooms, is similar to the ALRB rule, and is a common means across jurisdictions of limiting the impact of access on business operations.

Australia's Fair Work Act permits access to "any room or area: (a) in which one or more of the persons who may be interviewed or participate in the discussions ordinarily take meal or other breaks; and (b) that is provided by the occupier for the purpose of taking meal or other breaks." See Australia *Fair Work Act* 2009, Chapter 3, Parts 3-4 "Right of Entry" https://www.fwc.gov.au/registered-organisations/entry-permits#field-content-2-heading

Ireland seeks to enable access through a flexible standard and bilateral negotiation, rather than a strict rule, suggesting a different labor relations culture. Agricultural employers and trade union officials are required to "cooperate" in order to enable "reasonable access to Agricultural Workers" while ensuring that access "will not interfere with the normal working of the Agricultural Employer." *See Employment Regulation Order (Agricultural Workers Joint Labour Committee)* 2010, S.I. No. 164 of 2010, Schedule A "Union Access to Workers" http://www.irishstatutebook.ie/eli/2010/si/164/made/en/pdf#:~:text=The%20Agricultural%20Employers%20should%20cooperate,working%20of%20the%20Agricultural%20Employer.

Distinctions such as these reflect an intensely local assessment of the circumstances and the interests involved in regulating access, with divergence in detail and convergence in principle. Procedural

requirements in national law are details; access within reasonable limits is the common principle.

Even where there is divergence, customary international law does not require absolute uniformity of practice. As the International Court of Justice said in the Nicaragua Case:

> The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules . . . See International Court of Justice, Military and Paramilitary Activities (Nicaragua/United States of America) Merits. J. 27.6.1986 I.C.J. Reports 1986 https://www.icj-cij.org/en/case/70/judgments.

Jurisdictions also commonly regulate the *purpose* of union access to agricultural workers, in recognition of the state obligation to enable freedom of association, as well as the public interest in a robust role for worker representatives. With respect to the goal of building strong workers' organizations:

The Ontario *Agricultural Employees Protection Act* empowers the Labor Tribunal to grant access by union representatives to agricultural workplaces "for the purpose of attempting to persuade the employees to join an employees' association." *See* Ontario *Agricultural Employees Protection Act*, 2002, S.O. 2002, c. 16 - Bill 187 https://www.ontario.ca/laws/statute/s02016

Tanzania's Employment and Labour Relations Act says, "Any authorised representative of a registered

trade union shall be entitled to enter the employer's premises in order to recruit members; communicate with members; meet members in dealings with the employer; and hold meetings of employees on the premises" *See* Tanzania *Employment and Labour Relations Act*, No. 8 of 2006, Sec. 60 https://www.tanzania.go.tz/egov_uploads/documents/Employment%20and%20LAbour%20Relation%20Act.pdf.

New Zealand's *Employment Relations Act 2000* provides for union access to workplaces "to seek to recruit employees as union members" and "to provide information on the union and union membership to any employee on the premises." See New Zealand *Employment Relations Act* 2000 Secs.20-21 https://www.legislation.govt.nz/act/public/2000/0024/latest/DLM58644.html.

Many jurisdictions are also explicit about the co-enforcement role that trade unions commonly play. In addition to enabling access for unions "to hold discussions with potential members," Australia's Fair Work Act recognizes access for the purpose of enabling unions to "investigate suspected contraventions of this Act and fair work instruments and State or Territory OHS laws."

See Australia *Fair Work Act* 2009, Chapter 3, Parts 3-4 "Right of Entry" https://www.fwc.gov.au/registered-organisations/entry-permits#field-content-2-heading.

As a basic matter, many state frameworks that are premised on access to worksites (labor inspectorates especially) assume the need to collaborate with workers representatives in order to be effective. In some cases, this may be through tripartite, highly formalized structures of cooperation:

Poland's law establishing a labor inspectorate also established a Labor Protection Council to supervise its activity and the promotion of labor standards. This council is made up of members of parliament, candidates proposed by the Prime Minister, and candidates proposed by trade unions and employers organizations (Article 7) The legislation goes on to require that the "National Labour Inspectorate, during implementation of tasks, cooperates with trade unions [...]" (Article 14). The inspectorate has free access to the employer's premises (Article 23) See Act of 13 April, 2007 on the National Labor Inspectorate, https://www.pip.gov.pl/en/about-us

Other jurisdictions frame the work of co-enforcement differently. Zimbabwe's Labour Act covers access for state officials and trade unions under the same provision, stating that "Every employer shall permit a labour officer or a representative of the appropriate trade union, if any, to have reasonable access to his employees at their place of work during working hours." It does not distinguish between them in stating the purpose of this access: "advising the employees on the law relating to their employment; advising and assisting the employees in regard to the formation or conducting of workers committees and trade unions; and ensuring that the rights and interests of the employees are protected and advanced." See Zimbabwe Labour Act, Chapter 28:01, Sec. 7 http://veritaszim.net/sites/veritas_d/files/Labour%20Act%20updated%20to%202019.pdf.

