FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CEDAR POINT NURSERY; FOWLER PACKING COMPANY, INC., *Plaintiffs-Appellants*, v. GENEVIEVE SHIROMA; CATHRYN RIVERA-HERNANDEZ; SANTIAGO AVILA-GOMEZ, Esquire; ISADORE HALL III, *Defendants-Appellees*.	No. 16-16321 D.C. No. 1:16-cv-00185-LJO-BAM OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, Chief District Judge, Presiding

Argued and Submitted November 17, 2017
San Francisco, California

May 8, 2019

Before: Edward Leavy, William A. Fletcher,
and Richard A. Paez, Circuit Judges.

Opinion by Judge Paez;
Dissent by Judge Leavy

SUMMARY*

Constitutional Law / Takings / Seizure

The panel affirmed the district court's dismissal of an appeal by Growers seeking declaratory and injunctive relief against members of the California Agricultural Labor Relations Board who promulgated a regulation allowing union organizers access to agricultural employees at employer worksites under specific circumstances.

The Growers alleged that the access regulation, as applied to them, was unconstitutional because it was a per se taking in violation of the Fifth Amendment and was an unlawful seizure of their property in violation of the Fourth Amendment.

The panel rejected the Growers' allegation that the access regulation, as applied to them, effected a Fifth Amendment taking by creating an easement that allowed union organizers to enter their property "without consent or compensation." The panel held that the Growers did not suffer a permanent physical invasion that would constitute a per se taking. Although the access regulation did not have a contemplated end-date, it did not meet *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)'s definition of a permanent physical occupation where the regulation significantly limited organizers' access

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

to the Growers' property. The panel further held that the Growers did not suffer a permanent physical invasion that would constitute a per se taking because the sole property right affected by the regulation was the right to exclude.

The panel held that the Growers did not plausibly allege that the access regulation effected a "seizure" within the meaning of the Fourth Amendment. Specifically, the panel held that the Growers failed to cite any directly applicable authority supporting their contention that the access regulation was a meaningful interference with their possessory interests in their property. The panel further held that the Growers did not allege facts showing that the character of their property was somehow "profoundly different" because of the access regulation.

Judge Leavy dissented because he would hold that the alleged access regulation was an unconstitutional taking, and the district court erred in granting the motion to dismiss. Judge Leavy wrote that the Growers sufficiently alleged that no employees lived on the Growers' properties and the employees were not beyond the reach of the union's message; and he had found no Supreme Court case holding that non-employee labor organizers may enter an employer's nonpublic, private property for substantial periods of time, when none of the employees lived on the employer's premises.

COUNSEL

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OPINION

PAEZ, Circuit Judge:

In 1975, the California legislature enacted the Agricultural Labor Relations Act ("ALRA") to "ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in

labor relations."[1] Among the ALRA's enactments was the creation of the Agricultural Labor Relations Board ("the Board"). Shortly after the ALRA's effective date, the Board promulgated a regulation allowing union organizers access to agricultural employees at employer worksites under specific circumstances. In this case, we are asked to decide whether the access regulation is unconstitutional as applied to Plaintiffs, Cedar Point Nursery and Fowler Packing Company (collectively, "the Growers").

The Growers appeal the district court's dismissal of their complaint seeking declaratory and injunctive relief against members of the Board. The Growers contend that the access regulation, as applied to them, is unconstitutional in two ways. First, the Growers allege that the regulation amounts to a per se taking in violation of the Fifth Amendment because it is a permanent physical invasion of their property without just compensation. Second, the Growers allege that the regulation effects an unlawful seizure of their property in violation of the Fourth Amendment. We conclude the access regulation does not violate either provision, and affirm.

BACKGROUND

The Access Regulation

The ALRA authorized the Board to make "such rules and regulations as may be necessary to carry out" the ALRA. Cal. Lab. Code §§ 1141, 1144. Pursuant to this authority, the Board promulgated an

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[1] Cal. Lab. Code § 1140 note (West 2011) (Historical and Statutory Notes).

emergency regulation shortly after the ALRA's effective date that allowed union organizers access to employees on their employer's property under limited circumstances. The Board later certified that it had subjected the regulation to notice and comment, allowing the regulation to remain in effect until repealed or amended.[2] *Agric. Labor Relations Bd. v. Superior Court (Pandol & Sons)*, 546 P.2d 687, 692 n.3 (Cal. 1976).

The access regulation was promulgated in recognition that

> [t]he United States Supreme Court has found that organizational rights are not viable in a vacuum. Their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. When alternative channels of effective communication are not available to a union, organizational rights must include a limited right to approach employees on the property of the employer. Under such circumstances, both statutory and constitutional principles require that a reasonable and just accommodation be made between the right of unions to access and the legitimate property and business interests of

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[2] As the California Supreme Court explained, "The regulation took effect on August 29, 1975. An emergency regulation automatically expire[d] 120 days after its effective date unless the agency certifie[d] during that period that it has complied with certain requirements of notice and hearing." *Pandol & Sons*, 546 P.2d at 692 n.3 (internal citation omitted). The Board certified that it had completed these requirements on December 2, 1975. *Id.*

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

Cal. Code Regs. tit. 8, § 20900(b)–(c).

Thus, the Board determined that adopting a universally applicable rule for access—as opposed to case-by-case adjudications or the "adoption of an overly general rule"—would best serve the "legislatively declared purpose of bringing certainty and a sense of fair play to a presently unstable and potentially volatile condition in the agricultural fields of California." Cal. Code Regs. tit. 8, § 20900(d). The access regulation was intended to "provide clarity and predictability to all parties." *Id.*

In furtherance of these goals, the access regulation declared that the enumerated rights of agricultural 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." Cal. Code Regs. tit. 8, § 20900(e). This right of access is not unlimited. Rather, the access regulation imposes a number of restrictions on access relating to time, place, number of organizers, purpose, and conduct. *Id.* These restrictions include, among others:

[A]n agricultural employer's property shall be available to any one labor organization for no more than four (4) thirty-day periods in any calendar year. § 20900(e)(1)(A).

Each thirty-day period shall commence when the labor organization files in the appropriate regional office two (2) copies of a written notice of intention to take access onto the described property of an agricultural employer, together with proof of service of a copy of the written notice upon the employer . . . . § 20900(e)(1)(B).

Organizers may enter the property of an employer for a total period of one hour before the start of work and one hour after the completion of work to meet and talk with employees in areas in which employees congregate before and after working. § 20900(e)(3)(A).

In addition, organizers may enter the employer's property for a single period not to exceed one hour during the working day for the purpose of meeting and talking with employees during their lunch period, at such location or locations as the employees eat their lunch. § 20900(e)(3)(B).

Any organizer who violates the provisions of this part may be barred from exercising the right of access . . . for an appropriate period of time to be determined by the Board after due notice and hearing. Any labor organization or division thereof whose organizers repeatedly

> violate the provisions of this part may be barred from exercising the right of access . . . for an appropriate period of time to be determined by the Board after due notice and hearing. § 20900(e)(5)(A).

Shortly after the Board promulgated the access regulation, several agricultural employers challenged the regulation in California state courts on both constitutional and statutory grounds. *Pandol & Sons*, 546 P.2d at 692. Ultimately, the California Supreme Court, in a 4–3 decision, vacated several different trial courts' orders enjoining enforcement of the regulation. *Id.* at 690. The *Pandol & Sons* court rejected the statutory claims by holding that the regulation was a permissible exercise of the Board's statutory authority under the ALRA and that to the extent the access regulation conflicted with the general criminal trespass statute, the access regulation prevailed. *Id.* at 699–06. The court likewise rejected the plaintiffs' constitutional claims: first, that the regulation violated their due process rights, and second, that it constituted a taking without just compensation. *Id.* at 693–699. The regulation has remained in force to the present.

The Growers

Plaintiff Cedar Point is an Oregon corporation with a nursery located in Dorris, California. It raises strawberry plants for producers. Cedar Point employs approximately 100 full-time workers and more than 400 seasonal workers at its Dorris nursery. None of its employees lives on the nursery property. Its seasonal

employees are housed in hotels in Klamath Falls, Oregon.[3]

Cedar Point alleges that on October 29, 2015, organizers from the United Farm Workers union ("the UFW") entered its property at approximately 5 a.m., without providing prior written notice of intent to take access as required by the regulation. At around 6 a.m., the UFW organizers moved to the nursery's trim sheds, where they allegedly "disrupted work by moving through the trim sheds with bullhorns, distracting and intimidating workers." The majority of workers in the trim sheds did not leave their work stations during this time, although some workers joined the UFW organizers in protest. Most of the workers who had left their stations during the protest returned to work by October 31, two days after the UFW organizers entered the property. Sometime after the UFW organizers had accessed the property, they served Cedar Point with written notice of intent to take access. Following this event, Cedar Point filed a charge against the UFW with the Board, alleging that the UFW had violated the access regulation by failing to provide the required written notice prior to taking access. The UFW likewise filed a charge against Cedar Point, alleging that Cedar Point had committed an unfair labor practice. Cedar Point alleges that "it is likely that [UFW] will attempt to take access again in the near future," and that it would "exercise its right to exclude the [UFW] trespassers from its property" if not for the regulation.

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[3] There are no allegations in the complaint regarding where Cedar Point's full-time workers live.

Plaintiff Fowler is a large-scale shipper of table grapes and citrus, and is a California corporation headquartered in Fresno. Fowler employs 1,800 to 2,500 people in its field operations and approximately 500 people at its Fresno packing facility. Fowler's employees do not live on the premises; Fowler alleges in the complaint that its employees are "fully accessible to the Union when they are not at work." The UFW filed an unfair labor practice charge with the Board against Fowler, alleging that Fowler blocked its organizers from taking access permitted by the access regulation on three days in July 2015. The UFW subsequently withdrew the charge in January 2016. Fowler alleges that if it were not for the access regulation, it would oppose union access and "exercise its right to exclude union trespassers from its property."

Procedural History

In February 2016, the Growers filed a complaint for declaratory and injunctive relief under 42 U.S.C. § 1983 against several members of the Board and the Board's Executive Secretary, all of whom were sued in their official capacities.[4] The Growers alleged that the access regulation, as applied to them, amounts to a taking in violation of the Fifth Amendment and that it effects an unlawful seizure of their property in violation of the Fourth Amendment. They sought

[4] As all Defendants were sued in their official capacities, we refer to them collectively as "the Board" throughout this opinion. The Growers' suit, which seeks only prospective, declaratory, and injunctive relief, is not barred by the Eleventh Amendment. *See Ex parte Young*, 209 U.S. 123 (1908); *see also Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 956 (9th Cir. 2008).

declaratory and injunctive relief, barring the Board from enforcing the regulation against them. Upon filing the complaint, the Growers filed a motion for a preliminary injunction to bar enforcement of the regulation against them. The Board opposed the motion and promptly moved to dismiss the Growers' complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

After denying the Growers' motion for injunctive relief as to both the Fifth and Fourth Amendment claims, the district court granted the Board's motion to dismiss. The district court rejected the Growers' argument that the regulation constitutes a per se categorical taking, either on its face or as applied to them.[5] As to the Fourth Amendment claim, the district court held that the Growers had not plausibly alleged that the regulation "has been or will be enforced against them in a manner that will cause a meaningful interference with their possessory interests" such that it would effect a seizure within the meaning of the Fourth Amendment.[6] The district court granted the Growers leave to amend. The Growers declined to amend the complaint, and the

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[5] Takings claims are not ripe in federal court "until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue" and the state has denied the plaintiff any opportunity for just compensation. *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 195 (1985). Although the Board does not challenge ripeness on appeal, we agree with the district court that the Growers' takings claim is ripe for consideration.

[6] Because the Growers did not meet their burden as to the "threshold issue" of plausibly alleging a seizure, the district court did not discuss reasonableness in its order dismissing the case.

district court entered judgment in favor of the Board in July, 2016. The Growers timely appealed.

STANDARD OF REVIEW

We review de novo a district court's order granting a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008). In evaluating a motion to dismiss under Rule 12(b)(6), "[r]eview is limited to the complaint, materials incorporated into the complaint by reference, and matters of which the court may take judicial notice." *Id.* (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)).

We may affirm a 12(b)(6) dismissal "on any ground supported by the record, even if the district court did not rely on the ground." *Livid Holdings, Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 950 (9th Cir. 2005). In evaluating a 12(b)(6) motion, we accept "as true all well-pleaded allegations of fact in the complaint" and construe them in the light most favorable to the non-moving party. *United States v. Corinthian Colls.*, 655 F.3d 984, 991 (9th Cir. 2011). To survive a motion to dismiss, the complaint "must contain sufficient factual matter" that, taken as true, states "a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

DISCUSSION

The Growers argue that the access regulation as applied to them amounts to a per se taking in violation of the Fifth Amendment and effects an unlawful

seizure of their property in violation of the Fourth Amendment.

I. Fifth Amendment Per Se Takings Claim

We turn first to the Growers taking claim. We agree with the district court that the allegations in the complaint, taken as true, are insufficient to state a plausible claim for relief as a per se taking under the Fifth Amendment's Takings Clause.

The Fifth Amendment's Takings Clause "provides that private property shall not 'be taken for public use, without just compensation.'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005). The Supreme Court has recognized three categories of regulatory action in its takings jurisprudence, each of which "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain" and which focus a court's inquiry "directly upon the severity of the burden that government imposes upon private property rights." *Id.* at 539.

The first category is "where government requires an owner to suffer a permanent physical invasion of her property—however minor." *Id.* at 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). The second category involves regulations that "completely deprive an owner of '*all* economically beneficial us[e]' of her property." *Id.* (emphasis in original) (quoting *Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1019 (1992)). These first two categories involve actions that "generally will be deemed [per se] takings for Fifth Amendment purposes," but both categories are "relatively narrow."

Id. The third category covers the remainder of regulatory actions, which are governed by the standards set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). *Id.*

Here, the Growers allege that the access regulation, as applied to them, effects a Fifth Amendment taking by creating an easement that allows union organizers to enter their property "without consent or compensation." The Growers base their Fifth Amendment argument entirely on the theory that the access regulation constitutes a permanent physical invasion of their property and therefore is a per se taking.

In *Loretto*, the Supreme Court held that a state law requiring landlords to allow installation of cable facilities by cable television companies on their property constituted a per se taking because the installation was a permanent, albeit minor, physical occupation of the property. 458 U.S. at 421–423, 441. The Court noted the "constitutional distinction between a permanent occupation and a temporary physical invasion." *Id.* at 434. The Growers argue that, under *Loretto*, the access regulation is a permanent physical occupation, as opposed to a temporary invasion. The Growers contend that the concept of permanence, as contemplated in *Loretto*, "does not require the physical invasion to be continuous, but instead that it have no contemplated end-date."

This argument is contradicted by the Court's opinions in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). In *PruneYard*, the

Supreme Court considered whether the California Supreme Court's decision in *Robins v. Pruneyard Shopping Center*, 592 P.2d 341 (Cal. 1979), violated the Takings Clause. 447 U.S. at 76–77. In that case, the California Supreme Court held that the California Constitution protects reasonably exercised speech and petitioning in privately owned shopping centers. *Robins*, 592 P.2d at 347. The PruneYard, a privately owned shopping center that was open to the public for purposes of patronizing its commercial establishments, had a policy of forbidding visitors and tenants from engaging in public expressive activity unrelated to commercial purposes. *PruneYard*, 447 U.S. at 77.

Although the dissent correctly points out that *PruneYard* involved free speech, it also addressed a taking claim under the Fifth Amendment. Dissent at 25. As relevant here, the Court recognized that the California Supreme Court's decision "literally" constituted a "taking" of PruneYard's right to exclude others, but noted, "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense." *PruneYard*, 447 U.S. at 82 (citing *Armstrong v. United States*, 364 U.S. 40, 48 (1960)). The Court concluded that requiring the PruneYard to "permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of [the PruneYard's] property rights under the Taking Clause." *Id.* at 83.

Thus, in *PruneYard* there was no "contemplated end-date" to the California Supreme Court's decision holding that the California Constitution protects reasonably exercised speech and petitioning in

privately owned shopping centers. Yet, contrary to the Growers' argument, the Court did not conclude that the California Supreme Court's decision resulted in a permanent physical invasion. *Id.* at 83–84.

Similarly, *Nollan* does not support the Growers' theory. There, the Court considered whether the California Coastal Commission could condition the grant of a permit to rebuild a house on a transfer to the public of an easement across beachfront property. *Nollan*, 483 U.S. at 827. The Court held that California could use its power of eminent domain for this "public purpose," but if it wanted an easement, it must pay for it. *Id.* at 841–42. In its analysis, the Court concluded that a permanent physical occupation occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Id.* at 832. It noted that that the *PruneYard* holding was not inconsistent with this analysis, "since there the owner had already opened his property to the general public, and in addition permanent access was not required." *Id.* at 832 n.1.

Although the access regulation does not have a "contemplated end-date," it does not meet *Nollan*'s definition of a permanent physical occupation. As structured, the regulation does not grant union organizers a "permanent and continuous right to pass to and fro" such that the Growers' property "may continuously be traversed." *Id.* at 832. The regulation significantly limits organizers' access to the Growers' property. Unlike in *Nollan*, it does not allow random

members of the public to unpredictably traverse their property 24 hours a day, 365 days a year.

Furthermore, the Growers have not suffered a permanent physical invasion that would constitute a per se taking because the sole property right affected by the regulation is the right to exclude. "[I]t is true that one of the essential sticks in the bundle of property rights is the right to exclude others." *PruneYard*, 447 U.S. at 82 (internal citation omitted). In a permanent physical invasion, however, "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Loretto*, 458 U.S. at 435; *accord Murr v. Wisconsin*, 137 S. Ct. 1933, 1952 (2017) ("[W]here an owner possesses a full 'bundle' of property rights, the destruction of one strand of the bundle is not a taking, because the aggregate must be viewed in its entirety.") (Roberts, C.J., dissenting) (quoting *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979)). The Growers do not allege that other property rights are affected by the access regulation. This undermines their contention that the access regulation effects a taking because they only allege that the regulation affects "one strand of the bundle" of property rights. *Cf. Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994) (noting that unlike in *PruneYard*, a permanent recreational easement would not merely "regulate" plaintiff's right to exclude, but rather would "eviscerate" it, as she "would lose all rights to regulate the time in which the public entered onto the [property], regardless of any interference it might pose with her retail store").

The above discussion leads us to conclude that the access regulation is not a permanent physical taking. We do note, however, that in *PruneYard*, the Court analyzed the restriction under the standards set forth in *Penn Central Transportation Co. v. New York City*, rather than analyzing it as a permanent physical invasion.[7] *PruneYard*, 447 U.S. at 83–84. In its analysis, the Court noted there was "nothing to suggest" that the restriction would "unreasonably impair the value or use of [the] property as a shopping center" and that the PruneYard was "a large commercial complex . . . [that was] open to the public at large." *Id.*

The Growers attempt to distinguish their case from *PruneYard* by overstating the extent to which the Supreme Court relied on the fact that the PruneYard was a shopping center generally open to the public. While that was a consideration for the Court, it was not a dispositive one—and critically, it only factored into the Court's analysis under the standards set forth in *Penn Central*. *Id.* at 82–83.

PruneYard's use of the *Penn Central* analysis further weighs against the Growers' contention that the access regulation is a permanent physical taking. In many ways, the access restriction is analogous to the restriction at issue in *PruneYard*, which required

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[7] In *Penn Central*, the Supreme Court observed that an "ad hoc" factual inquiry was required to determine whether a regulatory action required compensation under the Fifth Amendment. 438 U.S. at 124. The Court identified "several factors that have particular significance," including the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action. *Id.*; *see also Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015).

the shopping center to permit individuals to exercise free speech rights on its property. *PruneYard*, 447 U.S. at 76–77. The Court's analysis of this restriction under *Penn Central* counsels against analyzing the access regulation as a permanent per se taking.[8]

Furthermore, the question of whether the access regulation falls under the category of takings governed by *Penn Central* is not before this court. At no point in this litigation have the Growers challenged the regulation under *Penn Central*. Their complaint alleges that the access regulation causes an unconstitutional taking because it "creates an easement for union organizers to enter [the Growers'] private property without consent or compensation." Before the district court, the Growers argued that the access regulation should be treated as a per se taking because the Growers must surrender their right to exclude trespassers permanently. And before this court, they argued in their opening brief that the access regulation involved a physical invasion, as opposed to a regulatory taking. Therefore, we take no position regarding whether the access regulation falls under the category of takings governed by the standards set forth in *Penn Central*.

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[8] The Court also contrasted the PruneYard shopping center's situation with that of the plaintiffs in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). *See PruneYard*, 447 U.S. at 84. *Kaiser Aetna* also weighs against the Growers' theory that the access regulation is a permanent physical taking. There, the Court held that requiring owners of a public pond to allow free public use of its marina constituted a taking—but only after applying the *Penn Central* analysis, rather than the permanent physical invasion analysis. *Kaiser Aetna*, 444 U.S. at 178–180.

The dissent contends that our analysis should be guided by *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956), and its progeny.[9] Dissent at 26–27. *Babcock*, however, pertained to an alleged violation of section 7 of the National Labor Relations Act ("NLRA"). *Nat'l Labor Relations Bd. v. Babcock & Wilcox Co.*, 351 U.S. 105, 106 (1956); *see also Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527, 529 (1992) ("This case requires us to clarify the relationship between the rights of employees under § 7 of the National Labor Relations Act (NLRA or Act) . . . and the property rights of their employers."); *Hudgens v. N. L. R. B.*, 424 U.S. 507, 508 (1976) ("The question presented is whether this threat violated the National Labor Relations Act."). The NLRA does not apply to "any individual employed as an agricultural laborer." 29 U.S.C. § 152(3). And while *Babcock* may be helpful in analyzing challenges to the access regulation under the ALRA, it is not relevant to the Growers' contention that the access regulation

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[9] The dissent points out that the California Supreme Court looked to *Babcock* for guidance when first analyzing the access regulation in *Pandol & Sons*. Dissent at 26. There, the court also pointed out that the Board determined that "significant differences existed between the working conditions of industry in general and those of California agriculture." *Pandol & Sons*, 546 P.2d at 702. The court highlighted some of those differences including that "many farmworkers are migrants," "the same employees did not arrive and depart every day on fixed schedules, there were no adjacent public areas where the employees congregated or through which they regularly passed, and the employees could not effectively be reached at permanent addresses or telephone numbers in the nearby community, or by media advertising." *Id.* The record is silent on whether the Board has revisited these differences. In any event, we do not need to address them because the only issue before us is whether the access regulation is a per se physical taking.

is a physical per se taking in violation of the Fifth Amendment.

In conclusion, we hold that the access regulation as applied to the Growers does not amount to a per se physical taking of their property in violation of the Fifth Amendment. Having been granted the opportunity to amend their complaint and having declined to do so, the district court did not err in dismissing the Growers' takings claim.

