No. 20-107

IN THE
Supreme Court of the United States

CEDAR POINT NURSERY AND FOWLER PACKING CO.,
Petitioners,
v.

VICTORIA HASSID, 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* CALIFORNIA RURAL LEGAL ASSISTANCE, INC., CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION, FARMWORKER JUSTICE, AND CALIFORNIA CATHOLIC CONFERENCE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

This case involves a state regulation affording union organizers a limited right to access property on which agricultural employees are working. The regulation restricts the time, duration, and purpose of the access. It also requires organizers to give advance notice to employers, limits the number of organizers who may be present on the property, and prohibits them from disrupting employers' business operations. The question presented is:

Whether the access regulation effects a *per se* taking of Petitioners' property under the Fifth Amendment.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

California Rural Legal Assistance, Inc. ("CRLA"), a legal non-profit, has been providing services to farmworker communities since 1968. Through its 16 rural field offices CRLA has represented thousands of farmworkers and families in employment, housing, education, and other civil matters and has engaged in extensive community outreach on issues such as wages, and workplace health and safety rights. CRLA works with federal, state, and local agencies, prompting compliance inspections and state enforcement actions. Petitioners' broad construction of property rights would severely impact CRLA's ability to work with state agencies and others to address illegal and dangerous working conditions.

California Rural Legal Assistance Foundation ("CRLAF") is a nonprofit that for over three decades has represented California's farmworkers in class and representative actions and engaged in regulatory and legislative advocacy on their behalf. CRLAF works with state agencies to address the most pressing needs of the farmworker community in labor, housing, safety, and health by bringing complaints that prompt state action. Petitioners' construction of property rights would severely impact CRLAF's legislative advocacy and its work with state agencies to redress violations affecting farmworkers' health and safety and wage and hour violations.

Farmworker Justice ("FJ") is a national advocacy organization founded in 1981 and based in Washington, DC, whose mission is to empower farmworkers to improve their wages and working conditions, immigration status, health, occupational safety, and access to justice. It provides policy analysis, educa-

tional materials, advocacy, legal representation, training, and technical assistance to farmworkers, farmworker organizations, attorneys, health-care providers, policymakers, the media and academics nationwide. Farmworker Justice has a longstanding commitment to helping enable farmworkers to communicate effectively with each other, engage in concerted activity in their workplaces, and ensure farmworkers' rights are enforced.

The California Catholic Conference ("Conference") is the public policy arm of the Roman Catholic Church in California. The Church has had a strong connection to farmworkers and has actively worked to foster respect for their work and dignity as individuals. In the nearly half century since the creation of the Agricultural Labor Relations Board ("Board"), the Conference has continued its commitment to the conditions and challenges faced by California farmworkers.

In 1969, the Conference established a committee that worked to try to fill the void that existed because the National Labor Relations Act ("NLRA") excluded farmworkers. The Committee helped conduct elections at farms, assisted in contract negotiations, and mediated disputes. In 1975, the Conference worked with Governor Jerry Brown to establish the Board, whose first chair was Bishop (now Cardinal) Roger Mahony.

Each of *Amici* have worked closely with farmworkers in California and are familiar with the access rights and protections afforded under California's comprehensive regulation of employment, as well as the farmworkers' living and working conditions. The *Amici*, and the workers they represent, have a strong interest in ensuring that the access to worksites by

non-employees guaranteed under California law is not impaired, as that would undermine the effectiveness of those protections. They submit this brief based on that interest.

This brief is submitted with the consent of the parties under Rule 37.3(a). [1]

SUMMARY OF ARGUMENT

Forty-five years ago, confronted with violence in its fields, California enacted the Agricultural Labor Relations Act ("ALRA"), Cal. Lab. Code § 1140 *et seq*., "to bring certainty and a sense of fair play to a presently unstable and potentially volatile condition in the state." ALRA Preamble, Stats. 1975, Third. Ex. Sess., Chap. 1, § 1. The ALRA, the first such statute in the country, set up a full-time regulatory agency to hold secret ballot elections on unionization and to police unfair labor practices by unions and employers.

The Board, the state's expert agency on agricultural labor relations, adopted the Access Rule in 1975 as a necessary foundation for that peace and stability. The Rule was supported by extensive findings about the inaccessibility of farmworkers outside the workplace. Half a century later, the Rule is still necessary. It provides a peaceful and effective channel of communication between workers and union organizers and specific time-place-and-manner rules to prevent interference with worksite operations, and sanctions for organizers who violate the Rule. Cal. Code Regs., tit. 8, § 20900(e)(5) (1975). The Rule has not

[1] This brief was not authored in whole or in part by counsel for a party. No person or entity, other than the *Amici*, their members or their counsel, made any monetary contribution to the preparation or submission of the brief.

interfered with the growers' property rights nor caused any loss of value to their property. It has effectively balanced the rights of all involved—the growers, workers, and unions. This balance is consistent with the Board's findings in 1975 and the basic principles embodied in the ALRA.

Forty years later in 2015 the Board held new hearings and determined, again, that no effective means of communication existed to reach farmworkers except at their workplace.[2] The Board found that the various alternative methods to worksite education advanced by employer representatives had already been tried (agency outreach) or were unworkable (relying on computers, cell phones, and social media, among others).[3] Nonetheless, Petitioners attack the Board's reasonable and limited exercise of regulatory authority without any showing of economic harm or any significant impact on the use of their property. They claim the absolute "right to exclude," even though they willingly run commercial businesses subject to state regulation.