In other cases, state and labor union collaborations on enforcement that are built around access to agricultural workers at their place of work may be designed to advance very specific interests.

Wages are one area where a number of jurisdictions rely extensively on trade union expertise. In India, for example, the Plantation Labour Act requires public access to plantations where workers live onsite (Section 16f). Wages for this sector are not set by the government, but rather through bipartite or tripartite negotiation, depending on the state, and are thus premised on union access to workers, and union assessments of the value of housing and other benefits received from the employer. *See* India Plantations Labour Act of 1951 http://legislative.gov.in/sites/default/files/A1951-69.pdf; see also ILO, "Wages and working conditions in the tea sector: the case of India, Indonesia and Viet Nam," December 23, 2020 https://www.ilo.org/global/docs/WCMS_765135/lang--en/index.htm.

The Labor Code of the Philippines not only grants the Department of Labor and Employment access to employer premises at any time when work is underway, in order to conduct inspections (Article 128), but requires that inspectors be accompanied by a union representatives "to determine whether the workers are paid the prescribed wage rates and other benefits granted by law or any Wage Order." See Philippines, Presidential Decree No. 442, s. 1974, Rule VII, Chapter 1, Section 18 https://www.officialgazette.gov.ph/1974/05/01/presidential-decree-no-442-s-1974/.

The goal of ensuring worker and union participation in health and safety is deemed especially critical. A number of countries provide for ample trade union access to workplaces, including or even singling out farms, to consult with workers and monitor conditions on this crucial issue.

Swedish law on labor inspection requires worker safety representatives, appointed by trade unions or elected directly by workers. If there is no such representative at a given work site, the local branch of a union may appoint an outside representative, who is granted access in order to meet workers and inspect conditions. See Sweden Work Environment Act, Ch 6, Section 2 https://www.av.se/arbetsmiljoarbete-och-inspektioner/lagar-och-regler-om-arbetsmiljo/arbetsmiljolagen/arbetsmiljoforordningen/

Norway's Working Environment Act states that, if no election for a worker safety representative has taken place, the state may enter the workplace to impose representation and carry out an election. *See* Norway Working Environment Act https://www.arbeidstilsynet.no/en/laws-and-regulations/laws/the-working-environment-act/6/6-1/

In the UK, trade unions are entitled to appoint safety representatives who can inspect the workplace. While the representative must be employed at the workplace, he/she is then entitled to represent the interests of all workers, even those not members of the union. See United Kingdom, Consulting workers on health and safety: Safety Representatives and Safety Committees Regulations 1977 (as amended) and Health and Safety Consultation with Employees) Regulations 1996 (as amended) https://www.hse.gov.uk/pubns/priced/l146.pdf

This survey of countries' treatment of trade union access to the workplace confirms a near-universal application of ILO standards balancing reasonable rights of access with due regard for other interests and rights. While approaches vary from country to country, underlying them is an international consensus on the general principle expressed in the ILO Committee on

Freedom of Association's decision in the Food Lion case, confirming workers' right to hear from trade union representatives in the workplace about the potential advantages of unionization, balanced with due respect for the rights of property and management. Owners' property rights are not fundamentally or substantially abridged by regulations granting temporary access to organizers.

These comparative examples and cases demonstrate that a trade union role in monitoring and consultation is vital in order to ensure occupational safety and health in the workplace, including the agricultural workplace, along with effective OSH inspection and enforcement systems. Safety and health in the agricultural workplace also enhance food safety and health protecting workers in the food supply chain, as well as consumers.

B. Collective bargaining for worker protections

Where workers have unions and the right to collective bargaining consistent with ILO standards, they also seek health and safety protections through collective bargaining. This is especially apparent in the Covid-19 crisis in the workplace. For example, one recent study of the nursing home sector found that nursing homes where workers had union representation had a 30% relative decrease in the COVID-19 mortality rate compared to facilities without health care worker unions.[4]

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[4] *See* Adam Dean, Atheendar Venkataramani, and Simeon Kimmel, "Mortality Rates From COVID-19 Are Lower In Unionized Nursing Homes," *Health Affairs*, September 10, 2020, at https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2020.01011?utm_medium=press&utm_source=mediaadvisory&utm_campaign=CovidFasttrack&utm_content=Dean&.