II. Fourth Amendment Seizure Claim

The first clause of the Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. To establish a seizure claim under the Fourth Amendment, the Growers must plausibly allege that a seizure occurred and that it was unreasonable. *See Soldal v. Cook County, Ill.*, 506 U.S. 56, 61–62 (1992). We agree with the district court's conclusion that the Growers failed to allege a plausible claim that the access regulation, as applied to them, effects a seizure protected by the Fourth Amendment.

A "'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 n.5 (1984). First, the Growers argue the access regulation effects a seizure because it substantially interferes with their right to exclude. They contend that the access regulation authorizes a "technical trespass."

The majority's holding in *United States v. Karo* undercuts the Growers' Fourth Amendment seizure argument. 468 U.S. 705, 712–13 (1984). There, the Court considered, *inter alia*, whether the transfer of a container by federal agents containing an unknown and unwanted beeper constituted a seizure. *Id.* at 712. First, the Court held that "[t]he existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated . . . for an actual trespass is neither necessary nor sufficient to establish a constitutional violation." *Id.* at 712–13. The Court then concluded that the mere transfer of the container with an unmonitored beeper did not constitute a seizure because it did not interfere with anyone's possessory interest in a meaningful way. *Id.* at 712. The Court noted that "[a]t most, there was a technical trespass on the space occupied by the beeper," but "if the presence of a beeper in the can constituted a seizure merely because of its occupation of space, it would follow that the presence of any object, regardless of its nature, would violate the Fourth Amendment." *Id.* at 712–13.[10]

More importantly, the Growers fail to cite any directly applicable authority supporting their contention that the access regulation is a meaningful

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[10] The Growers attempt to distinguish their case from *Karo* by pointing out that federal agents placed the beeper with the consent of the original owner before possession was transferred. They argue that that they did not consent to the entry of the union organizers onto their property. Yet, the original owner's consent was relevant to the *Karo* Court's analysis of whether "the actual placement of the beeper into the can" violated the defendant's Fourth Amendment rights, but did not factor into the Court's analysis of whether the transfer of the can to Karo was a seizure. *Karo*, 468 U.S. at 711–13.

interference with their possessory interests in their property. The Growers rely on *Presley v. City of Charlottesville*, 464 F.3d 480 (4th Cir. 2006), to support their argument. There, the Fourth Circuit concluded that the alleged "constant physical occupation" constituted a "'meaningful interference' with [the plaintiff's] 'possessory interests' in her property." *Id.* at 487 (citing *Jacobsen*, 466 U.S. at 113). The case concerned a trail map published by the city of Charlottesville that mistakenly showed a trail crossing through Presley's property (which encompassed less than an acre of land). *Id.* at 482. City officials refused to correct the error when Presley repeatedly complained, and declined to offer her compensation in exchange for an easement. *Id.* at 482–83. Presley had posted over 100 "No Trespassing" signs on her property, "all of which were defaced or destroyed." *Id.* at 483. Although Presley contacted the police to help stop trespassers, the police "could not stem the tide." *Id.* When Presley installed razor wire on her property in an attempt to block the trespassers, the city enacted an ordinance to prohibit her from pursuing such protective measures, and initiated a criminal prosecution (later dismissed) against her for violation of the ordinance. *Id.*

The factual circumstances in *Presley* make it inapposite to the access regulation as applied to the Growers. As the Fourth Circuit noted, Presley alleged that she had been "deprived of the use of her property due to the regular presence of a veritable army of trespassers who freely and regularly traverse her yard, littering, making noise, damaging her land, and occasionally even camping overnight." *Id.* at 487. Here, the Growers do not make such allegations. They

do not allege that the access regulation authorizes an intrusion that is constant, uncontrollable (even with police assistance), unpredictable, damaging, and stressful. The access regulation only allows controlled, nondisruptive visits that are limited in time, place, and number of union organizers.

Second, the Growers argue that the access regulation effects a seizure because it profoundly changes the character of the property. They urge us to adopt the test set forth in Justice Stevens' partial concurrence in *United States v. Karo*. There, Justice Stevens argued that a meaningful interference occurs when "the character of the property is profoundly different" with the interference than without it. *Karo*, 468 U.S. at 729 (Stevens, J., concurring in part dissenting in part). Yet even assuming this were the proper test, the Growers have not alleged facts showing that the character of their property is somehow "profoundly different" because of the access regulation. At most, the regulation would allow organizers access to the Growers' property 360 hours a year out of a total 8,760 hours (and only 120 of those hours would be during the workday). The Growers argue that the access regulation "transform[s] [their] property from a forum for production into a proselytizing opportunity for union organizers," but there are no such allegations in the complaint.

We therefore hold that the Growers have not plausibly alleged that the access regulation effects a "seizure" within the meaning of the Fourth Amendment.

AFFIRMED.

LEAVY, Circuit Judge, dissenting:

I respectfully dissent. In my view, the complaint sufficiently alleges that the Agricultural Labor Relations Board's Access Regulation is an unconstitutional taking, so the district court erred in granting the motion to dismiss. The Growers allege that no employees reside on the employers property, and that alternative methods of effective communication are available to the nonemployee union organizers who, under the Access Regulation, are allowed to physically enter the Growers' properties for substantial time periods. Specifically, I have found no Supreme Court case holding that non-employee labor organizers may enter an employer's nonpublic, private property for substantial periods of time, when none of the employees live on the employer's premises.

In spite of the majority's reliance on *PruneYard Shipping Center. v. Robins*, 447 U.S. 74 (1980), this is not a free speech case.[1] Instead, this case involves labor relations and the government's policy of

[1] The issue in *PruneYard* was whether the California constitution, which allows individuals to exercise First Amendment rights on private shopping center property, violated the federal constitution. The issue involved "only a state-created right of limited access to a specialized type of property." *Id.* at 98 (Powell, concurring). The PruneYard "specialized property" was a multi-block shopping center, open to the public to "come and go as they please," *id.* at 87, where "25,000 persons are induced to congregate daily." *Id.* at 78 (quoting *Robins v. PruneYard Shopping Ctr.*, 23 Cal. 3d 899, 910–911 (1979)). By contrast, in this case, the Growers are private employers with employees entering their properties daily for the sole purpose of agricultural work, with no public access.

encouraging collective bargaining. Thus, *PruneYard* provides little guidance.[2]

The California Legislature directs the Agricultural Labor Relations Board to "follow applicable precedents of the National Labor Relations Act." Cal. Labor Code § 1148. The outcome of this case is guided by cases concerning the rights of nonemployees to physically access the employer's property in order to communicate with employees about union organization. Although the NLRA's enforcement authority does not apply to "any individual employed as an agricultural laborer." 29 U.S.C. § 152(3), there is no dispute in this case about the agricultural status of the employee laborers. Rather, the dispute raised in the Grower's complaint is the constitutionality of the Board's regulation requiring employers to grant substantial physical access to nonemployee organizers where the agricultural employees do not reside on the employers' private property and are not beyond the reach of the organizers' message.

The California Supreme Court, when first analyzing the Access Regulation in *Pandol & Sons*, 546 P.2d 692 (Cal. 1976), correctly framed the issue:

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[2] The property owner in *PruneYard* wields the power to impose time, place, and manner restrictions on the general public's free expression rights on its premises. In the case at bar, a California agency imposes its power to regulate time, place, and manner restrictions on the Growers' right to exclude nonemployees. In other words, *PruneYard* involves a private party regulating the expressive conduct of other private parties entering its property where the public is invited. Our case involves a state agency universally regulating the access of nonemployee organizers on non-public, private property.

"The matter at bar, by contrast, is not primarily a First Amendment case . . . ; rather, the interest asserted is the right of *workers employed on the premises in question to have effective access to information* assisting them to organize into representative units pursuant to a specific governmental policy of encouraging collective bargaining." *Id.* at 694 (emphasis added). The *Pandol* court looked for guidance to *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956), "[W]hen the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." *Pandol*, 546 P.2d at 406 (*quoting Babcock*, 351 U.S. at 112).

The *Pandol* court upheld the regulation under the California constitution, comparing the inaccessibility of workers in California's agricultural industry to federal labor cases involving inaccessibility of workers in mining camps, lumber camps, and rural resort hotels. *Id.* at 406–408. The *Pandol* court summarized the rule of *Babcock*: "[I]f the circumstances of employment place the employees *beyond the reach of reasonable union efforts to communicate with them*, the employer must allow the union to approach his employees on his property." *Id.* at 409 (*quoting Babcock*, 351 U.S. at 113) (emphasis added). The *Babcock* rule has not been abrogated. *See Lechmere v. NLRB*, 502 U.S. 527, 540–41 (1992) (reaffirming *Babcock*); *Hudgens v. NLRB*, 424 U.S. 507, 521–22 (1976) (approving *Babcock's* admonition that accommodation between employees' labor rights and

employers' property rights "must be obtained with as little destruction of one as is consistent with the maintenance of the other"); *Central Hardware Co. v. NLRB*, 407 U.S. 539, 545 (1972) (explaining that under *Babcock*, nonemployee organizers cannot claim a limited right of access to a nonconsenting employer's property until after the requisite need for access to the property has been shown); *ITT Industries, Inc. v. N.L.R.B.*, 251 F.3d 995, 999 (D.C. Cir. 2001) ("For nearly fifty years, it has been black-letter labor law that the Board cannot order employers to grant nonemployee union organizers access to company property absent a showing that on-site employees are otherwise inaccessible through reasonable efforts.").

In my view, the Access Regulation allowing ongoing access to Growers' private properties, multiple times a day for 120 days a year (four 30-day periods per year) is a physical, not regulatory, occupation because the "right to exclude" is "one of the most fundamental sticks" in the bundle of property rights. *Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (stating that the right to exclude others is one of the "essential sticks" in the bundle of property rights). The Growers need not allege that the Access Regulation affects more property right "sticks" beyond this single, fundamental property right.[3]

The complaint alleges that the Access Regulation is unconstitutional because the Growers' employees, none of whom live on the Growers' premises, are not beyond the reach of union efforts. The complaint

[3] The majority fails to cite any cases dealing with the property rights of employers as opposed to access rights by nonemployees.

alleges employees can be reached by union organizers at nearby, off-premises locations through alternative means of communication. Complaint, Par. 27 ("Seasonal workers at Cedar Point are housed in hotels in nearby Klamath Falls, Oregon. None of Cedar Point's full-time or seasonal employees live on the Nursery's property."); Complaint, Par. 37 ("Fowler's employees do not live on the premises and are fully accessible to the Union when they are not at work."); Complaint Par. 64 ("And because such access is unnecessary given the alternative means of communication available, *see Lechmere v. NLRB*, 502 U.S. 527, 540–41 (1992), it is unreasonable to allow union organizers to seize this possessory interest in Plaintiff's property.").

The Supreme Court in *Lechmere* expressly reaffirmed *Babcock's* critical distinction between employees and nonemployees regarding union activities on private property. *Id.* at 537. The Court also reaffirmed *Babcock*'s general rule that "an employer may validly post his property against nonemployee distribution of union literature," and rejected an initial balancing test. The Court stated that the threshold inquiry is whether the facts in a case justify application of *Babcock*'s inaccessibility exception. *Id.* at 538–39. The Court explained, "[T]he exception to Babcock's rule is a narrow one. It does not apply wherever nontrespassory access to employee may be cumbersome or less-than-ideally effective, but only where 'the *location of a plant and the living quarters of the employees place the employees beyond the reach* of reasonable union efforts to communicate with them." *Id.* at 539 (quoting *Babcock*, 351 U.S. at 113 (original emphasis)). The Court concluded,

"[B]ecause the employees do not reside on Lechmere's property, they are presumptively not 'beyond the reach' of the union's message." *Id.* at 540 (internal citation omitted). Here, in light of the Growers' allegations, the burden should shift to the defendants to show "unique obstacles" that frustrate their reasonable access to the Growers' employees. *See id.* at 540–41.

In summary, because the Growers sufficiently allege that no employees live on the Growers' properties and the employees are not beyond the reach of the union's message, the district court erred in dismissing the complaint.

Filed 6/29/2016

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CEDAR POINT NURSERY and FOWLER PACKING CO., **Plaintiffs,** **v.** **WILLIAM B. GOULD IV, *et al.*,** **Defendants.**	**1:16-cv-00185-LJO-BAM** **MEMORANDUM DECISION AND ORDER RE: DEFENDANTS' MOTION TO DISMISS [Doc. 11]**

I. INTRODUCTION

Plaintiffs Cedar Point Nursery and Fowler Packing Company ("Plaintiffs") allege that Cal. Code Regs. tit. 8, § 20900(e) (the "Access Regulation"), a regulation promulgated by California's Agricultural Labor Relations Board ("ALRB" or "the State") allowing union organizers access to worksites for limited periods of time, is unconstitutional as applied to them. Plaintiffs argue that the Access Regulation allows third parties to take their property without providing just compensation, in violation of the Fifth

Amendment, and permits an unlawful seizure of their property rights, in violation of the Fourth Amendment.

II. THE ACCESS REGULATION

In 1975, California enacted the Agricultural Labor Relations Act ("ALRA"). Cal. Lab. Code § 1140. The ALRA created the ALRB and vested its members with authority to make rules to carry out this policy. Cal. Lab. Code §§ 1141, 1144. The ALRB promulgated the Access Regulation in recognition that workers' abilities to exercise their organizational rights "depend[ ] in some measure on the ability of employees to learn the advantages and disadvantages of organization from others." Cal. Code Regs. tit. 8, § 20900(b). The Access Regulation provides that "the rights of employees under [California] Labor Code Section 1152" 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." Cal. Code Regs. tit. 8, § 20900(e). This right is subject to several constraints. For example, a labor organization must provide notice to the ALRB and the employer of its intent to appear onsite. § 20900(e)(1)(B). No organization may appear for more than four thirty-day periods in any calendar year. § 20900(e)(1)(A)-(B). Organizers may enter an employer's property "for a total period of one hour before the start of work and one hour after the completion of work" and for "a single period not to exceed one hour during the working day for the purpose of meeting and talking with employees during

their lunch period." § 20900(e)(3). Access is limited to a certain number of organizers (depending on the number of employees) and organizers are not allowed to engage in "conduct disruptive of the employer's property or agricultural operations, including injury to crops or machinery or interference with the process of boarding buses." § 20900(e)(4). Organizers who violate these provisions may be barred from accessing employers' properties for organizing purposes. § 20900(e)(5).

III. FACTUAL BACKGROUND

Plaintiff Cedar Point Nursery ("Cedar Point") is located in Dorris, California. Compl. for Declaratory and Injunctive Relief ("Compl."), Doc. 1, ¶ 8. Cedar Point employs more than 400 seasonal employees, who are housed off-site. *Id.* ¶¶ 26-27. Cedar Point alleges that United Farm Workers ("UFW") members entered their property at 5:00 A.M. on October 29, 2015, "without any prior notice of intent to access the property" and "disrupted work by moving through the trim sheds with bullhorns, distracting and intimidating workers." *Id.* ¶ 30. Sometime after this event, UFW served notice of their intent to take access. *Id.* ¶ 32. Cedar Point lodged a complaint against the UFW with the ALRB regarding UFW's failure to provide notice prior to the October 29 incident. *Id.* ¶ 34. The UFW has also filed a charge with the ALRB against Cedar Point, alleging that Cedar Point has committed unfair labor practices. *Id.*

Plaintiff Fowler Packing Company ("Fowler") is a California corporation, headquartered in Fresno,

California. *Id.* ¶ 9. Fowler describes itself as "one of the largest shippers in the fresh produce business." *Id.* Fowler's employees do not live on their property. *Id.* ¶ 37. The UFW brought charges before the ALRB against Fowler, based on alleged violations of the Access Regulation, in July 2015. *Id.* ¶ 38. It withdrew these charges in January 2016. *Id.* ¶ 39. Fowler alleges that, "[a]bsent the challenged regulation, Fowler would oppose union access and exercise its right to exclude trespassers from its property." *Id.* ¶ 40.

Both companies allege they "have reason to believe that the access regulation will be applied against them in the future" and "the only proper and possible remedy . . . is declaratory and injunctive relief." *Id.* ¶ 57. They state that the Access Regulation should not apply to them because "such access is unnecessary given the alternative means of communication available [to union organizers]." *Id.* ¶ 64.

IV. PROCEDURAL HISTORY

Plaintiffs filed their complaint against individual members of the ALRB on February 10, 2016. Compl. at 11. Plaintiffs argue that the Access Regulation amounts to both a "taking" in violation of the Fifth Amendment of the Constitution, and an unlawful seizure of their private property in violation of the Fourth Amendment. *Id.* ¶¶ 58, 64. Plaintiffs seek a declaratory judgment stating that the Access Regulation is unconstitutional as applied to them and

an order enjoining the ALRB from enforcing the regulation against them. *Id.* at 10:16-19.

On February 16, 2016, Plaintiffs filed a motion for preliminary injunction seeking to enjoin the ALRB from enforcing the Access Regulation on their properties. On April 18, 2016, the Court denied their motion as to their Fifth Amendment claims and requested supplemental briefing on their Fourth Amendment claims. Mem. Decision and Order ("April 18 Order"), Doc. 13. On May 26, 2016 the Court denied Plaintiffs' motion in its entirety. Mem. Decision and Order ("May 26 Order"), Doc. 19.

Now pending before the Court is Defendants' motion to dismiss Plaintiffs' claims pursuant to Rule 12(b)(6). Defs.' Not. Of Mot. and Mot. to Dismiss ("MTD"), Doc. 11. Plaintiffs and Defendants filed their opposition and reply in a timely manner. Pls.' Opp'n to Defs.' Mot. to Dismiss ("Opposition"); Defs.' Reply in Supp. of Mot. to Dismiss ("Reply"), Doc. 17. The Court vacated the hearing set for the matter pursuant to Local Rule 230(g). Doc. 18.

V. STANDARD OF DECISION

A motion to dismiss pursuant to Fed R. Civ. P. 12(b)(6) is a challenge to the sufficiency of the allegations set forth in the complaint. A 12(b)(6) dismissal is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). In considering a motion to dismiss for

failure to state a claim, the court generally accepts as true the allegations in the complaint, construes the pleading in the light most favorable to the party opposing the motion, and resolves all doubts in the pleader's favor. *Lazy Y. Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).

To survive a 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." B*ell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility for entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted). Thus, "bare assertions . . . amount[ing] to nothing more than a 'formulaic

recitation of the elements' . . . are not entitled to be assumed true." *Iqbal*, 556 U.S. at 681. In practice, "a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly*, 550 U.S. at 562. In other words, the Complaint must describe the alleged misconduct in enough detail to lay the foundation for an identified legal claim. To the extent that the pleadings can be cured by the allegation of additional facts, the plaintiff should be afforded leave to amend. *Cook, Perkiss and Liehe, Inc. v. Northern California Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990) (citations omitted).

VI. ANALYSIS

A. Fifth Amendment Claims

1. Ripeness

In a footnote Defendants claim that Plaintiffs' takings claims should be dismissed because they are unripe on the ground that Plaintiffs have not sought and been denied compensation by the State of California. MTD at 9, n. 3. Based on the record that existed at the time, the Court rejected this theory in its April 15, 2015 Order, on the ground that California Supreme Court jurisprudence forecloses the relief sought and therefore recourse to the state courts would be futile. Because Defendants do not make any new substantive arguments as to this claim, the Court will not revisit its decision.

2. Whether Defendants Allege a Plausible Takings Claim

Plaintiffs allege that the Access Regulation creates an easement on their property and therefore effects a Fifth Amendment taking. Compl. ¶ 58. Defendants argue that this claim should be dismissed because the Access Regulation does not impinge on Plaintiffs' property rights. MTD at 5-9. As the parties both recognize, the Court found that Plaintiffs did not demonstrate in their request for preliminary injunction that they were likely to succeed on their Fifth Amendment claims. April 15 Order at 14-15. But a Court's conclusions as to injunctive relief do not determine the outcome of an analysis under Fed. R. Civ. P. 12(b)(6).

Plaintiffs' arguments in opposition to Defendants' motion to dismiss are nearly identical to those advanced in support of their motion for a preliminary injunction. They claim that the Access Regulation is categorically unconstitutional as matter of law. Opposition at 5. For the reasons discussed in its previous order, this Court disagrees that the Access Regulation effects a categorical taking on its face. April 18 Order at 10. Nor do Plaintiffs allege facts that suggest the Access Regulation will amount to a permanent, physical intrusion based on facts specific to their case. The Court, therefore, cannot find that Plaintiffs have stated a viable as-applied categorical takings claim.

Alternatively, Plaintiffs can state a takings claim if they can show that the Access Regulation is "so

onerous that its effect is tantamount to a direct appropriation or ouster" according to the "standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537-38 (2005). These factors include "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action." *Penn Central*, 438 U.S. at 124. Under *Penn Central*, courts examine a regulation's "character" and "economic impact," asking whether the action goes beyond "adjusting the benefits and burdens of economic life to promote the common good" and whether it "interfere[s] with distinct investment-backed expectations." *Id.* "That multi-factor test balances the government's manifest need to pass laws and regulations 'adversely affect[ing] ... economic values, with [the] longstanding recognition that some regulation 'goes too far.'" *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2604 (2013) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

Plaintiffs did not put forth arguments along these lines in support of its motion for preliminary injunction, thus the Court found no likelihood of success under *Penn Central*. On a motion to dismiss, however, the standard is different, and a court must evaluate whether "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Plaintiffs, however,

fail to allege facts in their pleadings that suggest that the Access Regulation has had *any negative economic impact on them at all*.[1] Thus, they have not provided a basis from which this Court might plausibly conclude that the economic burden they shoulder is unjust. For these reasons, the Court GRANTS Defendants' motion to dismiss Plaintiffs' Fifth Amendment claims. Plaintiffs are granted leave to amend.

B. Fourth Amendment Claims

Plaintiffs allege that the Access Regulation effects a seizure of their property because it grants "an access easement to union organizers" that is unnecessary "given the alternative means of communication available." Compl. ¶ 64. As discussed in the Court's previous two orders, whether access by organizers effects a Fourth Amendment seizure is a threshold issue. *Jensen v. Cty. of Sonoma*, 444 F. App'x 156, 159 (9th Cir. 2011) (no Fourth Amendment violation because order requiring property owners to schedule a home inspection did not effect a seizure). "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

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[1] Plaintiffs do assert negative impacts with regards to a protest that occurred on Cedar Point's property in 2015. Compl. ¶¶ 30-31. Plaintiffs, however, have also asserted that this conduct violated the Access Regulation. Compl. ¶ 34; Opposition at 8, n. 5. If the 2015 event occurred in violation of the Access Regulation, conduct associated with it cannot be viewed as evidence that implementation of the law is unconstitutional.

