No. 20-107

In the
Supreme Court of the United States

CEDAR POINT NURSERY AND FOWLER PACKING CO.,
Petitioners,

v.

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

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

BRIEF OF *AMICI CURIAE* UNITED FOOD AND COMMERCIAL WORKERS WESTERN STATES COUNCIL AND TEAMSTERS JOINT COUNCIL 7 IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

A. CALIFORNIA'S HISTORIC RELIANCE ON ACCESS PROVISIONS TO PROTECT THE PUBLIC INTEREST 6

1. California Has Allowed Access onto Private Property as Part of Its Regulation of Employment and Safety for More Than a Century 6

2. California Has Protected Unions' Right to Access to Employers' Property 9

B. THE BASIS FOR THE ALRB'S ACCESS REGULATION 10

1. The ALRB's Access Regulation is Part of a Comprehensive Labor Relations Statute 10

2. The ALRB's Access Regulation Remains Necessary Today 14

C. THE ALRB'S ACCESS REGULATION DOES NOT AMOUNT TO A TAKING UNDER THE FIFTH AMENDMENT 20

1. The Access Rights Provided by the ALRB's Regulation Do Not Rise to the Level of a Property Right Under California Law or a Taking Under Federal Law 20

2. The ALRB's Access Regulation Should Be Judged Under Established Regulatory Takings Standards 30

CONCLUSION 31

TABLE OF AUTHORITIES

Page

CASES

Aceves v. Allstate Ins. Co.,
68 F.3d 1160 (9th Cir. 1995) 26

Agricultural Labor Relations Bd. v. Superior Ct.,
16 Cal.3d 392 (1976)..... 11, 12, 20

Armstrong v. United States
364 U.S. 40 (1960) 22

Board of Regents v. Roth,
408 U.S. 564 (1972) 21

Brinker Restaurant Corp. v. Superior Ct.,
53 Cal.4th 1004 (2012) 14

In re Catalano,
29 Cal.3d 1 (1981)..... 10

Collier v. Oelke,
202 Cal.App.2d 843 (1962) 26

Dolan v. City of Tigard,
512 U.S. 374 (1994) 29

Hawks v. Hamill,
288 U.S. 52 (1933) 25-26

L & C Harvesting, Inc.,
19 ALRB No. 19 (1993)..... 26

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982) 24, 29

Munn v. Illinois,
94 U.S. 113 (1877) 21

Nebbia v. New York,
291 U.S. 502 (1934) 21

Nollan v. California Coastal Commission,
483 U.S. 825 (1987) 29

Penn Central Transportation Co. v. New York City,
438 U.S. 104 (1978) 5, 6, 29, 30, 31

People v. Medrano,
78 Cal.App.3d 198 (1978) 20

Property Reserve, Inc. v. Superior Ct.,
1 Cal.5th 151 (2016) 4, 23-25, 26, 27

PruneYard Shopping Center v. Robins,
447 U.S. 74 (1980) 21-22, 27-29, 30

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984) 20-21

Webb's Fabulous Pharmacies, Inc. v. Beckwith,
449 U.S. 155 (1980) 21

Yee v. Escondido,
503 U.S. 519 (1992) 22

Young's Market Co. v. Superior Ct.,
242 Cal.App.4th 356 (2015), *vacated and remanded*, 208 Cal.Rptr.3d 288 (October 19, 2016), *on remand*, 2017 WL 104476 (January 11, 2017)..... 25

In re Zerbe,
60 Cal.2d 666 (1964)..... 10

CONSTITUTIONAL PROVISIONS

United States Constitution, amend. V .....*passim*

United States Constitution, amend. XIV 4, 21, 22

STATUTES

California Civil Code

Section 802 26

California Food and Agriculture Code

Section 6521 8
Section 6901 8
Section 6903 8
Section 8551(g) 9
Sections 42761-42763 8
Section 52362 8
Section 53362 8
Sections 59282-59293 8
Sections 65500-65674 8

California Labor Code

Section 90 6
Section 144 6
Section 152 6
Section 247.5 6
Section 512(a) 14
Section 1140.2 2
Section 1141 10
Section 1144 10
Section 1151(a) 10
Section 1153 10
Section 1154 10
Section 1156.3(a)(1) 12
Section 1156.3(b) 12
Section 1174 ..... 5, 7

Section 1182.5(d) 6
Section 6315..... 7
Section 6712..... 7
Section 7872..... 7

California Penal Code

Section 552.1..... 9-10
Section 601(c)..... 9
Section 602(o)..... 9

California Unemployment Insurance Code

Section 1085..... 7
Section 1092..... 7

REGULATIONS

California Code of Regulations, Title 8

Section 3457..... 7
Section 11140(17) 7
Section 20900(c)..... 12
Section 20900(e)(1)(A) 12
Section 20900(e)(1)(B) 12
Section 20900(e)(1)(C) 12
Section 20900(e)(3)(A) 13
Section 20900(e)(3)(B) 12
Section 20900(e)(4)(C) 13

OTHER MATERIALS

Agricultural Labor Relations Board, 2015
Hearings on Worksite Access ... 17-18, 19

Luis Fernando Baron, Moriah Neils, & Ricardo Gomez, *Jobs and Family Relations: Use of Computers and Mobile Phones Among Hispanic Day Laborers in Seattle*, iConference (February 2013) 17

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William Kandel, United States Department of Agriculture, *Profile of Hired Farmworkers, A 2008 Update* (2008) .. 15

Matthew Kohnke, *Reeling in a Rogue Industry: Lethal E. Coli in California's Leafy Green Produce & the Regulatory Response*, Drake Journal of Agricultural Law 493 (2007) 8

