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 CALIFORNIA AGRICULTURAL LABOR RELATIONS BOARD, ET AL.,
Respondents.

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

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

HAROLD C. BECKER
MATTHEW J. GINSBURG
(*Counsel of Record*)
PATRICK J. FOOTE
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5397
mginsburg@aflcio.org

Mosaic - (301) 927-3800 - Cheverly, MD

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND
SUMMARY OF ARGUMENT 1

ARGUMENT 4

CONCLUSION.. 23

TABLE OF AUTHORITIES

Page

CASES

Agricultural Labor Relations Bd. v. Superior Court (Pandol & Sons), 16 Cal.3d 392 (Cal. 1976) 14

Andrus v. Allard, 444 U.S. 51 (1979) 17

Central Hardware Co. v. NLRB, 407 U.S. 539 (1972) .... *passim*

Dutra Farms, 22 ALRB No. 5 (1996) 13

Henry Moreno, 3 ALRB No. 40 (1977) 14, 21

Hudgens v. NLRB, 424 U.S. 507 (1976) 5

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 17

Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992) 7, 15

LeTourneau Co., 54 NLRB 1253 (1944) 6

Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005) 4, 5

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) .... *passim*

Mehl Berry Farms, 23 ALRB No. 9 (1997) 13

TABLE OF AUTHORITIES—Continued

Page

Navarro Farms,
23 ALRB No. 1 (1997) 11

NLRB v. Babcock & Wilcox Co.,
351 U.S. 105 (1956)....................................... *passim*

NLRB v. Gissel Packing Co.,
395 U.S. 575 (1969)...................................... 9

Nollan v. California Coastal Com'n,
483 U.S. 825 (1987).................................. 4, 20, 23

Penn Central Transp. Co. v. New York City,
438 U.S. 104 (1978).................................. 5, 17, 19

Ranch No. 1,
5 ALRB No. 36 (1979) 13, 16

Republic Aviation Corp. v. NLRB,
324 U.S. 793 (1945)...................................... 6

Sam Andrews' Sons,
13 ALRB No. 7 (1987) 11

United States v. Causby,
328 U.S. 256 (1946)...................................... 19

United States v. General Motors Corp.,
323 U.S. 373 (1945)...................................... 17

Statutes and Regulations

National Labor Relations Act,
29 U.S.C. § 151 *et seq.*
Section 1 (29 U.S.C. § 151) 2
Section 2(3) (29 U.S.C. § 152(3)) 9
Section 7 (29 U.S.C. § 157) 7

TABLE OF AUTHORITIES—Continued

Page

Section 9(a) (29 U.S.C. § 159(a)) 9
Section 9(c) (29 U.S.C. § 159(c)) 10
Section 9(e) (29 U.S.C. § 159(e)).................. 10

Cal. Lab. Code
§ 1140.. 1
§ 1140.2.. 9
§ 1156.3(a) 9
§ 1156.3(b) 10
§ 1156.4.. 10, 18
§ 1156.5.. 11
§ 1159.. 9
§ 1160.3.. 13

Cal. Code Regs. tit. 8
§ 20900(3)(A) 11
§ 20900(3)(B) 11
§ 20900(e) 10, 18
§ 20900(e)(1)(A) 21
§ 20900(e)(1)(B) .... *passim*
§ 20900(e)(1)(C) 11, 18, 19
§ 20900(e)(3) 18
§ 20900(e)(4)(A) 12
§ 20900(e)(4)(B) 12
§ 20900(e)(4)(C) 11
§ 20900(e)(5) 13
§ 20900(e)(5)(A) 13, 16
§ 20900(e)(5)(B) 13
§ 20900(e)(5)(C) 13
§ 20901.. 12

Page

Cal. Regulatory Notice Reg. 75, No. 50—12-13-75 21

Cal. Regulatory Notice Reg. 76, No. 49—12-4-76 21

Miscellaneous

ALRB Report to the Legislature and to the Governor, FY 2016-2017 (Dec. 21, 2018) 22

ALRB Report to the Legislature and to the Governor, FY 2017-2018 (March 4, 2019; Revised May 6, 2019) 22

ALRB Report to the Legislature and to the Governor, FY 2018-2019 (Sept. 18, 2020) 22

ALRB Report to the Legislature and to the Governor, FY 2019-2020 (Jan. 21, 2021) 22

Restatement of Property § 7 (1936) 17

Restatement (Second) of Torts § 211 (1965) ... 7, 8

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 55 national and international labor organizations with a total membership of over 12 million working men and women.[1] Although the regulation at issue in this case applies only to labor relations in the California agricultural industry, the AFL-CIO has a strong interest in the right of all workers "to learn the advantages of self-organization from others," *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956), including, in appropriate circumstances, by meeting with nonemployee union organizers on their employer's property.

