No. 20-107

In The

Supreme Court of the United States

Cedar Point Nursery and
Fowler Packing Company, Inc.,

Petitioners,

v.

Victoria Hassid, in her official capacity as
Chair of the California Agricultural
Labor Relations Board, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR UNITED FARM WORKERS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a regulation in effect for more than 40 years that permits union organizers to occasionally meet and speak with farmworkers at the farmworkers' work sites about the farmworkers' legal rights, and does not permit disruption of Petitioners' operations, effects a *per se* taking of Petitioners' property.

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STATEMENT OF INTEREST

Amicus Curiae United Farm Workers of America ("UFW") was founded in 1962 by César Chávez, Dolores Huerta, and thousands of farmworkers stiving for more just and equitable working conditions. UFW is the nation's first successful and largest farmworker union, and UFW is currently active throughout the nation organizing in major agricultural industries. UFW uses the Access Regulation challenged here, Cal. Code Regs. tit. 8, § 20900, on a periodic basis at different farms, to speak with agricultural workers about the workers' rights under California's Agricultural Labor Relations Act, California Labor Code § 1140 *et seq.* ("ALRA" or "Act").[1]

UFW occupies a unique place among the parties and *amici* in this case. Without UFW's peaceful boycotts, strikes, public marches, and peaceful civil disobedience, California would not have passed the ALRA, and the Access Regulation would not exist. Indeed, UFW was at the negotiating table with Governor Edmund Brown and his staff and had a central role in negotiating the terms of the ALRA. UFW and the workers it represents have a strong interest in ensuring that the ALRA is administered to fulfill its stated purpose: "to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the

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[1] All parties consented to the filing of this Amicus Curiae brief. No party's counsel authored the brief in whole or in part; and no party, party's counsel, or other person—other than the UFW, its members, and its counsel—contributed money that was intended to fund the preparing or submitting of this brief.

interference, restraint, or coercion of employers of labor." Cal. Lab. Code § 1140.2. The Access Regulation was adopted immediately after the ALRA as an aspect of the ALRA "rights of employees." Cal. Code Regs. tit. 8, § 20900(e).

UFW is also familiar with the practical context in which the Access Regulation operates and was at the center of the alleged dispute involving the Petitioners. Having engaged in organizing under the Act, UFW understands how farmworkers actually live and work, and UFW possesses unique insight into the challenges involved in communicating with and representing farmworkers throughout California.

HISTORICAL AND FACTUAL BACKGROUND

I. The Continuing Exploitation of Farmworkers

In 1935, Congress passed the Wagner Act, now known as the National Labor Relations Act ("NLRA"). *See* 29 U.S.C. § 151 *et seq*. The Wagner Act excluded farmworkers from its coverage and protections.[2] Commentators and studies of historical records show this exclusion was based on racism and discrimination, as most agricultural workers were African Americans, Latinos, and other persons of color.[3] The NLRA has never been amended to include farmworkers, and the federal government continues to exclude farmworkers from many labor and employment protections. The Fair Labor Standards Act, for example, grants most

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[2] 29 U.S.C. § 152(3) (The term "employee . . . shall not include any individual employed as an agricultural laborer . . .").

[3] *See* Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 Ohio St. L.J. 95, 96 n.1 (2011).

workers wage and hour protections, but excludes farmworkers from overtime provisions and certain minimum wage protections. 29 U.S.C. § 213. The Migrant and Seasonal Agricultural Worker Protection Act, the only federal statute authorizing farmworkers to sue in court, excludes non-immigrant H-2A visa agricultural workers even though they are workers particularly subject to exploitation. *See* 29 U.S.C. §§ 1802(8)(B)(ii), (10)(B)(ii).[4] In addition, farmworkers throughout the country are excluded from most basic state-law protections like unemployment benefits and workers' compensation insurance.[5]

Farmworkers face formidable obstacles to enforcing the limited rights they do have. According to the U.S. Department of Labor, approximately 77 percent of farmworkers were born outside the United States and many do not speak any English.[6] Farmworkers on average have only an eighth-grade education.[7] Approximately 19 percent are foreign migrant workers, and 49 percent are undocumented immigrants.[8] Further, even foreign migrant workers who come to the United States under the H-2A guest worker pro-

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[4] *See also* Christopher Ryon, *H-2A Workers Should Not be Excluded From The Migrant and Seasonal Agricultural Worker Protection Act*, 2 U. Md. L.J. Race Relig. Gender & Class 137 (2002).

[5] Bon Appétit Mgmt. Co. Found. & United Farm Workers, Inventory of Farmworker Issues and Protections in the United States ii-v (2011).