Regarding agricultural workers, the American Public Health Association has noted:

> Unions serve as a mechanism for workers to negotiate with employers to provide livable wages, health benefits, and safe working conditions. Unions have a positive effect on both unionized workers and non-union workers with respect to wages, fringe benefits, pay inequality, and working conditions. Lack of union representation and protection can result in vulnerable workers remaining silent in the face of exploitation and continuing to work in unsafe conditions. *See* American Public Health Association, "Improving Working Conditions for U.S. Farmworkers and Food Production Workers," *Policy Statement*, November 7, 2017. https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2018/01/18/improving-working-conditions.

Government inspection alone cannot meet the need. In California, the agency tasked with ensuring health and safety across worksites noted how sorely understaffed its inspectorate was, in the context of the impact of the drastic fires in September 2020 on farmworkers – there was no more than one inspector for every 1000 worksites. https://www.pri.org/stories/2020-09-18/amid-wildfires-us-farmworkers-labor-few-protections.

The level of union representation in agriculture, including in California, is extremely low.[5] This makes

[5] See Mike McFate, "California Today: The Collapse of Organized Farm Labor," *The New York Times*, February 2, 2017 https://www.nytimes.com/2017/02/02/us/california-today-farmworker-unions.html.

the effective application of the ALRB access regulation all the more important to help workers defend their lives and their health though organization and collective bargaining.

C. The ILO on trade unions and government inspection regimes

The ILO Committee of Experts has noted the relationship and mutual reinforcement of workers and union involvement alongside government inspectors in safety and health matters.

On workers and unions' involvement in safety and health:

> The Committee notes that the national legislation in many countries, such as in the Member States of the European Union, established the right for workers or their representatives to participate in risk assessments carried out by employers …The Committee emphasizes the importance of the participation of workers in the promotion of compliance, and recalls that this requires the provision of adequate and appropriate training, as well as measures to ensure that workers receive the necessary health and safety information…[The Committee recognizes the relevance of collective agreements as an important element of the national system for occupational safety and health and their significance to the progressive development of a safer and healthier working environment.
>
> [T]he Committee also notes that certain trade unions have referred to the positive experience of the involvement of trade unions

> in labour inspection…Moreover, the involvement of workers in workplace monitoring should not be linked to a reduction in the enforcement function of independent labour inspectors. *See* International Labor Conference, *Working together to promote a safe and healthy working environment*, para. 470, ILC.106/III/1B (2017), https://ilo.userservices.exlibrisgroup.com/discovery/delivery/41ILO_INST:41ILO_V2/1245409490002676?lang=en.

The ILO's Code of Practice on safety and health in agriculture says that countries' OSH policies:

> should include, as a minimum, the following key principles and objectives to which employers are committed, namely … complying with relevant OSH national laws and regulations, voluntary programmes, collective agreements on OSH and other requirements to which the enterprise subscribes or may wish to subscribe [and] ensuring that workers and their representatives are consulted and encouraged to participate actively in all elements of the OSH management system [and that] employers should consult with workers and their representatives concerning modifications to be carried out on facilities, vehicles, equipment or workstations. *See* ILO Code of Practice, Safety and Health in Agriculture (2011) https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/normativeinstrument/wcms_161135.pdf.

IV. Access to agricultural worksites is a commonly accepted practice in corporate social responsibility programs, "soft law" which can be defined as a quasi-legal obligation that does not have binding force, but nevertheless is seen by actors in the international sphere as a relevant guide in determining the range of acceptable conduct.

International organizations have recognized the role of workers and unions in agricultural and food systems: "Workers and their organizations play a key role in promoting and implementing decent work, thereby contributing to efforts towards sustainable and inclusive economic development. They also have a crucial role in engaging in social dialogue with all other stakeholders..." *See* Food and Agriculture Organization, Committee on World Food Security, "Principles for Responsible Investment in Agriculture and Food Systems" (2014) http://www.fao.org/3/a-au866e.pdf.

Mandatory access to the agricultural workplace by auditors and monitors enforcing compliance with international standards is a common feature of myriad corporate social responsibility schemes. *Amici* here offer some examples from the agricultural sector.

The Fair Labor Association is a major grouping of mostly U.S.-based companies with global supply chains in agricultural, apparel, footwear, sporting gear and other sectors. See Fair Labor Association, "Participating Companies" https://www.fairlabor.org/affiliates/participating-companies.