The validity of the Access Rule is not a new issue to this Court. The growers challenged the legality of the Rule before the California Supreme Court raising the same "takings" argument that Petitioners make here. In 1976 the California Supreme Court rejected all of the growers' contentions. *Agric. Labor Relations Bd. v. Superior Court*, 16 Cal. 3d 392 (1976) ("*Agric. Labor*

[2] Memorandum of Thomas Sobel, Administrative Law Judge, & Eduardo Blanco, Special Legal Advisor, on Staff Proposal for an Education Access Regulation for Concerted Activity to the Bd., p. 3 (Nov. 23, 2015), https://www.alrb.ca.gov/wp-content/uploads/sites/196/2018/06/StaffRecommendationWorksiteAccess.pdf ("Board Memo") (quotations omitted) (accessed Feb. 8, 2021).

[3] *Id.* at p. 3.

Relations Bd."). The growers then sought review by means of this Court's then-mandatory appellate jurisdiction. This Court dismissed the appeal "for want of a substantial federal question," a decision on the merits. *Pandol & Sons v. Agric. Labor Relations Bd.*, 429 U.S. 802 (1976). The facts and the law have not changed, and this Court should uphold the validity of the Access Rule, as it did in 1976.

ARGUMENT

I. THE ACCESS RULE CONTINUES TO PLAY A CRUCIAL ROLE IN PROTECTING CALIFORNIA FARMWORKER RIGHTS UNDER THE ALRA.

a. California Enacted the ALRA and the Access Rule to Ensure Peace, Stability and Predictability in its Fields.

Farmworkers in the United States have traditionally been afforded only limited protection under federal labor laws. *See, e.g.*, 29 U.S.C. §§ 152(3), 203(f). California's farmworkers struggled to better their working conditions without the benefit of the NLRA, 29 U.S.C. § 151, *et seq.*, or state law governing their rights to organize and bargain collectively. In response to bloody clashes in the fields between workers, growers, unions, and sheriffs' deputies, which led to arrests, injuries, and deaths,[4] California enacted the ALRA to ensure peace in its agricultural fields by "guaranteeing justice for all agricultural workers" and "stability in labor relations." ALRA Preamble, Stats. 1975, Third. Ex. Sess., Chap. 1, § 1.

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[4] *See, e.g.*, Harris, David, *The Battle of Coachella Valley: Cesar Chavez and UFW v. Teamsters*, Rolling Stone (Sept. 13, 1973), https://www.rollingstone.com/culture/culture-news/the-battle-of-coachella-valley-cesar-chavez-and-ufw-vs-teamsters-71968/ (accessed Feb. 8, 2021).

The ALRA achieves this by giving farmworkers the right to organize into unions, have secret ballot elections regarding unionization, and collectively bargain, protected from intimidation by employers or unions. These statutory rights are tailored to California's agricultural industry, given its seasonal nature, transient workforce, and isolated and rural worksites. However, these rights cannot exist in a vacuum. Recognizing that workers who are unaware of "the advantages of self-organization" and their rights under the ALRA cannot exercise those rights, *Agric. Labor Relations Bd.*, 16 Cal. 3d 392, 406 (citation and quotations omitted), the Board early on adopted the Access Rule. 8 Cal. Code Regs. § 20900, *et seq*. This Rule is limited in purpose (organizational rights), time and place (120 days a year, 60 minutes before and after work and during lunch), number of union organizers permitted (two per crew) and proscribes disruptive or destructive conduct by organizers. *Id.* at § 20900(e).

b. The Board Reasonably Found that the Access Rule Was Necessary Due to the Inaccessibility of Farmworkers Outside the Workplace and the Need for Clarity.

Prior to adopting the Rule in 1975, the Board heard extensive testimony about the conditions in California agriculture. *Agric. Labor Relations Bd.*, 16 Cal. 3d at 414-415. The Board found that the migratory nature of most farmworkers impeded effective communication outside of the workplace, with workers moving into town for the harvest and living in motels, labor camps, or with friends, and then moving out to follow the next crop. "Obviously home visits, mailings, or telephone calls [were] impossible." *Agric. Labor Relations Bd.*, 16 Cal. 3d at 414-415. Workers who had settled in one location often lived in widely spread

communities, "thus making personal contact at home impractical." *Id.* Workers also spoke many languages other than English and were often illiterate. *Id.* Consequently, advertising, broadcasting, and providing printed materials were futile. *Id.*

The Board found that agricultural working conditions were very different from those of industrial employees in terms of union access to workers. No public areas for organizers to meet with workers existed in the fields. *Agric. Labor Relations Bd.*, 16 Cal. 3d at 414-415. Once the public highway ended, the growers' land began. *Id.* Pamphleting or personal contact on public property was not a reasonable alternative. *Id.* There were no parking lots—employees did not walk between a parking lot and their workplace in the fields. *Id.* Instead, workers depended on labor contractors to transport them to and from the fields in buses, which did not stop when entering the fields. *Id.* There was no public transportation to the fields. *Id.* There were no off-site lunchrooms or cafeterias where organizers could talk with employees. *Id.* at 417. Rather, workers took their breaks and ate their lunches in their cars or buses at the edge of the fields or on the jobsite. *Id.*

The Board determined that the Access Rule was essential because of the unique provisions of the ALRA, requiring speedy secret elections that must occur within seven days of the filing of a petition or within 48 hours if a strike is in progress. Cal. Lab. Code § 1156.3(b). To trigger an election, a union must present a petition or authorization cards signed by 50% of the grower's workforce. Cal. Lab. Code § 1156.3(a). The ALRA further requires elections be held only during peak season, i.e., when at least 50% of the greatest annual workforce is employed, to "provide

the fullest scope of employees' enjoyment of [election] rights." Cal. Lab. Code §§ 1156.3(b), 1156.4; *Ruline Nursery Co. v. Agric. Labor Relations Bd.*, 169 Cal. App. 3d 247, 256 (1985).

In the experience of *Amici,* the peak season for each crop may last from a few weeks to a couple of months. This means that unions have a very short time to communicate with workers, explain their positions, and obtain cards signed by 50% of the workforce to trigger an election. In that brief period, it would be impossible to adjudicate whether union access could be achieved through the traditional methods used by NLRB.[5] The Board reasonably found that access at the worksite was a practical necessity. *Agric. Labor Relations Bd.*, 16 Cal.3d at 414-415.