[6] Trish Hernandez & Susan Gabbard, JBS Int'l, Findings from the National Agricultural Workers Survey (NAWS) 2015-2016: A Demographic and Employment Profile of United States Farmworkers i-ii (2018).

[7] *Id.* at ii.

[8] *Id.* at i. UFW's own estimates place the undocumented farmworker population at much higher rates.

gram could face deportation if they speak up, as they are authorized to work for only the specific employer on their H-2A visas and cannot seek other employment if they are fired for complaining about work conditions.[9]

Farmworkers typically have no or limited access to resources to vindicate their rights. The average annual total family income for farmworkers ranges from $17,500 to $19,999.[10] Fear of retaliation strongly discourages farmworkers from reporting violations by their employers. *See, e.g.*, *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332 (5th Cir. 1985) ("[F]arm workers who attempt to assert their rights must overcome a general background of fear and intimidation caused by the widespread practice of retaliation against those who complain about violations."). Few safety nets exist for farmworkers who lose their jobs because of employer retaliation. Only 39 percent of farmworkers are eligible for unemployment insurance and less than 50 percent are eligible for workers' compensation.[11] Approximately one in six farmworkers lives in employer-provided housing; for those workers, losing their jobs can mean immediate homelessness or housing insecurity for entire families.[12] Moreover, the dependencies so common among farmworkers arising from their precarious immigration or low socio-economic status makes

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[9] S. Poverty Law Ctr., Close to Slavery: Guestworker Programs in the United States 1 (2013).

[10] Human Rights Watch, Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment 18 (2012).

[11] *Id.*

[12] Hernandez, *supra* note 6, at ii.

many vulnerable to forced labor and other human trafficking crimes.[13]

These factors leave agricultural workers in a "climate of fear,"[14] feeling "disposable," and often reluctant to report injuries or health and safety violations.[15] They fear being fired for work-related injuries or even for seeking medical treatment from someone other than the company nurse or doctor.[16] One report describes supervisors discouraging workers from reporting work-related injuries, despite constant pain.[17] Several news outlets have covered the common practice of poultry processing facilities denying farmworkers restroom breaks—forcing them to urinate and defecate while standing or wear diapers to work.[18]

II. California's ALRA and Access Regulation

California adopted the ALRA in 1975 in an attempt to balance the historic imbalance of power between farmworkers and agricultural employers and to bring a "sense of fair play to a presently unstable and potentially volatile condition in the state." *ALRB v. Superior Court*, 16 Cal. 3d 392, 398 (1976) (hereinafter *Pandol & Sons*). The ALRA gives farmworkers the right to organize for purposes of collective bargaining. Cal. Lab. Code § 1152. Immediately after the ALRA's

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[13] Bon Appétit Mgmt. Co. Found., *supra* note 5, at iv.

[14] S. Poverty Law Ctr., Unsafe at These Speeds: Alabama's Poultry Industry and its Disposable Workers 4, 38 (2013).

[15] S. Poverty Law Ctr., Injustice on Our Plates 4, 23 (2010).

[16] S. Poverty Law Ctr., *supra* note 14, at 4.

[17] *Id.*

[18] *See, e.g.*, Roberto A. Ferdman, *'I Had to Wear Pampers': The Cruel Reality the People Who Bring You Cheap Chicken Allegedly Endure*, Washington Post (May 11, 2016, 10:39 AM).

adoption, the Agricultural Labor Relations Board ("ALRB" or "Board") carefully considered the "context of agricultural labor," concluded that "the rights of employees under [the ALRA] include the right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support," and adopted the Access Regulation to define the contours of that right. Cal. Code Regs. tit. 8, § 20900(c), (e).

While the Access Regulation is described in detail in Respondents' brief, Resp. Br. 7-10, it is important to understand the factual context in which unions, like UFW, *actually* exercise the rights provided by the Regulation. Rarely does UFW seek access for more than one 30-day period.[19] In general, UFW will either succeed quickly in garnering sufficient support to win an election, and thus access will end, or the organizing campaign will end quickly, sometimes in a matter of days—as happened at Cedar Point—and no further access will be taken.

Moreover, under California law, farmworkers are only required to be provided with a 30-minute meal period. *See* Cal. Lab. Code § 512(a). In those situations, access lasts only the length of the meal period, not the full hour permitted by the Regulation. In addition, in practice farmworkers are rarely accessible prior to or after work because they arrive at the time required by management in the morning, and after working long days they leave for home once work is completed. Moreover, many workers depend on supervisors or management for rides to and from work and are not able to speak with union organizers due

[19] Only one 30-day access period was sought with respect to Petitioners' operations: in July 2015 with respect to Fowler, and in October 2015 with respect to Cedar Point. Pet. App. G-22; G-24.

to retaliation by employers or fear of such retaliation. As such, union organizers are often limited to speaking with farmworkers during a single 30-minute meal period.