When an owner is not completely dispossessed of his property, but only suffers a trespass, it is not necessarily the case that interference causes a seizure. The Fourth Circuit found that a "constant physical occupation" of a plaintiff's property (which resulted from a city's advertisement of a hiking trail through her backyard) "certainly constitute[d] a 'meaningful interference' with [her] possessory interests." *Presley v. City Of Charlottesville*, 464 F.3d 480, 487 (4th Cir. 2006). Generally, however, "[t]he existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated . . . for an actual trespass is neither necessary nor sufficient to establish a constitutional violation." *United States v. Karo*, 468 U.S. 705, 712-13 (1984). For example, in *Karo*, the Supreme Court considered whether "the installation of a beeper in a container of chemicals with the consent of the original owner constitutes a search or seizure within the meaning of the Fourth Amendment when the container is delivered to a buyer having no knowledge of the presence of the beeper." *Id.* at 707. While acknowledging that placing the beeper in the car may have been a "technical trespass on the space occupied by the beeper," the Court found that no seizure occurred because "it cannot be said that anyone's possessory interest was interfered with in a meaningful way." *Id.*

Plaintiffs argue that the Access Regulation's interference with their interests is substantial because it deprives them of "their right to exclude non-employees from their property." Opposition at 9.

However, they point to no law that suggests that such time and manner-limited access would be characterized as a meaningful interference. While Plaintiffs claim that their case is analogous to *Presley*, the facts alleged do not bear this out because they do not suggest that the Access Regulations may or has permitted them to suffer a "constant physical occupation." *Presley*, 464 F.3d at 487. Nor have Plaintiffs alleged that the ALRB has applied the Access Regulation in a manner that has restricted Plaintiffs' freedom to use their property. *Jacobsen*, 466 U.S. at 114, n. 5. In fact, Plaintiffs do not allege that the ALRB has used the Access Regulation to force them to allow *any* organizers on their properties to date. As discussed in the May 26 Order, the one example Plaintiffs provide of union organizers accessing their property is alleged to have occurred in violation of the Access Regulation. Compl. ¶ 34 (describing that the Union's actions "violated the access regulation by taking access to Cedar Point's property without providing proper notice."). In addition, Plaintiffs allege Cedar Point has filed a charge against the Union with the ALRB related to that event. *Id.* As previously explained: "Plaintiffs cannot have it both ways. If the 2015 event occurred in violation of the Access Regulation, conduct associated with it cannot be viewed as compelling evidence that implementation of the law is unconstitutional." May 26 Order at 7.

Further, under the Access Regulation, organizers are not allowed to engage in "conduct disruptive of the employer's property or agricultural operations,

including injury to crops or machinery or interference with the process of boarding buses." § 20900(e)(4). Thus, it seems that the Access Regulation, on its face, would not allow organizers to disrupt an employer's use of his land in a significant manner.[2]

For these reasons, the Court finds that Plaintiffs have failed to allege facts that plausibly support a conclusion the Access Regulation has been or will be enforced against them in a manner that will cause a meaningful interference with their possessory interests. Accordingly, the Court GRANTS Defendants' motion to dismiss this claim. Plaintiffs will be allowed to amend their claims.

VII. CONCLUSION AND ORDER

For the reasons discussed above, the Court GRANTS the State's motion to dismiss, Doc. 11.

Plaintiffs are granted leave to amend their claims.

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[2] Additionally, it is not clear that California property law treats conduct authorized by the Access Regulation as a trespass, given the California Supreme Court's finding that the rule "is not a deprivation of 'fundamental personal liberties' but a limited economic regulation of the use of real property imposed for the public welfare." *Agric. Labor Relations Bd. v. Superior Court*, 16 Cal. 3d 392, 409 (1976); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 n. 21 (1994) ("The right of employers to exclude union organizers from their private property emanates from state common law . . ."); *N.L.R.B. v. Calkins*, 187 F.3d 1080, 1088 (9th Cir. 1999) ("[S]tate property law is what creates the interest entitling employers to exclude organizers in the first instance. Where state law does not create such an interest, access may not be restricted consistent with Section 8(a)(1) [of the National Labor Relations Act].").

Plaintiffs shall file any amended complaint within 14 days of this order.

No later than 21 days after service of any amended complaint, Defendants shall file a response thereto.

Plaintiffs are cautioned that this will be the last opportunity to amend. Plaintiffs should only amend if amendment will not be futile based on the law and holding in this Order. This court does not have the resources to review and write extensive orders on how to write, rewrite and submit pleadings. This order gives the proper direction for the last time.

IT IS SO ORDERED.

Dated: **June 29, 2016** **/s/ Lawrence J. O'Neill**
UNITED STATES
CHIEF DISTRICT
JUDGE

Filed 5/26/2016

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CEDAR POINT NURSERY and FOWLER PACKING CO., Plaintiffs, v. WILLIAM B. GOULD IV, et al., Defendants.	**1:16-cv-00185-LJO-BAM** **MEMORANDUM DECISION AND ORDER RE: PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION [Doc. 4]**

I. INTRODUCTION

Plaintiffs Cedar Point Nursery and Fowler Packing Company ("Plaintiffs") allege that Cal. Code Regs. tit. 8, § 20900(e) (the "Access Regulation"), a regulation promulgated by California's Agricultural Labor Relations Board ("ALRB" or "the State") allowing union organizers access to worksites for limited periods of time, is unconstitutional as applied to them. Plaintiffs argue that the Access Regulation allows third parties to take their property without providing just compensation, in violation of the Fifth Amendment, and permits an unlawful seizure of their

property rights, in violation of the Fourth Amendment.

II. THE ACCESS REGULATION

In 1975, California enacted the Agricultural Labor Relations Act ("ALRA"). Cal. Lab. Code § 1140. The ALRA created the ALRB and vested its members with authority to make rules to carry out its policies. Cal. Lab. Code §§ 1141, 1144. The ALRB promulgated the Access Regulation in recognition that workers' abilities to exercise their organizational rights "depend[ ] in some measure on the ability of employees to learn the advantages and disadvantages of organization from others." Cal. Code Regs. tit. 8, § 20900(b). The Access Regulation provides that "the rights of employees under [California] Labor Code Section 1152" 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." *Id.* § 20900(e).

This right is subject to several constraints. For example, a labor organization must provide notice to the ALRB and the employer of its intent to appear onsite. *Id.* § 20900(e)(1)(B). No organization may appear for more than four thirty-day periods in any calendar year. *Id.* § 20900(e)(1)(A)-(B). Organizers may enter an employer's property "for a total period of one hour before the start of work and one hour after the completion of work" and for "a single period not to exceed one hour during the working day for the purpose of meeting and talking with employees during their lunch period." *Id.* § 20900(e)(3). Access is limited to a certain number of organizers (depending on the number of employees) and organizers are not allowed

to engage in "conduct disruptive of the employer's property or agricultural operations, including injury to crops or machinery or interference with the process of boarding buses." *Id.* § 20900(e)(4). Organizers are only allowed to meet with employees in areas "employees congregate before and after working" or "at such location or locations as the employees eat their lunch." *Id.* § 20900(e)(3). Organizers that violate these provisions may be barred from accessing employers' properties for organizing purposes. *Id.* § 20900(e)(5).

III. FACTUAL BACKGROUND

Plaintiff Cedar Point Nursery ("Cedar Point") is located in Dorris, California. Compl. for Declaratory and Injunctive Relief ("Compl."), Doc. 1, ¶ 8. Cedar Point employs more than 400 seasonal employees, who are housed off-site. *Id.* ¶¶ 26-27. Cedar Point alleges that United Farm Workers ("UFW") members entered their property at 5:00 A.M. on October 29, 2015, "under the guise of the access regulation . . . without any prior notice of intent to access the property" and "disrupted work by moving through the trim sheds with bullhorns, distracting and intimidating workers." *Id.* ¶¶ 6, 30. Sometime after this event, UFW served notice of their intent to access pursuant to the Access Regulation. *Id.* ¶ 32. Cedar Point lodged a complaint against the UFW with the ALRB regarding UFW's failure to provide notice prior to the October 29 incident. *Id.* ¶ 34. The UFW has also filed a charge with the ALRB against Cedar Point, alleging that Cedar Point has committed unfair labor practices. *Id.*

Plaintiff Fowler Packing Company ("Fowler") is a California corporation, headquartered in Fresno, California. *Id.* ¶ 9. Fowler describes itself as "one of the largest shippers in the fresh produce business." *Id.* Fowler's employees do not live on their property. *Id.* ¶ 37. The UFW brought charges before the ALRB against Fowler, based on alleged violations of the Access Regulation, in July 2015. *Id.* ¶ 38. It withdrew these charges in January of 2016. *Id.* ¶ 39. Fowler alleges that, "[a]bsent the challenged regulation, Fowler would oppose union access and exercise its right to exclude trespassers from its property." *Id.* ¶ 40.

Both companies allege they "have reason to believe that the access regulation will be applied against them in the future" and "the only proper and possible remedy . . . is declaratory and injunctive relief." *Id.* ¶ 57. They state that the Access Regulation should not apply to them because "such access is unnecessary given the alternative means of communication available [to union organizers]." *Id.* ¶ 64.

IV. PROCEDURAL HISTORY

Plaintiffs filed their complaint against individual members of the ALRB on February 10, 2016. Compl. at 11. Plaintiffs argue that the Access Regulation amounts to both a "taking" in violation of the Fifth Amendment of the Constitution, and an unlawful seizure of their private property in violation of the Fourth Amendment. *Id.* ¶¶ 58, 64. Plaintiffs seek a declaratory judgment stating that the Access Regulation is unconstitutional as applied to them and

an order enjoining the ALRB from enforcing the regulation against them. *Id.* at 10:16-19.

On February 16, 2016, Plaintiffs filed a motion for preliminary injunction seeking to enjoin the ALRB from enforcing the Access Regulation on their properties. Mot. for Preliminary Injunction ("MPI"), Doc. 4-1. The State filed an opposition on March 9, 2016. Mem. of P. & A. in Opp'n to Pls.' Mot. for Prelim. Inj. ("Opposition"), Doc. 7. Plaintiffs filed their reply on March 16, 2016. Reply in Supp. of Pls.' Mot. for Prelim. Inj. ("Reply"), Doc 9. On April 18, 2016, this Court issued an order denying the motion to the extent that it was based on Plaintiffs' Fifth Amendment claims and requesting supplemental briefing on their Fourth Amendment claims. Mem. Decision and Order ("April 2016 Order"), Doc. 18. The Parties timely responded. Br. In Supp. of Mot. for Prelim. Inj. ("Pls.' Brief"), Doc. 14; Suppl. Br. in Opp'n to Pls.' Mot. for Prelim. Inj. ("Defs.' Brief"), Doc. 15.[1]

V. STANDARD OF DECISION

A "preliminary injunction is an extraordinary and drastic remedy." *Munaf v. Geren*, 552 U.S. 674, 128 (2008). As such, the Court may only grant such relief "upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat'l Res. Def. Council, Inc.*, 129 S. Ct. 365, 375 (2008). To prevail, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood that the moving party will suffer irreparable harm absent a preliminary injunction; (3) that the balance of equities tips in the moving

[1] Also before the Court is Defendants' motion to dismiss, Doc. 11. This matter shall be addressed in a separate order.

party's favor; and (4) that an injunction is in the public interest. *Id.* at 374. In considering the four factors, the Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* at 376 (quoting *Amoco Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 542 (1987)); *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell–Jolly*, 572 F.3d 644, 651 (9th Cir. 2009). When the government is a party, the last two factors in the *Winter* analysis merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2013).

VI. ANALYSIS

A. Scope of the Claims

As indicated in its previous Order, the Court perceives Plaintiffs' claims to be challenges to the Access Regulation as it may be applied to them. April 2016 Order at 3, n. 1. However, it is also important to note that Plaintiffs do not seek a review of past conduct. Compl. 10:18-19. Nor do they seek to limit the scope of the Access Regulations to certain situations in the future. Rather, they want to enjoin Defendants from enforcing the rule against them *in any way* in the future, based on the characteristics of their operations. *Id.* 10:16-17. The wide breadth of the relief requested suggests that the underlying challenge is facial. But, it stays within the framework of an as-applied challenge because Plaintiffs state that they only seek relief that would apply to their "particular circumstances." *John Doe No. 1 v. Reed*,

561 U.S. 186, 194 (2010).[2] Therefore, to succeed on the merits of their claim, Plaintiffs must show that it would be unconstitutional to apply the Access Regulation to them. *McCullen v. Coakley*, 134 S. Ct. 2518, 2534, n. 4 (2014).[3]

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[2] The Court notes that Plaintiffs do not claim that their circumstances make them unique among agricultural employers. However, an order enjoining the ALRB from applying the Access Regulation would not automatically apply to other entities.

[3] Defendants' discussion of *Freeman v. City of Dallas*, 242 F.3d 642 (5th Cir. 2001), seems to suggest that Plaintiffs must show that the Access Regulation has been or will be applied to them in a manner that violates *some other constitutional right* before the Fourth Amendment is triggered. Defs.' Br. at 4. In *Freeman*, the Fifth Circuit held that a municipality did not need a judicial warrant to demolish a building that had been condemned as a dangerous nuisance. 242 F.3d at 647, 654. In the context of nuisance cases, the Fifth Circuit held that "the Fourth Amendment reasonableness of a seizure and demolition of nuisance property will ordinarily be established when the substantive and procedural safeguards inherent in state and municipal property standards ordinances have been fulfilled." *Id.* at 654 n.17. As the *Freeman* Court recognized, *id.* at 652, the Ninth Circuit has taken a different approach, and has held that a warrant is required to seize property in a nuisance abatement action. *Conner v. City of Santa Ana*, 897 F.2d 1487, 1492 (9th Cir. 1990) ("The warrant requirement applied to the City . . . regardless of how 'reasonable' the warrantless search and seizure appeared in light of the pre-seizure process afforded the [property owners]."). Thus, to the extent that Defendants argue that a seizure that comports with due process requirements is entitled to a presumption of reasonableness based on nuisance jurisprudence, this theory does not have a viable basis in Ninth Circuit case law.

B. Likelihood of Success on the Merits

1. Threshold Issue: Seizure/Meaningful Interference

Whether access by organizers effects a Fourth Amendment seizure is a threshold issue. *Jensen v. Cty. of Sonoma*, 444 F. App'x 156, 159 (9th Cir. 2011) (no Fourth Amendment violation because order requiring property owners to schedule a home inspection did not effect a seizure). As discussed in the Court's April 2016 Order, "a 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). In its supplemental brief, the State argues that the Access Regulation does not effect a "meaningful interference" with Plaintiffs' property rights because it only allows a limited number of organizers access for short periods of time. Defs.' Brief at 4.[4] The Supreme Court has explained that "[w]hile the concept of a 'seizure' of property is not much discussed in our cases, this definition follows from our oft-repeated definition of the 'seizure' of a person within the meaning of the Fourth Amendment-meaningful interference, however brief, with an individual's freedom of movement." *Jacobsen*, 466 U.S. at 114 n. 5. Generally, Fourth Amendment property seizures involve the removal or destruction

[4] In its request for supplemental briefing, the Court asked the parties to expand on the reasonableness of the Access Regulation as applied to Plaintiffs. In their brief, Defendants also clarified an earlier position that the Court misread as a concession on the threshold issue of whether a seizure occurred. Because Defendants timely raised this issue in their previous brief, the Court will consider the argument.

or personal property. *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1030 (9th Cir. 2012) (unreasonable to destroy "unabandoned" personal effects of plaintiffs temporarily left on sidewalk); *Cochran v. Gilliam*, 656 F.3d 300, 308 (6th Cir. 2011) (removing personal effects from apartment constituted a seizure); *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 210 (3d Cir. 2001) ("[K]illing of a person's dog by a law enforcement officer constitutes a seizure under the Fourth Amendment."); *Archer v. Gipson*, 108 F. Supp. 3d 895, 909 (E.D. Cal. 2015) (warrantless seizure of construction materials to abate nuisance was "per se unreasonable" unless exception to the warrant requirement applies). In these cases, the complete displacement of possessory interests is undisputed. *See, e.g.*, *Lavan*, 693 F.3d at 1030. ("The district court was correct in concluding that even if the seizure of the property would have been deemed reasonable had the City held it for return to its owner instead of immediately destroying it, the City's destruction of the property rendered the seizure unreasonable.").

When an owner is not completely dispossessed of his property, but only suffers a trespass, it is not necessarily the case that interference causes a seizure. As discussed in the Court's April 2016 Order, the Fourth Circuit found that a "constant physical occupation" of a plaintiff's property (which resulted from a city's advertisement of a hiking trail through her backyard) "certainly constitute[d] a 'meaningful interference' with [her] possessory interests." *Presley v. City Of Charlottesville*, 464 F.3d 480, 487 (4th Cir. 2006). Generally, however, "[t]he existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been

violated . . . for an actual trespass is neither necessary nor sufficient to establish a constitutional violation." *United States v. Karo*, 468 U.S. 705, 712-13 (1984). For example, in *Karo*, the Supreme Court considered whether "the installation of a beeper in a container of chemicals with the consent of the original owner constitutes a search or seizure within the meaning of the Fourth Amendment when the container is delivered to a buyer having no knowledge of the presence of the beeper." *Id.* at 707. While acknowledging that placing the beeper in the can may have been a "technical trespass on the space occupied by the beeper," the Court found that no seizure occurred because "it cannot be said that anyone's possessory interest was interfered with in a meaningful way." *Id.*

Plaintiffs argue that the Access Regulation's interference with their interests is substantial because "it effectively terminates" their right to exclude others from their properties. MPI at 11. However, Plaintiffs have not shown that the ALRB has applied or will apply the Access Regulation in a manner that has restricted Plaintiffs' freedom to use their property. *Jacobsen*, 466 U.S. at 114, n. 5. Nor do Plaintiffs show that the rule will subject them to a "constant physical occupation." *Presley*, 464 F.3d at 487. In fact, Plaintiffs do not allege that the ALRB has used the Access Regulation to force them to allow *any* organizers on their properties to date. This is because the one example Plaintiffs provide of union organizers accessing their property is alleged to have occurred in *violation* of the Access Regulation. Compl. ¶ 34 (describing that the Union's actions "violated the access regulation by taking access to Cedar Point's

property without providing proper notice."). In fact, Cedar Point admits that it has filed a charge against the Union with the ALRB related to this event. *Id.* Plaintiffs cannot have it both ways. If the 2015 event occurred in violation of the Access Regulation, conduct associated with it cannot be viewed as compelling evidence that implementation of the law is unconstitutional.[5] Thus, Plaintiffs have not at this time met their burden to show it is likely that the Access Regulation has caused or will cause a "meaningful interference" with their possessory interests.[6]

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[5] The constitutionality of the 2015 access event is not at issue in this case, as Plaintiffs have requested no relief related to this event. Additionally, because the ALRB has not yet issued its own decision regarding the event, the issue is likely not ripe for review. *See Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 304 (1979) (Constitutionality of Arizona access regulation not justiciable until organizers could "assert an interest in seeking access to particular facilities as well as a palpable basis for believing that access will be refused.").

[6] Further, it is not clear that California property law treats conduct authorized by the Access Regulation as a trespass, given the California Supreme Court's finding that the rule "is not a deprivation of 'fundamental personal liberties' but a limited economic regulation of the use of real property imposed for the public welfare." *Agric. Labor Relations Bd. v. Superior Court*, 16 Cal. 3d 392, 409 (1976); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 n. 21 (1994) ("The right of employers to exclude union organizers from their private property emanates from state common law . . ."); *N.L.R.B. v. Calkins*, 187 F.3d 1080, 1088 (9th Cir. 1999) ("[S]tate property law is what creates the interest entitling employers to exclude organizers in the first instance. Where state law does not create such an interest, access may not be restricted consistent with Section 8(a)(1) [of the National Labor Relations Act].").

2. Reasonableness of the Access Regulation

Even if Plaintiffs were able to show that the Access Regulation effects a Fourth Amendment seizure, they still must demonstrate that such a search would be unreasonable. When determining whether an interference violates the Fourth Amendment, "reasonableness is still the ultimate standard." *Soldal v. Cook Cty., Ill.*, 506 U.S. 56, 71 (1992). Any analysis of reasonableness must involve a "careful balancing of governmental and private interests." *Id.* at 71 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)). It is Plaintiff's burden to demonstrate likelihood of success. In their supplemental brief, Plaintiffs put forth two new arguments that the interference with their property rights is unreasonable. First, Plaintiffs argue that the Access Regulation threatens their ability to comply with health and safety regulations. Pls.' Brief at 1-2. Second, they argue that the Access Regulation impairs productivity. *Id.* at 3. Plaintiffs also cite to additional evidence in support of their previously asserted position that the Access Regulation harms them because it hurts their goodwill and reputation.

In support of their first argument, Plaintiffs point to the declaration of Fowler's human resources director, Chris Rodriguez. *Id.* at 2. Rodriguez testified that Fowler has a "food defense policy" that requires specialized training to protect their food products from contamination. Decl. of Chris Rodriguez ("Rodriguez Decl."), Doc. 14-12, ¶ 7. He states that the Access Regulation

> allows persons to come on to the property near sensitive products who have no reason to be trained in or to be aware of the protocols required by Fowler's food defense policy. Fowler's field workers typically congregate near open-faced tubs of grapes during their breaks and meal periods. Consequently, union representatives naturally position themselves in this sensitive zone to be able to speak with employees. A union representative could easily contaminate this zone if the representative had an unprotected open cut or wound, was not properly dressed with protective clothing, or had a viral condition, such as the common cold, influenza, mononucleosis, or hepatitis. Such contamination would pose a substantial risk to Fowler as a legal and business matter, and to its vendors and customers, as a safety matter. In contrast, these risks are minimized by Fowler's employees, who must use aprons to cover their street clothes when packing, and who are not allowed to work if they exhibit symptoms of infection.

Id. Rodriguez also states that the presence of union organizers who are non-compliant with their food safety policies during an audit may jeopardize Fowler's ability meet audit standards. *Id.* at ¶ 8. Cedar Point's human resources manager testified that:

> [d]uring harvest time, operations on Cedar Point's property, including within the trim sheds, are very fast-paced and involve a

> variety of heavy equipment, including tractors, excavators, forklifts, and heavy bins. For employee safety, Cedar Point is very strict about when and where employees may stand or walk on the property and in the trim sheds. Knowing these protocols can be a life-or-death matter. For example, during harvest time, heavy bins are placed on metal tracks within the trim sheds to facilitate the transport of plants from the coolers to the packing areas. If one does not pay attention to whether one is standing on these tracks, one could very easily be struck by a moving heavy plastic bin, which typically weighs 2,500 pounds. Similarly, if one does not know the areas where forklifts or other heavy equipment operate within the trim sheds, one could very easily be struck by the equipment.

Decl. of Rachel Halpenny ("Halpenny Decl."), Doc. 14-2, ¶ 6.