Richard Mines, Sandra Nichols, & David Runsten, *California's Indigenous Farmworkers: Final Report of the Indigenous Farmworker Study to the California Endowment* (January 2010) 18

Juan-Vicente Palerm, *Immigrant and Migrant Farm Workers in the Santa Maria Valley, California*, 2006 University of California Santa Barbara: Center for Chicano Studies 16, 17

Don Villarejo, *California's Hired Farm Workers Move to the Cities: the Outsourcing of Responsibility for Farm Labor Housing*, California Rural Legal Assistance (January 24, 2014) 15

IDENTITY AND INTEREST OF *AMICI CURIAE*

The *Amici* are United Food and Commercial Workers Western States Council ("the Western States Council") and Teamsters Joint Council 7 ("Joint Council").

The UFCW Western States Council is a chartered body within the United Food and Commercial Workers International Union, made up of local unions who represent more than 200,000 workers in California, Arizona, and Nevada throughout the food chain from agriculture, packing sheds, distribution, manufacture, warehousing, food storage, and retail sales. UFCW locals have been representing agricultural workers in California since the 1940s and have extensive first-hand experience organizing in the fields both before and since the passage of the Agricultural Labor Relations Act ("the ALRA" or "the Act"). They are also intimately familiar with the wide range of laws, regulations, and industry practices at all levels of the food chain that protect the health and safety of workers and the general public.

Teamsters Joint Council 7 represents more than 100,000 members in 23 local unions in California and Nevada. Its affiliated local unions have been representing agricultural workers and employees engaged in the food processing industry throughout Northern California and Arizona for over 75 years. Currently, the Joint Council and its affiliates Teamsters Local 853, Teamsters Local 856, Teamsters Local 890, and Teamsters Local 948 represent over 19,000 members employed as agricultural workers and in the food processing industry. Organizing

agricultural workers under the ALRA has been and continues to be of central importance to the Joint Council.

The *Amici* are familiar with the Access Regulation, challenged through this suit, and with the ALRA, under which the Access Regulation was promulgated. The *Amici*, and the workers they represent, have a strong interest in ensuring that the ALRA is administered to fulfill its stated purpose: "to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing, to negotiate the terms and conditions of their employment, and to be free from the interference, restraint, or coercion of employers of labor…." Labor Code § 1140.2.

The *Amici* are also familiar with the practical context in which the challenged regulation operates. *Amici* understand the conditions under which farm workers live and work. Having long engaged in organizing under the Act, *Amici* possess unique insight into the challenges involved in communicating with and representing farm workers throughout California. *Amici* offer their perspectives, based on years of farm worker organizing, on the legality—and necessity—of the challenged regulation.

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

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[1]. No party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no

SUMMARY OF ARGUMENT

The Petitioners have asked this Court to adopt a *per se* rule under which any law or regulation permitting access by third parties, whether they are union organizers or government employees, would violate their Fifth Amendment rights by depriving them of their power to exclude trespassers from their property. This case illustrates, however, why such a *per se* approach is not only contrary to this Court's takings jurisprudence, but untenable when it comes to California's regulation of labor relations, workers' rights, and food production, safety, and distribution in its vast agricultural industry.

California does not, for one thing, recognize any such absolute right of property owners to exclude third parties, much less one so paramount as to trump all other interests. On the contrary, California has for more than a century provided for access rights as part of its regulation of growers' and other employers' relations with their own workers and requires access to agricultural employers' property as an essential element of its regulation of health and safety in the growing and processing of food.

This is significant, since property rights are, in the final analysis, primarily created by state, not federal law. While the Petitioners speak about property rights in almost exclusively abstract terms, in the real world property rights are rarely absolute, and almost always hedged in by state and local

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person—other than the *Amici*, their members, and their counsel—contributed money that was intended to fund preparing or submitting the brief.

regulations seeking to advance the common good. The Fifth and Fourteenth Amendments protect those property rights from being taken without compensation in some instances, but do not override the power of the states to regulate employers' business activities. Nor can they add to or change those property rights that state law has created.

That is, however, what the Petitioners are asking this Court to do, by urging it to treat the ALRA's Access Regulation as if it were an easement under California law. That argument falls apart as soon as it comes into contact with California law.

The California Supreme Court has, for one thing, rejected this attempt to characterize access rights of this sort as a property interest. *Property Reserve, Inc. v. Superior Ct.*, 1 Cal.5th 151 (2016). It has likewise dismissed any *per se* takings claims based on that mischaracterization.

The Access Regulation is, instead, part of a comprehensive regulatory scheme designed to provide for the peaceful resolution of labor disputes in California's fields after the years of unrest that prevailed there before the passage of the ALRA. Because of the seasonal nature of much farm labor and farm production, the Act provides for representation elections on very short notice to allow as many workers as possible to participate in the election process during the peak season. Workplace access is a key component of this system, since it provides workers with the ability to learn about their rights from someone other than their employer.

Workplace access is, moreover, just as critical now as it was when the regulation was adopted. Farm workers continue to be isolated, both on the job and off it: many migrate from job to job during the year, speak languages not known by their neighbors, are hired through farm labor contractors rather than the grower they work for, and choose, for a host of reasons, to avoid contact with the larger society around them. The ALRA's Access Regulation represents the only reliable way for these workers to hear about their rights and ask hard questions about what those rights mean.