INTRODUCTION AND SUMMARY OF ARGUMENT

Agricultural employees covered by the California Agricultural Labor Relations Act (ALRA), Cal. Lab. Code § 1140 *et seq.*, are permitted to meet with nonemployee union organizers on their employer's property in certain limited circumstances and subject to specific time, place, and manner restrictions, in a manner closely analogous to the access rules that apply to employees covered by the National Labor Rela-

[1] Counsel for the Petitioners and counsel for the Respondents have each consented to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of this brief.

tions Act (NLRA), 29 U.S.C. § 151 *et seq*. This Court has previously distinguished cases concerning nonemployee access under the NLRA from situations involving a permanent physical occupation of property under the Takings Clause. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 n.11 (1982). Petitioners and the United States fully embrace that distinction. Pet. Br. 31 n.19; U.S. Br. 27. Yet, Petitioners claim that the access allowed under the ALRA constitutes a "*per se* physical taking." Pet. Br. 15. That is incorrect.

The ALRA and its access regulation differ somewhat from the NLRA regime, reflecting the seasonal nature of California's agricultural industry and the largely migrant agricultural workforce. However, the access permitted by the ALRA does not constitute a permanent physical occupation of the employer's property for the same reasons explained in *Loretto*—the intrusion on property rights is limited to that necessary to enable employees, the property owner's invitees, to exercise their statutory organizing rights and is further restricted by the regulation's express time, place, and manner limitations that both minimize interference with the owner's use of its property and give the owner a measure of control over the access.

Although the ALRA regulation, unlike the NLRA, does not require a showing that access is necessary in each particular case, that difference is firmly rooted in the specific manner in which the ALRA regulates labor relations in the seasonal agriculture industry. The ALRA requires employees who wish to form a union to collect signatures from a majority of their coworkers and then file an election petition during a period of peak agricultural employment, before proceeding to an election just one week later. Because the

ALRA *requires* all covered employees to use this highly time-sensitive procedure to obtain representation, it is entirely sensible that the regulation *permits* all employees subject to the procedure to meet with union representatives on the employer's property during the narrow window for organizing. If it is not a taking to allow NLRA-covered workers at a mining camp to meet with nonemployee union organizers on the employer's property because their special work location makes such access necessary, it is not a taking to permit agricultural employees to do the same based on the limited duration of their employment, the migratory nature of the workforce, and the special requirements of the ALRA representation procedure that reflect these unique characteristics of the industry. Certainly, any differences between the two labor relations regimes do not convert the ALRA regulation into a *per se* physical taking.

Wholly aside from the NLRA analogy, it is clear that the limited access provided by the ALRA does not meet *Loretto*'s definition of a "permanent physical occupation" because it does not interfere with the owner's rights "to possess, use and dispose of" its property. 458 U.S. at 435 (citation and quotation marks omitted). The limited access provided by the regulation—for employees to meet with union organizers solely in connection with the ALRA's time-sensitive procedure for selecting a bargaining representative—does not deprive the employer of the right to possess the property. Because access is restricted to non-work times and non-work areas—time periods and locations that are defined by the employer itself—the employer is not deprived of the right to use the property. And, because the access regulation is only relevant to the employment relationship, not to any attribute of or appurtenance to the property, the regulation does not

interfere with the employer's right to dispose of the property as it sees fit.

Against all this, Petitioners' insistence that the ALRA regulation works a *per se* physical taking because it allegedly "forces agricultural businesses to allow labor organizers onto their property three times a day for 120 days each year," Pet. Br. i, and, on the basis of that premise, is analogous to the permanent physical easement across a homeowner's property open to the general public that was at issue in *Nollan v. California Coastal Com'n*, 483 U.S. 825 (1987), is particularly ill-founded. That claim rests on a gross mischaracterization of the access actually permitted under the ALRA. As common sense dictates and the record shows, since agricultural employees are rarely employed for more than a few weeks or, at most, a couple of months on the employer's property, the union is rarely able to seek access to any particular employer's property pursuant to the regulation more than once a year, and never for anywhere near the length of time asserted by the Petitioners. Petitioners' attempt to analogize this case to *Nollan* is thus wholly without merit.