The Court credits Plaintiffs' concern for the safety of their operations. However, Plaintiffs do not provide a basis for finding that the ALRB has employed or will employ the Access Regulation in a manner that would permit or encourage violations of food safety policies or require Plaintiffs to jeopardize the health or safety of their employees, their property, or, for that matter, the union organizers. Crucially, Plaintiffs do not claim that they have been prevented from requiring organizers to comply with their protocols. Nor do they suggest that it would be impractical to require organizers to do so. Plaintiffs posit that instructing organizers about their safety protocols may run afoul

of the Access Regulation's prohibition on employer interference with the activities of union organizers. Pls.' Brief at 2, n. 1. However, there is no evidence that the Access Regulation has been or would be applied in such a manner. In fact, the Access Regulation *prohibits* organizers from engaging in "conduct disruptive of the employer's property or agricultural operations." Cal. Code Regs. tit. 8, § 20900(e)(4). Because refusal to comply with health and safety procedures would disrupt an employer's operations, the conduct of which Plaintiff is concerned is prohibited, not required, by the Access Regulation.

Halpenny also described that when union protestors visited Cedar Point's facility in 2015, they did so "in the early morning hours when the trim sheds and outside areas were dark," and "had no reason to know about Cedar Point's safety protocols or the dangers of not knowing whether one is standing in a safe area on the property." Halpenny Decl. ¶ 7. While the concerns about this event are reasonable, it is not clear that they can be tied to implementation of the Access Regulation. Plaintiffs acknowledge that the organizers did not comply with the Regulation, first because they failed to give notice, and second because they engaged in disruptive activities. Compl. ¶ 30. In fact, two of Cedar Point's employees testified that this event was a "protest" that was "particularly disruptive." Decl. of Matthew McEwen ("McEwen Decl."), Doc. 14-3; ¶ 7; Decl. of Victor Garcia ("Garcia Decl."), Doc. 14-4, ¶ 7. Plaintiffs do not claim that the ALRB sanctioned such behavior as protected by the Access Regulation. In fact, Plaintiffs filed a complaint with the ALRB about the union's activities that is still pending. Compl. ¶ 34; Decl. of Mike Fahner ("Fahner

Decl."), Doc. 4-3, ¶ 13. Therefore, although this event is of obvious practical concern to Plaintiffs, it is not persuasive evidence of conduct permitted by the Access Regulation. Violations of the Access Regulation can result in the banning of any group for non-compliance. Cal. Code Regs. tit. 8, § 20900(e)(5). This in no way makes the regulation unconstitutional.

Plaintiffs next argue that the Access Regulation threatens productivity because workers do not generally eat when union organizers meet with them. Pls.' Br. at 3; *see also* Rodriguez Decl. ¶ 9. Plaintiffs explain that this requires them to give the workers longer lunch breaks. *Id.* It is logical to assume that longer lunch breaks may negatively affect productivity. However, given that Plaintiffs do not provide any estimate of how much time is actually lost (or may be lost in the future) in relation to these activities, the Court cannot determine how meaningful any such negative impact is relative to Defendants' stated interests. Defendants provide testimony that the 2015 event resulted in a "significant work slowdown." McEwen Decl. ¶ 7. For one crew, this meant that "an additional three hours were required to complete trimming work." *Id.* For another crew, this meant that employees were "only able to produce approximately 50% of what they could normally do." Garcia Decl. ¶ 7. As discussed above, given that the 2015 event was "particularly disruptive," occurred without the required notice, and the ALRB has not endorsed the event, the Court cannot consider productivity losses alleged to be associated with the event to be persuasive evidence as to how the rule is actually implemented. Violating the rule is not the same as implementing it.

Plaintiffs next assert that the Access Regulation is unreasonable because it will cause them to lose goodwill insofar as its application sends a message that they do not treat their workers well. In its April 2016 Order, the Court noted that Plaintiffs had not provided any authority for the proposition that such a loss of goodwill is a cognizable form of injury that would support an unlawful seizure claim. April 16 Order at 13. In supplemental briefing, Plaintiffs point to a Fifth Circuit case that recognized a business could have a property interest in its reputation under Florida law. *Marrero v. City of Hialeah*, 625 F.2d 499, 514 (5th Cir. 1980) ("Florida has long extended its protection to the intangible interests of a business."). California law also protects business goodwill as property. *WMX Techs., Inc. v. Miller*, 80 F.3d 1315, 1323 (9th Cir. 1996) (citing California Civil Code § 655), *on reh'g en banc*, 104 F.3d 1133 (9th Cir. 1997). Rodriguez states that Fowler's good will is impaired when organizers access the property because "the perception among Fowler's employees is that the company must be a wrongdoer." Rodriguez Decl. ¶ 10. He also states that a similar impression is left with Fowler's vendors and customers, "making it less likely that they will continue to do business with Fowler." *Id.* Halpenny states that, "since last year's protest, every labor contractor who has contacted me has asked whether Cedar Point has resolved the issues with the union. These contractors are now concerned about whether to contract with Cedar Point, a concern that was not present prior to the union protests." Halpenny Decl. ¶ 9. As discussed above, Plaintiffs have not made clear that the mere presence of union organizers on their property will cause them to lose goodwill, or whether the goodwill they alleged to have

lost in the past was due to the "particularly disruptive" nature of the event that occurred in 2015. In other words, it is impossible at this point to determine whether the repercussions alleged by Plaintiff would have occurred had the organizers complied with the Access Regulation.

In contrast, Defendants persuasively argue that the State's general interests in enforcing the Access Regulation are significant. California has declared that is the

> policy of the state 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 interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Cal. Lab. Code § 1140.2. The ALRB has found that workers' abilities to exercise these rights "depend[ ] in some measure on the ability of employees to learn the advantages and disadvantages of organization from others." Cal. Code Regs. tit. 8, § 20900(b). The Supreme Court has also recognized that "[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others." *Nat'l Labor Relations Bd. v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). The ALRB has found "that unions seeking to organize

agricultural employees do not have available alternative channels of effective communication." Cal. Code Regs. tit. 8, § 20900(c). Therefore, to bring "certainty and a sense of fair play" to the "potentially volatile condition in the agricultural fields of California," the ALRB has also found that the state's interests are "best served by the adoption of rules on access which provide clarity and predictability to all parties." *Id.* § 20900(d). "Relegation of the issues to case-by-case adjudication or the adoption of an overly general rule would cause further uncertainty and instability and create delay in the final determination of elections." *Id.* The California Supreme Court subsequently confirmed that this rule was within the ALRB's rulemaking powers. *Agric. Labor Relations Bd. v. Superior Court* ("*ALRB v. SC*"), 16 Cal. 3d 392, 416 (1976).

The State also presents evidence that conditions supporting the necessity of worksite access at the time of the rule's inception still exist today. Opposition at 13-14. For example, the State presents a memorandum summarizing the testimony and minutes of three hearings the ALRB held in September of 2015. Req. for Judicial Notice, Ex. A ("ALRB Memo"), Doc. 8 at Ct. R. 4.[7] In these hearings, the ALRB heard testimony that agricultural workers remain largely unaware of their labor rights because of a number of communication barriers. *Id.* at Ct. R.

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[7] A court may take judicial notice of "records and reports of administrative bodies." *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986), abrogated on other grounds by *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991).

10-11.[8] First, reaching employees directly offsite is difficult because of the long hours that agricultural employees work. *Id.* Second, many workers are not literate in Spanish or English, and lack access to the internet because of the high cost of data plans and computers. *Id.* at 13-14. Workers' lack of language and computer literacy means that online outreach efforts have not been very successful. *Id.* at 14. Further, the ALRB heard testimony that agricultural workers were fearful about exercising their rights and that face-to-face communication is important to help them overcome these fears. *Id.* at 20.

Plaintiffs counter that their employees are accessible because they mostly speak Spanish or English. McEwen Decl., ¶ 5; Garcia Decl., ¶ 5. Cedar Point also presents evidence that between 90% and 100% of their employees possess cellular or smartphones. McEwen Decl. ¶ 5; Garcia Decl. ¶ 5. Fowler represents that 50% of their employees use "a cellular or smart phone." Decl. of Scott Sanders ("Sanders Decl."), Doc. 14-5, ¶ 5. Plaintiffs also show that organizers utilize internet resources and have a radio station. Decl. of Kevin Desormeaux, Doc. 14-6, Ex. A-E.

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[8] Plaintiffs argue that the Court may not take judicial notice of the facts set forth in the ALRB Memo because they are "legislative facts." Pls.' Br. at 5, n. 3. Plaintiffs' argument is misplaced. The Court takes judicial notice that the administrative hearings took place and that the Memo reflects these proceedings as summarizing part of the administrative record. Further, this Court has discretion to consider a broad range of evidence because "the rules of evidence do not strictly apply to preliminary injunction proceedings." *Houdini Inc. v. Goody Baskets LLC*, 166 F. App'x 946, 947 (9th Cir. 2006).

That Plaintiffs' employees may have some access to social media does not negate the ALRB's concerns that workers have sufficient access to the internet or the skills to find *and* understand the relevant information. Nor does the fact that organizers use broadcast and social media mean that these tools are sufficient. As discussed above, the Access Regulation is primarily concerned with information delivery and education. Cal. Code Regs. tit. 8, § 20900(e). ("[T]he rights of employees under Labor Code Section 1152 [ ] 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*.") (emphasis added). Defendants have put forth evidence supporting their conclusion that worksite access is necessary for organizers to be able to provide this information. In contrast, Plaintiffs have not presented compelling evidence that their seasonal workers have reliable access to such information via alternative sources that would negate the need for worksite access. Thus, they have not shown that it would be unreasonable for the ALRB to allow organizers to access their property to provide such information.

C. Irreparable Harm

1. Constitutional Injuries

Plaintiffs argue that they are suffering from a "deprivation of constitutional rights" which "unquestionably constitutes irreparable injury." MPI at 12. This theory arises out of a First Amendment case where public employees alleged that "they were discharged or threatened with discharge solely because of their partisan political affiliation or

nonaffiliation." *Elrod v. Burns*, 427 U.S. 347, 349 (1976). Finding that "First Amendment interests were either threatened or in fact being impaired at the time relief was sought," the Court concluded that such a loss, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 373. The government argues that this line of case law only extends to violations of "fundamental" constitutional rights. Opposition at 12. The cases the government cites in support of this argument, however, are from out of circuit. *Id.* (citing *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 484 (1st Cir. 2009), and *Ne. Florida Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285-86 (11th Cir. 1990)). There is no indication that the Ninth Circuit requires a constitutional right to be "fundamental" in order to support a conclusion that its violation would constitute an irreparable injury. Rather, it has held more generally that "an alleged constitutional infringement will often alone constitute irreparable harm." *Associated Gen. Contractors of Cal., Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991). For example, it has recognized a violation of the equal protection clause as a type of constitutional infringement that "will often alone constitute irreparable harm." *Goldie's Bookstore, Inc. v. Superior Court of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984). Further, the Ninth Circuit has upheld a decision in which a district court found irreparable injury on the basis of a Fourth Amendment violation. *Lavan*, 693 F.3d at 1033. Thus, Plaintiffs may be able to show an irreparable injury if they can show that activities authorized by the Access Regulation are unconstitutional.

While a Fourth Amendment violation may be a sufficient basis for finding irreparable harm, the strength of this position is tied to the likelihood of success of their underlying claim. *Dex Media W., Inc. v. City of Seattle*, 790 F. Supp. 2d 1276, 1289 (W.D. Wash. 2011) ("Because the court finds that Plaintiffs have failed to establish that they are likely to succeed on the merits of their First Amendment claim . . . the court cannot find that Plaintiffs have established that they are likely to suffer irreparable First Amendment injury in the absence of a preliminary injunction."); *accord Nationwide Biweekly Admin., Inc. v. Owen*, No. 14-CV-05166-LHK, 2015 WL 1254847, at *9 (N.D. Cal. Mar. 18, 2015). As discussed above, Plaintiffs have not demonstrated that the Access Regulation is likely to cause a constitutional injury. Therefore, they cannot show that irreparable harm based on such an injury is likely.

2. <u>Operational Injuries</u>

Plaintiffs also allege that the potential for them to lose goodwill and competitive advantage is also likely to cause them irreparable harm. MPI at 12. They claim that "just the 'threatened loss' of goodwill is undeniably an irreparable harm under Ninth Circuit precedent," citing *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001). MPI at 12. However, the *Stuhlbarg* Court's reliance on the "possibility" that goodwill would be lost as sufficient showing of irreparable harm was overruled by the Supreme Court in *Winter*: "[T]he Ninth Circuit's 'possibility' standard is too lenient. Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable

injury is likely in the absence of an injunction." 555 U.S. at 22. The Ninth Circuit has since made clear that a plaintiff "must establish a likelihood of irreparable harm that is grounded in evidence, not in conclusory or speculative allegations of harm." *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1133 (9th Cir. 2014).

Plaintiffs argue that the Access Regulation "threatens to put Plaintiffs at a competitive disadvantage relative to their unionized competitors" by "inciting protests on their property" and will cause them to lose goodwill because "the regulation sends the message that Plaintiffs would treat own workers poorly if it were not for union interference." MPI at12. Cedar Point's owner states that the Access Regulation will cause Cedar Point to lose goodwill because it "sends a message that Cedar Point would treat its workers poorly without union interference." Fahner Decl. ¶ 14. Similarly, Fowler's CEO states that the access regulation will cause Cedar Point to lose goodwill because "it sends a message that Fowler would treat its workers poorly without union interference." Decl. of Dennis Parnagian ("Parnagian Decl."), Doc. 4-2, ¶ 10. Plaintiffs submitted additional evidence with their supplemental briefing attesting to the fact that Cedar Point's employees were "visibly shaken and scared" in response to the 2015 episode. Pls.' Br. at 4. Cedar Point's human resources director attested that "approximately 75" employees resigned in response to the event and that since that time, "every labor contractor who has contacted me has asked whether Cedar Point has resolved issues with the union." Halpenny Decl. ¶¶ 8-9. The Court credits Plaintiffs' frustration with the events alleged to have

occurred in 2015, as well as their alleged ramifications. If Plaintiffs were able to tie these allegations to the lawful implementation or enforcement of the Access Regulation, then there might be a basis for finding harm. However, as discussed above, Plaintiffs have not shown that the 2015 events were the result of lawfully implementing or enforcing the Access Regulation. Rather, according to Plaintiffs, these events occurred *in violation* of the Access Regulation. Fahner Decl. ¶ 13; Compl. ¶ 34. Plaintiffs do not present any other objective evidence that substantiates their theory that the Access Regulation, when lawfully implemented or enforced, is likely to cause Plaintiffs to lose goodwill or suffer a competitive disadvantage. Thus, they have not shown that the Access Regulation is likely to cause them irreparable harm.

D. Balance of the Equities/Public Interest

Plaintiffs argue that the balance of the equities tips in their favor because they would suffer "many injuries," such as the "loss of goodwill, a competitive disadvantage, and deprivation of their constitutional rights." MPI at 12-13. As indicated above, Plaintiffs do not provide sufficient evidentiary support for these assertions. In contrast, the government has shown that the state of California has a specific interest in protecting the rights and safety of the agricultural workers under the ALRA and that the Access Regulation is an integral part of this policy. *ALRB v. SC*, 16 Cal. 3d at 415.

Plaintiffs invoke the Supreme Court's decision in *Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527 (1992), to undermine the strength of the State's stated interests.

MPI at 13. In *Lechmere*, the Supreme Court considered whether section 7 of the National Labor Relations Act ("NLRA") permitted an administrative law judge to require an employer to allow non-employee union organizers on to its property. 502 U.S. at 531. Summarizing its previous holding in *Nat'l Labor Relations Bd. v. Babcock & Wilcox Co.*, 351 U.S. 105, 109-110 (1956), the *Lechmere* Court explained that section 7 "simply does not protect nonemployee union organizers except in the rare case where 'the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.'" *Id.* Plaintiffs argue that *Lechmere* requires this Court to find that the Access Regulation is contrary to the public interest because they claim that their circumstances differ from those that the Supreme Court recognized as making the employees inaccessible (*i.e.*, that their employees speak Spanish or English, own cell phones and are not housed on their employer's property).

First, it must be noted that *Lechmere* and *Babcock* were based on the *scope of the NLRA* and did not present constitutional challenges. Therefore, the holdings in these cases do not control the issue of whether ALRA regulations are constitutional. But even if the factors identified in *Lechmere* and *Babcock* might be considered in an evaluation of the public interest, the outcome of that analysis would favor the State. As the California Supreme Court recognized in 1976, the ALRB reasonably found that employee inaccessibility "was the rule rather than the exception in California agriculture" because

. . . many farmworkers are migrants; they arrive in town in time for the local harvest, live in motels, labor camps, or with friends or relatives, then move on when the crop is in. Obviously home visits, mailings, or telephone calls are impossible in such circumstances. According to the record, even those farmworkers who are relatively sedentary often live in widely spread settlements, thus making personal contact at home impractical because it is both time-consuming and expensive.

Nor is pamphleting or personal contact on public property adjacent to the employer's premises a reasonable alternative in the present context, on several grounds. To begin with, many ranches have no such public areas at all: the witnesses explained that the cultivated fields begin at the property line, and across that line is either an open highway or the fields of another grower. Secondly, the typical industrial scene of a steady stream of workers walking through the factory gates to and from the company parking lot or nearby public transportation rarely if ever occurs in a rural setting. Instead, the evidence showed that labor contractors frequently transport farmworkers by private bus from camp to field or from ranch to ranch, driving directly onto the premises before unloading; in such circumstances, pamphleting or personal contact is again impossible. . .

> Finally it was also shown that many farmworkers are illiterate, unable to read even in one of the foregoing languages; in such circumstances, of course, printed messages in handbills, mailings, or local newspapers are equally incomprehensible.

ALRB v. SC, 16 Cal. 3d at 414-15. The government presents evidence that these conditions persist today. ALRB Memo at Ct. R. 10. Thus, the fact that Plaintiffs' employees do not meet certain metrics of isolation does not undermine the State's position that these employees are inaccessible to organizers.

Finally, Plaintiffs also submit declarations of their executives that working conditions at their properties are excellent and that their employees have not expressed an interest in organizing. Fahner Decl. ¶ 8, Parnagian Decl. ¶ 6. That is beside the point. The purpose of the Access Regulation is to provide employees with the *knowledge* of their rights. It has nothing to do with employees' decisions as to what, if anything, to do with those rights. This purpose exists independent of the actual conditions on site. As discussed above, Plaintiffs provide no evidence that their workers have reliable access to information about their organizational rights. For these reasons, the Court finds that the balance of the equities favors Defendants and that denial of Plaintiffs' request is in the public interest. *Drakes Bay Oyster Co.*, 747 F.3d at 1092.

VII. CONCLUSION AND ORDER

For the reasons discussed above, the Court finds that each of the *Winter* factors favors Defendants with

respect to Plaintiffs' Fourth Amendment claims. The Court previously denied Plaintiffs' motion as to their Fifth Amendment claims. It now DENIES Plaintiffs' motion for preliminary injunction, Doc. 4, in its entirety.

IT IS SO ORDERED.

Dated: **May 26, 2016** **/s/ Lawrence J. O'Neill**
UNITED STATES CHIEF
DISTRICT JUDGE

Filed 4/18/2016

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CEDAR POINT NURSERY and FOWLER PACKING CO., **Plaintiffs,** **v.** **WILLIAM B. GOULD IV,** ***et al.*****,** **Defendants.**	**1:16-cv-00185-LJO-BAM** **MEMORANDUM DECISION AND ORDER DENYING IN PART MOTION FOR PRELIMINARY INJUNCTION AND REQUESTING SUPPLEMENTAL BRIEFING [Doc. 4]**

I. INTRODUCTION

Plaintiffs Cedar Point Nursery and Fowler Packing Company ("Plaintiffs") allege that Cal. Code Regs. tit. 8, § 20900(e) (the "Access Regulation"), a regulation promulgated by California's Agricultural Labor Relations Board ("ALRB") allowing union organizers access to worksites, is unconstitutional as applied to them. Plaintiffs argue that the Access Regulation allows third parties to take their property without providing just compensation, in violation of the Fifth Amendment, and permits unlawful seizure of their property rights, in violation of the Fourth Amendment.

As set forth below, the Court finds that Plaintiffs have not shown a substantial likelihood of success on their Fifth Amendment claim. Plaintiffs present a stronger legal argument in support of their Fourth Amendment claim. However, the record needs to be developed further before the Court can either evaluate the merits of this argument or balance the equities involved.

II. THE ACCESS REGULATION

The Access Regulation provides that "the rights of employees under [California] Labor Code Section 1152" 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." Cal. Code Regs. tit. 8, § 20900(e). The right is subject to several constraints. For example, a labor organization must provide notice to the ALRB and the employer of its intent to appear onsite. § 20900(e)(1)(B). No organization may appear for more than four thirty-day periods in any calendar year. § 20900(e)(1)(A)-(B). Organizers may enter an employer's property "for a total period of one hour before the start of work and one hour after the completion of work" and for "a single period not to exceed one hour during the working day for the purpose of meeting and talking with employees during their lunch period." § 20900(e)(3). Access is limited to a certain number of organizers (depending on the number of employees) and organizers are not allowed to engage in "conduct disruptive of the employer's property or agricultural operations, including injury to crops or machinery or interference with the process of boarding buses." § 20900(e)(4).

III. FACTUAL BACKGROUND

Plaintiff Cedar Point Nursery ("Cedar Point") is located in Dorris, California. Compl. for Declaratory and Injunctive Relief ("Compl."), Doc. 1, ¶ 8. Cedar Point employs more than 400 seasonal employees, who are housed off-site. *Id.* ¶¶ 26-27. Cedar Point alleges that United Farm Workers ("UFW") members entered their property at 5:00 A.M. on October 29, 2015, "without any prior notice of intent to access the property" and "disrupted work by moving through the trim sheds with bullhorns, distracting and intimidating workers." *Id.* ¶ 30. Sometime after this event, UFW served notice of their intent to take access. *Id.* ¶ 32. Cedar Point lodged a complaint against the UFW with the ALRB regarding UFW's failure to provide notice prior to the October 29 incident. *Id.* ¶ 34. The UFW has also filed a charge with the ALRB against Cedar Point, alleging that Cedar Point has committed unfair labor practices. *Id.*

Plaintiff Fowler Packing Company ("Fowler") is a California corporation, headquartered in Fresno, California. *Id.* ¶ 9. Fowler describes itself as "one of the largest shippers in the fresh produce business." *Id.* Fowler's employees do not live on their property. *Id.* ¶ 37. The UFW brought charges before the ALRB against Fowler, based on alleged violations of the Access Regulation, in July 2015. *Id.* ¶ 38. It withdrew these charges in January 2016. *Id.* ¶ 39. Fowler alleges that, "[a]bsent the challenged regulation, Fowler would oppose union access and exercise its right to exclude trespassers from its property." *Id.* ¶ 40.

Both companies allege they "have reason to believe that the access regulation will be applied against them in the future" and "the only proper and possible remedy . . . is declaratory and injunctive relief." *Id.* ¶ 57. They state that the Access Regulation should not apply to them because "such access is unnecessary given the alternative means of communication available [to union organizers]." *Id.* ¶ 64.