The Regulation is a very measured response to this need: it not only limits access to no more than three hours a day during only a few months out of the year—and far less time if the Agricultural Labor Relations Board ("the Board" or "the ALRB") conducts an election—but in practice provides even less than that, given the difficulties unions face in contacting workers on the job before and after their work day or during their breaks. Far from creating a permanent easement for union organizers, it actually allows only a few hours of intermittent access during a very narrow window period before and after an ALRB election.

Treating these very limited access rights as if they constituted a permanent invasion of landowners' property rights cannot be squared with this Court's decisions in this area. This case calls instead for the sort of *ad hoc* factual analysis that this Court employed in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) and cases following it

when called on to determine whether a particular governmental action was a regulatory taking—not the *per se* approach advanced by the Petitioners, which ignores the purposes to be achieved by the regulation and its practical impact.

The Petitioners have, however, not only expressly disavowed any regulatory takings argument but conceded that they could not prove that the Access Regulation effected a taking of their property under *Penn Central*. That is powerful evidence, in its own way, of how little connection their *per se* approach has to the real world in which farmworkers live and work. Their attempt to overturn more than forty years of Fifth Amendment jurisprudence should be rejected.

ARGUMENT

A. CALIFORNIA'S HISTORIC RELIANCE ON ACCESS PROVISIONS TO PROTECT THE PUBLIC INTEREST

1. California Has Allowed Access onto Private Property as Part of Its Regulation of Employment and Safety for More Than a Century

California first provided for access to private property as part of the government's regulation of workers' safety and working conditions in 1883, when it authorized the Labor Commissioner to have "free access to all places with labor." Labor Code § 90.[2] California later gave its newly formed Industrial

[2] Stats 1883 C. 21, page 29. Violation of this right may be punished as a misdemeanor. Labor Code § 1174. See also Labor Code §§ 144, 152, 247.5, 1182.5(d).

Welfare Commission the same authority in 1920; that access right is now codified at Labor Code Section 1174. Those access rights applied to agricultural employers when the first agricultural wage order was adopted in 1920 and continue to apply today to those employers, as well as employers in virtually every other industry in California. See, 8 California Code of Regulations § 11140(17).

California has since extended the same access rights to a number of other labor agencies, including the Employment Development Department, which administers the State's unemployment insurance benefits system,[3] and the Division of Occupational Safety and Health, or Cal/OSHA, which investigates and enforces compliance with workplace safety standards.[4] Cal/OSHA conducts both "programmed" and "unprogrammed" inspections of agricultural workplaces to check, among other things, the availability of potable water, adequate sanitation facilities, and protection from extreme heat.[5]

Cal/OSHA's enforcement activities are, moreover, only one part of a much broader inspection regime for agricultural producers. In order to achieve food safety, ensure the safe use of pesticides, and control diseases and pests, the State requires

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[3] Unemployment Insurance Code §§ 1085, 1092.

[4] Labor Code § 6315; *see also*, *e.g.*, Labor Code § 7872.

[5] Labor Code § 6712; 8 California Code of Regulations § 3547; Division of Occupational Safety and Health Policy and Procedures Manual C-46, "Field Sanitation and Agricultural Safety and Health," available at https://www.dir.ca.gov/doshpol/p&pc-46.htm (last visited February 4, 2021).

agricultural employers, including the Petitioners, to grant the government unlimited access to their property.

Nurseries such as Cedar Point, for example, are subject to extensive regulation, including access to their workplaces by Department of Food and Agriculture inspectors[6] with the power to destroy diseased stock.[7] Table grape producers such as Fowler Packing are covered by the Table Grape Pest and Disease District Law, which confers similar access rights on the Department.[8] And Fowler is also subject to inspections of its citrus properties by the Central Citrus Pest Control District, which has the right to "enter into or upon any land included within the

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[6] In some instances these access rights have been required by statute or regulation. *See*, *e.g.*, Food and Agriculture Code §§ 6901, 6903. In other cases growers have volunteered to be covered by these regulatory regimes in order to protect their industry from the spread of food-borne disease. See Matthew Kohnke, *Reeling in a Rogue Industry: Lethal E. Coli in California's Leafy Green Produce & the Regulatory Response*, Drake Journal of Agricultural Law 493, 508-12 (2007). Where market orders govern crops such market commissions have unrestricted access to ensure compliance with those orders. Food and Agriculture Code §§ 52982, 52983.

[7] Food and Agriculture Code §§ 6521, 52362, 53362. Cedar Point has also participated in a strawberry inspection and certification program run by the California Department of Food and Agriculture Department. California Department of Food & Agriculture, "2017-18 California Strawberry Plan Participants Registration and Certification Program," available at https://www.cdfa.ca.gov/plant/pe/nsc/docs/nursery/2017StrawberryParticipantList20171208.pdf (last visited February 4, 2021).

[8] Food and Agriculture Code §§ 42761-42763, 65500-65674. The market commissions established by these market orders have unrestricted access to insure compliance with the order. Food and Agriculture Code §§ 6903, 59282-59293.

boundaries of the district for the purpose of inspecting and treating the citrus trees and other host plants and fruit growing on them."[9]

2. California Has Protected Unions' Right to Access to Employers' Property

California also affirms union organizers' and representatives' access rights. Penal Code Section 601, California's criminal trespass statute, specifically exempts "labor union activities which are permitted to be carried out on the property by the Agricultural Labor Relations Act of 1975" from prosecution. Penal Code § 601(c). Penal Code Section 602(o) likewise exempts "lawful labor union activities."