ARGUMENT

1. The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." As its text makes clear, the Takings Clause "is designed not to limit the governmental interference with property *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.'" *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005) (citation and quotation marks omitted; emphasis in original). Accordingly, in most cases concerning whether a government regulation, as opposed to a direct appropriation of property, constitutes a taking, a

balancing test applies. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (identifying "several factors" of "particular significance," including "[t]he economic impact of the regulation on the claimant" and "the character of the government action"). Only "two relatively narrow categories" of regulations are "deemed *per se* takings for Fifth Amendment purposes." *Lingle*, 544 U.S. at 538. As relevant to Petitioners' claim here, one of those categories concerns "when the character of the governmental action is a permanent physical occupation of property." *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 434-35 (1982) (citation and quotation marks omitted).

In defining what constitutes a "permanent physical occupation of property," *Loretto* specifically distinguished "labor cases requiring companies to permit access to union organizers." 458 U.S. at 434 n.11 (citing *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956)). The Court explained that the access at issue in those cases did not constitute a taking because:

> (1) "'the allowed intrusion on property rights is . . . necessary to facilitate the exercise of employees' § 7 rights to organize under the National Labor Relations Act'"; and
>
> (2) "'the access is limited'" in time, place, and manner to "'the duration of the organiz[ing] activity,'" to "'prescribed non-working areas of the employer's premises,'" and for the sole purpose of "'labor organiz[ing].'" *Loretto*, 458 U.S. at 434 n.11 (quoting *Central Hardware*, 407 U.S. at 545).

The Court's observation that allowing access to non-employee union organizers to meet with employees

was "necessary to facilitate the exercise of employees' § 7 rights to organize under the National Labor Relations Act," *ibid.*, rests on the established understanding 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." *Babcock & Wilcox*, 351 U.S. at 113. It is a fundamental principle of federal labor policy that "'the employer's right to control his property does not permit him to deny access to his property to persons whose presence is necessary there to enable the employees effectively to exercise their right to self-organization and collective bargaining.'" *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 n.8 (1945) (quoting *LeTourneau Co.*, 54 NLRB 1253, 1259-60 (1944)).

Similarly, *Loretto*'s focus on time, place, and manner restrictions on nonemployee access flows from the established understanding that, in regulating access rights, the government's role is to "work[] out an adjustment between the undisputed right of self-organization assured to employees . . . and the equally undisputed right of employers to maintain discipline in their establishments." *Republic Aviation*, 324 U.S. at 797-98. Thus, while "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," this "accommodation" between organizing rights and property rights "must be obtained with as little destruction of one as is consistent with the maintenance of the other." *Babcock & Wilcox*, 351 U.S. at 112.

Access under the NLRA is, therefore, nothing more than an application of the common law rule that "[a] duty or authority imposed or created by legislative enactment carries with it the privilege to enter land in the possession of another for the purpose of perform-

ing or exercising such duty or authority in so far as the entry is reasonably necessary to such performance or exercise, if, but only if, all the requirements of the enactment are fulfilled." Restatement (Second) of Torts § 211 (1965). *See also id.*, cmt. d ("Whether the actor is a public official or a private person is immaterial to the existence of the privilege."). Insofar as § 7 of the NLRA guarantees employees "the right to self-organization," 29 U.S.C. § 157, that statutory authority "carries with it the privilege" to permit nonemployee union organizers "to enter land in the possession of" the employer to meet with employees in furtherance of that authority "in so far as the entry is reasonably necessary to . . . [employees'] exercise" of their § 7 rights. Restatement (Second) of Torts § 211.

In the NLRA context, the circumstances in which access for nonemployee organizers is "reasonably necessary," *ibid.*, is limited to "protect[ing] the § 7 rights of those employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society," such as those who work in "logging camps," "mining camps," and "mountain resort hotels." *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539-40 (1992). That is because most employees covered by the NLRA, such as those employed at the suburban retail store in *Lechmere*, can be reached "directly, via mailings, phone calls, and home visits" during their off hours, as well as on public sidewalks adjacent to their workplace. *Id.* at 540. For that reason, under the NLRA, it is "[t]he union's burden of establishing" that access to meet with employees on the employer's property is necessary for employees to exercise their organizing rights. *Ibid.*

That NLRA-specific assignment of the burden of proof aside, the relevant point for present purposes is

that, in any particular labor relations setting—whether a retail store or a mining camp under the NLRA or a farm under California's statute—the ultimate inquiry is whether "the entry is reasonably necessary to [the] performance or exercise" of "[a] duty or authority imposed or created by legislative enactment." Restatement (Second) of Torts § 211. As long as it is "reasonably necessary" for employees to meet with nonemployee union organizers on the employer's property in order "to exercise" their statutory organizing rights, access to the employer's property is "privilege[d]," *ibid.*, such that any "'yielding' of property rights . . . require[d]'" does not constitute a taking under this Court's precedent. *Loretto*, 458 U.S. at 434 n.11 (quoting *Central Hardware*, 407 U.S. at 545).