IV. PROCEDURAL HISTORY

Plaintiffs filed their complaint against individual members of the ALRB on February 10, 2016. Compl. at 11. Plaintiffs argue that the Access Regulation amounts to both a "taking" in violation of the Fifth Amendment of the Constitution, and an unlawful seizure of their private property in violation of the Fourth Amendment. *Id.* ¶¶ 58, 64. Plaintiffs seek a declaratory judgment stating that the Access Regulation is unconstitutional as applied to them and an order enjoining the ALRB from enforcing the regulation against them. *Id.* at 10:16-19.

On February 16, 2016, Plaintiffs filed a motion for preliminary injunction seeking to enjoin the ALRB from enforcing the Access Regulation on their properties. Proposed Order Granting Prelim. Inj., Doc. 4-4.[1] The government filed an opposition on March 9,

[1] While some of the parties' arguments suggest that Plaintiffs are raising a facial challenge, it is clear from the remedies sought by the Complaint and their request for preliminary injunction that Plaintiffs bring a challenge to the Access Regulation as it is applied to them. *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010) ("[A] claim can have characteristics of as-applied and facial challenges: it can challenge more than just the plaintiff's

2016. Mem. of P. & A. in Opp'n to Pls.' Mot. for Prelim. Inj. ("Opposition"), Doc. 7. Plaintiffs filed their reply on March 16, 2016. Reply in Supp. of Pls.' Mot. for Prelim. Inj. ("Reply"), Doc 9. The matter was taken under submission on the papers pursuant to Local Rule 230(g). Doc. 10.

V. STANDARD OF DECISION

A "preliminary injunction is an extraordinary and drastic remedy." *Munaf v. Geren*, 552 U.S. 674, 128 (2008). As such, the Court may only grant such relief "upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat'l Res. Def. Council, Inc.*, 129 S. Ct. 365, 375 (2008). To prevail, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood that the moving party will suffer irreparable harm absent a preliminary injunction; (3) that the balance of equities tips in the moving party's favor; and (4) that an injunction is in the public interest. *Id.* at 374. In considering the four factors, the Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* at 376 (quoting *Amoco Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 542 (1987)); *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell–Jolly*, 572 F.3d 644, 651 (9th Cir. 2009).

"[I]f a plaintiff can only show that there are 'serious questions going to the merits'—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the

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particular case without seeking to strike the law in all its applications.").

'balance of hardships tips sharply in the plaintiff's favor,' and the other two *Winter* factors are satisfied." *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)). "Serious questions" in the context of preliminary injunctive relief are those that are "substantial, difficult, and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (citation and internal quotation marks omitted). They do not need to "promise a certainty of success, nor even present a probability of success, but must involve a fair chance of success on the merits." *Id.* (citation and internal quotation marks omitted).

VI. ANALYSIS

A. Takings Claims

1. Ripeness

Defendants ("ALRB Members" or "the government") argue that Plaintiffs' takings claims are unripe under *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 1985). Opposition at 10, n. 3. *Williamson* imposes two requirements that must be satisfied before a takings claim may be heard in federal court: (1) "the government entity charged with implementing the regulations [must have] reached a final decision regarding the application of the regulations to the property at issue," and (2) the plaintiff must have been denied compensation by the state. 473 U.S. at 194-95. As Plaintiffs point out, these requirements are

prudential, not jurisdictional, in nature. *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1117 (9th Cir. 2010). "Prudential considerations of ripeness are discretionary." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1142 (9th Cir. 2000).

The parties do not seem to dispute that the first element is met. Therefore, the Court will assume without deciding that satisfaction of this element is undisputed.

Plaintiffs argue that the second *Williamson* requirement (referred to as the "exhaustion" requirement) does not apply to their case. Mem. of P. & A. in Supp. of Pls.' Mot. for Prelim. Inj. ("MPI"), Doc. 4-1 at 8. They argue that the exhaustion requirement only applies when a petitioner seeks relief under the "just compensation clause," which they do not. *Id.* This argument is a red herring. The cases Plaintiffs cite to support their position that they should be permitted to bypass the exhaustion requirement all involved only facial challenges. *San Remo Hotel, L.P. v. City & Cty. of San Francisco, Cal.*, 545 U.S. 323, 345-46 (2005) ("Petitioners therefore could have raised most of their *facial* takings challenges, which by their nature requested relief distinct from the provision of 'just compensation,' directly in federal court.") (emphasis added); *Cty. Concrete Corp. v. Town of Roxbury*, 442 F.3d 159, 165 (3d Cir. 2006) (holding that a "facial Fifth Amendment Just Compensation Takings claim need not comply with the finality rule"); *Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1074 (N.D. Cal. 2014) (holding that plaintiffs in facial challenge case need not seek compensation in state court). Therefore, the fact that Plaintiffs do not

seek damages does not mean that they are not subject to the exhaustion requirement. Rather, it is the scope of the constitutional challenge that is relevant. "[A]s applied challenges require[ ] *Williamson* exhaustion," while facial challenges "sometimes" do and sometimes do not. *Guggenheim*, 638 F.3d at 1117 (citing *Sinclair Oil Corp. v. Cty. of Santa Barbara*, 96 F.3d 401, 405 (9th Cir. 1996)). Plaintiffs here bring only as applied claims. Compl. 10:16-19; MPI at 15. Therefore, they are subject to both elements of *Williamson*. *Guggenheim*, 638 F.3d at 1117.

A plaintiff may fulfill the second *Williamson* prong by showing that "recourse to the state courts would be futile." *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003). Futility exists where a state court has "specifically heard the cause of action at issue and denied it." *Id.* at 659 (citing *Austin v. City & Cty. of Honolulu*, 840 F.2d 678, 681 (9th Cir. 1988)). Plaintiffs argue that they meet this requirement because in *Agric. Labor Relations Bd. v. Superior Court*, 16 Cal. 3d 392, 411 (1976) ("*ALRB v. SC*"), the California Supreme Court found that the Access Regulation does not constitute a taking under either the California or U.S. Constitutions. MPI at 9-10. The ALRB Members did not address this issue in their Opposition. The Court agrees with Plaintiffs that *ALRB v. SC* forecloses their ability to recover in state court. *Id.* For this reason, and in light of the prudential nature of the *Williamson* factors, the Plaintiffs takings claims are ripe for decision.

2. Likelihood of Success on the Merits

Plaintiffs claim that they are likely to succeed on their takings claims because the Access Regulation allows a physical invasion of their property rights and should be recognized as a *per se* (or "categorical") taking under Fifth Amendment jurisprudence. MPI at 6.

a. Legal Background

There are "two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005).. The first is where a government "requires an owner to suffer a permanent physical invasion of her property—however minor." *Id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982)). The second applies to regulations that "completely deprive an owner of 'all economically beneficial use' of her property." *Id.* (quoting *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)).[2] Aside from these two "relatively narrow categories," regulatory takings challenges are governed by the balancing test set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). *Id.* Thus, there is an important distinction between "a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property." *Loretto*, 458 U.S. at 441.

[2] Plaintiffs do not argue that this category applies to them.

b. <u>The Access Regulation As Applied to Plaintiffs</u>

Plaintiffs argue that the Access Regulation constitutes a *per se*/categorical physical taking because it infringes on their right to exclude strangers from their property. MPI at 6-7. Defendants argue that because it does not authorize a permanent physical occupation, it is subject to a *Penn Central* balancing test. Opposition at 7. Because Plaintiffs do not explain how they are likely to prevail under *Penn Central*, the government claims that they are not likely to succeed on this issue. *Id.* at 7-8.

As the government identifies, the plain language of the Access Regulation does not suggest that Plaintiffs will be subject to a "permanent physical occupation" in a manner that has been recognized by the Supreme Court. Opposition at 9. To the extent that it requires owners to allow access to those they want to exclude, such access is limited to certain times and locations. *See* § 20900(e)(3)-(4).[3] These limitations ensure that any occupation allowed under the Access Regulation is far from permanent.

Plaintiffs attempt to escape the reach of *Penn Central* by analogizing their case to other takings cases. First, Plaintiffs cite to the Supreme Court's holding in *Kaiser Aetna v. United States*, 444 U.S. 164

[3] As discussed above, organizations are limited to four thirty-day periods in any calendar year, § 20900(e)(1)(A)-(B) during which they may enter an employer's property "for a total period of one hour before the start of work and one hour after the completion of work" and for "a single period not to exceed one hour during the working day for the purpose of meeting and talking with employees during their lunch period." § 20900(e)(3).

(1979), for the prospect that a taking can occur when the government creates an easement. MPI at 7. Plaintiffs are correct that the creation of an easement *may* amount to a taking, but they go too far by equating this action with a categorical taking. *Kaiser Aetna* recognized that a public right of access to an improved pond went "so far beyond ordinary regulation or improvement for navigation as to amount to a taking under the logic of *Pennsylvania Coal Co. v. Mahon* [ ]." *Id.* at 178. *Pennsylvania Coal* articulated the "general rule" that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. 393, 415 (1922).[4] This reference makes it clear that even though *Kaiser Aetna* dealt with a type of physical invasion, the fact that it occurred was not dispositive as to whether it amounted to a taking. 444 U.S. at 178 (noting that "more than one factor" lead to its conclusion). For example, it was significant that the public right of access caused the property owners serious economic harm. *Id.* at 180. ("This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the

[4] In that case, the Supreme Court considered a Pennsylvania law that prohibited mining coal in a manner that would cause subsidence of residential properties. *Id.* at 412-413. Pennsylvania's highest court had admitted that the law "destroy[ed] previously existing rights of property and contract." *Id.* at 413. In contrast, the Supreme Court found that the law provided only a limited benefit to the public. *Id.* at 414. Thus, its ultimate conclusion that the law was unconstitutional was the result of an analysis that weighed the public and private interests involved. *Id.* at 416.

privately owned marina."). The Supreme Court later clarified this distinction in *Loretto*, where it described that the easement at issue in *Kaiser Aetna*, "not being a permanent occupation of land, was not considered a taking *per se*." 458 U.S. at 433. Thus, even if the Access Regulation could be read as allowing a continuing intrusion similar to the easement in *Kaiser Aetna*, Plaintiffs would still not have demonstrated a categorical taking.

Plaintiffs next point to the Supreme Court's decisions in *United States v. Causby*, 328 U.S. 256 (1946), and *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012), for the prospect that temporary invasions can amount to permanent occupations. Reply at 2-3. In *Causby*, the Supreme Court found that airplane flights over private land may constitute a taking if they are "so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." 328 U.S. at 266. In doing so, the *Causby* Court emphasized that the Government had caused "as complete a loss as if the government had entered upon the surface of the land and taken exclusive possession of it." *Id.* at 261. In other words, the action at issue in *Causby* was seen as akin to an exercise of eminent domain. Here, as Plaintiffs concede, the government's infringement on their property rights is far less severe and far less frequent.

Further, the Supreme Court has more recently confirmed that while temporary intrusions *may* be compensable, under current jurisprudence they are treated separately from those that fall on the other side the "bright line" of permanent physical

occupation. *Arkansas Game & Fish Comm'n v.*, 133 S. Ct. at 518. In *Arkansas*, the issue before the Court was whether temporary flooding *might* be considered a taking. *Id.* Notably, the *Arkansas* Court did *not* treat temporary flooding as a permanent physical occupation. *Id.* Rather, it found that "[f]looding cases, like other takings cases, should be assessed with reference to the 'particular circumstances of each case,' and not by resorting to blanket exclusionary rules." *Id.* at 521. The *Arkansas* Court also reiterated the holding in *Loretto* that "temporary limitations are subject to a more complex balancing process to determine whether they are a taking." *Id.* at 521 quoting *Loretto*, 458 U.S. at 436, n. 12). Thus, these cases do not stand for the proposition that temporary intrusions may be treated as equivalent to permanent physical occupations.

Plaintiffs' reliance on *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Otay Mesa Prop., L.P. v. United States*, 670 F.3d 1358, 1360 (Fed. Cir. 2012), is also misplaced. In *Nollan*, the California Coastal Commission sought to require owners to grant the state a public easement across their property, as a condition of receiving a building permit. *Id.* at 828. In coming to the conclusion that a "permanent physical occupation" had occurred, the Court described the physical invasion as one where individuals are given a *permanent and continuous* right to pass to and fro, so that the real property may *continuously* be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Id.* at 832 (emphasis added). In other words, the *Nollan* easement was "a classic right-of-way easement." *Id.* at 832 n.1. While Plaintiffs liken

the Access Regulation to some sort of easement, they do not show that it would allow the public to access their property in a permanent and continuous manner for whatever reason, as in *Nollan*. In an attempt to tie their case *Nollan*, Plaintiffs speculate that the Supreme Court would have come to the same conclusion if the *Nollan* easement "had been limited to daylight hours or certain months of the year, because it would continue in perpetuity." Reply at 3. Plaintiffs provide no authority for extending this theory, however, and the Court finds it unpersuasive. The difference is that it is not necessarily permanent, depending on what kind of business is conducted at the location, is limited, and is for a very specific reason.

Similarly, in *Otay Mesa*, the Federal Circuit found that the U.S. Border Patrol had a "blanket easement to install, maintain, and service sensors" on private property. 670 F.3d at 1365. As was the case in *Nollan*, there is a critical difference between a "blanket easement" and the limited access allowed to union organizers by the Access Regulation. Thus, the fact that the Access Regulation is itself a permanent law does not mean that its application to the Plaintiffs will be permanent. Therefore it does not provide a basis for a categorical taking claim. To find otherwise would render any law providing any measure of access a permanent taking. This is plainly not consistent with the takings jurisprudence.

Finally, Plaintiffs have not shown that the Access Regulation has been applied to them in such a way that they have suffered a "permanent physical occupation." To the contrary, the testimony of

Plaintiffs' executives demonstrates that union organizers have entered their property on only one occasion. Decl. of Mike Fahner ("Fahner Decl."), Doc. 4-3, ¶ 11. Nor do they claim that the Access Regulation deprives them of "all economically beneficial use" of their properties. Thus, Plaintiffs have not shown that they have suffered, or will suffer, a categorical taking. Thus, to succeed on their takings claim, Plaintiffs must show that "justice and fairness" require that the government compensate them for whatever economic injuries the Access Regulation causes them. *Penn Central*, 438 U.S. at 124. Plaintiffs have not set forth such arguments in their papers. Thus, they have not met the heavy burden of showing that there is a substantial likelihood that they will succeed on this claim. Therefore, the Court DENIES Plaintiffs' motion for preliminary injunction as to their Fifth Amendment claim.

B. Fourth Amendment Claim

Plaintiffs argue that they are likely to succeed on the merits of their Fourth Amendment claim on the basis that the Access Regulation unreasonably interferes with their possessory rights. MPI at 11-12.

1. Legal Background

The Fourth Amendment provides that the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. The Supreme Court recognizes that this protection extends to possessory as well as privacy interests. *Soldal v. Cook Cty., Ill.*, 506 U.S. 56, 62 (1992) ("[O]ur cases unmistakably hold that the Amendment

protects property as well as privacy."). "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). In the determination of whether a seizure's interference with possessory interests violates the Fourth Amendment, "reasonableness is still the ultimate standard." *Soldal*, 506 U.S. at 71. "A seizure is reasonable if it meets the 'careful balancing of governmental and private interests' that *Soldal* requires." *Hroch v. City of Omaha*, 4 F.3d 693, 697 (8th Cir. 1993).

When a seizure occurs pursuant to valid law, making a showing of unreasonableness is a "laborious task." *Soldal*, 506 U.S. at 71. For example, "the Constitution is not offended by the warrantless abatement of a vehicle in accordance with a valid state law from a location where the possessor has no reasonable expectation of privacy." *Tarantino v. Syputa*, 270 F. App'x 675, 677 (9th Cir. 2008). The fact that a seizure is conducted in the context of a legitimate law enforcement or public policy objective is not dispositive, however. *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1030 (9th Cir. 2012) ("A seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on "unreasonable seizures.") ("*Lavan I*"). In *Lavan*, nine homeless individuals alleged that the City of Los Angeles violated their Fourth and Fourteenth Amendment rights by "seizing and immediately destroying their unabandoned [sic] personal possessions, temporarily left on public sidewalks

while [they] attended to necessary tasks such as eating, showering, and using restrooms." *Id.* at 1023-24. The district court found that Plaintiffs were likely to be able to show that this seizure was unreasonable based on "at least three separate declarations and photographic evidence" showing that the City was "in fact notified that the property belonged to [plaintiffs], and that when attempts to retrieve the property were made, the City took it and destroyed it nevertheless." *Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005, 1014 (C.D. Cal. 2011) ("*Lavan II*"). The Ninth Circuit upheld the preliminary injunction order enjoining the city from engaging in similar behavior based on the district court's "correct" conclusion that "the City's destruction of the property rendered the seizure unreasonable." *Lavan I*, 693 F.3d at 1030.

2. Whether the Access Regulation Violates Plaintiffs' Fourth Amendment Rights

Plaintiffs argue that the Access Regulation violates the seizure clause of the Fourth Amendment because it "effectively terminates" their "right to exclude others from their property." MPI at 11. The government does not appear to dispute that the Access Regulation may cause a seizure. Opposition at 11.[5] Rather, it argues that Plaintiffs have not shown that such a seizure is unreasonable, given that the state

[5] The California Supreme Court' s position on this topic, however, is that the Access Regulation "is not a deprivation of 'fundamental personal liberties' but a limited economic regulation of the use of real property imposed for the public welfare." 16 Cal. 3d at 409. Because the government does not dispute that the Access Regulation may create a seizure, and the state court case is not precedential, the Court will assume without deciding that this is the case.

has "strong governmental interests at stake . . . to safeguard the rights of agricultural employees to freedom of association, self-organization and collective bargaining." *Id.*

In their request for a preliminary injunction, Plaintiffs do not explain how "a careful balancing of governmental and private interests" leads to the conclusion that the Access Regulation's previous or future application to them is unreasonable. Rather they point to the Fourth Circuit's decision in *Presley v. City of Charlottesville*, 464 F.3d 480 (4th Cir. 2006), as authority for their position that they present a viable claim. Plaintiffs must go further to show that they are entitled to a preliminary injunction. Elsewhere in their papers, Plaintiffs discuss how conditions around their worksites and related to their specific workforces make reliance on the access regulation unnecessary. MPI at 12. They also suggest that the Access Regulation presents them with operational challenges. *Id.* The latter suggestion is not based on any competent evidence and Plaintiffs do not elaborate on the extent to which such challenges would actually harm them. Plaintiffs' representatives testify that they fear they will lose "goodwill" because "it sends a message" that they treat their workers poorly. Decl. of Dennis Parnagian, Doc. 4-2, ¶ 10; Fahner Decl. ¶ 14. Plaintiffs, however, do not provide any authority for the proposition that such a "loss of goodwill" is a cognizable form of injury that would support an unlawful seizure claim. Further, Plaintiffs' representatives do not provide any testimony, other than conclusory statements, as to any competitive disadvantages they expect to incur.

The government, on the flip side, rested its entire case on the premise that the Access Regulation is constitutional on its face. Opposition at 10-11. In doing so, they failed to explain why it is reasonable to apply the Access Regulation *to the Plaintiffs* in particular. The fact that Access Regulation is legal itself does not determine if it is constitutional as applied to Plaintiffs. *Miranda v. City of Cornelius*, 429 F.3d 858, 865 (9th Cir. 2005) ("The question in this Court upon review of a state-approved search or seizure is not whether the search (or seizure) was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment.") (quoting *Sibron v. New York*, 392 U.S. 40, 61 (1968))). Thus, the government provides this Court little basis for disputing Plaintiffs' as-applied claims.

Plaintiffs' strongest argument that they will suffer irreparable harm is based on the possibility that they will suffer a constitutional injury. The likelihood and extent to which such an injury will occur is therefore entwined with the merits of their legal argument. Thus, the present state of the record undercuts this court's ability to evaluate all four *Winter* factors. Further briefing is required for the Court to come to a reasoned decision.

VII. CONCLUSION AND ORDER

For the reasons discussed above, the Court DENIES Plaintiffs' Motion for Preliminary Injunction, Doc. 4, as to their Fifth Amendment claim.

As to Plaintiffs' Fourth Amendment claim, the Court ORDERS supplemental briefing as follows:

Each side is to submit a brief explaining whether "careful balancing of governmental and private interests" leads to the conclusion that the Access Regulation may reasonably be applied to Plaintiffs. Briefs are to be no longer than ten (10) pages in length, not including relevant declarations and attachments, and are due fourteen days after the date of this order.

IT IS SO ORDERED.

Dated: **April 18, 2016** **/s/ Lawrence J. O'Neill**
UNITED STATES
DISTRICT JUDGE

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CEDAR POINT NURSERY; FOWLER PACKING COMPANY, INC., *Plaintiffs-Appellants*, v. GENEVIEVE SHIROMA; CATHRYN RIVERA-HERNANDEZ; SANTIAGO AVILA-GOMEZ, Esquire; ISADORE HALL III, *Defendants-Appellees.*	No. 16-16321 D.C. No. 1:16-cv-00185-LJO-BAM ORDER

Filed April 29, 2020

Before: Edward Leavy, William A. Fletcher, and Richard A. Paez, Circuit Judges.

Order;
Concurrence by Judge Paez;
Dissent by Judge Ikuta

SUMMARY*

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Civil Rights

The panel denied a petition for panel rehearing, and denied on behalf of the court a petition for rehearing en banc, from an opinion in which the panel affirmed the district court's dismissal of an action seeking declaratory and injunctive relief against members of the California Agricultural Labor Relations Board who promulgated a regulation allowing union organizers access to agricultural employees at employer worksites under specific circumstances.

Concurring in the denial of rehearing en banc, Judge Paez, joined by Judge W. Fletcher wrote separately only to respond to arguments raised in Judge Ikuta's dissent from the decision, which were not raised by the parties. Judge Paez stated that the majority opinion correctly held that the plaintiffs had not suffered a "permanent and continuous" loss of their right to exclude the public from their property. They had thus not suffered a taking in violation of the Fifth Amendment.

Dissenting from the denial of rehearing en banc, Judge Ikuta joined by Judges Callahan, R. Nelson, Bade, Collins, Bress, Bumatay, and VanDyke stated that the majority fundamentally misunderstood the nature of the property rights at issue, and how California had taken them. Judge Ikuta wrote that the plaintiffs had plausibly alleged that California had appropriated easements and thus taken valuable property rights protected by the Takings Clause. By failing to give fair consideration to the plaintiffs' actual claims, the majority created a circuit split, disregarded binding Supreme Court precedent, and

deprived property owners of their constitutional rights.

COUNSEL

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Curiae United Farm Workers of America and United Food and Commercial Workers Union, Local 770.

ORDER

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed R. App. P. 35.

The petition for rehearing en banc is **DENIED**.

Attached are a dissent from and a concurrence respecting the denial of rehearing en banc.