Similarly, Penal Code Section 552.1, enacted in 1953, exempts lawful labor union organizing efforts from prosecution as criminal trespass onto posted industrial property.[10] The California Supreme Court

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[9] The Central Citrus Pest Control District, described at http://centralpest.special district.org/ (last visited February 4, 2021), is part of the Central California Tritesa Eradication Program, described at http://www.cctea.org (last visited February 4, 2021). Food and Agriculture Code § 8551(g).

[10] Section 552.1 provides:

> This article does not prohibit:
>
> (a) Any lawful activity for the purpose of engaging in any organizational effort on behalf of any labor union, agent, or member thereof, or of any employee group, or any member thereof, employed or formerly employed in any place of business or manufacturing establishment described in this article, or for the

extended the reach of Section 552.1 to cover unposted as well as posted industrial property in *In re Zerbe*, 60 Cal.2d 666, 669 (1964); *accord In re Catalano*, 29 Cal.3d 1, 10-13 (1981).

B. THE BASIS FOR THE ALRB'S ACCESS REGULATION

1. The ALRB's Access Regulation is Part of a Comprehensive Labor Relations Statute

California enacted the ALRA to provide a peaceful and fair procedure for resolving labor disputes between farm workers and their employers, after years of conflict—often violent—across California in one of the most important sectors of the California economy. This statute gives farmworkers in California the right to elect a representative of their own choosing for purposes of collective bargaining and protects that right from both employer and union interference. Labor Code §§ 1153, 1154.[11]

To accomplish that goal, the ALRA grants the Agricultural Labor Relations Board extensive enforcement powers, including "the right of free access to all places of labor," Labor Code § 1151(a), and broad rulemaking powers. Labor Code §§ 1141, 1144. The

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> purpose of carrying on the lawful activities of labor unions, or members thereof.

[11] The Act likewise bars a union that has not been certified as workers' bargaining representative by the ALRB from engaging in strikes for union recognition, as well as certain types of secondary and jurisdictional strikes. Labor Code § 1154.

ALRB used that authority to promulgate the Access Regulation.

It did so only after extensive fact finding, in which it heard evidence that "many farmworkers are migrants; they arrive in town for the local harvest, live in motels, labor camps, or with friends or relatives, then move on when the crop is in ... even farmworkers who are relatively sedentary often live in widely spread settlements, thus making personal contact at home impractical." *Agricultural Labor Relations Board v. Superior Ct.*, 16 Cal.3d 392, 414-15 (1976). The Board found that many farms had no public areas; that many workers travel to and from work and between sites on buses owned by labor contractors who unloaded the workers directly onto the premises; and that many workers spoke uncommon foreign languages or were illiterate. *Id.* at 415.

Moreover, the ALRB found that farmworkers often did not even know the name of their employer, because they changed jobs frequently and were typically hired through labor contractors. *See id.* at 414-15. This meant that many workers would not be able to tell a union the name of their employer if contacted away from the worksite, making it difficult (if not impossible) for unions to submit valid petitions for recognition. *See id.*

The ALRA's election provisions make those obstacles even more daunting. Because much agricultural work is highly seasonal, the ALRA provides for elections on very short notice during the weeks during peak season that a representative

complement of workers are on the job.[12] *Id.* at 416. That makes the necessity for reaching workers at their worksite, during the narrow window allowed by the ALRA's election timetable, particularly critical. The Board thus concluded that "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." 8 California Code of Regulations § 20900(c).

The Access Regulation only provides limited access rights, however: union representatives are only allowed to enter the grower's property to speak with workers after filing a "written notice of intention to take access onto the described property" with the ALRB and serving it on the grower. Access is limited to (1) 60 minutes before the start of work, (2) 60 minutes after the completion of work and (3) 60 minutes during employees' lunch period.[13] Those rights terminate, moreover, if the ALRB holds a representation election among those employees.[14]

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[12] Elections may only proceed if the number of workers at the time of the filing of the petition is not less than 50 percent of the employer's peak agricultural employment. Labor Code § 1156.3(a)(1). The Act directs the ALRB to hold elections within seven days of the filing of a petition. Labor Code § 1156.3(b). This period is shortened to 48 hours if a strike or lockout is in progress. *Id*.

[13] 8 California Code of Regulations § 20900(e)(3)(A), (B). The original version of the regulation applied year-round. *ALRB v. Superior Ct.*, 16 Cal.3d at 400, n. 4. The ALRB subsequently amended the regulation to limit access still further to only four months out of the year. 8 California Code of Regulations § 20900(e)(1)(A), (C).

[14] 8 California Code of Regulations § 20900(e)(1)(B), (C). If no party to the election files objections to the outcome of the

Experience has shown, moreover, that those access rights are even more limited in practice. Farm workers are, for one thing, wholly inaccessible during the times when they are being brought to and from work by either growers' or labor contractors' buses. While the current version of the regulation allows access to these workers while they are waiting to be transported by bus to the workplace, it expressly bars any activity that would prevent these workers from getting on or off the bus. 8 California Code of Regulations § 20900(e)(3)(A), (4)(C).

Nor does the Regulation require that the grower or farm labor contractor inform union organizers where and when employees get on the bus, much less allow them to ride the bus. And, in those cases in which a grower uses more than one farm labor contractor to supply it with workers, the job of simply locating these workers as they gather to be brought to the workplace becomes that much harder. As a result, the nominal right of access to workers before and after their shift is, in practice, often reduced to no more than a few minutes, if that, while employees wait to be transported from the fields.