2. Although the ALRA and its access regulation differ in meaningful ways from the NLRA regime, those differences are not of such a character as to convert the access permitted by the ALRA into a taking. Access under the ALRA is limited to what is necessary for agricultural employees to exercise their right to self-organization within the specific context of seasonal agricultural employment and is subject to express time, place, and manner restrictions that are more protective of the employer's property rights than the corresponding restrictions under the NLRA. Access under the ALRA is, therefore, distinguishable from physical takings cases for reasons similar to those set forth in *Loretto* with regard to the NLRA. But even if that were not the case, the limited access allowed by the ALRA clearly does not constitute a permanent physical occupation of the employer's property as that term is defined by *Loretto*.

a. While broadly similar in form to the NLRA regime, the ALRA's regulation of labor relations in Cali-

fornia's agricultural industry diverges in significant ways from federal labor law, reflecting the unique characteristics of agricultural employment.[2] The ALRA's regulation of agricultural employees' ability to meet with nonemployee union organizers on employer property to learn about organizing, in turn, reflects the specific requirements of the ALRA.

Similar to the NLRA, the ALRA "protect[s] the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing . . . for the purpose of collective bargaining or other mutual aid or protection." Cal. Lab. Code § 1140.2. Unlike the NLRA, however, the ALRA's procedure for employees to select a collective bargaining representative is the *exclusive* permissible means for employers, unions, and employees to enter into a bargaining relationship. *See* Cal. Lab. Code § 1159 (stating that "only labor organizations certified" by the ALRB following a Board-conducted election may be "parties to a legally valid collective-bargaining agreement"). The NLRA, in contrast, allows employers and unions to enter into voluntary recognition agreements and then bargain enforceable contracts. 29 U.S.C. § 159(a); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 596-97 (1969).

To trigger the ALRA's exclusive representation procedure, employees must first gather the signatures of "a majority of the currently employed employees in the bargaining unit." Cal. Lab. Code § 1156.3(a). And, they must do so during the harvest season because, "[r]ecognizing that agriculture is a seasonal occupation for a majority of agricultural employees," employ-

---

[2] Agricultural employees are excluded from coverage by the NLRA. 29 U.S.C. § 152(3).

ees are only permitted to petition for an election when "the employer's payroll reflects 50 percent of the peak agricultural employment." *Id.* § 1156.4. These agriculture-specific requirements differ significantly from the NLRA's election procedure, which requires signatures from only thirty percent of employees, 29 U.S.C. § 159(c), (e); NLRB Casehandling Manual, Part Two, Representation Proceedings § 11023.1, which can then be used to file a petition for an election at any time during the calendar year.

If an election petition meets the ALRA's strict criteria, the Agricultural Labor Relations Board (ALRB) conducts an election on an expedited timeline—"within a maximum of seven days of the filing of the petition," Cal. Lab. Code § 1156.3(b)— again reflecting the narrow timeframe within which representation decisions and collective bargaining must take place in the agricultural industry. In contrast, the NLRA contains no statutory mandate requiring that elections occur within any specified number of days; in recent years, the average time between petition and election has ranged from 23 to 38 days. NLRB, *Representation-Case Procedures*, 84 Fed. Reg. 69,524, 69,528 n.15 (Dec. 18, 2019) (Final Rule).

In keeping with the time-sensitive procedure the ALRA requires employees to utilize to select a collective bargaining representative, the ALRA access regulation permits employees to meet with nonemployee union organizers on the employer's property during the critical organizing period, while subjecting that access to strict time, place, and manner restrictions.

Organizers are permitted on the employer's property solely "for the purpose of meeting and talking with employees and soliciting their support," Cal. Code Regs. tit. 8, § 20900(e), *i.e.*, gathering employee

signatures and meeting with employees during the week-long pre-election period. Access for other purposes, such as industrial action or any other "conduct disruptive of the employer's property or agricultural operations," is expressly prohibited. *Id.* § 20900(e)(4)(C). The ALRB takes these restrictions seriously; even access for non-disruptive, otherwise proper, union activity is barred if that activity is not directly related to the ALRA representation procedure. *See, e.g.*, *Navarro Farms*, 23 ALRB No. 1 (1997) (union representatives violated regulation by using access to conduct safety inspections).