In the present case, UFW sought to take access to speak with workers on three different days in the summer of 2015 at Petitioner Fowler Packing's fields. On each occasion, Petitioner blocked UFW from taking access, threatening UFW organizers with arrest. With respect to Petitioner Cedar Point, UFW took access for two to three days in the fall of 2015. After a few days of access, no further access was taken. Although Petitioners claim that UFW "trespassed" onto Cedar Point property and interfered with operations, UFW at all times complied with the Access Regulation, as borne out by the Board's dismissal of Cedar Point's meritless unfair labor practice charge against UFW.[20] In these cases, UFW used the Access Regulation precisely as it was intended, for an extremely limited duration and in such a manner as did not frustrate Petitioners' use of their land or long-settled expectations under California law.

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[20] If union organizers interfere with agricultural employer operations, the ALRB may prohibit union access. *See* Cal. Code Regs. tit. 8, § 20900(e)(5). Employers may also obtain injunctive relief under the procedures set forth in California Code of Civil Procedure Sections 525 to 534 to prohibit "breach of the peace, disorderly conduct, the unlawful blocking of access or egress to premises where a labor dispute exists, or other similar unlawful activity." Cal. Civ. Proc. Code §§ 525-534; *see also United Farm Workers Organizing Comm. v. Superior Court*, 483 P.2d 1215, 1227 n.30 (Cal. 1971). Employers may also obtain damages done to business under California tort law. *See Maggio, Inc. v. UFW, Inc.*, 227 Cal. App. 3d 847 (Cal. Ct. App. 1991), *cert. denied UFW v. Maggio, Inc.*, 502 U.S. 863 (1991). Aside from filing charges with the ALRB that were dismissed as meritless, Cedar Point did not seek other remedies against UFW for any alleged violation of law.

SUMMARY OF ARGUMENT

Contrary to Petitioners' contention, the Access Regulation is even more necessary now than when it was first adopted. Today's California farmworkers are increasingly indigenous workers from Mexico who have limited formal educations and limited knowledge of both English and Spanish. The only effective way to communicate with these workers about their rights is in person, and the only practical means for union organizers to locate and meet with these farmworkers for such communications is to do so in the fields where the farmworkers are employed. Petitioners and their *amici* deprecate the importance of the Access Regulation, but they have never petitioned the ALRB to reconsider the Regulation and there is no record evidence to support their assertions.

The Access Regulation is not a *per se* taking of Petitioners' property. This Court's precedents distinguish between permanent and continuous physical occupations of real property (which constitute *per se* takings) and intermittent entries onto property (which are subject to the multi-factor *Penn Central* analysis). The Access Regulation falls within the second category. The limited right of union organizers to occasionally access property to speak with farmworkers about the workers' legal rights does not interfere with the property owner's *use* of the property, so it is not tantamount to a permanent physical taking. Instead, it is an intermittent occupation for a specific purpose under very stringent standards. Indeed, this Court has already recognized that similar access rights granted by the NLRA are not violations of the Fifth Amendment. Nor does the Access Regulation effectively grant a common law easement. Easements are rights appurtenant to land, not to farmworkers, who move from place to place.

Petitioners' proposed *per se* analysis also fails to treat with background state property law. California's trespass law was amended decades ago to provide that property owners do not have a right to exclude union organizers taking lawful access under the ALRA. As such, Petitioners' "bundle of rights" does not include the right to exclude that they seek to vindicate. In any event, there are many laws that limit business owners' right to exclude others from business property without interfering with the business owners' *use* of the property. Those laws are not treated as *per se* takings, and Petitioners provide no principled based for treating the Access Regulation differently.

ARGUMENT

I. The Need For The Access Regulation Is Even Greater Today Than When The Regulation Was First Adopted

The ALRB promulgated the Access Regulation after extensive public hearings and fact finding, as described both in the Regulation and in *Pandol & Sons*. Cal. Code Regs. tit. 8, § 20900; *Pandol & Sons*, 16 Cal. 3d at 414-415; Resp. Br. 7-10. The ALRB concluded that "[a]lternative channels of effective communication which have been found adequate in industrial settings do not exist or are insufficient in the context of agricultural labor." Cal. Code Regs. tit. 8, § 20900(c). Petitioners claim that this is no longer the case, Pet. Br. 10, but no record evidence supports their claim.[21] Petition-

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[21] Petitioners' brief is rife with numerous misrepresentations, including that most farmworkers speak Spanish or English (Pet. Br. 9 n.8) and that UFW owns and runs a radio station (*id.* at 9-10). The radio station is run by the Cesar Chavez Foundation, an entirely different non-profit organization that has nothing to do with labor organizing in general or UFW's organizing specifi-

ers also never petitioned the ALRB to reconsider the Regulation. *See* Cal. Gov't Code § 11340.6 ("any interested person may petition a state agency requesting the adoption, amendment, or repeal of a regulation").