Law enforcement officials testified at the Board hearing in 1975 and requested that any right of access be defined with precision and clarity, lest they be caught without guidance on whether to arrest organizers for trespass or protect them for exercising a lawful right of entry.[6] In response, the Board adopted the Access Rule to bring "certainty and a sense of fair play to" California's fields by providing "clarity and predictability to all parties." 8 Cal. Code Regs. § 20900(d). The Board stated: "a Relegation of the issues to case-by-case adjudication or the adoption of an overly general rule would cause uncertainty and instability and create delay in the final determination of elections." *Id.*

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[5] *See, e.g.,* N*LRB v. Babcock & Wilcox Co.,* 351 U.S. 105 (1956).

[6] Transcript, Agricultural Labor Relations Board Meeting, August 28, 1975, Morning Session, p. A-49–A-50, https://www.alrb.ca.gov/wp-content/uploads/sites/196/2021/01/1-ALRB-Hearing-on-Access-19750828-morning-session.pdf (accessed Feb. 8, 2021).

c. In 2015, the Board Reviewed Farmworkers' Conditions and Again Found that Farmworkers Remain Inaccessible Outside the Workplace.

The conditions in California agriculture persist and are remarkably unchanged since the 1970s. California's farmworkers continue to experience the same low literacy levels; poverty; poor working and housing conditions; dependency on labor contractors for work; undocumented status; and language isolation that limit accessibility. Even in 2021, there are few alternative methods for unions to communicate with these workers.

In 2015, the Board conducted public hearings to determine workers' awareness of their rights under the ALRA and their accessibility outside of the workplace to learn about the Act. The Board considered and rejected as "unworkable" the very methods of communication proposed by Petitioners and their *Amici*—computers, cell phones, social media, radio, television, and billboards.[7] The Board found that California has seen an "emergence of a new population of immigrant workers less familiar with the American legal system, and more difficult to reach because of various language and cultural barriers. They . . . remain largely unaware of their . . . rights and protections. Thus, it is as true of farmworkers today as it was [then] that . . . very few of the individuals directly [affected] by . . . the ALRA have had [any] experience of the law."[8]

The Board's 1975 and 2015 findings, the experience of *Amici* in representing or working with this population, and other public data and academic reports

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[7] Board Memo at p. 3.

[8] *Ibid.*

demonstrate that California's farmworkers are not accessible outside the workplace and the need for the Access Rule continues.

i. *Farmworkers Remain Largely an Immigrant, Undocumented, Non-English-speaking and Low Literacy Population, Making Print Communication Futile.*

California's farmworkers are predominantly immigrants.[9] Many are undocumented,[10] with their primary language being Spanish or an Indigenous language.[11] Many are also "functionally illiterate" (reading at between fourth and seventh grade levels) or "totally illiterate" (reading below fourth grade level), struggling or unable to acquire information through print.[12]

The number of workers who identify as Indigenous continues to be significant in California's fields. It is estimated that the number of Indigenous farmworkers grew from 31,800 in 1991 to 117, 850 in 2008, an increase of more than 3.5 times.[13] They speak many

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[9] Findings from the National Agricultural Workers Survey (NAWS) 2015-2016, Research Report, p. 1, https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf (accessed Feb. 8, 2021) ("NAWS Report").

[10] *Id.* at p. 5.

[11] *Id.* at p. 10.

[12] Board Memo at p. 12-13; NAWS Report at p. 5.

[13] Mines, Richard, et al., *California's Indigenous Farmworkers, Final Report of the Indigenous Farmworker Study (IFS) to the California Endowment January 2010,* p. 8, http://www.indigenousfarmworkers.org/IFS%20Full%20Report%20_Jan2010.pdf (accessed Feb. 8, 2021) ("Indigenous Farmworker Study").

different languages[14] for which there is no written form and generally, do not speak or understand Spanish at all or only very little, and often cannot read it.[15]

In recent years, California has seen a sharp increase[16] of farmworkers from other countries entering the state under an H-2A visa[17] unaware of their legal rights.[18] The Board found in 2015 that "[w]orkers arrive [in California] without any existing knowledge of labor laws or governmental protections."[19] Many of these workers speak solely Indigenous languages.[20]

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[14] Indigenous Farmworker Study at p. 8; Board Memo at p. 15.

[15] Board Memo at p. 12.

[16] *See, e.g.*, Martin, Philip L. *The H-2A Guest Worker Program Expands in California*, ARE Update 22(1) (2018): 9–11. University of California Giannini Foundation of Agricultural Economics, https://s.giannini.ucop.edu/uploads/giannini_public/63/a3/63a3052b-045a-4a3b-b7b8-1383c590c40e/v22n1_4.pdf (accessed Feb. 8, 2021).

[17] The H-2A visa program allows employers to bring in temporary farmworkers if they can demonstrate a shortage of U.S.-based farmworkers. 8 U.S.C. § 1188.

[18] *See, e.g.,* Bauer, Mary & Maria Perales Sanchez, *Ripe for Reform: Abuses of Agricultural Workers in the H-2A Visa Program*, Centro de Los Derechos del Migrante, Inc. (2020), https://cdmigrante.org/wp-content/uploads/2020/04/Ripe-for-Reform.pdf (accessed Feb. 8, 2021) ("Ripe for Reform").

[19] Board Memo at p. 7.

[20] Botts, Jackie and Kate Cimin, *Investigation: COVID Rips Through Motel Rooms of Guest Workers Who Pick Nation's Produce*, CalMatters (Sept. 4, 2020), https://calmatters.org/california-divide/2020/08/guest-worker-covid-outbreak-california/ (accessed Feb. 8, 2021).