Employees' permission to meet with organizers on the property expires once the election process is complete. Cal. Code Regs. tit. 8, § 20900(e)(1)(B), (C). If employees vote for the union, post-certification access becomes a matter for collective bargaining. *Sam Andrews' Sons*, 13 ALRB No. 7 (1987).[3] If the unionization effort is unsuccessful, access is not permitted again until 30 days prior to the expiration of the statutory twelve-month bar on holding another election. Cal. Lab. Code § 1156.5; Cal. Code Regs. tit. 8, § 20900(e)(1)(C).

Access is subject to specific time, place, and manner restrictions. Employees are allowed to meet with non-employee union organizers on the property for a maximum of "one hour before the start of work and one hour after the completion of work" and "a single period not to exceed one hour during the working day . . . during [employees'] lunch period." Cal. Code Regs. tit. 8, § 20900(e)(3)(A), (B). Employees can only meet with the union "in areas in which employees congregate before

[3] ALRB decisions are indexed and available in full on the Board's website at https://www.alrb.ca.gov/legal-searches/decision-index/.

and after working" and "at such location or locations as the employees eat their lunch." *Ibid.* The number of union representatives allowed on the property is limited, based on the number of employees on-site, *id.* § 20900(e)(4)(A), and union representatives are required to wear badges clearly stating their names and organizations at all times and to identify themselves to the employer upon request, *id.* § 20900(e)(4)(B).[4]

In addition to these substantive protections for the employer's property rights, the regulation provides employers with several important procedural mechanisms to enforce these restrictions on union access. Most significantly, the union must provide the employer and the government advanced notice in writing of its intention to access the property on a form provided by the ALRB. Cal. Code Regs. tit. 8, § 20900(e)(1)(B). That form requires the union to identify itself, to provide the name of a union contact person with authority to reach agreement with the employer regarding any access issues, and to describe the specific location where the union intends to meet with employees. ALRB, *Notice of Intent to Take Access*, Form ALRB 89 E (Rev. 11/08).

Based on this advanced notice, an employer may challenge the union's stated intention to visit employees at the worksite through a streamlined administrative procedure known as a "motion to deny access."

---

[4] ALRA regulations contain additional, more detailed, restrictions on nonemployee access "for special segments of agriculture," *e.g.*, for the dairy, poultry and egg, and nursery and floral industries. Cal. Code Regs. tit. 8, § 20901. These crop-specific restrictions take into account such matters as the "danger of spread of disease" and the "spraying of lethal insecticides" in limiting where nonemployee union organizers can meet with employees. *Ibid.*

See Ranch No. 1, 5 ALRB No. 36 (1979) (describing procedure); *Dutra Farms*, 22 ALRB No. 5 (1996) (setting forth criteria for evaluating such motions); *Mehl Berry Farms*, 23 ALRB No. 9 (1997) (applying procedure). If the union seeks access to which it is not entitled—*e.g.*, at a time, in a location, or for a purpose not permitted by the regulation—the employer can challenge that access *in advance* and obtain an order barring the union from entering its property *before* any interference with property rights occurs.

Similarly, if a union representative, once on the property, violates the time, place, or manner restrictions on access contained in the regulation, the employer can obtain a cease and desist order and other sanctions. Cal. Lab. Code § 1160.3; Cal. Code Regs. tit. 8, § 20900(e)(5). A union or individual union representative who violates the regulation's restrictions may be barred from future property access not only at the location where the violation occurred, but throughout the entire geographic region. Cal. Code Regs. tit. 8 § 20900(e)(5)(A). Such a violation also may constitute objectionable conduct sufficient to set aside a subsequent election, an unfair labor practice under the ALRA, or both. *Id.* § 20900(e)(5)(B), (C).

b. Although the specifics of the ALRA labor relations regime differ somewhat from the NLRA, the access permitted under the ALRA is similar in Takings Clause terms to the NLRA access the Court discussed in *Loretto* and thus is distinguishable from the physical takings cases for the same reasons. Like access under the NLRA, "'the allowed intrusion on property rights'" in the ALRA context "'is limited to that *necessary* to facilitate the exercise of employees' . . . rights to organize'" under the ALRA's exclusive procedure for determining collective bargaining representatives.