The actual access that union organizers are allowed during workers' lunch breaks also proves to be far more limited in practice. While the Access Regulation allows up to an hour of access during workers' breaks, farmworkers are rarely provided

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election, then access rights terminate after the fifth day following completion of the ballot count. If any party files objections then a union may continue to exercise access rights for ten days following service of and the filing of those objections.

with an hourlong lunch break. California law requires employers to provide workers with an unpaid half hour break for meals if they are working for more than five hours. Labor Code § 512(a). It does not, on the other hand, require employers to ensure that employees actually take their meal breaks, *Brinker Restaurant Corp. v. Superior Ct.*, 53 Cal.4th 1004, 1038-40 (2012), much less require that all workers take their breaks at the same time or at a single fixed location. As a consequence, this nominal right of access for an hour during employees' lunch breaks usually dwindles to no more than thirty minutes—if the union organizer can correctly guess when the employer will schedule these workers' breaks and can find them while they are still on break.

Finally, the regulation does not authorize access to workers while they are housed on the employer's property or in the hotels owned by third parties where some employers, such as Cedar Point, provide for lodging.

2. The ALRB's Access Regulation Remains Necessary Today

The conditions that prompted the Board to promulgate the Access Regulation in 1975 have not changed meaningfully in the decades since then. Farm workers are still hired through labor contractors and still move from farm to farm frequently. They still live in inaccessible or temporary housing that is often controlled by company supervisors or agents, have limited access to communication technology, may be illiterate or semi-literate, and face serious language barriers.

Many farm workers still live in inadequate housing that is difficult for union organizers to access. A 2008 report from the United States Department of Agriculture notes, "[H]ousing for hired farmworkers differs from that of all workers as a group. Because hired farmworkers earn less, work short periods, and move frequently, they are more likely to live in crowded conditions, less likely to own their own homes, more likely to receive free housing, and more likely to live in mobile homes."[15]

Farm workers also change employers and move often. A 2018 National Agricultural Workers Survey found that almost 20 percent of agricultural workers reported having worked on jobs that were more than 75 miles apart, or having moved more than 75 miles for work, within a 12-month period.[16] Additionally, 7 percent of farm workers reported having worked for more than two different employers within the previous 12 months, and another 13 percent reported working for more than one.[17] Nearly 70 percent of farm workers reported periods of unemployment during the year.[18]

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[15] William Kandel, United States Department of Agriculture, *Profile of Hired Farmworkers, A 2008 Update* 28 (2008), available at https://www.ers.usda.gov/webdocs/publications/46038/err-60.pdf?v=2100.3 (last visited January 20, 2021).

[16] Trish Hernandez & Susan Gabbard, United States Department of Labor, *Findings from the National Agricultural Survey (NAWS) 2015-2016: A Demographic and Employment Profile of United States Farmworkers, Research Report No. 13, 5* (2018), available at https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf (last visited January 20, 2021).

[17] *Id*. at 27.

[18] *Id*. at 35.

A large segment of farmworkers live in inaccessible or temporary locations. As many as 10 percent live in locations not suitable for human habitation: vehicles, garages, sheds, barns, or squatter encampments.[19] On a fact-finding trip, members of the ALRB "witnessed migrant farmworkers sleeping both in and next to their automobiles, sometimes switching with one another between the auto itself and the adjacent mats."[20]

The academic studies confirm what unions have learned: gathering any information about farm workers presents serious challenges. One study notes, "Because many farm workers in California lead unconventional lives by, among other circumstances, incessantly changing jobs and addresses, maintaining migratory practices, being undocumented and/or harboring the undocumented, and crowding into unusual housing arrangements, they represent a population that challenges conventional data gathering procedures and, moreover, that eludes both efforts and methods specifically designed to identify and enumerate them."[21]

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[19] Don Villarejo, *California's Hired Farm Workers Move to the Cities: the Outsourcing of Responsibility for Farm Labor Housing*, California Rural Legal Assistance (January 24, 2014), available at http://www.crla.org/sites/all/files/u6/2014/rju0214/VillarejoFrmLbrHsngHlth_CRLA_012414.pdf (last visited January 20, 2021).

[20] William Gould, *Agricultural Labor Relations Act: 40th Anniversary* (June 24, 2015), *available* at https://law.stanford.edu/wp-content/uploads/2015/07/WBGouldIV-Chair-24Jun2015-SPEECH-40th-Anniv-Calif-ALRA.pdf (last visited January 20, 2021).

[21] Juan-Vicente Palerm, *Immigrant and Migrant Farm Workers in the Santa Maria Valley, California*, 2006 University

It is true that some migrant farm workers own cell phones. But not all. A 2013 study of day laborers, for instance, found that fourteen percent do not own any mobile phone.[22] And many who own phones are likely reluctant to use them to talk about sensitive topics, such as their labor rights. "A considerable number of immigrant and migrant farm workers prefer not to be identified and, hence, will actively avoid and frustrate efforts designed to enumerate them."[23] Many day laborers, interviewed in a 2013 study, "thought that becoming too dependent on a mobile phone was a big risk."[24]

Computers or smart phones do not provide a viable substitute. In testimony before the ALRB in 2015, one agricultural economist, Professor Mines, stated, "Very few [farmworkers] have access to computers. A lot of them have access to cell phones, but not smart phones."[25] Even those that do have access to computers or smartphones might be unable or afraid to use them. A community outreach coordinator who has farm worker clients testified to

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of California Santa Barbara: Center for Chicano Studies, *available at* https://escholarship.org/uc/item/1x89x8cc#page-1. (last visited January 20, 2021).

[22] Luis Fernando Baron, Moriah Neils, & Ricardo Gomez, *Jobs and Family Relations: Use of Computers and Mobile Phones Among Hispanic Day Laborers in Seattle*, *iConference* (February 2013), available at https://www.ideals.illinois.edu/bitstream/handle/2142/36050/145.pdf?sequence=4 (last visited January 20, 2021).