In 2020, California had the fourth largest number of H-2A workers nationwide.[21]

Employers maintain a high level of control over H-2A workers because federal regulations require that employers provide housing, transportation and food.[22] These workers silently tolerate isolated and precarious housing conditions and exploitative working conditions.[23] Because their employment and lawful non-immigrant status is linked to their specific employer, they are even more vulnerable to employer control than non-H-2A farmworkers.[24] This level of control also makes them less able to meet outside of work hours.

It is as true now as it was in the 1970s that communication through advertising, broadcasting, and printing materials would prove "futile" for many farmworkers.

ii. *Technology-Based Communication Remains Ineffective.*

Petitioners and their *Amici* argue that the Access Rule is unnecessary due to the availability of smart phones and social media. However, the Board in 2015 found that cell phones were not an effective alternative means of communication with farmworkers.[25]

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[21] U.S. Dept. of Lab., Office of Foreign Labor Certification, H-2A Temporary Agricultural Program—Selected Statistics, Fiscal Year (FY) 2020, https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A_Selected_Statistics_FY2020.pdf (accessed Feb. 8, 2021).

[22] Farm Labor ERS U.S. Dept. of Agric., Economic Research Service, Farm Labor, https://www.ers.usda.gov/topics/farm-economy/farm-labor#h2a (accessed Feb. 8, 2021).

[23] Ripe for Reform at p. 27.

[24] *Id.* at p. 4

[25] Board Memo at pp. 10-16.

Internet access and data are a cost-prohibitive luxury for many low-wage workers.[26] In 2019, the average annual salary for California's farmworkers was $27,550.[27] The Board found that workers use "their wages to pay rent, to pay for food, to send to Mexico or for the doctor, after that they don't have money for the internet".[28] This, presumably, also extends to smart phones and data plans. Currently, only about one-third of California rural households subscribe to internet service.[29]

Rural families spend over 30 percent of their income on rent; after Los Angeles, the next four highest cost-burden counties in California are rural.[30] Almost half of the households earning $30,000 or less a year had to cancel or shut off their cell phone service due to its high cost.[31] This is similar to the 2015 findings that

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[26] *Id.* at p.10.

[27] Occupational Employment and Wages, May 2019, 45-2092 Farmworkers and Laborers, Crop, Nursery, and Greenhouse, https://www.bls.gov/oes/current/oes452092.htm#st (accessed Feb. 8, 2021).

[28] Board Memo at p. 5.

[29] Johnson, Sydney, *Why Internet Stops Once School Ends for Many Rural California Students*, PBS NewsHour (Dec. 31, 2019), https://www.pbs.org/newshour/education/why-internet-stops-once-school-ends-for-many-rural-california-students (accessed Feb. 8, 2021).

[30] Pruitt, Lisa R. and Zach Newman, *California's Rural Housing Crisis: the Access to Justice Implications December 2019, Part III of CalATJ's Rural Justice Policy Paper Series*, UC Davis Legal Studies Research Paper Series (Dec. 2019), p. 7-8, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3564441 (accessed Feb. 8, 2021).

[31] Smith, Aaron, *et al.*, *U.S. Smartphone Use in 2015,* PEW Research Center (Apr. 1, 2015), p. 3, https://www.pewresearch.org/internet/2015/04/01/chapter-one-a-portrait-of-smartphone-ownership/#cancel-phone (accessed Feb. 8, 2021).

cell phones are not an effective alternative means of communication with farmworkers.[32] Additionally, cell phone signal and home internet service in rural areas of California are unreliable.[33]

Even if California farmworkers had access to data or the internet, they lack the literacy necessary to use computers. The Board found in 2015 that such workers cannot "use technology to acquire . . . understand . . . or interpret written materials."[34] Many lack the necessary reading level to use technology "to (a) obtain information (knowledge) from the computer and then (b) have the ability to read and interpret that information."[35] Workers are unable to learn about their ALRA rights without technology literacy.

Amici know from personal experience that most farmworkers they serve lack basic internet skills to learn about their rights. During the COVID-19 pandemic, it has proven a challenge for *Amici*, and public agencies to rely on technology to serve this population. What may generally be considered simple tasks, like joining a conference or video call, are immensely difficult tasks for farmworkers.

iii. *Farmworkers Are Inaccessible Where They Live.*

Farmworkers compete in the scant market for low income housing in rural areas and disproportionately live in overcrowded housing, in apartments, single-family homes, motels, or hotels, with no real connec-

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[32] Board Memo at pp. 10-16.

[33] *Id.* at p. 15.

[34] *Id.* at p. 13.

[35] *Ibid.*

tion to where they might work. Many of California's farmworkers are quietly homeless, living in trucks, tents, cars and garages, making them inaccessible outside the workplace.

Amici regularly conduct outreach to farmworkers and find that when housing is provided through the employer in any way, the employees are subject to that employer's unofficial oversight and control. For example, employers who put up their workers in motels, like Petitioner Cedar Point, can control whether the motel provides internet access, there is a common area for group meetings, and workers can receive mail or newspaper subscriptions. Most employer-provided housing at motels, in labor camps, or even in single family homes, have rules establishing curfews, requiring visitors to sign-in, and even require permission from foremen who live on-site before visitors can enter the housing or common areas. [36]

In the Salinas Valley, for example, due to the statewide housing crisis and lack of affordable housing, a "company town" for farmworkers has been built.[37] Due to the lack of affordable housing, employer-provided housing for workers is likely to increase.[38] California's H-2A workers live in employer-provided housing, as required by law. 8 U.S.C. § 1188(c)(4).

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[36] *See also*, Ripe for Reform at p. 27.

[37] Morehouse, Lisa, *How a Farmworker 'Company Town' is Taking Shape in the Salinas Valley*, KQED (Nov. 5, 2016), https://www.kqed.org/news/11155240/how-a-farmworker-company-town-is-taking-shape-in-the-salinas-valley (accessed Feb. 8, 2021).