To participate in the FLA:

> Employers shall maintain on file all documentation needed to demonstrate compliance with the FLA Workplace Code and required laws. Employers shall make these documents available to third-party assessors commissioned by the FLA and shall submit to inspections without prior notice. *See* Fair Labor Association, "Workplace Code of Conduct and Compliance Benchmarks" (September 2020) https://www.fairlabor.org/sites/default/files/fla-charter_revised_september_2020.pdf.

U.S.-based Pepsico Corp. maintains a supplier code of conduct obligating compliance with code requirements that include mandatory access for auditors and monitors enforcing the code: The Code requires suppliers to comply with international standards on wages, working hours and benefits; forced and child labor, safe and healthy working conditions, and to "respect employees' rights to freedom of association and collective bargaining." The Code goes on to say:

> To conduct business with Pepsico, suppliers must enter into contracts and execute purchase orders that mandate compliance with the Supplier Code. With prior notice, Pepsico may conduct reasonable audits to verify Supplier's compliance with the Supplier Code. *See* Pepsico, Inc. "Global Supplier Code of Conduct" (June 2018) https://www.pepsico.com/docs/album/supplier-code-of-conduct/pepsico-global-scoc-final_english.pdf.

Many agricultural producers participate in "fair trade" programs that requires access to worksites by

third-party auditors and monitors ensuring compliance with program requirements. The main U.S.-based fair trade body, Fair Trade USA, has an "unannounced audit policy" that says:

> Unannounced audit refers to audits with no notification provided to the client by Fair Trade USA or the conformity assessment bodies (CABs) prior to the audit taking place…When advanced notification is necessary to gain access to the certified sites, such notification shall not exceed 24 hours in advance. If more notice is deemed necessary, such as in cases where travel and scheduling is particularly difficult, prior approval from Fair Trade USA is required.
>
> Whenever possible, unannounced audits will be conducted during periods of high activity (e.g. production, harvest) to ensure that findings are relevant and representative of the overall management of the sites included under the certification. Client facilitation of announced and unannounced audits is a requirement of Fair Trade USA Standards. Client facilitation of audits includes granting auditors access to all documentation (for document review including records, contracts, receipts, forms, policies, etc.), all workers (for worker interviews) and all production sites (for observation) needed to evaluate compliance with the compliance criteria. *See* Fair Trade USA, "Unannounced Audit Policy" (August 2018) https://www.fairtradecertified.org/sites/default/files/filemanager/documents/Standards/CRT_POL_UnannouncedAudits_EN_1.0.0.pdf.

One of the major agricultural producers in California, Driscoll's berries, is certified by Fair Trade USA pursuant under the program that includes mandatory access to the workplace. Driscoll's says this about the program:

> Driscoll's is committed to the well-being of our workforce and their communities everywhere we operate. This led us to establish our global labor standards and work with our independent growers to continuously improve working conditions through audits and ranch improvement plans. We knew we could do more, which is why we partner with Fair Trade USA. Their certification not only aligns with our global labor standards, but also provides an opportunity for us to directly impact the local community and people who live and work in the region. *See* Driscoll's, "Fair Trade Certification Program" https://www.driscolls.com/about/thriving-workforce/fair-trade.

These examples demonstrate that many agricultural producers, including in California, accept adherence to international labor standards enforced through mandatory auditing, monitoring and inspection programs at the workplace to ensure compliance. Producers should have no less objection to the California ALRA regulation granting limited access to union representatives to discuss organizing and collective bargaining with workers in keeping with access principles articulated by the ILO Committee on Freedom of Association.

CONCLUSION

Freedom of association, the right to organize and the right to collective bargaining have achieved the status of customary international which the Court should take into account in this case, based on legal principles enunciated in the *The Paquete Habana* and its progeny. *See* 175 U.S. 677 (1900).

Decisions of the ILO Committee on Freedom of Association and Committee of Experts have established workers' right to hear from union representatives in the workplace, and the corresponding right of access to the workplace by such representatives, as integral elements of freedom of association. Comparative law and practice confirm the applicability of the access principle.

Trade union access to the workplace is vitally important for helping workers attain a safe and healthy workplace, not least in the midst of the Coronavirus pandemic. Workers' freedom of association and safety and health rights are recognized and guaranteed in voluntary labor regulation regimes under corporate social responsibility (CSR) programs which require access to agricultural worksites of employers participating in such programs.

The California ALRA regulation authorizing union access to growers' property with limitations as to time, place and manner fits squarely in the mainstream of international, comparative and CSR norms on such access. Amici urge the Court to preserve the regulation.

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