Loretto, 458 U.S. at 434 n.11 (quoting *Central Hardware*, 407 U.S. at 545) (emphasis added). And, the ALRA's time, place, and manner restrictions on access are more protective of the employer's property rights than the corresponding restrictions under the NLRA.

As we have explained, under the ALRA, allowing employees to meet with nonemployee union organizers on the employer's property is "necessary to facilitate the exercise of employees' . . . rights to organize," *Loretto*, 458 U.S. at 434 n.11 (citation and quotation marks omitted), because the ALRA's exclusive procedure for the selection of collective bargaining representatives requires employees to collect signatures from a majority of their co-workers and file an election petition during a period of peak agricultural employment, and then quickly seek support for the union in an election one week later. *See*, *supra*, pages 9-10. And, there are practical obstacles, as well as these statutory considerations, that underlie the rule. Given the seasonal nature of agricultural employment, "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" to harvest a different crop on a different employer's property. *Agricultural Labor Relations Bd. v. Superior Court (Pandol & Sons)*, 16 Cal.3d 392, 414-15 (Cal. 1976). As the ALRB recognized, "those organizational rights which the access rule aims to protect may be exercised as a practical matter only during those periods of time when enough employees are working at one employer to make discussion of their desire for representation by that employer a relevant topic." *Henry Moreno*, 3 ALRB No. 40, at 5 (1977).

This, of course, is a different necessity analysis than under the NLRA, where the focus is exclusively on the

locus of employment, *i.e.*, whether "'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,'" *Lechmere*, 502 U.S. at 539 (quoting *Babcock & Wilcox*, 351 U.S. at 113), rather than temporal and other aspects of employees' presence on the employer's property. But that difference is entirely reasonable in light of the distinct requirements of the two statutes, which reflect the characteristics of the regulated industries. The NLRA's non-exclusive procedure for employees to select their bargaining representative contains none of the ALRA's time-sensitive requirements. *See*, *supra*, page 10. Employees in an NLRA-regulated workplace, who typically work at the same location year-round, can collect signatures from their co-workers any time of year and submit an election petition whenever they are ready or feel that conditions are favorable for unionization—or they can avoid the NLRA representation process altogether and seek voluntary recognition from their employer. Thus, despite the variations between the two labor relations regimes' access rules, the ALRB's determination that allowing employees to meet with nonemployee union organizers on the employer's property is necessary to "protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing," Cal. Lab. Code § 1140.2, is entirely consistent for Takings Clause purposes with the corresponding analysis under the NLRA.

The ALRA's time, place, and manner restrictions on access, like the analogous restrictions under the NLRA, additionally ensure that "'the 'yielding' of property rights [that access] may require is both temporary and limited.'" *Loretto*, 458 U.S. at 434 n.11 (quoting *Central Hardware*, 407 U.S. at 545). As is

the case under the NLRA, the permission granted for agricultural employees to meet with nonemployees on their employer's property "is limited to (i) union organizers; (ii) prescribed non-working areas of the employer's premises; and (iii) the duration of the organization activity." *Ibid.* (quoting *Central Hardware*, 407 U.S. at 545). *See supra*, pages 10-12.

Moreover, by requiring the union to provide advanced notice to the employer of the union's intention to meet with employees on the property, Cal. Code Regs. tit. 8, § 20900(e)(1)(B), providing a streamlined administrative procedure for the employer to challenge such access before it occurs, *Ranch No. 1*, 5 ALRB No. 36, and providing specific remedies barring unions or individual union representatives from future access if they violate the ALRA's time, place, and manner restrictions, Cal. Code Regs. tit. 8, § 20900(e)(5)(A), the ALRA is *more protective* of employer property rights than the analogous NLRA scheme, which contains no similar safeguards. There is thus no serious question that, although the ALRA access regime strikes a different balance than the NLRA on whether access is presumptively permitted in the workplaces it regulates, the access it allows is reasonably necessary for agricultural employees to exercise their right to self-organization and is carefully regulated to ensure that there is "as little destruction of [the employer's property rights]" as possible. *Babcock & Wilcox*, 351 U.S. at 112.

c. Even if access under the ALRA were not sufficiently similar to NLRA access to distinguish it from the physical takings cases on the same basis as stated in *Loretto*, it is clear that access under the ALRA does not constitute a permanent physical occupation of the employer's property under *Loretto*'s definition of that term.