PAEZ, Circuit Judge, concurring in the denial of rehearing en banc, joined by W. FLETCHER, Circuit Judge:

A majority of the active judges of the court voted against rehearing this case en banc. I concur in that decision and write only to respond to arguments raised in Judge Ikuta's dissent from that decision, which were not raised by the parties. The dissent argues that the panel opinion failed to address the Growers' central argument that the Access Regulation appropriates an easement by granting union organizers access to their property without their approval. According to the dissent, because an easement is a species of property, the Access Regulation effects a taking of property in violation of the Fifth Amendment.

The dissent accuses the majority of ignoring the Growers' claim and reframing it as a different one. This seriously mischaracterizes the Growers' arguments before this court. They argued one and only one theory of their case: that the Access Regulation amounted to a "permanent physical invasion" of their property. They did not argue that the taking of an easement was the beginning and end of the analysis. They wisely did not do so because the argument advanced by Judge Ikuta fundamentally misapprehends existing Supreme Court authority.

* * *

The dissent's central doctrinal argument is that the state engages in a Fifth Amendment taking whenever it appropriates an easement. As support for this bright-line rule, the dissent cites a series of Supreme Court cases purportedly holding that the imposition of any easement is a per se taking. The cases say no such thing.

In *Portsmouth Harbor Land and Hotel Co. v. United States*, for instance, the dissent points out that the Court remarked that a "servitude" constitutes "an appropriation of property for which compensation should be made." 260 U.S. 327, 329 (1922) (citation omitted). But what the dissent neglects to mention is that in *Portsmouth Harbor*, the Court limited its inquiry to whether the servitude imposed in that case "would constitute an appropriation of property for which compensation should be made" when the intrusion "*result[ed] in depriving the owner of its profitable use*[.]" *Id.* (citation omitted) (emphasis added).

The Court applied that same basic principle in *United States v. Causby*. There, the Court considered whether a taking had occurred where military flights in the airspace over the plaintiffs' property resulted in "the destruction of the use of the property as a commercial chicken farm." 328 U.S. 256, 259 (1946). The government conceded—and the Court agreed—that the military flight activities would effect a taking if the "flights over respondents' property rendered it uninhabitable." *Id.* at 261. The government's actions resulted in the taking of an "easement of flight" and, "if permanent and not merely temporary, normally would be the equivalent of a fee interest." *Id.* at 261–62. The government's acts "would be a definite exercise of complete dominion and control over the surface of the land." *Id.* at 262. "If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it." *Id.* at 261 (footnote omitted). Although there was a taking of an "easement of flight," a Fifth Amendment taking occurred not only because of the "easement," but because of the severe negative effects of the government's actions on the plaintiffs' property. *Id.* at 261–62.

Neither of these cases stands for the proposition that a regulatory easement which allows intermittent intrusions onto private property will result in a taking where there is no evidence that the intrusion has rendered the property "uninhabitable," *id.* at 261, or "depriv[ed] the owner of its profitable use," *Portsmouth Harbor*, 260 U.S. at 329.

The dissent faults the majority for failing to address whether the appropriation of an easement, by itself, violates the Takings Clause. The dissent complains that the majority instead erroneously focuses on whether the Access Regulation amounted to a "permanent physical invasion." As support for this accusation, the dissent notes that in their complaint, the Growers allege that "the access regulation now creates an easement for union organizers to enter Plaintiffs' private property without consent or compensation." The dissent then asserts that the majority "ignore[d]" and "re-characteriz[ed]" the Growers' claim.

But the dissent's theory is not the theory the Growers advanced in their appellate briefs. Although the Growers did assert that the Access Regulation "appropriat[es] an easement[,]" they argued that the easement was a "permanent physical intrusion" under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). As a result of this intrusion, the Growers argued, the Access Regulation effected an unconstitutional taking.

Guided by the *Nollan*[1] standard—that a "permanent physical invasion" occurs when the state grants the public a "permanent and continuous right to pass to and fro, so that the real property may continuously be traversed"—the majority correctly held that the Growers failed to state a cognizable takings claim. Although the Access Regulation does not have a contemplated end-date, it does not grant union organizers a "permanent and continuous right to pass to and fro" on the Growers' property. The

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[1] *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 832 (1987).

regulation makes clear that the union organizers may not, whenever they desire, enter the employers' premises to speak with employees about unionization. Only in specific circumstances may they take advantage of the limited access provided by the Access Regulation. Given that the Access Regulation does not authorize "continuous" access to the Growers' property, it likewise does not result in a wholesale deprivation of their right to exclude and thus does not effect a Fifth Amendment taking. And unlike the raisin farmers in *Horne v. Department of Agriculture*, who were forced to transfer over half of their annual crops to the federal government, the Growers here were not stripped of their "rights to possess, use and dispose of" their property.[2] 135 S. Ct. 2419, 2428 (2015) (quoting *Loretto*, 458 U.S. at 435).

The dissent also asserts that the majority opinion creates a circuit split with the Federal Circuit's decision in *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991). Not so. In that case, the government installed wells on the plaintiffs' property and subsequently "entered upon [their] land from time to time, without permission, for purposes of" maintaining them. *Id.* at 1377. The court reasoned

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[2] The government's raisin-seizure was a per se taking under *Loretto* because the growers "lost the entire 'bundle' of property rights in the appropriated raisins—'the rights to possess, use and dispose of' them—with the exception of the speculative hope that some residual proceeds may be left when the Government is done with the raisins and has deducted the expenses of implementing all aspects of the marketing order." *Horne*, 135 S. Ct. at 2428 (internal citation omitted). "Actual raisins [were] transferred from the growers to the Government" and "[t]itle to the raisins passe[d] to the Raisin Committee." *Id.* No such transfer happened here.

that "[t]hese surveillance wells [were] at least as 'permanent' in this sense as the CATV equipment in *Loretto*, which comprised only a few cables attached by screws and nails and a box attached by bolts." *Id.* (citation omitted). And even after installing the physical wells, the government routinely entered the plaintiffs' land "at its convenience," as if it had "acquired an easement not unlike that claimed in" *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). *Hendler*, 952 F.2d at 1378. The resulting situation was a complete "taking of the plaintiffs' right to exclude," so long as the wells remained on the property. *Id.* As in *Nollan* and *Kaiser Aetna*, the property owners retained no ability to control when and where the government trespassed upon their property. *Id.*

Here, unlike in *Hendler*, the Board has not erected a permanent physical structure on the Growers' property, and the union organizers are excludable from the property unless they are authorized to enter under the terms of the Access Regulation. The court's opinion thus does not create a circuit split.

* * *

The court's majority opinion correctly held that the Growers have not suffered a "permanent and continuous" loss of their right to exclude the public from their property. *Nollan*, 483 U.S. at 832. They have thus not suffered a taking in violation of the Fifth Amendment. Neither the panel majority nor the district court erred in so holding.

For the reasons discussed above and in the majority opinion, I concur in the court's decision not to rehear this case en banc.

IKUTA, Circuit Judge, joined by CALLAHAN, R. NELSON, BADE, COLLINS, BRESS, BUMATAY, and VANDYKE, Circuit Judges, dissenting from denial of rehearing en banc:

Once again, the Ninth Circuit endorses the taking of property without just compensation. *See Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128 (9th Cir. 2014), *rev'd sub nom. Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015). California property law and Supreme Court precedent make clear that an easement is private property protected by the Takings Clause. *See, e.g.*, *L.A. Terminal Land Co. v. Muir*, 136 Cal. 36, 48 (1902); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987). In opposition to this precedent, the majority concludes there is no taking because the state's appropriation of an easement is not a "permanent physical occupation." *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 531–34 (9th Cir. 2019). This decision not only contradicts Supreme Court precedent but also causes a circuit split. *See Hendler v. United States*, 952 F.2d 136, 1377–78 (Fed. Cir. 1991). We should have taken this case en banc so that the Supreme Court will not have to correct us again.

I

The property owners and plaintiffs in this case are Cedar Point Nursery, a strawberry nursery, and

Fowler Packing Company, a shipper of table grapes and citrus. Both companies employ full-time workers and seasonal workers, none of whom live on company property.

The companies abruptly became aware that union organizers claimed a right to trespass on their property in the summer of 2015. According to Cedar Point, early one morning near the end of the strawberry harvesting season, union organizers entered Cedar Point's property and trespassed across it to the trim sheds, where hundreds of employees were preparing strawberry plants. The union organizers disrupted work by moving through the trim sheds with bullhorns, distracting and intimidating the workers. Fowler, on the other hand, was able to avoid such an intrusion; when the union organizers attempted to invade Fowler's property, Fowler blocked them.

After these clashes, union organizers filed complaints against both Cedar Point and Fowler with the California Agricultural Labor Relations Board (the Board), alleging unfair labor practices. The union organizers claimed that they had a statutory right to enter Cedar Point's and Fowler's property based on the Agricultural Labor Relations Act (the Act), Cal. Lab. Code §§ 1140–1166.3. The Act, enacted in 1975, substantially tracks the language of the National Labor Relations Act by giving employees the right to concerted action. *Compare* Cal. Lab. Code § 1152 *with* 29 U.S.C. § 157.

The Act does not authorize non-employees to enter private property. *See, e.g.*, Cal. Lab. Code § 1152. But shortly after the Act went into effect, the Board

promulgated an emergency regulation to give union organizers access to the private property of agricultural employers. *See* Cal. Code Regs. tit. 8, § 20900(e). This emergency regulation is sometimes referred to as the "Access Regulation." In promulgating the regulation, the Board relied on a Supreme Court opinion, *N.L.R.B. v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), which upheld an employer's right to exclude nonemployee union organizers from the employer's private property but also created an exception: the employer's property right must "yield to the extent needed to permit communication of information on the right to organize" when "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them," *id.* at 113; *see Agric. Labor Relations Bd. v. Superior Court*, 16 Cal. 3d 392, 414 (1976) (the Board "predicated its access regulation" on *Babcock & Wilcox*).[1]

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[1] At the time the California regulation was promulgated, agricultural workers often lived on their employer's property and were cut off from the outside world, so "unions seeking to organize agricultural employees d[id] not have available alternative channels of effective communication." Cal. Code Regs. tit. 8, § 20900(c). The agricultural industry has changed dramatically in the past 40 years, however. "Today, all but a relative handful of workers obtain housing off-farm." Brief of Amicus Curiae Cal. Farm Bureau Fed'n at 8, *Cedar Point v. Shiroma*, 923 F.3d 524 (9th Cir. 2019) (No. 16-16321) (quoting Don Villarejo, Cal. Inst. for Rural Studies, *The Status of Farm Labor Housing* 5 (Mar. 6, 2015), https://bit.ly/36tUs7N). Moreover, modern technology gives union organizers multiple means of contacting employees. *See id.* at 9. Given the Supreme Court's more recent narrowing construction of *Babcock & Wilcox* as applying only to "rare case[s]" where the "inaccessibility of

The current version of the Access Regulation is not limited to situations where union organizers do not have reasonable access to employees.[2] Rather, it gives union organizers a permanent right to access "the premises of an agricultural employer for the purposes of meeting and talking with employees and soliciting their support." Cal. Code Regs. tit. 8, § 20900(e). Union organizers may enter the private property for one hour before the start of work, one hour after the completion of work, and one hour during the lunch break, for 120 days during the calendar year. Cal. Code Regs. tit. 8, § 20900(e)(3). Under the regulation, two organizers may enter the owner's property for every 15 employees. Cal. Code Regs. tit. 8, § 20900(e)(4)(A). The Access Regulation prevents the employer from interfering with the organizers' full access to the property, Cal. Code Regs. tit. 8, § 20900(e)(5)(C), and prohibits the union organizers only from injuring crops or machinery, interfering with the employees when they are boarding buses, and similar disruptive behaviors, Cal. Code Regs. tit. 8, § 20900(e)(4)(C).

Cedar Point and Fowler filed this action against members of the Board after union organizers entered

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employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels," *Lechmere, Inc. v. N.L.R.B.*, 502 U.S. 527, 537 (1992) (citation omitted), the decades-old justifications for the Access Regulation are questionable.

[2] As Judge Leavy points out in his dissent, *Babcock & Wilcox* does not undermine the plaintiffs' takings claim because their employees are accessible to union organizers through reasonable means of communication. *Cedar Point*, 923 F.3d at 539 (Leavy, J., dissenting).

(or attempted to enter) their properties pursuant to the Access Regulation, alleging that "the access regulation . . . creates an easement for union organizers to enter . . . private property without consent or compensation," causing an "unconstitutional taking." Cedar Point and Fowler also allege they have reason to believe that union organizers will invoke their right under the Access Regulation to enter their properties in the near future. If not for the regulation, Cedar Point and Fowler allege they would exclude union organizers from their properties. Therefore, they seek a declaration that the Access Regulation is unconstitutional as applied to them and an order enjoining the Board from enforcing the regulation. The district court dismissed the complaint on the ground that the plaintiffs failed to state a plausible Takings Clause claim. *See Cedar Point Nursery v. Gould*, 2016 WL 3549408, at *5 (C.D. Cal. June 29, 2016).

The plaintiffs appealed, and the panel affirmed, over Judge Leavy's dissent. *See Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 536 (9th Cir. 2019). The majority first acknowledged that Cedar Point and Fowler "allege that the access regulation, as applied to them, effects a Fifth Amendment taking by creating an easement that allows union organizers to enter their property 'without consent or compensation.'" *Id.* at 531. But instead of addressing this takings claim, the majority held (without explanation) that the Access Regulation does not effect a "classic taking in which government directly appropriates private property." *Id.* (citation omitted).

In light of this conclusion, the majority considered whether the Access Regulation fell within the category of regulatory takings where "the government requires an owner to suffer a permanent physical invasion." *Id.* (citation omitted). The majority held that the plaintiffs had not suffered such a regulatory taking, because, unlike in *Nollan*, union organizers were not allowed to traverse the plaintiffs' property "24 hours a day, 365 days a year." *Id.* at 532. Rather, according to the majority, the Access Regulation merely affected the plaintiffs' "right to exclude," which is only "'one strand of the bundle' of property rights." *Id.* at 533. Accordingly, the majority ruled that the plaintiffs had "not suffered a permanent physical invasion that would constitute a per se taking." *Id.* at 532.[3]

In reaching this conclusion, the majority fundamentally misunderstood the nature of the property rights at issue, and how California had taken them.

II

Under long-established Takings Clause principles, the analysis of the plaintiffs' complaint should proceed as follows. First, property rights are determined by reference to state law—here, California. Second, California law has long recognized that easements are a traditional form of private

[3] While suggesting that the Access Regulation might fall within a category of regulatory takings governed by the standards set out in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the majority did not address this issue because the plaintiffs had not raised it. *Cedar Point*, 923 F.3d at 533–34.

property. Third, the Access Regulation appropriates easements from property owners and transfers them to union organizers. Finally, consistent with Supreme Court precedent, the appropriation of an easement constitutes a taking of "private property" and therefore requires "just compensation." U.S. Const. amend. V.

A

Some background is in order. "Property rights are created by the State." *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001). As such, "the existence of a property interest is determined by reference to 'existing rules or understandings that stem from . . . source[s] such as state law.'" *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)); *accord United States v. Causby*, 328 U.S. 256, 266 (1946).

Although property rights are defined by state law, there are limits on a state's ability to alter traditional understandings of property through legislation. *See Palazzolo*, 533 U.S. at 627–28; *Phillips*, 524 U.S. at 167. "[A]s to confiscatory regulations (as opposed to those regulating the use of property), a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." *Phillips*, 524 U.S. at 167. That is, a state may not, "by ipse dixit, transform private property into public property without compensation." *Palazzolo*, 533 U.S. at 628 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)).

Thus, a proper takings analysis begins with a determination of whether there is a traditional

property interest at stake. *See Phillips*, 524 U.S. at 164; *Webb's Fabulous Pharmacies*, 449 U.S. at 162. Here, a court must look to California law to make such a determination. *See Palazzolo*, 533 U.S. at 628; *Phillips*, 524 U.S. at 164.

B

For well over a century, California has recognized that easements are a type of real property. *See, e.g.*, *L.A. Terminal Land Co. v. Muir*, 136 Cal. 36, 48 (1902). "An easement is generally defined as an 'interest in land created by grant or agreement, express or implied, which confers a right upon the owner thereof to some profit, benefit, dominion, or lawful use out of or over the estate of another.'" *Mosier v. Mead*, 45 Cal. 2d 629, 632 (1955) (quoting *Muir*, 136 Cal. at 48). "An affirmative easement gives its owner a right to do something on the land of another, such as a right to pass over the other person's land." 6 Miller & Starr, California Real Estate § 15:9 (4th ed. 2019); *accord Wolford v. Thomas*, 190 Cal. App. 3d 347, 354 (1987); *Balestra v. Button*, 54 Cal. App. 2d 192, 197 (1942).

One type of affirmative easement recognized under California law is an easement in gross. *See Balestra*, 54 Cal. App. 2d at 197. An easement in gross is a "personal interest in real estate of another." *Id.* (citation omitted). It may be "granted and held though not attached to land." *Callahan v. Martin*, 3 Cal. 2d 110, 121 (1935) (citation omitted); *accord* Restatement (Third) Property § 1.5(2) (2000). The Civil Code of California provides examples of easements in gross, including "[t]he right to pasture, and of fishing and taking game," "[t]he right of a seat in church," "[t]he

right of burial," "[t]he right of taking rents and tolls," "[t]he right of way," and "[t]he right of taking water, wood, minerals, or other things." *Gerhard v. Stephens*, 68 Cal. 2d 864, 880 n.11 (1968) (quoting Cal. Civ. Code § 802). Thus, as the Civil Code's examples indicate, the owner of an easement in gross may enter the land of another for the purpose of taking some action.

There is a "long line of California cases holding that an easement in gross is real property." *Balestra*, 54 Cal. App. 2d at 197. In California, the owner of such an easement may sell or transfer it like any other form of property. *See* Cal. Civ. Code § 1044; *Callahan*, 3 Cal. 2d at 121; *LeDeit v. Ehlert*, 205 Cal. App. 2d 154, 166 (1962) ("In California an easement in gross is both assignable and inheritable *unless* restricted by proper language to certain individuals."). By the same token, the state's appropriation of an easement in gross is a taking of real property, requiring just compensation.

C

The U.S. Supreme Court has long recognized that an easement in gross is a traditional form of private property that cannot be taken without just compensation. Almost a century ago, the Court held that plaintiffs had sufficiently alleged "that a servitude ha[d] been imposed" on their land,[4] resulting in an "appropriation of property for which compensation should be made," based on allegations that the federal government "set up heavy coast

[4] A "servitude" refers to "encumbrance[s] consisting in a right to the limited use of a piece of land or other immovable property without the possession of it" and "include[s] easements." *Servitude*, Black's Law Dictionary 1577 (10th ed. 2014).

defence guns," intended to fire across the plaintiffs' land, and had done so on occasion "even if not frequently." *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329–30 (1922) (citation omitted).[5]

Some twenty years later, the Court again held that an "easement was taken" based on "frequent and regular flights of army and navy aircraft over respondents' land at low altitudes." *Causby*, 328 U.S. at 258, 267. The Court first reasoned that under North Carolina law, a landowner had a property right "to the immediate reaches of the superadjacent airspace." *Id.* at 266. Therefore, invasions of that property "are in the same category as invasions of the surface." *Id.* at 265. Because the government's flights were within the airspace owned by the landowners, the Court concluded that an "easement was taken" and the government owed the landowners just compensation. *Id.* at 267. The Court reached this conclusion even though more fact-finding was necessary given that the trial court's "findings of fact contain[ed] no precise description as to [the] nature" of the easement. *Id.* The easement was "not described in terms of frequency of flight, permissible altitude, or type of airplane." *Id.* "Nor [was] there a finding as to whether the easement

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[5] Contrary to the concurrence in the denial of the petition for rehearing en banc (hereinafter, the "Concurrence"), *Portsmouth Harbor* did not focus on whether the servitude "result[ed] in depriving the owner of all profitable use." Concurrence at 5. Rather, the government's intent to use the plaintiffs' land and its overt acts in doing so were enough to create a servitude. 260 U.S. at 329–30; *see also Causby*, 328 U.S. at 261–62 (holding that there is "no material difference" between a case where an owner is prevented from "us[ing] th[e] land for any purpose" and one where the "use of the land [is] not completely destroyed").

taken was temporary or permanent." *Id.* Because "an accurate description of the property taken is essential," the Court remanded for additional findings of fact to determine the appropriate amount of the award of compensation. *Id.* at 267–68. In short, once an easement is taken, the remaining question is the amount of just compensation, which is determined based on the nature of the easement.

Over three decades later, the Court held that there was a taking of private property when the government claimed that a marina owner was required to open its lagoon to the public on the ground that the lagoon was subject to a "navigational servitude." *Kaiser Aetna v. United States*, 444 U.S. 164, 170 (1979). The Court explained that the government could not open the lagoon to the public "without invoking its eminent domain power and paying just compensation" because there is a taking even if the government "physically invades only an easement in property." *Id.* at 180 (citing *Causby*, 328 U.S. at 265; *Portsmouth Harbor*, 260 U.S. 327). Although *Kaiser Aetna* referred to the government's imposition of a navigational servitude as a taking "under the logic" of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), as well as "an actual physical invasion" comparable to the traditional taking of a fee interest, *Kaiser Aetna*, 444 U.S. at 178, 180, the Court has subsequently construed *Kaiser Aetna* as holding that there is a taking when the government imposes a "navigational servitude on [a] marina created and rendered navigable at private expense," *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

To the extent there was any doubt as to whether the appropriation of an easement constitutes a taking, it was dispelled by *Nollan*.[6] There, the Court stated that if California were to require landowners to "make an easement across their beachfront available to the public," there is "no doubt there would . . . be[ ] a taking." *Nollan*, 483 U.S. at 831. According to the Court, "[t]o say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather . . . 'a mere restriction on its use,' is to use words in a manner that deprives them of all their ordinary meaning." *Id.* (citation omitted).[7]

The Federal Circuit's decision in *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991), is in accord with these precedents. There, the Federal Circuit held that the federal government had acquired an uncompensated easement when "Government vehicles and equipment entered upon plaintiffs' land from time to time, without permission, for purposes of installing and servicing . . . various [groundwater]

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[6] *Nollan* and *Dolan v. City of Tigard* upheld the government's right to "exact some forms of dedication as a condition for the grant of a building permit." *Dolan v. City of Tigard*, 512 U.S. 374, 385–86 (1994). But the "authority of state and local governments to engage in land use planning," *id.* at 384, is not at issue here.