[23] Palerm, *supra* note 21 at 27-28.

[24] Baron, Neils, & Gomez, *supra* note 22 at 70.

[25] *2015 Hearings on Worksite Access*, Agricultural Labor Relations Board (2015) (statement of Richard Mines, PhD. U.C. Berkeley), Tr. 15: 7-10, available at https://www.alrb.ca.gov/wp-content/uploads/sites/196/2018/06/2015-09-09_Fresno_Public_Hearing.pdf (last visited January 20, 2021).

the ALRB in 2015 on the number of farm workers who have access to a computer, "Not one of them."[26] "They don't know how to read in Spanish or English, and they are very afraid to use the computers."[27]

Finally, language barriers or illiteracy make communication difficult with many farm workers. According to Professor Mines, "a very large minority of farm workers are semi-literate or illiterate."[28] Pamphlets, mailings, or web sites will never be an effective way for these workers to understand their labor rights because the low literacy rates and lack of access to computers. A significant number of farm workers do not speak Spanish or English as a native language. One study estimates that there are 117,850 indigenous farm workers in California who speak languages other than Spanish or English.[29] Many of these workers speak a language that does not exist in written form.[30] For these workers, "the largest barrier [for compiling data] is language, because although some speak Spanish well and most speak it to some extent, most prefer to speak in their own languages.

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[26] *2015 Hearings on Worksite Access*, *supra* note 25 (statement of Fausto Santos, community outreach coordinator, California Rural Legal Assistance), Tr. 99:11-16.

[27] *Id.*

[28] *Id.*, tr. 15:7-10.

[29] Richard Mines, Sandra Nichols, & David Runsten, *California's Indigenous Farmworkers: Final Report of the Indigenous Farmworker Study to the California Endowment* (January 2010) at 8, available at http://www.crla.org/sites/all/files/content/uploads/pdfBrochures/IFS_Mines_Final_2010.pdf (last visited January 20, 2021).

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

Most have a limited Spanish vocabulary that constrains their ability to express what they are feeling."[31] The 2018 National Agricultural Workers Survey confirmed that language barriers and illiteracy continue to pose significant obstacles for farm workers.[32]

Given these conditions, academic researchers have concluded that compiling data on farm workers can only be done at their workplace. According to Professor Mines, "it's impossible to take a sample [for information gathering purposes] of the universal farm workers without access to the work site."[33] In order to even take a census of farm workers, concludes another study, "face-to-face encounters are necessary."[34] Conveying complicated and important information about labor rights requires at very least—as the Board has reasonably found—a similar form of face-to-face access. Without access rights, in most cases these workers' only source of information about their rights would be their employer or a labor contractor.

Even if farmworkers do have access to new technology and housing arrangements, the record does not support any assertion that these changes have somehow aided employees' understanding of their rights under the Act. For instance, Petitioners have pointed to the existence of Spanish language radio as an alternative means for worker communication and organizing. But radio broadcasts in California have existed—and been a source for

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[31] Mines, Sandra Nichols, & David Runsten, *supra* note 29, at 4.

[32] Hernandez & Gabbard, *supra* note 16, at 11.

[33] *2015 Hearings on Worksite Access*, *supra* note 25, tr. 15:1-3.

[34] *Id.* at 29.

farmworker education—since the 1930s.[35] And Radio Campesina, which specifically provides information pertinent to agricultural employee self-organization, has roots dating back to 1966, well *before* the Board recognized the need for the increased access and promulgated the challenged rule, and began broadcasting only a few years after the regulation's effective date.

Nor have farmworker living arrangements changed substantially. In upholding the regulation, in 1976, the California Supreme Court noted that "many farmworkers . . . live in motels." *Agricultural Labor Relations Board*, 16 Cal.3d at 414-15. As Petitioners indicate, Cedar Point houses its seasonal employees in a hotel in Oregon. That hotel site is, if anything, less accessible than on-site housing would be. *People v. Medrano*, 78 Cal.App.3d 198, 210-14 (1978).

C. THE ALRB'S ACCESS RULE DOES NOT AMOUNT TO A TAKING UNDER THE FIFTH AMENDMENT

1. The Access Rights Provided by the ALRB's Regulation Do Not Rise to the Level of a Property Right Under California Law or a Taking Under Federal Law

Property rights are the product of state law, not an independent emanation of the Fifth Amendment. As this Court held in *Ruckelshaus v. Monsanto Co.*, it is axiomatic "that [p]roperty interests . . . are not created by the Constitution. Rather, they are created

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[35] *See e.g. Federal Writers Project of the WPA, California in the 1930s: the WPA Guide to the Golden State* 117 (1939).

and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." 467 U.S. 986, 1001 (1984) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)), internal quotation marks omitted). While the Fifth Amendment prevents the taking of property rights without compensation in some circumstances, it cannot give a property owner rights that it does not have under State law.

This rule has its roots not only in the history of the Fifth Amendment, but in basic principles of federalism. Before the passage of the Fourteenth Amendment the Fifth Amendment's takings clause applied only to the actions of the federal government concerning those property rights that a state had created. The Fourteenth Amendment changed the first part of that statement but not the second. *Munn v. Illinois*, 94 U.S. 113, 124-26, 134 (1877).