The *Loretto* exception to the *Penn Central* balancing analysis is intended to address the unusual circumstance "when [a] physical intrusion reaches the extreme form of a permanent physical occupation." 458 U.S. at 426. As the Court explained,

> "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. See *Kaiser Aetna [v. United States]*, 444 U.S. [164,] 179-180 [(1979)]; see also Restatement of Property § 7 (1936). Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, see *Andrus v. Allard*, [444 U.S. 51,] 66 [(1979)], it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property. *Id.* at 435-36 (emphasis in original; footnote omitted).

That exception clearly does not apply in this case because the limited permission the ALRA grants to

agricultural employees to meet with nonemployee union organizers on the employer's property to learn about organizing does not "destroy[]"—indeed, does not even significantly interfere with—an agricultural employer's ability "to possess, use and dispose of" its property. *Loretto*, 458 U.S. at 435 (citation and quotation marks omitted).

The access the ALRA allows does not "permanently occup[y]" the agricultural employer's property or deprive the employer of the "right to possess the occupied space himself." *Loretto*, 458 U.S. at 435. Access is permitted solely for the "purpose of meeting and talking with employees and soliciting their support," Cal. Code Regs. tit. 8, § 20900(e), in connection with the exclusive ALRA representation procedure—*i.e.*, expeditiously assisting employees to obtain the signatures of a majority of their co-workers during the short time they are employed on the property and then campaigning for the union during the week-long election period. There is nothing permanent about the union's presence—organizing activities can only be undertaken during the period of "peak agricultural employment," Cal. Lab. Code § 1156.4, and access terminates once the election process is complete, Cal. Code Regs. tit. 8, § 20900(e)(1)(B), (C).

The limited access permitted by the regulation also does not "den[y] the owner any power to control the use of the property." *Loretto*, 458 U.S. at 436. The regulation limits access to non-work times and non-work areas where employees gather before and after work and to eat lunch, Cal. Code Regs. tit. 8, § 20900(e)(3)—time periods and locations that are defined entirely by the employer—and, more generally, permits access only during those periods of the year when employees may avail themselves of the ALRA's exclusive

representation procedure, *id.* § 20900(e)(1)(B), (C)—*i.e.*, *not* when a collective bargaining agreement is in place, *not* when the union has proceeded to an election and lost in the previous year, and *not*, needless to say, during the many months of the year when seasonal employees are not even present on the employer's property. That is a far cry from a regulation that altogether deprives the owner "of the right to use and obtain a profit from property." *Loretto*, 458 U.S. at 436. *See*, *e.g.*, *Penn Central*, 438 U.S. at 135 (distinguishing Landmarks Law regulating use of airspace above Penn Station from *United States v. Causby*, 328 U.S. 256 (1946), where "invasion of airspace . . . destroyed the use of the farm beneath").

Finally, the access regulation does not deprive the agricultural employer of the "legal right to dispose of the occupied space by transfer or sale" or "empty [that] right of any value." *Loretto*, 458 U.S. at 436. The access permitted by the regulation is keyed to specific aspects of the employment relationship, not to any special attribute of, or appurtenance to, the property. A purchaser would thus be subject to the ALRA and the access regulation only if it were to undertake agricultural activities on the property, and even then, only if it were to engage employees for that purpose. If, to the contrary, the purchaser engages in an activity that is not regulated by the ALRA—*e.g.*, food processing or warehousing—or builds a housing development rather than using the property as a farm, the access regulation does not apply.

Contrary to the United States' argument that "legal authorization to invade private property, even intermittently, is a per se taking," U.S. Br. 8, this Court has made clear that the mere fact that the limited access permitted by the ALRA could be char-

acterized as a "physical[] inva[sion]" of the employer's property, "cannot be viewed as determinative" of the Takings Clause issue. *Loretto*, 458 U.S. at 434 (citation and quotation marks omitted). Rather, because the union's presence is "limited to that necessary to facilitate the exercise of employees' . . . rights to organize," and subject to express time, place, and manner restrictions, any "temporary and limited" interference with the employer's property rights that results does not constitute a taking under *Loretto*. *Id.* at 434 n.11 (citation and quotation marks omitted).