[7] A treatise on which *Nollan* relied, *see* 483 U.S. at 831, explains that both existing easements and "new easements carved out of the unencumbered fee" are "subject to the power of eminent domain," and "[a]ll of these interests must be paid for when the property is acquired through eminent domain," 2 Julius L. Sackman, Nichols on Eminent Domain § 5.01 (3rd ed.) (emphasis added).

wells." *Id.* at 1377.[8] Entry onto private property, "even though temporally intermittent," effected a taking because "the concept of permanent physical occupation does not require that in every instance the occupation be exclusive, or continuous and uninterrupted." *Id.* It was sufficient that the vehicles "entered upon [the] plaintiffs' land from time to time," "remained on the land for whatever duration was necessary to conduct their activities, and then left, only to return again when the Government desired." *Id.* The Federal Circuit reasoned that *Nollan* and *Kaiser Aetna* left "little doubt" that "dr[iving] . . . upon [the] plaintiffs' land for the purpose of installing and periodically servicing and obtaining information from . . . various wells," though "temporally intermittent," constituted a taking. *Id.* at 1377–78.

In sum, the Supreme Court has repeatedly, and consistently, recognized that the appropriation of an easement that allows for entry onto private property constitutes a taking of property. And the Court has expressly recognized that taking an easement in California is, by definition, an "appropriation" of "property," not a "mere restriction" on use. *Nollan*, 483 U.S. at 831 (citation omitted). Indeed, "[t]he clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use." *Palazzolo*, 533 U.S. at 617. The Federal Circuit

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[8] In a different section of the opinion, the Federal Circuit also concluded that placing the wells on the plaintiffs' land gave rise to an "occupancy . . . within the degree necessary to make out a taking." *Hendler*, 952 F.2d at 1377; *compare id.* at 1375–77 (analyzing the government's placement of wells on the plaintiffs' property) *with id.* at 1377–78 (analyzing the government's entry onto the plaintiffs' land to install and service the wells).

has recognized this as well. *See Hendler*, 952 F.2d at 1378. Only the Ninth Circuit refuses to acknowledge that taking an easement is a taking.

D

Here, the plaintiffs have plausibly alleged that California took their property—specifically, easements in gross—by means of the Access Regulation.

As the Court has explained, "the classic taking is one in which the government directly appropriates private property for its own use." *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2425 (2015) (cleaned up). "[I]n the case of real property, such an appropriation is a per se taking that requires just compensation." *Id.* at 2426. Thus, the sole question is whether the government has "appropriate[d] private property for its own use." *Id.* at 2425. If so, there "is a per se taking that requires just compensation." *Id.* at 2426.

The right to enter onto the land of another to take some action is the epitome of an easement in gross. *See, e.g.*, Cal. Civ. Code § 802; *Nollan*, 483 U.S. at 832 & n.1; *Buehler v. Or.-Wash. Plywood Corp.*, 17 Cal. 3d 520, 527 (1976); *LeDeit*, 205 Cal. App. 2d at 159, 165–67. The Access Regulation gives multiple union organizers the right to enter onto employers' private property to "meet[ ] and talk[ ] with employees and solicit[ ] their support" for three hours a day, 120 days a year. Cal. Code Regs. tit. 8, § 20900(e). The Access Regulation limits a union organizer's rights to enter private property to some extent, *see* Cal. Code Reg. tit. 8, § 20900(e), but that does not detract from the conclusion that it appropriates easements; indeed,

restrictions are a quintessential feature of all easements.[9] Accordingly, we have the "classic taking" described in *Horne*. 135 S. Ct. at 2425. It is irrelevant that the property taken is an easement—as opposed to some other type of real or personal property—because the Takings Clause "protects 'private property' without any distinction between different types." *Id.* at 2426. Because California has "appropriate[d] private property for its own use," there has been "a per se taking that requires compensation." *Id.* at 2425–26. No additional showing is required. *See id.* Thus, the majority errs in concluding that the plaintiffs fail to plausibly allege that their rights under the Takings Clause were violated. *See Cedar Point*, 923 F.3d at 531–33.

III

The majority's failure to recognize that the plaintiffs have stated a viable takings claim is based on several fundamental errors.

A

First, the majority ignores the plaintiffs' claim that California has directly appropriated their property and instead suggests that the plaintiffs' claim must fall into one of "three categories of

[9] *See, e.g.*, Cal. Civ. Code § 806 (extent of an easement is "determined by the terms of the grant, or the nature of the enjoyment by which it was acquired"); *Youngstown Steel Prods. Baker v. Pierce*, 100 Cal. App. 2d 224, 226 (1950) ("No authority need be cited for the well-known rule that the owner of a dominant tenement must use his easement and rights in such a way as to impose as slight a burden as possible on the servient tenement.").

regulatory action[s]" which are "functionally equivalent to the classic taking." *Id.* at 531 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005)). The three categories identified by the majority are: (1) "where government requires an owner to suffer a permanent physical invasion of her property—however minor," (2) where regulations "completely deprive an owner of 'all economically beneficial us[e]' of her property," and (3) "the remainder of regulatory actions, which are governed by the standards set forth in *Penn Central Transportation Co. v. New York City*." *Id.* (citations omitted). The majority then focuses on the first of these three categories of "regulatory actions," characterized as a "permanent physical invasion." *See id.* at 531–34.

This re-characterization of the plaintiffs' claims is wrong on its face. The plaintiffs' complaint expressly alleges that they have suffered what the majority refers to as a "classic taking," namely that "the access regulation . . . creates an easement for union organizers to enter . . . private property without consent or compensation," causing an "unconstitutional taking." As the Supreme Court has explained, separate and apart from any categories of regulatory takings, "[t]he paradigmatic taking requiring just compensation is a direct government appropriation . . . of private property." *Lingle*, 544 U.S. at 537. Thus, the majority errs by attempting to rewrite the plaintiffs' claim that California has directly appropriated their property into a claim that regulatory activity has gone too far by causing a permanent occupation of their land. *See Cedar Point*, 923 F.3d at 533–34.

B

The majority also errs in concluding that the Access Regulation does not effect a taking because it "does not grant union organizers a 'permanent and continuous right to pass to and fro' such that the [plaintiffs'] property 'may continuously be traversed.'" *Id.* at 532. There is no support for the majority's claim that the government can appropriate easements free of charge so long as the easements do not allow for access "24 hours a day, 365 days a year." *Id.*

First, an easement need not allow for a "continuous physical occupation" for it to be taken. It is well established that an easement holder's right to go onto property of another exists regardless whether the easement holder permanently occupies the property. *Loretto* itself recognizes that *Portsmouth Harbor*, *Causby*, and *Kaiser Aetna*—cases in which there was no permanent physical occupation—stand for the proposition that the government must pay compensation even if it "physically invades only an easement in property." *Loretto*, 458 U.S. at 433 (citation omitted). And *Loretto* recognizes that "[t]he one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, regularly use . . . a thing [such as an easement][10] which . . . was understood to

[10] The law review article from which *Loretto* quotes makes clear that the word "'thing' signifies any discrete, identifiable (even if incorporeal) vehicle of economic value which one can conceive of as being owned," including "easements," and that these "things" "can be affirmatively expropriated by public authority in a manner analogous to its 'taking' of a corporeal thing." Michelman, *supra* at 1184 n.37. That is, even though easements

be under private ownership." *Id.* at 427 n.5 (cleaned up) (quoting Frank I. Michelman, *Property, Utility & Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 Harv. L. Rev. 1165, 1184 (1967)).

Similarly, *Nollan* held that imposing an easement across a property owner's beachfront property effectively gave rise to a "permanent physical occupation," as in *Loretto*, "even though no particular individual [was] permitted to station himself permanently upon the premises." 483 U.S. at 832. And, as the dissent in *Nollan* pointed out, "public passage for a portion of the year would either be impossible or would not occur on appellant's property" due to "high-tide line shifts throughout the year." *Id.* at 854 (Brennan, J., dissenting). Put simply, the Supreme Court has never held that a government has free rein to take easements, without paying for them, so long as the easements do not allow for access "24 hours a day, 365 days a year." *Cedar Point*, 923 F.3d at 532. Thus, the majority errs by engrafting a "continuous use" requirement onto the Takings Clause.

Second, an easement need not be "permanent" for it to be taken, contrary to the majority's repeated invocation of that word. *See Cedar Point*, 923 F.3d at 531–34. In *Causby*, the Court made clear that there was a taking even though the trial court had not yet determined whether the "easement taken [was] a

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"[h]ave a conceptual existence but no physical existence," *Incorporeal*, Black's Law Dictionary 884 (10th ed. 2014), they can be affirmatively expropriated (i.e., taken) just like a piece of land or an object.

permanent or a temporary one." 328 U.S. at 268; *see also Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 33 (2012) ("[W]e have rejected the argument that government action must be permanent to qualify as a taking."); *First English Evangelical Church of Glendale v. L.A. Cty., Cal.*, 482 U.S. 304, 329 (1987) ("A temporary interference with an owner's use of his property may constitute a taking for which the Constitution requires that compensation be paid."). Thus, there is no basis for the majority's conclusion that the government can take easements without paying compensation so long as the easements do not meet the majority's definition of "permanent."

In holding that the plaintiffs' claim fails because there is no "permanent physical occupation," the majority creates a circuit split by contradicting the Federal Circuit's decision in *Hendler*. The Federal Circuit's holding that activity involving "temporally intermittent" intrusions onto private property effects a taking, *Hendler*, 952 F.2d at 1377, is inconsistent with the majority's view that there is no taking of an easement unless "random members of the public [can] unpredictably traverse the[ ] property 24 hours a day, 365 days a year," *Cedar Point*, 923 F.3d at 532.[11]

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[11] As previously explained, *see supra* at 20 n.8, *Hendler* analyzed the entry of the federal officials onto the land separately from the government's installation of the wells. *Compare* 952 F.2d at 1375–77 (analyzing the government's placement of wells on the plaintiffs' property), *with id.* at 1377–78 (analyzing the government's entry onto the plaintiffs' land to install and service the wells). Accordingly, the Concurrence errs in attempting to distinguish *Hendler* on the ground that the Federal Circuit was considering only the permanent trespass caused by the installation of the wells. *Cf.* Concurrence at 8–9.

C

Finally, the majority blunders in relying on *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), to support its conclusion that the Access Regulation does not effect a taking, *see Cedar Point*, 923 F.3d at 531–32. In *PruneYard*, the appellants were owners of "a large commercial complex that cover[ed] several city blocks, contain[ed] numerous separate business establishments, and [was] open to the public at large." 447 U.S. at 83. The owners ordered a group of high school students who were distributing literature and soliciting signatures for a petition to leave the premises. *Id.* at 77. The California Supreme Court held that the state constitution protected speech and petitioning, even at privately owned shopping centers, and therefore concluded that the students were entitled to conduct their activity on the private property. *Id.* at 78 (citing *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899, 910 (1979)). The U.S. Supreme Court affirmed, characterizing the state constitutional requirement as a regulatory restriction that did not go so far as to constitute a taking. *Id.* at 82–85.

According to the majority, *PruneYard* "contradict[s]" the plaintiffs' claim that the Access Regulation appropriates their property, because *PruneYard* involved restrictions on a property owner's "right to exclude" individuals from property and the Court held that there was no taking. *Cedar Point*, 923 F.3d at 531–32. This reliance on *PruneYard* is mistaken.

PruneYard did not involve a state law that gave third parties access to otherwise private property;

rather, the owner in *PruneYard* "had already opened his property to the general public." *Nollan*, 483 U.S. at 832 n.1. Indeed, *PruneYard* framed the issue as "whether state constitutional provisions, which permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center *to which the public is invited*, violate the shopping center owner's property rights under the Fifth . . . Amendment." 447 U.S. at 76–77 (emphasis added). Given that the shopping center was open to the public, it is not surprising that the parties did not argue, and the Supreme Court did not consider, whether the state had appropriated an easement by giving members of the public the right to exercise their "state-protected rights of free expression and petition" on the shopping center property. *Id.* at 83.

The Supreme Court subsequently made clear that *PruneYard* does not provide guidance for analyzing a governmental appropriation of an easement. *Dolan v. City of Tigard* distinguished the imposition of a permanent recreational easement from the situation in *PruneYard*, where the property was already open to the public and "attracted more than 25,000 daily patrons." 512 U.S. 374, 394 (1994); *see also Nollan*, 483 U.S. at 832 n.1 (distinguishing the appropriation of a beachfront easement from the situation in *PruneYard* where the owner "had already opened his property to the general public," individuals were not given permanent access to the property, and there was no "classic right-of-way easement").[12] And, as *Horne*

[12] The word "permanent" has carried a variety of different meanings in takings jurisprudence, and its meaning has changed over time. *See Causby*, 328 U.S. at 267 (referring to "temporary" and "permanent" easements); *Loretto*, 458 U.S. at 421 (referring

made clear, "limiting a property owner's right to exclude certain speakers from an already publicly accessible shopping center did not take the owner's property." 135 S. Ct. at 2429 (citing *PruneYard*, 447 U.S. at 83).

Here, unlike in *PruneYard*, the plaintiffs' property is not "open to the public at large," 447 U.S. at 83, and the plaintiffs expressly alleged that the Access Regulation appropriates easements. California has not merely regulated the "right to exclude" certain persons from property that is open to the public based on their speech, as in *PruneYard*; rather, California has appropriated a state-defined property right. Therefore, *PruneYard* is simply inapplicable: The majority's fails to recognize that *PruneYard* did not involve the taking of easements but rather a restriction on a landowner's ability to prevent speech on land that was already open to the public.

IV

"That rights in property are basic civil rights has long been recognized," *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972), and like other civil rights must be zealously protected from infringement by government. Here, the plaintiffs allege that California

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to a "permanent physical occupation"); *Hendler*, 952 F.2d at 1376 ("'[P]ermanent' does not mean forever, or anything like it"); *Ark. Game & Fish Comm'n*, 568 U.S. at 33 (rejecting the "argument that government action must be permanent to qualify as a taking"); *Cedar Point*, 923 F.3d at 533 (referring to a "permanent per se taking"). But there has been no change in the Supreme Court's view that the taking of an easement, whether "temporary" or "permanent," constitutes a taking. *Causby*, 328 U.S. at 267.

has appropriated easements and thus taken valuable property rights protected by the Takings Clause. To say, as the majority does, that there has not been a taking, "is to use words in a manner that deprives them of all their ordinary meaning." *Nollan*, 483 U.S. at 831. By failing to give fair consideration to the plaintiffs' actual claims, the majority creates a circuit split, disregards binding Supreme Court precedent, and deprives property owners of their constitutional rights. We should have taken this case en banc to rectify this error.

Appendix F-1

8 CCR § 20900

§ 20900. Solicitation by Non-Employee Organizers.

Labor Code Section 1140.2 declares it to be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing.

(a) Agricultural employees have the right under Labor Code Section 1152 to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, as well as the right to refrain from any or all of such activities except to the extent that such right may be affected by a lawful agreement requiring membership in a labor organization as a condition of continued employment. Labor Code Section 1153(a) makes it an unfair labor practice for an agricultural employer to interfere with, restrain, or coerce agricultural employees in the exercise of these rights.

(b) The United States Supreme Court has found that organizational rights are not viable in a vacuum. Their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others. When alternative channels of effective communication are not available to a union, organizational rights must include a limited right to approach employees on the property of the employer. Under such circumstances, both statutory and constitutional principles require

that a reasonable and just accommodation be made between the right of unions to access and the legitimate property and business interests of the employer.

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

(d) The legislatively declared purpose of bringing certainty and a sense of fair play to a presently unstable and potentially volatile condition in the agricultural fields of California can best be served by the adoption of rules on access which provide clarity and predictability to all parties. Relegation of the issues to case-by-case adjudication or the adoption of an overly general rule would cause further uncertainty and instability and create delay in the final determination of elections.

(e) Accordingly the Board will consider the rights of employees under Labor Code Section 1152 to 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, subject to the following regulations:

(1) When Available.

(A) Access under this section onto an agricultural employer's property shall be available to

any one labor organization for no more than four (4) thirty-day periods in any calendar year.

(B) Each thirty-day period shall commence when the labor organization files in the appropriate regional office two (2) copies of a written notice of intention to take access onto the described property of an agricultural employer, together with proof of service of a copy of the written notice upon the employer in the manner set forth in Section 20300(f).

If a petition for election is filed, the right of access shall continue until after the election as provided by Section 20900(e)(1)(C). If a run-off or rerun election is directed, the right of access shall continue until after said election as provided in Section 20900(e)(1)(C).

(C) The right to take access under this section terminates as to any labor organization after the fifth day following completion of the ballot count pursuant to Section 20360(a) in an election conducted under Chapter 5 of the Act, except that where objections to the election are filed pursuant to Labor Code Section 1156.3(c), the right of access shall continue for ten days following service of and the filing of such objections. The right to take access under this Section recommences 30 days prior to the expiration of the bars to the direction of an election set forth in Labor Code Sections 1156.5 and 1156.6, and 13 months prior to the expiration of a valid collective bargaining agreement that would otherwise bar the holding of an election but for the provisions of Labor Code Section 1156.7(d). Where the right to take access is recommenced during the pendency of a valid collective-bargaining agreement pursuant to this paragraph, no more than four thirty-day periods of

access shall be permitted to any one labor organization in the 13 months preceding the expiration of said collective bargaining agreement.

Nothing herein shall be interpreted or applied to restrict or diminish whatever rights of access may accrue to a labor organization certified as a bargaining representative.

(2) Voluntary Agreements on Access. This regulation establishes the terms upon which a labor organization may take access. However, it does not preclude agreements by the parties to permit access on terms other than as set forth in this part, provided that any such agreement shall permit access on equal terms to any labor organization which agrees to abide by its terms. For the purpose of facilitating voluntary resolution by the parties of problems which may arise with access, the notice of intent to take access shall specify a person or persons who may reach agreements on behalf of the union with the employer concerning access to his/her property. The parties are encouraged to reach such agreements and may request the aid of the regional director and board agents in negotiating such agreements; however, no such attempts to reach an agreement, be they among the parties themselves or with the aid of this agency, shall be deemed grounds for delay in the taking of immediate access once a labor organization has filed its notice of intent to take access.

(3) Time and Place of Access.

(A) Organizers may enter the property of an employer for a total period of one hour before the start of work and one hour after the completion of

work to meet and talk with employees in areas in which employees congregate before and after working. Such areas shall include buses provided by an employer or by a labor contractor in which employees ride to and from work, while such buses are parked at sites at which employees are picked up or delivered to work. Where employees board such buses more than one hour before the start of work, organizers may have access to such buses from the time when employees begin to board until such time as the bus departs.

(B) In addition, organizers may enter the employer's property for a single period not to exceed one hour during the working day for the purpose of meeting and talking with employees during their lunch period, at such location or locations as the employees eat their lunch. If there is an established lunch break, the one-hour period shall encompass such lunch break. If there is no established lunch break, the one-hour period shall encompass the time when employees are actually taking their lunch break, whenever that occurs during the day.

(4) Numbers of Organizers; Identification; Prohibited Conduct.

(A) Access shall be limited to two organizers for each work crew on the property, provided that if there are more than 30 workers in a crew, there may be one additional organizer for every 15 additional workers.

(B) Upon request, organizers shall identify themselves by name and labor organization to the employer or his agent. Organizers shall also wear a badge which clearly states his or her name, and the

name of the organization which the organizer represents.

(C) The right of access shall not include conduct disruptive of the employer's property or agricultural operations, including injury to crops or machinery or interference with the process of boarding buses. Speech by itself shall not be considered disruptive conduct. Disruptive conduct by particular organizers shall not be grounds for expelling organizers not engaged in such conduct, nor for preventing future access.

(5) Violations of Section 20900.

(A) Any organizer who violates the provisions of this part may be barred from exercising the right of access under this part in any one or more of the four geographical areas currently designated by the Board as regions, for an appropriate period of time to be determined by the Board after due notice and hearing.

Any labor organization or division thereof whose organizers repeatedly violate the provisions of this part may be barred from exercising the right of access under this part in any one or more of the four geographical areas currently designated by the Board as regions, for an appropriate period of time to be determined by the Board after due notice and hearing.

(B) Violation by a labor organizer or organization of the access regulation may constitute an unfair labor practice in violation of Labor Code Section 1154(a)(1) if it independently constitutes

restraint and coercion of employees in the exercise of their rights under Labor Code Section 1152.

Violations by a labor organizer or organization of this part may constitute grounds for setting aside an election where the Board determines in objections proceedings under Section 1156.3(c) of the Act that such conduct affected the results of the election.

(C) Interference by an employer with a labor organization's right of access under this part may constitute grounds for setting aside an election where the Board determines in proceedings under Section 1156.3(c) of the Act that such conduct affected the results of the election. Furthermore, such interference may constitute an unfair labor practice in violation of Labor Code Section 1153(a) if it independently constitutes interference with, restraint, or coercion of employees in the exercise of their rights under Labor Code Section 1152.

(6) Citrus Industry.

(A) For purposes of this subsection the term "employer" refers to any "agricultural employer" involved in the growing, harvesting or packing of citrus.

(B) The service of a Notice of Intent to Take Access or Notice of Intent to Organize upon such an employer and the proper filing of such Notice upon the appropriate regional office by a labor organization shall be deemed sufficient under Section 20900(e)(1) to permit the labor organization to take access, as provided in this section, to the employees employed at

groves and orchards of citrus fruit which the employer grows, harvests or packs.

(C) Any labor organization which has duly filed a Notice of Intent to Take Access or Notice of Intent to Organize concerning the employer may request, in writing, from the regional director a copy of the following information required to be made available pursuant to Section 20915(b): the written list of the name(s) of the owner(s)/lessee(s) and the location of each citrus grove or orchard of citrus fruit which the employer grows, harvests, or packs. If, after investigation, the regional director determines that some or all of the owner(s)/lessee(s) of the citrus groves or orchards of citrus fruit which the employer grows, harvests, or packs, are part of the bargaining unit, then, pursuant to the labor organization's request, the regional director shall provide to the labor organization(s) a list containing the names of the owner(s)/lessee(s) and the location of each grove or orchard that is included within the bargaining unit. The regional director will immediately notify the owner(s)/lessee(s) of said citrus groves or orchards in writing of the fact that a Notice of Intent to Take Access or Notice of Intent to Organize has been filed and that union organizers may take access to the grove or orchard.

(D) Upon the proper filing and service of a Notice of Intent to Take Access or Notice of Intent to Organize, the employer and the union, with the assistance of the regional director, shall establish the means whereby the employer will keep the union informed of the places and times at which the employer's crews may be found during the relevant

access taking or organizing period. For purposes of this provision, crews consisting of three (3) or fewer workers may be excluded, if the employer has no knowledge of the specific locations in which such crews will be working during the day. As to such crews, the employer will provide the union with as specific a description as possible of the area in which such employees will be working. Should the employer and the union fail to establish a mutually agreeable plan for providing the union with the aforesaid information, the following procedures shall be observed:

(1) The employer shall on a day-by-day basis during the access period prepare a schedule showing the place and time where each crew will be working, including the time each crew will begin work, take its lunch break, and end work each day and directions to the location(s) where each crew will be working. Said schedule shall be posted at least two hours in advance of the start of work on each day during the access period. Posting shall occur at the location from which the employer dispatches its crews, and the employer will advise the union of that location. The union's representatives shall be afforded reasonable access to the place where the employer posts the schedules.