[38] Cimini, Kate, *Do California Ag Counties Hold Solutions to Monterey County Farm worker Housing Crisis*, CalMatters (Nov. 23, 2020), https://calmatters.org/california-divide/2020/11/monterey-county-farmworker-housing-crisis/ (accessed Feb. 8, 2021) (solutions include more employer-provided housing).

This very real control over workers impedes the ability of *Amici* to reach farmworkers. As recently as 2018, outreach workers from CRLA Foundation were ordered to leave an employer-operated labor camp and threatened with legal action for attempting to distribute outreach materials about worker rights. The California Catholic Conference has provided spiritual support services and education to farmworkers for decades. Currently their clergy and lay workers are provided access to workers by labor contractors and employers. However, the Conference's clergy and lay workers have been expressly prohibited from bringing union material or discussing organizing with the workers.

iv. *The Widespread Use of Labor Contractors Means that Communication at the Workplace is Essential.*

California's agricultural workforce is composed of employees hired directly by growers and those hired indirectly by labor contractors. Since 2007, there has been a sharp increase in the use of labor contractors in California.[39] In the California counties with the most farmworkers, labor contractors predominate. Sixty-five percent of farmworkers in Kern County are hired by contractors, 47% in Fresno County and 41% in Monterey County.[40] Consequently, the *grower's* property, in particular, is the only place where union orga-

[39] Martin, Philip, *et al*. Employment and earnings of California farmworkers in 2015, California Agriculture, Volume 72, Number 2, p. 108, http://www.ncaeonline.org/wp-content/uploads/2019/08/Employment-and-Earnings-of-California-Farmworkers-in-2015.pdf (accessed Feb. 8, 2021) ("Martin, 2015 Farmworker Earnings").

[40] *Id*. at p. 111.

nizers can effectively communicate with all workers, both direct and indirect hires.

Under the ALRA, labor contractors are excluded from the definition of agricultural employer. Cal. Lab. Code § 1140.4(c). Bargaining units are grower-based and collective bargaining happens solely between unions and growers, not labor contractors. Cal. Lab. Code §§ 1140.4(c), 1156.2, 1156.4, *see also Vista Verde Farms v. Agric. Labor Relations Bd.*, 29 Cal. 3d 307, 323-325 (1981). Workers hired by labor contractors are part of the bargaining unit of the grower that hired the labor contractor. *See* Lab. Code §§ 1140.4(c), 1156.2; *Gerawan Farming, Inc. v. Agric. Labor Relations Bd.*, 2018 CA ALRB LEXIS 1, *76 (2018).

This widespread practice of using labor contractors results in a workforce that inaccurately identifies the labor contractor as their employer and not the entity who hired the labor contractor. Consequently, workers do not know who their ALRA employer is. They depend on their labor contractor to know both the location of the fields and the name of their employer. Labor contractors are not fixed-site employers. Crews move from one grower's field to another. As a result, if unions could contact workers only at their homes, the workers are unlikely to be able to identify their ALRA employer and, therefore, cannot sign a union authorization card needed to trigger an election.

Even if workers know the name of their ALRA employer, union organizers are likely unable to find the rest of the workforce of that employer, whether hired directly or indirectly, outside their worksite. As crews move from site to site, the workers do not know which co-workers will be the voters at any potential election. For example, union organizers attempting to organize workers employed by Petitioner Fowler Packing would

have to locate and speak to 1,800 to 2,500 employees scattered throughout hundreds of miles in the Central Valley. In order to trigger an election, they must obtain authorization cards from 50% of this workforce. They simply cannot do this without access to workers at their job sites.

v. *The Characteristics of Agricultural Work Make Communication at the Work Site Essential.*

California's agricultural industry is not composed of small family-owned farms, but of commercial agrobusiness, farming vast areas of land with private dirt roads separating each grower's fields.[41] Once the public highway ends, the grower's land begins. There are no parking lots or public areas. There are no onsite break rooms—just the fields. Employees congregate next to the cars or buses parked in the dirt roads to rest and eat.[42] There is no fixed worksite, no factory or office building, no neighborhood coffee shop or restaurant around the corner where workers can congregate for pre- or post-work meetings. Workers travel from field to field, sometimes within a certain geographical area and sometimes between cities, counties, and even states.

More than a third of California's local farmworkers are dependent on others, including *raiteros*,[43] labor

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[41] *See, e.g.*, *Piscando fresas en Salinas California . . . [Harvesting strawberries in Salinas, California],* video posted on September 26, 2016, https://youtube/eC7cbuO9V-I (accessed Feb. 8, 2021).

[42] *See, e.g.*, *Pisca de tomate en Gilroy ca . . . [Tomato harvest in Gilroy, California],* video posted Aug. 10, 2020, https://youtube/esUXuMpqgCg (accessed Feb. 8, 2021).

[43] "*Raitero*" is derived from the English word "ride" that is used

contractors, and company buses, to get to work.[44] Company buses, caravans led by the contractors, and "*raiteros*" park in the dirt roads next to the fields for each day of work.[45] Oftentimes, the *raitero* is their foreperson, crew leader or even their employer. H-2A workers are legally entirely dependent on their employer to provide them with daily transportation between their housing and the worksite. 20 C.F.R. §655.122(h)(3).

Many farmworkers are subjected to far more formal and informal control than Petitioners admit. Drivers of employer-provided vehicles and *raiteros* are unlikely to wait for a worker who wants to stay after work hours to talk to an organizer. No one can talk to workers as they enter or leave their worksites because the drivers and car drivers continue driving.

It would be impractical for union organizers to follow workers home from the fields. Many farmworkers travel one to two hours to reach their workplace from home. More than 15% of California's farmworkers travel more than 75 miles each way to and from work.[46] At the end of their workday, they return to many different towns and cities, including, for some, cities lo-

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by Spanish-speaking individuals to mean a person who charges a fee for providing a ride to work. NAWS Report at p. 19, n. 19.