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) illustrates this principle. As this Court recognized, the mall owner's right to exclude strangers from its property, while an important feature of its bundle of rights, is not absolute. *Id.* at 82, 85-86. California retains the power, in balancing the public's right to free speech under the California Constitution against this one aspect of the mall owner's property rights, to permit access for students seeking support for their protest, so long as it does not act in an unreasonable, arbitrary, or capricious manner. *Id.* at 85-86 (quoting *Nebbia v. New York*, 291 U.S. 502, 523, 525 (1934)).

PruneYard also represents another important principle critical to this case: "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 (quoting *Armstrong v. United States*, 364 U.S. 40, 48 (1960)). As it turns out, the access rights provided for under the ALRB's regulation do not even amount to a property right under California law, much less one weighty enough to support a takings claim under the Fifth and Fourteenth Amendments.

The ALRB's access regulation is, first and last, an employment regulation. It only comes into play because a property owner is employing farm workers. It only applies when those workers are on the grower's property or are waiting to be transported by bus to the grower's property. And it can only be used if either those workers or a union seeking to organize them are attempting to exercise their rights under the Agricultural Labor Relations Act.

Nor does it invest any union organizer or union with any property interest in the employer's fields. This access right not only has no fixed duration—since it expires after the ALRB's election procedures are completed—but no fixed location as well—since exercise of the right depends on where these workers are located, which can change from one hour to the next, or where the farm labor contractors' buses are parked. And of course, if there are no farmworkers on site, then there are no access rights at all. *Cf. Yee v. Escondido*, 503 U.S. 519, 527-29 (1992).

This supposed easement has, moreover, nothing in common with the actual easements recognized by California law. The California Supreme Court faced this issue in *Property Reserve, Inc. v. Superior Ct.*, 1 Cal.5th 151 (2016), a case in which the State Department of Water Resources' inspectors were allowed to come onto landowners' property for anywhere from 25 to 66 days over a one-year period to conduct environmental surveys, sampling, and testing activities. The Court had no difficulty puncturing the landowners' claim that this environmental survey access was an easement of any kind:

> It is questionable, however, whether the authority afforded by the trial court's environmental order can accurately be characterized as granting the Department a compensable property interest for purposes of the state takings clause. Although the total number of days Department employees are permitted to enter and conduct investigatory activities on a landowner's property is not insignificant, the activities encompassed in the trial court's environmental order consist primarily of surveying and sampling activities that have been limited by the trial court so as to minimize any interference with the landowner's use of the property. The landowner will retain full possession of the property and no significant damage to the property is intended or anticipated. The landowners have not

> cited any decision in which the granting of comparable authority to a public entity has been held to constitute a taking or damaging of a compensable property interest for purposes of the state takings clause.

Id. at 196 (footnote omitted). The Court later distinguished the environmental testing access permitted by the trial court from temporary construction easements on the ground that "the environmental order at issue here does not grant the Department exclusive possession of any portion of a landowner's property for a significant period of time." *Id*. at 199 n.19.

The Court was equally dismissive of the landowners' claim that the Department's proposed geological testing, in which it would drill holes in the property, then fill them with grout, would effect a *per se* taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). As the Court held, there was no permanent physical occupation of any property since the government did not claim any continuing interest in the land after it had completed the testing. *Property Reserve*, 1 Cal.5th at 209-11. Nor is there in this case.

The Petitioners may contend, however, that the California Supreme Court's rejection of the landowner's easement and *per se* takings arguments in that case were mere *dicta* because the Court was able to dispose of the landowner's claims on other grounds. Both the premise and the conclusion are false.

First, the California Supreme Court has not treated its analysis of these property rights claims as mere *dicta*. On the contrary, after granting review of the Court of Appeal's decision in *Young's Market Co. v. Superior Ct.*, 242 Cal.App.4th 356 (2015), the Supreme Court remanded that case to the appellate court with directions to reconsider it in light of its decision in *Property Reserve*. *Young's Market Co. v. Superior Ct.,* 208 Cal.Rptr.3d 288 (October 19, 2016). The Court of Appeal followed the Supreme Court's lead and arrived at the same conclusions on remand—that the government's testing activities did not constitute a *per se* taking of any property interest. 2017 WL 104476 at 10 (January 11, 2017). The Supreme Court and the Court of Appeal both treated the Supreme Court's takings analysis as binding.

But even if we assumed that the Court's statements were *dicta*, that would still not be determinative. *Hawks v. Hamill*, 288 U.S. 52, 58-60 (1933). The *Hawks* Court's advice for determining local law is particularly applicable to this case:

> In controversies so purely local, little gain is to be derived from drawing nice distinctions between dicta and decisions. Disagreement with either, even though permissible, is at best a last resort, to be embraced with caution and reluctance. The stranger from afar, unacquainted with the local ways, permits himself to be guided by the best evidence available, the directions or the counsel of those who dwell upon the spot.

Id. at 60; *accord Aceves v. Allstate Ins. Co.*, 68 F.3d 1160, 1164 (9th Cir. 1995) (federal courts must follow the considered *dicta* as well as the holdings of the California Supreme Court when applying California law, particularly when lower appellate courts have treated those statements as binding). The Supreme Court's decision in *Property Reserve* is binding on these issues of California law.

The Court should reach the same result, moreover, even if it were writing on a clean slate. The right to come onto the land where farmworkers are working[36] or the buses where they are waiting to be taken to work to talk to them about their rights under the ALRA does not resemble any of the easements listed in Section 802 of the Civil Code or the cases cited by the Petitioners.