The importance of the Access Regulation has actually increased since it was first adopted. In 1975, farmworkers were generally bilingual, knew some English, and had some formal education. Today farmworkers are increasingly indigenous workers from Mexico who speak only their native languages and have minimal formal education, with many not even having completed a primary education.[22] A significant number of farmworkers do not speak Spanish, let alone English, as a native language. One study estimates that there are 117,850 indigenous farmworkers in California who speak languages other than Spanish or English.[23] Many of these workers speak a language that does not even exist in written form.[24] For these workers, "[t]he largest barrier [for compiling data] is language, because although some

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cally. *Communications Fund*, Cesar Chavez Found., https://chavezfoundation.org/communications-fund/ (last viewed Feb. 6, 2021).

[22] "[A] very large minority of farm workers are semi-literate or illiterate." Richard Mines et al., California's Indigenous Farmworkers: Final Report of the Indigenous Farmworker Study to the California Endowment 8 (2010). Pamphlets, mailings, or websites will never be an effective way for these workers to understand their labor rights because of low literacy rates and lack of access to computers.

[23] *Id.*

[24] Jose Antonio Flores Farfan, *Cultural and Linguistic Revitalization, Maintenance and Development in Mexico, in* On the Margins of Nations: Endangered Languages and Linguistic Rights 217, 217 (Joan A. Argenter & R. McKenna Brown ed. 2004).

speak Spanish . . . . [m]ost have a limited Spanish vocabulary that constrains their ability to express what they are feeling."[25]

In addition, the use of the H-2A visa "guest worker" program has dramatically increased in the last two decades, from 30,201 H-2A visas certified in 2000 to 204,801 H-2A visas certified in 2019.[26] With the influx of workers that come and go every year, there are limited opportunities for workers to receive information about their organizing rights, with advocacy efforts instead focusing on basic survival skills like staying out of forced labor, slavery, or sex trafficking.[27] Further, with the proliferation of the use of Farm Labor Contractors ("FLCs"), farmworker dependence on company owners, supervisors, and FLCs for housing and transportation has only increased, making home visits or visits outside of the workplace a virtual impossibility. Many farmworkers still live in inadequate housing that is difficult for union organizers to access. A recent report from the U.S. Department of Agriculture observes that "[b]ecause hired farmworkers earn less, work shorter periods, and move frequently, they are more likely to live in crowded conditions, less likely to own their own homes, more likely to receive free housing, and more likely to live in mobile homes."[28]

A large segment of the agricultural workforce lives in inaccessible or temporary locations not suitable for

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[25] Mines, s*upra* note 22, at 4.

[26] Congressional Research Serv., H-2A and H-2B Temporary Worker Visas: Policy and Related Issues 5, 29 (2020).

[27] *See generally* Polaris Project, Human Trafficking on Temporary Work Visas: A Data Analysis 2015-2017 (2019).

[28] William Kandel, U.S. Dep't of Agric., Profile of Hired Farmworkers, A 2008 Update 28 (2008).

human habitation: vehicles, garages, sheds, barns, condemned motels, or squatter encampments. Members of the ALRB recently "witnessed migrant farmworkers sleeping both in and next to their automobiles, sometimes switching with one another between the auto itself and the adjacent mats."[29]

Moreover, while some farmworkers have cell phones and sometimes smart phones,[30] most farmworkers in California continue to lead migratory lives, constantly "changing jobs and addresses, maintaining migratory practices . . . crowding into unusual housing arrangements," and frequently changing phone numbers and phone service providers based on what is cheapest at the time.[31] Decisions published by the ALRB have long found that employers do a horrible job of maintaining current and accurate addresses for employees. *See, e.g.*, *Silva Harvesting* (1985) 11 ALRB No. 12 (employer's address list was only approximately 25% accurate, causing election to be set aside); *Gallo Vineyards* (2009) 35 ALRB No. 6 (defective address list provided by employer caused election to be dismissed).

Given these conditions, face-to-face access at the worksite is not only the most effective way of communicating with farmworkers about their labor rights—practically speaking it is the only way to do

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[29] William B. Gould IV, Chairman, Nat'l Labor Relations Bd., Agricultural Labor Relations Act 40th Anniversary (June 24, 2015).

[30] A recent study of day laborers, for instance, found that fourteen percent do not own any mobile phone. Luis Fernando Baron et al., Jobs and Family Relations: Use of Computers and Mobile Phones Among Hispanic Day Laborers in Seattle 68 (2013).