[44] NAWS Research Report at p. 19.

[45] *See, e.g.*, *Lechugeros en salinas ca [Lettuce harvesters in Salinas, Ca]*, video posted September 27, 2012, https://www.youtube.com/watch?v=OtuS5LBym7M (accessed Feb. 8, 2021) (buses parked by lettuce fields).

[46] U.S. Department of Labor, National Agricultural Workers Survey, Table 13: Hired Crop Worker Demographics, California Estimates, Six Time Periods, https://www.dol.gov/agencies/eta/national-agricultural-workers-survey/research/data-tables (accessed Feb. 7, 2021).

cated in Mexico. Thousands of farmworkers living in Mexico cross the California-Mexico border every day to work in California.[47]

Access at their homes is equally challenging. In the Board's 2015 Hearings, farmworkers reported that receiving information after work was not feasible because of the long, difficult hours farm work requires.[48] Farmworkers start working before dawn and have long commutes home. After work, they pick up their children, cook food, do laundry, and prepare for the next workday. Night work, a growing trend,[49] makes home access even harder. At peak harvest time, when elections must occur, employees work even longer hours.

d. Without the Access Rule, Farmworkers Would Be Unable to Effectively Exercise Their Rights under the ALRA.

Farmworkers' organizational rights are the crux of the ALRA. However, their right to self-organization would exist in a vacuum without the ability "to learn the advantages of self-organization from others." *Agric. Labor Relations Bd.*, 16 Cal.3d at 406; 8 Cal. Code Regs. § 20900(b) (1975). This Court has held that the right to organize "necessarily encompasses the right [to] effectively . . . communicate with one another regarding self-organization at the jobsite" and that both employee organization rights and employer-property

[47] Pajanor, Appaswamy, *The Hands that Feed Us*, Catholic Charities Diocese of San Diego, https://ccdsd.org/the-hands-that-feed-us/ (accessed Feb. 7, 2021).

[48] Board Memo at p. 16.

[49] *Night Work: A Growing Trend in Western Agriculture?*, Western Center for Agricultural Health and Safety (Mar. 7, 2019), https://aghealth.ucdavis.edu/news/night-work-growing-trend-western-agriculture (accessed Feb. 8, 2021).

rights must be accommodated "with as little destruction of one as is consistent with the maintenance of the other." *Beth Isr. Hosp. v. NLRB*, 437 U.S. 483, 491 (1978) (quotations and citations omitted).

Invalidation of the Access Rule would decimate the organizational rights granted by California to its agricultural workforce. The isolation that typifies the life of farmworkers also impedes their access to other labor information about their right to minimum wages, overtime, safe housing, protection from heat and disease exposure, and the right to organize. *Amici* themselves struggle to find effective ways of imparting information about labor and health and safety protections and spiritual support services to the farmworker community. Often the only message that can be conveyed is that someone is there for you, at a church or in a law office. The right to organize and the way to do it is a far more complex message that cannot be effectively shared in radio sound bites or flyers.

Even if communication of rights is accomplished, workers are then faced with the very real threat of retaliation.[50] Sometimes even having a flyer or asking a question about their rights can lead to abuse, surveillance and termination. Confidence in the anti-retaliation provisions of the ALRA, as well as the understanding that there are people there to support them, cannot come from a piece of paper or a radio message. It comes from in-person conversations and discussions about the issues. Only after overcoming both the lack of information and fear of reprisal can farmworkers actually exercise the oth-

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[50] At the 2015 Board hearing, workers testified that due to their undocumented status they fear retaliation and this makes them more vulnerable to unlawful practices. Board Memo at p. 5. They feel "powerless." *Ibid.*

erwise abstract right to self-organize and engage in collective activity. The Access Rule helps to make their rights a reality.

e. Case-by-Case Adjudication of Union Access to the Worksite Would Be Unworkable Under the ALRA.

The Board chose to proceed by regulation rather than the case-by-case approach utilized by the NLRB. *See Babcock & Wilcox Co.*, 351 U.S. 105. The Board and the California Supreme Court recognized that a case-by-case approach would be slow and destructive to farmworkers' organizational rights. *Agric. Labor Relations Bd.*, 16 Cal. 3d at 416 ("Relegation of the issues to a case-by-case adjudication . . . would cause further uncertainty and instability") (quotations omitted).

A case-by-case approach is at odds with the seasonal and transitory nature of agricultural work. Each claim for union access would have to be adjudicated through unfair labor practice procedures. *See* Cal. Lab. Code §§ 1160-1160.9. Access would have to be requested and when denied, a charge filed, an investigation conducted, a hearing conducted, a decision rendered and only then, if an appeal is not taken could access be granted. Cal. Lab. Code §1160.8. The seasonal peak is generally over in between a few weeks and couple of months, meaning that the workers who signed union cards will be long gone. The next season might very well have 100% turnover in workers, so a union would have to start collecting cards again. *Harry Carian Sales v. Agric. Labor Relations Bd.*, 29 Cal.3d 209, 239 (1985) ("[H]igh employee turnover is inherent in agricultural employment"). These conditions have not changed since 1975.

As the California Supreme Court stated, "[G]eneral economic regulations affecting property rights are not constitutionally invalid merely because they may be inappropriate in the case of a few individual property owners . . . We conclude that the decision of the ALRB to regulate the question of access by a rule of general application transgresses no constitutional command." *Agric. Labor Relations Bd.*, 16 Cal. 3d 392, 411. The same is true now, and Petitioners' claim must likewise fail as no injury or constitutional violation can be shown.

II. PETITIONERS HAVE FAILED TO PRESENT A JUSTICIABLE CLAIM.

Petitioners' lawsuit lacks the fundamental allegations necessary to establish a case in controversy, *viz,* that an injury or intrusion on their asserted property interests occurred and is ripe for review.