(2) Should the union desire to take access on any given day during the access period, it shall so notify the employer in advance of the taking of access and provide a phone number at which it may be contacted pursuant to subsection (3) below.

(3) Once posting has occurred, the employer may find it necessary to change the time or

place at which a crew will be working. In that event, the employer shall make reasonable efforts to notify the union of the new time or location.

Note: Authority cited: Section 1144, Labor Code. Reference: Section 1152, Labor Code; and ALRB v. Superior Court (1976) 16 Cal. 3d 392.

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CEDAR POINT NURSERY and FOWLER PACKING CO., Plaintiffs, v. WILLIAM B. GOULD IV, GENEVIEVE SHIROMA, CATHRYN RIVERA-HERNANDEZ, AND J. ANTONIO BARBOSA, members of the Agricultural Labor Relations Board in their official capacities, Defendants.	No. 1:16-cv-00185-LJO-BAM **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

JURISDICTION

1. The claims in this action arise under the Fourth and Fifth Amendments to the United States Constitution, made applicable to the States by the Fourteenth Amendment. This Court has jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. A remedy is sought under 28 U.S.C. § 2201.

2. Under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), State officials may be sued for declaratory and injunctive relief when they act in violation of the Constitution. This Court has jurisdiction to grant the requested injunction against

an unconstitutional regulation enforced by the Agricultural Labor Relations Board.

3. Venue is proper in this district because the conduct at issue took place within this district and the Plaintiffs' properties are all located within this district. 28 U.S.C. § 1391(b)(2). Venue is proper in the Fresno Division of this District Court under Local Court Rule 120(d) because Plaintiff Fowler Packing Co. is located in Fresno County.

INTRODUCTION

4. Cedar Point Nursery (Cedar Point) and Fowler Packing Co. (Fowler) bring this action for declaratory and injunctive relief against the Members of the California Agricultural Labor Relations Board (the Board) in their official capacities. The action challenges a Board regulation that unlawfully permits union organizers to access private property in violation of the Fourth and Fifth Amendments (the access regulation).

5. The Fourth Amendment guarantees the right to be free from unreasonable searches and seizures, while the Fifth Amendment prevents the government from depriving property owners of the right to exclude trespassers from their property without just compensation. The Board regulation gives union organizers the right to access private property for the purposes of soliciting support, and thus authorizes a seizure and taking of possessory interests in private property, including the right to exclude others.

6. Cedar Point experienced recent disruptions caused by United Farm Workers (the Union)

organizers protesting on their property under the guise of the access regulation. The Union filed a charge against Fowler with the Board for violating the regulation by denying access to union organizers.

7. The access regulation imposes an easement across the private property of Cedar Point and Fowler for the benefit of union organizers. It deprives Plaintiffs of the right to exclude trespassers from private property and seizes a possessory interest in that property. Consequently, it violates the Fourth and Fifth Amendments to the United States Constitution, as applied to the States through the Fourteenth Amendment. Plaintiffs are entitled to equitable relief under 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201, including a preliminary injunction.

THE PARTIES

8. Plaintiff Cedar Point Nursery is an Oregon corporation. Its nursery is located at 624 Dorris Brownell Road in Dorris, California, a few miles from the Oregon border. Cedar Point raises strawberry plants for producers both statewide and nationally. It has recently been subject to a Union protest on its property under the guise of the access regulation.

9. Plaintiff Fowler Packing Co. is a California corporation with its headquarters in Fresno. It is one of the largest shippers in the fresh produce business, handling over 5 million boxes of table grapes, and 15 million boxes of citrus each year, including the popular mandarin brand "Halos." In July 2015, the Union filed a charge against Fowler with the Board, alleging that Fowler had unlawfully denied access to

its property at 8570 South Cedar Avenue in Fresno on three separate days.

10. Defendant William B. Gould IV is Chairman of the California Agricultural Labor Relations Board. The Board is an agency of the State of California which has responsibility for administering the Agricultural Labor Relations Act (the Act), Cal. Lab. Code § 1140, *et seq*. The Board has the responsibility to investigate unfair labor practice charges and pursue remedies. Defendant William B. Gould is being sued in his official capacity as Chairman of the Board.

11. Defendant Genevieve Shiroma is a Board Member. She is being sued in her official capacity.

12. Defendant Cathyrn Rivera-Hernandez is a Board Member. She is being sued in her official capacity.

13. Defendant J. Antonio Barbosa is Executive Secretary of the Board. He is being sued in his official capacity.

FACTUAL BACKGROUND RELATING TO THE ACCESS REGULATION

14. The Agricultural Labor Relations Act, Cal. Lab. Code § 1140, *et seq.*, went into effect on August 28, 1975. The Act does not include a provision permitting access for union organizers on private property.

15. After the Act took effect, the Board immediately promulgated an emergency access regulation. It took effect on August 29, 1975, and was

duly certified on December 2, allowing it to remain in effect until amended or repealed.

16. Two groups of growers challenged the regulation as a violation of the Takings and Due Process Clauses of the United States Constitution in state court immediately after it was adopted. Two separate California trial courts issued temporary injunctions. *Agricultural Labor Relations Board v. Superior Court (Pandol & Sons)*, 16 Cal. 3d 392, 401 (1976). In a 4-3 decision, the California Supreme Court reversed. *Id.* at 409-11. The court held that the Board was not required to decide whether union access was necessary on a case-by-case basis, but could instead maintain a blanket rule granting access. *Id.* at 409. The dissent, on the other hand, concluded that "the regulation constitutes an unwarranted infringement on constitutionally protected property rights." *Id.* at 421 (Clark, J., dissenting).

17. The current version of the access regulation declares that the Board "will consider the rights of employees under Labor Code Section 1152 to 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 . . . ." Cal. Code Regs. tit. 8, § 20900(e).

18. The regulation contains time, place, and manner restrictions: (1) access is available for no more than four 30-day periods in a calendar year; (2) each such period commences when the Union files a written Notice of Intent to Take Access as well as proof of service on the agricultural employer; (3) organizers can enter the property for one hour before the start of work, one hour after the completion of work, and one

hour during the lunch break; (4) two organizers are permitted per work crew of up to 30 employees, with an additional organizer allowed for each additional 15 employees. *Id.* § 20900(e)(1)-(4).

19. Interference with the union organizers' regulatory right of access "may constitute an unfair labor practice in violation of Labor Code Section 1153(a) if it independently constitutes interference with, restraint, or coercion of employees in the exercise of their rights under Labor Code Section 1152." *Id.* § 20900(e)(5)(c).

20. In 2015, the Union filed 62 notices of intent to take access with the Board. *See* Exhibit A.

FACTUAL BACKGROUND RELATING TO THE BOARD AND ITS PROCEEDINGS

21. Board regulations allow any person to file a charge against any other person for engaging in an unfair labor practice. Cal. Code Regs. tit. 8, § 20201. The charge must contain "[a] short statement of the facts allegedly constituting an unfair labor practice." *Id.* § 20202(c).

22. Once the charge has been filed, the regional director of the proper Board office has a duty to investigate whether an unfair labor practice has been committed. *Id.* § 20216. If the regional director concludes that no reasonable cause exists or there is insufficient evidence to support the charge, it is dismissed. *Id.* § 20218. The regional director must then issue a written notice explaining the reasons for the dismissal. *Id.*

23. Upon a dismissal, the charging party may seek review by the Board's general counsel. *Id.* § 20219. The general counsel may affirm the regional director's decision, remand for further factfinding, or issue a formal complaint in the name of the Board. *Id.* §§ 20219-20220. "The complaint shall contain a statement of the specific facts upon which jurisdiction of the Board is based, including the identity of the respondent, and shall state with particularity the conduct which is alleged to constitute an unfair labor practice." *Id.* at 20220.

24. Once the complaint is issued, proceedings are similar to litigation. *See id.* §§ 20220-20278. At the conclusion of factfinding and argument, an administrative law judge (ALJ) makes the decision as to whether an unfair labor practice has been committed. *Id.* § 20279. If the ALJ finds that an unfair labor practice has been committed, "the decision shall contain an order for such affirmative action by the respondent as will effectuate the policies of the Act." *Id.*

25. Within 20 days of the ALJ's decision, any party may file an exception to the Board, seeking to reverse particular parts of the decision. *Id.* § 20282(a). If no exceptions are filed, the ALJ's decision becomes final 20 days after it is served on the parties. *Id.* § 20286(a). If there are exceptions, "the Board shall review the applicable law and the evidence and determine whether the factual findings are supported by a preponderance of the evidence taken." *Id.* § 20286(b).

FACTS RELATING TO THE PLAINTIFFS

Cedar Point

26. Cedar Point employs more than 400 seasonal and about 100 full-time workers at its Dorris, California nursery.

27. Seasonal workers at Cedar Point are housed in hotels in nearby Klamath Falls, Oregon. None of Cedar Point's full-time or seasonal employees live on the Nursery's property.

28. Cedar Point employees earn at or above market rates. Workers typically work 9-hour days beginning around 6:00 a.m., and complementary meals are served at designated times on the premises. Cedar Point's management has never received complaints about the working conditions or housing provided to employees.

29. The Union staged a protest on Cedar Point's property during the tail-end of the six-week strawberry harvesting season in 2015. It was Cedar Point's first interaction with the Union.

30. On October 29, 2015, Union protesters entered Cedar Point's property at approximately 5:00 a.m., without any prior notice of intent to access the property. By approximately 6:00 a.m. Union protesters trespassed across Cedar Point's property to the trim sheds, where hundreds of employees were preparing Cedar Point's strawberry plants. The protesters disrupted work by moving through the trim sheds with bullhorns, distracting and intimidating workers.

31. Some workers who were present when the Union entered Cedar Point's property left to protest with Union representatives. Other workers left the work site and did not join the protest. Many of the employees who left the work site or joined the protest were back at work at Cedar Point by Saturday, October 31. The majority of workers did not leave their work stations during the protest.

32. After the Union entered Cedar Point's property, the Union informed Cedar Point employees, including Human Resources Director Rachel Halpenny, that it had filed paperwork with the Board. It was at this point—after the Union had already trespassed throughout the property—that it finally served the notice of intent to take access.

33. The Union claims that the access regulation grants it access rights to Cedar Point's property.

34. Cedar Point has filed a charge against the Union with the Board, alleging that the Union has violated the access regulation by taking access to Cedar Point's property without providing proper notice. The Union has also filed a charge against Cedar Point, alleging that Cedar Point committed an unfair labor practice.

35. Because the Union was ultimately unsuccessful in recruiting most of Cedar Point's workers, it is likely the Union will attempt to take access again in the near future. If not for the challenged regulation, Cedar Point would exercise its right to exclude the Union trespassers from its property.

Fowler

36. Fowler employs 1,800 - 2,500 people in its field operations and approximately 500 people at its packing facility in Fresno, California. The company takes its social responsibility seriously; it provides free, wholesome meals for its packing house employees on premises, and maintains a medical clinic that serves all Fowler employees and their families free of charge. Each employee also carries a card with a "hotline" number, which they may anonymously call to report any signs of abuse, misconduct, harassment, or unsafe working conditions.

37. Fowler's employees do not live on the premises and are fully accessible to the Union when they are not at work.

38. The Union alleged in a charge that Fowler interfered with its access rights under the regulation for three days in July 2015. According to the charge filed with the Board, the Union duly provided notice before taking access, but Fowler blocked its organizers from taking the access permitted by the regulation.

39. Subsequently, the Union moved to withdraw its charge against Fowler. On January 13, 2016, the Board granted the Union's request. The Board did not indicate the Union's reason for seeking withdrawal.

40. Absent the challenged regulation, Fowler would oppose union access and exercise its right to exclude union trespassers from its property.

DECLARATORY RELIEF ALLEGATIONS

41. Under the Fourth, Fifth, and Fourteenth Amendment to the United States Constitution, Plaintiffs have a right to be free from laws that take or seize property for a public purpose, but on an unreasonable ground and without any mechanism for compensation.

42. Defendants are charged with enforcing the access regulation, which takes an interest in private property without providing a mechanism for compensation.

43. There is a justiciable controversy in this case as to whether the regulation violates the Fourth, Fifth, and Fourteenth Amendments as applied to Cedar Point and Fowler.

44. A declaratory judgment as to whether the regulation unconstitutionally takes or seizes property will clarify the legal relations between Plaintiffs and Defendants with respect to enforcement of the regulation.

45. A declaratory judgment as to the constitutionality and legality of the regulation will give the parties relief from the uncertainty and insecurity giving rise to this controversy.

INJUNCTIVE RELIEF ALLEGATIONS

46. Plaintiffs have no adequate remedy at law to address the unlawful and unconstitutional taking and deprivation of their property effected by the regulation and under color of state law.

47. There is a substantial likelihood that Plaintiffs will succeed on the merits of their claims that the regulation unconstitutionally takes and seizes private property.

48. Plaintiffs Cedar Point and Fowler are required to permit union trespassers to enter their property under the authority of the regulation. They cannot avoid those events without judicial relief, and will suffer irreparable injury absent a preliminary injunction restraining Defendants from enforcing the regulation.

49. Plaintiffs will suffer irreparable injury absent a permanent injunction restraining Defendants from enforcing the regulation.

50. Plaintiffs' injury—the immediate, unconstitutional, and illegal taking of a property interest for the benefit of union organizers—outweighs any harm the injunction might cause Defendants or the State of California.

FIRST CLAIM FOR RELIEF

(Taking of an Easement Without Just Compensation, in Violation of the Fifth and Fourteenth Amendments, through 42 U.S.C. § 1983)

51. Plaintiffs hereby re-allege each and every allegation contained in paragraphs 1 through 50 as though fully set forth herein.

52. The Fifth Amendment to the United States Constitution, applied to the States through the

Fourteenth Amendment, provides "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

53. The Supreme Court of the United States has recognized that the Declaratory Judgment Act, 28 U.S.C. § 2201, "allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained." *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 71 n.15 (1978).

54. As a result of the California Supreme Court's *Pandol & Sons* decision, there is no adequate state-law remedy for property owners affected by the Board's access regulation, and Plaintiffs need not seek such a remedy before bringing this action in federal court.

55. In addition, monetary relief is not available as a matter of law in this action, because "the Eleventh Amendment bars reverse condemnation actions brought in federal court against state officials in their official capacities." *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 956 (9th Cir. 2008).

56. Both Plaintiffs have reason to believe that the access regulation will be applied against them in the future. Fowler had a recent charge filed against it for violating the access regulation. The Union alleges Fowler prevented union organizers from trespassing after Fowler had been served with a notice of intent to take access. Cedar Point has a charge pending against the Union relating to the Union protest on October 29, 2015.

57. Given the foregoing, the only proper and possible remedy for the constitutional taking injury alleged in this case is declaratory and injunctive relief, and this Court is a proper forum for such relief.

58. Since the access regulation now creates an easement for union organizers to enter Plaintiffs' private property without consent or compensation, it causes an unconstitutional taking. Plaintiffs are entitled to declaratory and injunctive relief preventing the application of Cal. Code Regs. tit. 8, § 20900(e) against them.

SECOND CLAIM FOR RELIEF

(Unconstitutional Seizure in Violation of the Fourth Amendment, through 42 U.S.C. § 1983)

59. Plaintiffs hereby re-allege each and every allegation contained in paragraphs 1 through 58 as though fully set forth herein.

60. The Fourth Amendment to the United States Constitution, applied to the States through the Fourteenth Amendment, provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

61. A seizure of property occurs whenever "there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

62. The right to exclude unwanted strangers from private land is a protected possessory interest in real property.

63. When a private person acts "'as an agent of the Government or with the participation or knowledge of any governmental official,'" then the private person's acts are attributed to the Government. *Id.* (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)).

64. By granting an access easement to union organizers, the Board's access regulation now permits those organizers to significantly interfere with Plaintiffs' possessory interest in their private property. And because such access is unnecessary given the alternative means of communication available, *see Lechmere v. NLRB*, 502 U.S. 527, 540-41 (1992), it is unreasonable to allow union organizers to seize this possessory interest in Plaintiffs' property.

65. Plaintiffs are entitled to injunctive relief and a declaration that Cal. Code Regs. tit. 8, § 20900(e) effects an unreasonable seizure of their property.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment from this Court as follows:

1. A declaratory judgment that Cal. Code Regs. tit. 8, § 20900(e) is unconstitutional as applied to Plaintiffs;

2. An order enjoining Defendants from enforcing Cal. Code Regs. tit. 8, § 20900(e) against Plaintiffs;

3. An award to Plaintiffs of reasonable attorneys' fees in bringing and maintaining this action pursuant to 42 U.S.C. § 1988;

4. An award to Plaintiffs of costs of suit pursuant to Federal Rule of Civil Procedure 54(d); and

5. An award to Plaintiffs of any other relief that the Court deems just and proper under the circumstances of this case.

DATED: February 10, 2016.

Respectfully submitted,

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By /s/ Joshua P. Thompson
JOSHUA P. THOMPSON

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Exhibit 1

Notice of Intent to Take Access Filings in 2015

Notices to Take Acccess (NA) - Salinas

#	Date Filed	Case Number	Labor Organization	Employer
1.	06/24/15	2015-NA-001-SAL	UFW	Larse Farms, Inc.
2.	06/24/15	2015-NA-002-SAL	UFW	Rocha Brothers Farms
3.	06/26/15	2015-NA-003-SAL	UFW	Ortega Berry Farms
4.	06/26/15	2015-NA-004-SAL	UFW	Garroutte Farms
5.	06/26/15	2015-NA-005-SAL	UFW	Corralitos Farms

6.	06/26/15	2015-NA-006-SAL	UFW	Dutra Farms dba Premiere Raspberries
7.	07/08/15	2015-NA-007-SAL	UFW	Aptos Berry Farms
8.	07/08/15	2015-NA-008-SAL	UFW	Reiter Berry Farms
9.	07/08/15	2015-NA-009-SAL	UFW	Fernandez Bros. Inc.
10.	07/08/15	2015-NA-010-SAL	UFW	Scurich Berry Farm
11.	07/13/15	2015-NA-011-SAL	UFW	Tanimura & Antle Inc.
12.	07/16/15	2015-NA-012-SAL	UFW	Saticoy Berry Farms
13.	07/17/15	2015-NA-013-SAL	UFW	Ito Bros, Inc.
14.	07/21/15	2015-NA-014-SAL	UFW	Mandalay Berry Farms
15.	07/23/15	2015-NA-015-SAL	UFW	Marz Farms, Inc.

16.	07/23/15	2015-NA-016-SAL	UFW	Colorado Farms, LLC
17.	07/24/15	2015-NA-017-SAL	UFW	Camarillo Berry Farms
18.	07/27/15	2015-NA-018-SAL	UFW	Ortega Berry Farms (2nd)
19.	07/30/15	2015-NA-019-SAL	UFW	Springfield Farms
20.	08/06/15	2015-NA-020-SAL	UFW	Harvest Moon Agricultural Services
21.	08/07/15	2015-NA-021-SAL	UFW	T.T. Miyasaka, Inc.
22.	08/10/15	2015-NA-022-SAL	UFW	Desert Best Farms
23.	08/17/15	2015-NA-023-SAL	UFW	Aptos Berry Farms
24.	08/17/15	2015-NA-024-SAL	UFW	Providence Farms, LLC
25.	08/17/15	2015-NA-025-SAL	UFW	Merrill Farms, LLC

26.	08/20/15	2015-NA-026-SAL	UFW	PV Farming Operations LLC
27.	08/25/15	2015-NA-027-SAL	UFW	Fernandez Brothers, Inc.
28.	08/20/15	2015-NA-028-SAL	UFW	Sunset Farming, Inc.
29.	08/20/15	2015-NA-029-SAL	UFW	Paraiso Organics, Inc.
30.	09/08/15	2015-NA-030-SAL	UFW	Camarillo Berry Farms
31.	09/10/15	2015-NA-031-SAL	UFW	Rio Mesa Organics Farms
32.	09/10/15	2015-NA-032-SAL	UFW	Royal Oaks Farms LLC
33	09/10/15	2015-NA-033-SAL	UFW	Sakakihara Farms
24.	09/17/15	2015-NA-034-SAL	UFW	Elkhorn Berry Farms LLC
35.	09/17/15	2015-NA-035-SAL	UFW	Elkhorn Berry Organic Farms LLC

36.	10/29/15	2015-NA-036-SAL	UFW	Cedar Point Nursery
37.	11/09/15	2015-NA-037-SAL	UFW	Tanimura & Antle, Inc.
38.	11/09/15	2015-NA-038-SAL	UFW	Dutra Farms dba Premiere Raspberries, LLC
39.	11/09/15	2015-NA-039-SAL	UFW	Harvest Moon Agricultural Services
40.	11/09/15	2015-NA-040-SAL	UFW	Larse Farms, Inc.
41.	11/09/15	2015-NA-041-SAL	UFW	T.T. Miyasaka, Inc.
42.	11/09/15	2015-NA-042-SAL	UFW	Providence Farms, LLC

Notices to Take Access (NA) - Visalia

#	Date Filed	Case Number	Labor Organization	Employer
1.	06/25/15	2015-NA-001-VIS	UFW	Rogina Inc.
2.	06/25/15	2015-NA-002-VIS	UFW	Live Oak Farms
3.	06/29/15	2015-NA-003-VIS	UFW	Sweetwoods Farm . . . Inc. dba "Red Rooster"
4.	06/30/15	2015-NA-004-VIS	UFW	Mike Jensen Farms
5.	06/30/15	2015-NA-005-VIS	UFW	Dimare Fresh
6.	06/30/15	2015-NA-006-VIS	UFW	Family Ranch
7.	07/07/15	2015-NA-007-VIS	UFW	Valley Garlic Inc. dba Sequoia Packing

8.	07/09/15	2015-NA-008	UFW	Fowler Packing Co.
9.	07/09/15	2015-NA-009-VIS	UFW	Pappas & Co.
10.	07/09/15	2015-NA-010-VIS	UFW	Stamoules Produce Company
11.	07/09/15	2015-NA-011-VIS	UFW	Martinelli Vineyards
12.	07/10/15	2015-NA-012-VIS	UFW	John H. Kautz dba John Kautz Farms aka Diversified Farms
13	07/10/15	2015-NA-013-VIS	UFW	Vino Farm Inc.
14.	07/13/15	2015-NA-014-VIS	UFW	Sonoma Cutrer Vineyards
15.	07/30/15	2015-NA-015-VIS	UFW	Dimare Fresh (2nd)
16.	07/31/15	2015-NA-016-VIS	UFW	Live Oak Farms
17.	07/31/15	2015-NA-017-VIS	UFW	Stellar Distributing, Inc.

18.	08/03/15	2015-NA-018-VIS	UFW	Logoluso Farms Inc.
19.	08/04/15	2015-NA-019-VIS	UFW	Specialty Crop Co.
20.	08/24/15	2015-NA-020-VIS	UFW	J. Marchini Farms