[31] Juan Vicente Palerm, Immigrant and Migrant Farm Workers in the Santa Maria Valley, California 2 (2006).

so.[32] Conveying complicated information and information that is frequently contested by employers about labor rights requires, at very least, face-to-face access. The need for worksite access is therefore stronger than ever.

II. The Access Regulation Does Not Constitute A Per Se Taking Of Petitioners' Property

Petitioners urge that the Access Regulation constitutes a *per se* taking of their property that requires just compensation under the Fifth Amendment. Pet. Br. 1. But Petitioners' theory lacks any support in this Court's precedents. This Court has treated government action as a *per se* taking of real property only if the government action destroys all beneficial use of the property (which Petitioners concede did not occur here, *see* Pet. Br. 19) or amounts to a permanent and continuous physical occupation of the property. *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 426-428 (1982). This Court has rejected Petitioners' theory that any limitations on the owner's "right to exclude" are tantamount to a permanent physical taking. Rather, in *Loretto* and the Court's other takings cases, the Court has recognized that "the absolute exclusivity of a physical occupation distinguish[es] it from temporary limitations on the right to exclude." *Id.* at 435 n.12.

Outside of the "very narrow" class of permanent and continuous occupations, *id.* at 441, this Court treats takings claims not with the "all-or-nothing" approach advanced by Petitioners, but with a multifactor analysis set out in *Penn Central Transportation Co. v. New*

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[32] One study concluded that "face-to-face encounters are necessary." Juan Vicente Palerm, Univ. of Cal., Immigrant and Migrant Farm Workers in the Santa Maria Valley, California 29 (1994).

York City, 438 U.S. 104 (1978), to determine whether a taking has occurred.[33] This multifactor approach considers the economic impact of the government action, the extent of interference with investment backed expectations, and the character of the government action. *Penn Central*, 438 U.S. at 124.

Petitioners seek to have the Court upset the established distinction between permanent and continuous occupations and "temporary limitations on the right to exclude." *Loretto*, 458 U.S. at 435 n.12. But none of their arguments for doing so is persuasive. Thus, any Takings Clause challenge to the Access Regulation must be evaluated under the *Penn Central* analysis. Petitioners have forfeited any such claim. *See* Pet. Writ of Cert. 18 n.5; *see also* Pet. Br. 33-34.

A. The Access Regulation does not interfere with Petitioners' use of their property and does not grant an easement.

Relying on *Loretto* and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), Petitioners claim that the Regulation is tantamount to a permanent physical occupation of their property. *See* Pet. Br. 21-22. Such a claim is an exaggerated mischaracterization of the Access Regulation and those cases. This

[33] The Court more recently set out a similar, but not exact, multifactor analysis in *Arkansas Game & Fish Commission. v. United States,* 568 U.S. 23 (2012). The Court there did not explain whether *Arkansas Game*'s multifactor analysis superseded *Penn Central*'s or should be applied to a specific category of takings cases. *Arkansas Game*'s approach involves factual evaluations of the character of the property, the intrusion's frequency, duration, and severity, the owner's investment-backed expectations, and the degree to which the challenged "invasion" was the intended or foreseeable result of authorized government action. *Ark. Game*, 568 U.S. at 38-39.

Court has never found a government regulation to be tantamount to a permanent physical occupation of property for purposes of the Takings Clause where, as here, there is no interference with the complaining party's *use* of the property.

In this regard, it bears emphasis that farmworkers are already being employed to work on the property and that Petitioners are not required by the Access Regulation to make any changes (or refrain from making any changes) to the property. Union organizers take occasional access to speak with the workers while the workers are already on the property for their meal breaks or before or after shifts. Petitioners have not shown that such access interferes with their use of the property in any way.

Contrary to Petitioners' contention, moreover, the access granted to union organizers, whether in theory or in this case, is very limited. With respect to the access at Cedar Point in the fall of 2015, UFW organizers only gained access for two to three days and stopped when the organizing campaign ended after a few days. In the intervening time, no union has taken any access at any Cedar Point properties. With respect to Fowler Packing, although UFW attempted to take access three times, Fowler officials prevented that access and no union organizers ever entered their property. As with Cedar Point, no union has taken access at Fowler Packing at any time since. In practice, because of the seasonal nature of agricultural operations, and because of requirements for elections to happen during agricultural peak season (Cal. Lab. Code. § 1156.3(a)(1)) and within 7 days of the filing of an election petition (Cal. Lab. Code. § 1156.3(b)), unions will either quickly win or lose an election and stop taking access, or they will determine that there is

insufficient support to continue a campaign and will end access that way. Cal. Code Regs. tit. 8, § 20900(e)(1)(C). Either way, the practical application of the Access Regulation means only sporadic and occasional entries onto employer properties. *Cf. Ark. Game*, 568 U.S. at 38 (when "temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of a compensable taking").[34]