Petitioners must show "the irreducible constitutional minimum . . . that they have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citations and quotations omitted). This requires a showing of harm that is both "concrete and particularized." *Id.* at 1545.

The mere fear of future injury based on hypothetical scenarios is not adequate. The plaintiff must show that he "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged official conduct. *L.A. v. Lyons*, 461 U.S. 95, 101-102 (1983) (citations omitted). The injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical." *Id.* These tenets apply even though Petitioners assert a constitutional claim. *Golden v. Zwickler*, 394 U.S. 103, 110 (1969) ("No federal

court has jurisdiction to pronounce any statute . . . void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies") (quotations omitted).

a. No Actual Injury Is Alleged in Petitioners' Complaint.

Petitioners do not allege an injury caused by the Rule. The only arguable harm that Cedar Point experienced was entry by a private party, the United Farm Workers ("UFW"), that was neither authorized nor sanctioned by Petitioners. Cedar Point alleges that the UFW served written notice of intention to take access only "after" organizers entered Cedar Point property. Dist. Crt. Dkt. 1, ¶ 32. As alleged, this means that the UFW's entry of the Cedar Point property was *not* pursuant to the Access Rule, which requires filing and service of the notice prior to entry. 8 Cal. Code of Regs. § 20900. Petitioners agree, and allege, that the UFW violated the regulation. Pet. App. A10, G9-G10.

Petitioner Fowler alleges no union entry whatsoever. Instead, complaining that the UFW *attempted* to gain access and was denied access on one occasion. *Id.* at A11, G11; Dist. Crt. Dkt. 1, ¶ 38-39.

Neither Petitioner alleges that the Board found the UFW's alleged actions to be within the scope of the regulation, or directed that access be granted. Cedar Point filed an unfair labor practice charge with the Board after the entry, but does not mention the status of that charge. The UFW filed an unfair labor practice charge against Fowler asserting that Fowler unlawfully blocked union organizers from entering Fowler's property in violation of the Access Rule, but the charge was withdrawn. Pet. App. A11, G11; Dist. Crt. Dkt. 1,

¶¶ 35, 40. There is no allegation that there has been any administrative determination by the Board based on the Access Rule. There has been no administrative order directing that access be granted to either Cedar Point's or Fowler's property.

Finally, and determinatively, for a "takings" claim, there are no allegations that either Petitioner suffered any economic injury or a limit on the use of their property. Petitioners allege only that, but for the access regulation, they would have been able to freely exclude union organizers from their property. Pet. App. G10-G11; Dist. Crt. Dkt. 1, ¶¶ 35, 40. That is not enough.

b. A Takings Claim Must Be Based on Actual Injury.

Petitioners base their "takings" claim on an alleged physical invasion of the property. But they fail to demonstrate a concrete and tangible injury to their property interests, which is required by the law.

In every one of the "per se" cases relied upon by Petitioners, a taking resulting in demonstrable injury had actually occurred, or was imminently threatened, and was a direct result of government activity or activity sanctioned by the government. Petitioners improperly equate the possibility of limited and temporary union organizer presence to the permanent cable and boxes installed on Loretto's apartment building under government order, [51] the government suing to compel public access to Kaiser-Aetna's marina, [52] and the government placing and firing cannons across Portsmith Harbor Land & Hotel Company's land,

[51] *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419 (1982).

[52] *Kaiser Aetna v. United States*, 444 U.S. 164, 165 (1979).

scaring tourists away.[53] Petitioners' Complaint contains no comparable allegations.

The alleged apprehension about some speculative future entry by a union is insufficient. In *Portsmith Harbor*, two prior cases had been properly dismissed for a failure to allege a taking. 260 U.S. at 328. The first case alleged that the guns had been fired some years earlier and plaintiffs had "the apprehension that the firing would be repeated." *Id.* at 328. The second case alleged "some occasional subsequent acts of gun fire." Both cases were found to be lacking facts adequate to establish a taking. *Id.* at 330.

i. *The Claims Are Not Ripe.*

Petitioners seek to bypass the ripeness requirement and "entangl[e]" the courts in "abstract disagreements over administrative policies" and subject the Board to judicial interference in the absence of an "administrative decision [that] has been formalized and its effects felt in a concrete way by the challenging parties." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 732-733 (1998) (quotations and citations omitted).

A challenge to a regulation must be ripe for review, issues must be fit for judicial resolution, and any potential hardship to the parties considered. *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). The allegations must be "fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Id.*

Petitioners have not alleged concrete facts showing that the Access Rule was used to force admission of

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[53] *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922).

organizers to Petitioners' property, or that organizers are likely to take access at any time. Nor have they demonstrated any economic harm, loss of use, or threat of harm that would rise to the level of a taking. As demonstrated above, and fully addressed in Respondents' brief, evaluation of whether a taking has occurred requires consideration of the scope of the alleged injury and whether it rises to the level of economic impact necessary to demonstrate a taking. *Penn. Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992). Petitioners do not even attempt to make such a showing.

Their asserted fear of impingement of their so-called "right to exclude" likewise fails to allege any imminent threat of injury to their property rights, economic or otherwise. Their fears are not "real and immediate," but are instead "conjectural" and "hypothetical." *Lyons,* 461 U.S. at 101-102 (constitutional challenge to chokehold not ripe, although victim had previously been subjected to a chokehold and feared it might occur again).

Even a showing that the regulation is likely to be applied is inadequate unless there is sufficient factual development to evaluate the hardship—potential harm—that will be suffered if review is not granted. *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162 (1967). The Court examines the impact of the regulation not generally, or based on speculation, but with respect to the actual application of the regulation. *See Ohio Forestry*, 523 U.S. at 733 (general challenge not ripe without allegation of the specific application that impaired a right).