3. Against all of this, Petitioners nevertheless insist that the ALRA access regime "effects a *per se* physical taking" because it allegedly "forces agricultural businesses to allow labor organizers onto their property three times a day for 120 days each year." Pet. Br. i. Based on that premise, Petitioners seek to rely on the finding in *Nollan v. California Coastal Com'n*, 483 U.S. 825, 832 (1987), that "a 'permanent physical occupation has occurred' . . . 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." *See* Pet. Br. 21-22 (discussing *Nollan*). By plucking a single provision from the ALRA access regulation out of context, Petitioners' argument grossly mischaracterizes the extent of access permitted under the ALRA. The limited and highly regulated permission the ALRA grants to agricultural employees to meet with nonemployee union organizers on the employer's property bears no similarity to the general public's "permanent and continuous right to pass to and fro" across a homeowner's property that was at issue in *Nollan*.

The ALRA regulation states that "access . . . 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." Cal. Code Regs. tit. 8, § 20900(e)(1)(A) (emphasis added). That provision was added in 1976 to *restrict* the unlimited access permitted by the original regulation that was enacted the previous year. *Compare* Cal. Regulatory Notice Reg. 75, No. 50—12-13-75, pages 1051-52 (original version of the regulation), *with* Cal. Regulatory Notice Reg. 76, No. 49—12-4-76, pages 1051-53 (regulation after 1976 amendment). As the ALRB explained, referring to the public hearings that led to the 1976 amendment, "[a]mong the problems raised by employer representatives during the two days of testimony devoted to the access rule was the complaint that organizers were permitted on their property . . . at any time during the year." *Henry Moreno*, 3 NLRB No. 40, at 4. In response to that employer complaint, the ALRB added the four thirty-day period provision, "modif[ying] the access rule to limit access to a period which will encompass one or two seasonal peaks at any particular employer," in recognition of the fact "that year-round access may unnecessarily disturb employers in their enjoyment of their property rights, by subjecting them to access by organizers at times when few employees are present." *Id.* at 6 and n.5.

As a practical matter, given the brevity of the growing season and the strict time limitations the ALRA's exclusive representation procedure imposes on employees who want to form a union, it is difficult, if not impossible, for a union to avail itself of access during even "one or two seasonal peaks at any particular employer," *ibid.*, much less to utilize the full extent of time permitted by the regulation. For example, in 2015, the United Farm Workers (UFW), the only

union that utilized the access regulation that year, sought access at each individual employer's property only one time in the vast majority of cases, Pet. App. G-18–G-25, including at Fowler Packing, *see id.* G-24. In only nine instances did the UFW seek access twice with the same employer. Pet. App. G-18–G-25. And, the union *never* sought access more than two times with any single employer during 2015. *Ibid.*[5]

The record also shows that, statutory restrictions on the representation process aside, the highly seasonal nature of agricultural employment provides an independent limit on how often the union can access the employer's property, *i.e.*, if there are no agricultural employees on the property, access is not available. Of the 62 access notices filed by the UFW in 2015, 49, or 80 percent, were filed in the two-month period between June 24 and August 25. Pet. App. G-18–G-25. Only six notices were filed in September, one in October, and six more in early November. *Ibid.* From January 1 through June 23, and from November 10 through December 31—a period of more than half the calendar year—no access notices were filed at all. *Ibid.*

Obviously, if the ALRA regulation only permits access for organizing during periods of peak agricultural employment and agricultural employees only work on the employer's property for several weeks or, at most,

---

[5] Overall, in 2015, the UFW filed a total of 62 access notices across the entire state of California. Pet. App. G-18–G-25. And that was a particularly busy year. *Compare* ALRB Report to the Legislature and to the Governor, FY 2016-2017 2 (Dec. 21, 2018) (zero access notices filed); ALRB Report to the Legislature and to the Governor, FY 2017-2018 3 (March 4, 2019; Revised May 6, 2019) (18 notices filed); ALRB Report to the Legislature and to the Governor, FY 2018-2019 3-4 (Sept. 18, 2020) (24 notices filed); ALRB Report to the Legislature and to the Governor, FY 2019-2020 2 (Jan. 21, 2021) (5 notices filed).

a couple of months during the year, the union will not be present on the employer's property anywhere close to the "120 days each year," Pet. Br. i, that Petitioners assert. As common sense and the record in this case demonstrate, Petitioners' claim that the limited and highly-regulated access permitted by the ALRA regulation is akin to the permanent physical easement at issue in *Nollan* is, therefore, wholly without merit.

CONCLUSION

The Court should affirm the decision of the court of appeals.

Respectfully submitted,

HAROLD C. BECKER
MATTHEW J. GINSBURG
(*Counsel of Record*)
PATRICK J. FOOTE
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5397
mginsburg@aflcio.org