The cases relied on by Petitioners do not support their view that the Access Regulation amounts to a permanent physical occupation. While *Loretto* observed that a permanent physical occupation of real property is "invariably" a taking, *Loretto* makes clear that permanent physical occupations mean such things as the permanent flooding of property so as to "effectually destroy" the property, the permanent placement of telegraph poles on city streets, and the permanent placement of rails, underground pipes, and wires on or in property. *Loretto*, 458 U.S. at 428-430 (citing various cases). These were all government actions that interfered with the *use* of the property.

Further, "[s]ince these early cases, this Court has consistently distinguished between . . . permanent physical occupation [cases] . . . and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within . . ." *Id.* at 428. Unlike a temporary

[34] In Petitioners' view, any regularly scheduled access rule would subject them to a taking, even if the access were only for 360 minutes or 360 seconds per year, and not just the "360 hours a year" it claims it is subjected to. *See* Br. Nat'l Ass'n of Ctys. et al. 14. Such a view of permanence conflicts with this Court's *Arkansas Game* analysis, especially where here there is no actual interference with the employers' use of their property.

invasion or government action outside the property, a permanent physical occupation "presents relatively few problems of proof," such that "[t]he placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute." *Id.* at 437. The "temporary limitations" found in *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74 (1980), *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), and the intermittent flooding cases, on the other hand, "are subject to a more complex balancing process [under *Penn Central]* to determine whether they are a taking." *Loretto*, 458 U.S. at 435 n.12.[35]

Here, Petitioners point to no facts that describe anything resembling a permanent occupation. While they claim they are subject to 120 days of access per year, this in itself is not permanent and continuous, and in practical terms, they have not been subject to more than a few days of access in the past five plus years. And, other than the abstract "right to exclude," they can point

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[35] Contrary to Petitioners' claim, Pet. Br. 15, 24-26, even where the Court found "permanent" invasions of space based on "intermittent" government activity, the Court found that there was serious economic loss *in addition* to that intermittent government activity. *See, e.g.*, *United States v. Cress*, 243 U.S. 316, 328 (1917) (holding that damage to property by "permanent liability to intermittent but inevitably recurring overflows" from government dam amounted to taking); *United States v. Causby*, 328 U.S. 256, 258, 266-267 (1946) (U.S. liable for taking based on "frequent and regular" low-altitude flights of military aircraft over land that resulted in serious personal discomfort, destruction of commercial chicken farm, and a "diminution in value of property"); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329-30 (1922) (taking found based on frequency of military barrages that demonstrated "an abiding purpose to fire when the United States sees fit," coupled with proof that "serious loss has been inflicted upon the claimant"). Here, Petitioners have not demonstrated any economic loss at all from the Access Regulation.

to no destruction, limitation, or depreciation of any value in their property because of union organizer access. This Court has often recognized that property rights in a physical thing can be described as the right to "possess, use and dispose of it." *Id.* at 435 (citing *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)). Under the Access Regulation, Petitioners continue to have the right to possess, use, and dispose of the property without limitation. *See id.* at 435-436.

That occasional union organizer access to employer property is not treated as a permanent and continuous occupation is evident from the fact that the Court said so explicitly in *Loretto*. There, the cable company attempted to analogize its cable placement to labor organizer access cases under the NLRA. *Id.* at 434 n.11. This Court found reliance on those cases was "misplaced":

> As we recently explained: [The] allowed intrusion on property rights is limited to that necessary to facilitate the exercise of § 7 rights [to organize under the National Labor Relations Act]. After the requisite need for access to the employer's property has been shown, the access is limited to (i) union organizers; (ii) prescribed non-working areas of the employer's premises; and (iii) the duration of the organization activity. In short, the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the 'yielding' of property rights it may require *is both temporary and limited.*

Id. (discussing *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)) (emphasis added).[36]

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[36] In the sixty-plus years since the *Babcock & Wilcox* decision, this Court has repeatedly affirmed that employers may be com-