Nor does the access permitted by this regulation have any of the secondary features of an easement or any other property interest recognized by California law. It is not, for one thing, transferable, as is an easement, like any other interest in property. *Collier v. Oelke*, 202 Cal.App.2d 843, 845 (1962). Nor does it attach to any particular part of the property, even on a temporary basis, since it only provides access to whatever spot where those workers happen to be gathered when the narrow time period allowed

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[36] It is irrelevant, as far as the ALRB's access rule is concerned, whether the land in question belongs to the employer, or is leased by it, or is managed by it under contract with some other party, so long as the union files a Notice of Intent to Take Access that names the employer operating on that particular plot. See, generally, *L & C Harvesting, Inc.*, 19 ALRB No. 19 (1993).

by the regulation opens. If access for the sort of environmental survey, sampling, and testing activities at issue in *Property Reserve* did not constitute an easement under California law, then authorization to talk to workers could not either.

Pretending that these access rights are something that they are not is an affront to basic principles of federalism. It is also a repudiation of this Court's Fifth Amendment jurisprudence.

PruneYard rejected the *per se* approach that Petitioners ask the Court to apply here. While the Court in *PruneYard* noted that the California Supreme Court's decision unquestionably allowed the students in that case to "physically invade[]" the mall owner's property, it rejected any claim that this was enough, in and of itself, to establish a Fifth Amendment taking. Instead this Court looked to the actual facts of that case, not the labels that the mall owner sought to apply to them, and held that any interference with the mall owners' property rights was too slight to constitute a taking.

The access provided to union organizers under the ALRB's regulation is, in fact, very similar to the access rights at issue in *PruneYard*. There is, as in *PruneYard*, no record evidence to suggest that allowing union representatives onto their property to speak to their workers before or after work or while they are on break will unreasonably impair the value or use of their property. *See PruneYard*, 447 U.S. at 84. Similarly, just as the mall owner in *PruneYard* could adopt time, place, and manner regulations to minimize any interference with its commercial

functions, *Id.*, the regulation in this case specifies that union organizers may not engage in disruptive activity while on the grower's land. And, as the ALRB's regulation itself demonstrates, any right to access is brief, contingent, and strictly limited. This regulation simply does not meet the minimum threshold for a taking. *See id.*

This point is driven home by the extensive network of regulatory regimes that require agricultural businesses, such as the Petitioners, to allow access to their property for a wide range of purposes, from enforcement of wage and hour laws and food safety standards to labor organizing and other lawful activities by unions. As this Court held in *PruneYard*, we must judge just how intrusive a particular incursion—or "invasion," to use the Petitioners' preferred term—is by looking at how it operates in actual practice, rather than in the abstract.

Just like the mall owner in *PruneYard*, who had welcomed the public at large onto its property, agricultural employers have, as a condition of doing business, accepted frequent and far more intrusive visits by strangers, sometimes on their invitation They have a diminished expectation that they can also exclude union organizers exercising the very limited access rights provided under the ALRB's regulation.

Some *amici* have suggested, however, that *PruneYard* is outside the mainstream of takings jurisprudence and should either be reversed, ignored,

or distinguished into irrelevance. This Court's decisions since *PruneYard* show just the opposite.

This Court has repeatedly endorsed the *ad hoc*, factual approach used by this Court in *PruneYard*—and in *Penn Central* and its progeny—in deciding whether a restriction on a property owner was a taking. This Court cited *PruneYard* with approval in *Loretto*, the case with which the Petitioners and nearly all of the *amici* supporting them begin and end their Fifth Amendment argument, in explaining the distinction between a permanent occupation and a temporary physical invasion.

This was more than mere lip service. *Loretto* cited each factor that the intrusion in *PruneYard* has in common with the access rights permitted under the ALRB's regulation: the prohibitions against disruptive behavior, the temporal limits on any intrusion, and the constant access that the landowners gave others who entered their property. *Loretto*, 458 U.S. at 434. Far from being an anomaly, the *PruneYard* Court's choice to rely on the facts before it, rather than the Petitioners' *per se* approach, has always been an integral part of this Court's Fifth Amendment jurisprudence. *Accord, Nollan v. California Coastal Commission*, 483 U.S. 825, 832 n. 1 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994).

Erasing this distinction between *per se* and regulatory takings would rewrite this Court's decisions of the past forty years. The Court should decline the invitation to do so.

2. The ALRB's Access Regulation Should Be Judged Under Established Regulatory Takings Standards

Rejecting the Petitioners' *per se* approach would not leave them without any recourse, as they would still have the right to challenge the regulation as so unreasonable, arbitrary, or capricious as to be a denial of due process, *PruneYard*, 447 U.S. at 85-86, or as a regulatory taking under *Penn Central*. That is, however, only an academic point in this case, since the Petitioners have not brought any due process challenge to the regulation and have expressly disavowed any reliance on *Penn Central* and its progeny, even going so far as to acknowledge that they could not even hope to prevail under that standard. (Petitioners' Opening Brief at 19 n. 12)

Amici do not disagree. These transitory access rights, required as part of the ALRB's carefully elaborated election procedures developed to allow farmworkers a choice of union representation through elections held in the short time frame necessitated by the nature of agricultural work, are undeniably reasonable, yet have no measurable negative effect on the value of Petitioners' property or the property itself. On the contrary, the ALRA benefits both workers and their employers by establishing a peaceful process for resolving disputes over union representation, instead of the system that prevailed before the ALRA was passed, which made labor disputes even longer, larger, and more chaotic. The Access Regulation is an essential part of that process.

The same factors that the Court relied on in *Penn Central* to hold that there was no taking in that case likewise compel the conclusion that there is no regulatory taking here.

CONCLUSION

For the foregoing reasons, the Court should affirm the Ninth Circuit's decision.

Respectfully submitted,

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