Even Petitioners' conjecture lacks a factual basis. The Rule is designed to limit any real impact on the business operations and access to employer property. It permits organizers, after filing a notice, to en-

ter employer property to talk to employees for up to one hour before and after work and during the employees' lunch break of up to one hour. Under California law, this time is the workers' time, not the employers. Cal. Lab. Code § 226.7. They are entitled to be fully relieved from job responsibilities and access during these times, by definition, will not disrupt the work.

The daily one-hour contact three times a day, as permitted by the Rule, is unlikely to be fully used. Organizers have access only when workers are present and not working, which will seldom be a full hour before or after work or during a lunch break. Cal. Code Regs., tit. 8, § 20900(e). If the employees are immediately picked up after work by a labor contractor's bus or if they have only a 30-minute lunch break, the organizers' access rights are reduced accordingly. Finally, because the Rule requires elections during peak season, which generally occurs once or twice a calendar year, organizers are unlikely to seek access under the Rule except during those times, in order to ensure there are enough workers to sign the authorization cards needed to petition for an election.

III. PETITIONERS FAIL TO SHOW THAT THE ACCESS RULE HAS IN ANY WAY IMPAIRED THEIR PROPERTY INTERESTS.

The "takings" analysis begins with the construction of California property law, which Petitioners ignore or misapply, to support their per se argument. There is no federal definition of property rights. Property interests "are created, and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (quotations and citations omitted).

The definition of property rights in California has historically limited property interests recognized at common law, with refinements of those interests that were necessary to realize public interest goals. This is demonstrated through the development of California's trespass statute.

a. California Law Imposes Limits on Property Interests When that Property is Used for The Employment of Others.

Originally enacted in 1850, California's trespass statue, Penal Code section 602, has gone through significant adjustments to reflect and ensure the implementation of other public policies for the welfare of Californians. Under Sections 602(l) and 602(o) trespass includes entering cultivated or uncultivated lands, whether fenced or posted, or refusing to leave, upon request. However, it *excludes* from that definition "persons engaged in lawful labor union activities which are permitted to be carried out on the property" under the ALRA and the NLRA. Penal Code § 602(o). Penal Code section 552.1 is even broader. Passed in 1958, it provides that "lawful activity for the purpose of engaging in any organizational effort on behalf of any labor union, agent, or member thereof" is not a violation of California's trespass laws.

The California Supreme Court harmonized the labor protections of section 552.1(a) and the property protections of section 602, before the ALRA language was added, and characterized the authorized intrusion on property as furthering "the established policy of this state to have labor conflicts settled by the free interaction of economic forces." *In re Zerbe* 60 Cal. 2d 666, 669 (1964). The court stated that "conduct of various types has been treated as a proper means of obtaining a valid labor objective even though the con-

duct would be considered unlawful in the absence of a labor dispute." *Id*.

Special access for unions has been recognized as important to address health and safety issues in other industries. Penal Code section 551.2(b) grants unions in the building trades the right to enter construction sites for health and safety inspections, even against the wishes of property owners. *In re Catalano*, 29 Cal. 3d 1, 10 (1981).

Similarly, California recognizes that in the context of employer property used to house agricultural employees, the employees' free speech interest in obtaining information about upcoming elections outweighs the property interest of the employer and trespass law cannot be constitutionally applied. *People v. Medrano*, 78 Cal. App. 3d 198, 214 (1978) disapproved on other grounds in *Vista Verde Farms*, 29 Cal. 3d at 325 n.8.

These definitions of what is and what is not a trespass on property establish the scope of California property interests. They protect the State's power to regulate activities on commercially owned property by defining the employers' property interest in a manner that limits their "right to exclude." Petitioners' state defined property interests do not include the "right to exclude" those acting within the scope of access sanctioned by trespass law.

b. California Employers Must Comply With Worker Protection Standards and Provide Access for the Enforcement of Those Standards On Their Property.

Petitioners voluntarily employ workers on their property with the full knowledge and expectation that they must afford certain rights to those workers—in-

cluding those guaranteeing minimum wage and working conditions, workers' compensation, and posted notifications of rights. *See, e.g.*, 8 Cal. Code Regs. 11010, *et seq.*, Cal. Lab. Code §§ 233, 246, 510, 512, 1171, 1194, 3100, *et seq.*, 6200, *et seq*. They must comply with health and safety standards and may be required to modify their property to ensure worker health and safety. Cal. Lab. Code §§ 6300, 6207, 6308(a); *see also, e.g.*, 8 Cal. Code Regs. 11040(13) and (14) (requiring seats and changing facilities). Employers are prohibited from exercising their "right to exclude" workers from their property (through termination) who demand or exercise their rights under those laws. *See, e.g.*, Cal. Labor Code §§ 98.6., 6311.

Petitioners must allow access to state investigators for investigations related to wage and working conditions requirements (Cal. Lab. Code § 1174(b)) and for inspections to investigate violations of health and safety rights. *See* Cal. Lab. Code §§ 6309(a), 6314(a). An employee or her authorized representative has the right to accompany the state investigator during a safety inspection of the worksite. Cal. Lab. Code § 6314(d). These restrictions on Petitioners' property interests would be equally subject to attack if Petitioners' construction of the "right to exclude" were adopted by this Court.

Petitioners argue a per se taking as recognized in *Loretto*, 458 U.S. 419. But they disregard a crucial step. This Court must determine the property interest based on California's "existing rules or understandings" that define the range of interests that qualify for protection as "property" under "the Fifth and Fourteenth Amendments." *Lucas*, 505 U.S. at 1030 (quotations and citations omitted). California's long standing and existing rules regulating property, through its trespass and access laws, make clear that

there has been no interference with Petitioners' property interests. To rule otherwise would improperly interfere with California's definition of property and the exercise of legitimate police powers.

CONCLUSION

The Ninth Circuit's decision is correct and should be affirmed.

Respectfully submitted,

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