Petitioners urge that the grant of access to union organizers here should nonetheless be treated like a permanent physical occupation because it is analogous to the grant of a common law easement. But the Access Regulation does not grant an easement because it allows access to the workers—not to particular property. The agricultural workers are rarely in the same place on consecutive days, moving almost daily with the harvest and pre-harvest activities. Large employers like Petitioner Fowler own or rent multiple fields in many different locations and move work crews among different locations.[37] An easement must be appurtenant to land, not to workers. *See* Restatement (Third) of Property: Servitudes § 1.2(1) ("An easement is a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement."); *id.* §1.2(3) ("The burden of an easement . . . is always appurtenant."). The access rights here also are not transferable, like an easement. If Petitioners choose to sell their land and the new landowner chooses to create a mobile home park or factory, there would be no transferable easement granting anyone access. *See Collier v. Oelke*, 202 Cal. App. 2d 843, 844 (Cal. Ct. App. 1962). Moreover, there is no principled distinction between the access rights here and the government's right to conduct inspections on property, which is not treated as an easement. *See Prop. Reserve, Inc. v. Superior Court*, 375 P.3d 887 (Cal. 2016) (no easement or taking found where government inspectors allowed to come

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pelled to grant access to union organizers without violating the Takings Clause. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538 (1992) (discussing various Supreme Court rulings on this issue).

[37] Fowler has more than 70 ranches covering 4 different counties in California, and it is common in agricultural for land lease agreements to change on a yearly basis.

onto the landowner's property for 25 to 66 days over a one-year period to conduct environmental survey, sampling, and testing activities).

Petitioners' reliance on *Nollan* does not help them because *Nollan* involved a permanent public easement to access a public beach. *Nollan*, 483 U.S. at 832. The easement attached to the property and it interfered with the owner's use of the property. *Id.* at 828-829. The owner could not, for example, put up a fence that blocked all access to the beach. *Nollan* also did not suggest that all nonpossessory interests are equivalent to "permanent occupations" for purposes of the Takings Clause. To the contrary, *Nollan* recognized that its holding was "not inconsistent with" the Court's opinion in *PruneYard*. *Id.* at 832 n.1; *Loretto*, 458 U.S. at 434 (*PruneYard* "underscores the constitutional distinction between a permanent occupation and a temporary physical invasion"). Moreover, this Court has restricted *Nollan* and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to "the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use." *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 702 (1999).

B. Petitioners' analysis ignores background principles of California property law.

Petitioners' *per se* takings analysis is also a poor fit for this case because it does not take into account the background state law. "Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Webb's Fabulous Pharmacies,*

Inc. v. Beckwith, 449 U.S. 155, 161 (1980); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998). The Fifth Amendment addresses the taking of property rights, but it does not independently grant property owners rights they did not have in the first place.[38]

Thus, this Court looks to "'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments . . ." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992); *Phillips*, 524 U.S. at 164. Property interests cannot be taken if those "interests were not part of [the owner's] title to begin with." *Lucas*, 505 U.S. at 1027.

Petitioners seek to exercise their alleged right to exclude union organizers from their property, presumably because they do not want farmworkers to know their rights, to exercise their rights, or to form a union to improve or eliminate their illegal or unfair working conditions.[39] However, California's trespass laws do *not* grant property owners or renters the right to exclude union organizers who are lawfully exercising

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[38] *PruneYard* shows how property rights are defined by reference to state law. As this Court recognized, California retained the power to limit a property owner's right to exclude people when it required the property owner to allow free speech activity on its property. *PruneYard*, 447 U.S. at 85 (quoting *Nebbia v. New York*, 291 U.S. 502, 523, 525 (1934)).

[39] Petitioners' real concern with the Access Regulation is not that it interferes with their use of property, or the value of property, but that they do not want farm workers to know or exercise their rights. For example, Fowler is being sued in a major class action by its workers for failing to pay minimum wage, failing to provide them with lawful rest periods and meal periods, and cheating them out of wages. *Aldapa v. Fowler Packing Co., Inc.*, No. 15-cv-420 (E.D. Cal. filed Mar. 17, 2015).

ALRA access rights to communicate with workers. California Penal Code section 602 specifically states, with respect to the definition of "trespass," that "this subdivision does not apply to persons engaged in lawful labor union activities which are permitted to be carried out on the property by the [ALRA] . . ." Cal. Pen. Code § 602(o).

As *Lucas* instructs, takings jurisprudence must be guided by "the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." *Lucas*, 505 U.S. at 1027. While Petitioners repeatedly complain that their "right to exclude" has been abridged by the Access Regulation, in all likelihood Petitioners' purchased or rented the property at issue *after* 1975, and never had a "bundle of rights" that contained the right to exclude union organizers taking limited access for the purpose of communicating with farmworkers. As such, there is a threshold flaw in Petitioners' claim that they have been forced to give up a "discrete property interest under California law." Pet. Br. 18. Because of California's background principles regarding organizer access, Petitioners cannot establish a taking.

C. Petitioners' analysis fails to account for numerous other restrictions on the bare right to exclude.

Petitioners claim that "history shows" the right to exclude is "so universally held to be a fundamental element of the property right" that it cannot be infringed without compensation. Pet. Br. 29. But history shows the opposite—the right to exclude is often restricted by state regulations that do not amount to *per se* Fifth Amendment takings because they do not interfere with the *use* of the property. Petitioners of-

fer no principled basis for distinguishing between the Access Regulation and many other limitations on the bare right to exclude.

In *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), for example, a motel owner sought to challenge the constitutionality of the Civil Rights Act of 1964 on a Takings Clause theory, arguing that he had a right to exclude African Americans from his motel. The Court unanimously rejected the argument, finding no merit to the "claim that the [Civil Rights] Act is a taking of property without just compensation." *Heart of Atlanta*, 379 U.S. at 261; *see also Katzenbach v. McClung*, 379 U.S. 294, 298 n.1, 305 (1964) (disposing of Fifth Amendment claim by restaurant owner that sought to exclude customers based on race, holding *Heart of Atlanta Motel* controlled, and finding "no violation of any express limitations of the Constitution").

Similarly, this Court has repeatedly affirmed the constitutionality of eviction and rent control statutes in the face of takings challenges. *See, e.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 531 (1992) (in upholding rent control statute, Court found "petitioners cannot assert a *per se* right to compensation based on their inability to exclude particular individuals"); *Edgar A. Leavy Leasing Co. v. Siegel*, 258 U.S. 242 (1922) (emergency housing law preventing evictions). Indeed, this Court "has consistently affirmed that States have broad power to regulate the housing conditions in general and the landlord-tenant relationship in particular." *Loretto*, 458 U.S. at 440.

Even more directly on point are the labor organizing access cases, under which this Court has upheld—for more than 60 years—the right of union organizers to enter onto employer property in limited circumstances to speak with workers. *Babcock &*

Wilcox Co., 351 U.S. at 112; *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538 (1992).

Likewise, in *PruneYard*, this Court rejected at Takings Clause challenge to California law that precluded shopping mall owners from excluding individuals who wished to exercise their free speech rights. *PruneYard*, 447 U.S. at 84. The Court reasoned that the access rights did not interfere with the mall owners' *use* of the property, which had already been opened to the public. *Id.* at 83.

Numerous statutes also authorize federal or state officials to enter onto private property to conduct periodic, investigatory, and/or unannounced visits.[40] Most

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[40] *See, e.g.*, 29 U.S.C. § 657 (Occupational Safety Health Administration entry at places of employment); 7 U.S.C. § 136g(1) (Environmental Protection Agency entry where pesticides are held for distribution or sale); 21 U.S.C. § 642 (access to places of business to examine facilities under Federal Meat Inspection Act); Foreign Supplier Verification Programs for Food Importers, 21 C.F.R. § 1.651(b) (third-party certification entry to conduct unannounced audit); 7 C.F.R. § 869.108 (government can enter and inspect any licensed warehouse under United States Warehouse Act); 7 C.F.R. § 46.17 (U.S. Department of Agriculture can enter place of business and inspect under Perishable Agricultural Commodities Act); Food and Drug Administration 2017 Food Code, § 8-402.11 (model code for restaurant inspections); Cal. Lab. Code § 90 ("The Labor Commissioner, his deputies and agents, shall have free access to all places of labor."); Cal. Health & Safety Code § 1596.852 (home day care inspections); *id.* at § 1743.35 (inspection of any building of Private Duty Nursing Agencies); *id.* at § 1752 (inspection of hospice care facilities); *id.* at § 17970 (inspection of buildings used for human habitation); *id.* at § 18025.5 (state or delegees may enter and inspect premises where mobile homes or manufactured homes are built).

cities have local rules subjecting restaurants to mandatory, unannounced inspections by public health officers to check for health code violations.[41]

Commonplace employment regulations are yet another limitation on the "right to exclude." Under anti-discrimination and anti-retaliation laws, employers may have to hire workers they do not wish to hire and retain or reinstate workers they wish to fire, thereby allowing these individuals onto the employer's property. Employers may also have to provide adequate sanitary facilities for the workers on the employer's property, a particular issue for agricultural employment. Employers may also have to allow employees to bring physical objects onto the employer's property. In Texas, for example, employees have a right to store their guns in their vehicles in company parking lots. *See* Tex. Lab. Code § 52.061.

In sum, what "history shows," Pet. Br. 29, is that private businesses must often tolerate limitations on the right to exclude and that businesses that choose to hire employees to work on company property must often admit the employees' rights as well. So too here.

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[41] *See, e.g.*, D.C. Mun. Regs. tit. 25, § 25-A4402.1 (2012); Omaha, Neb., Mun. Code § 11-263(b) (2020).

CONCLUSION

The Court should affirm the decision of the Court of Appeals.

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